

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
	:	*AMENDED
of	:	
GUTLOVE & SHIRVINT, INC.	:	DETERMINATION
	:	DTA NOS. 822533
for Review of a Denial, Suspension, Cancellation, Refusal	:	AND 822921
or Revocation of a License, Permit, Appointment or	:	
Registration under Article 20 of the Tax Law.	:	

Petitioner, Gutlove & Shirvint, Inc., filed petitions¹ for review of a denial, suspension, cancellation, refusal or revocation of a license, permit, appointment or registration under Article 20 of the Tax Law.

A hearing was commenced before Frank W. Barrie, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on January 14, 2009 at 9:45 A.M., continued at the same location on January 15, 2009 at 9:00 A.M., and January 16, 2009 at 9:00 A.M.

**** This determination was amended to reflect the following changes: (1) footnote 2 now refers to Finding of Fact 6, not Finding of Fact 5, and (2) on the third line of page 28, the reference now is to footnote 14, not footnote 8.***

¹ Petitioner filed a petition dated September 25, 2008 which contested a notice of cancellation dated June 30, 2008. As detailed in the Findings of Fact, this notice of cancellation repeated word-for-word the grounds for cancellation noted in an earlier notice of *proposed* cancellation dated April 8, 2008, as well as asserting three additional grounds for cancellation of petitioner's licenses under Article 20 of the Tax Law. Petitioner also filed a petition dated March 10, 2009, which contested a Conciliation Order dated December 12, 2008 issued by the Division of Taxation's Bureau of Conciliation and Mediation Services (BCMS) denying its request for relief from the notice of *proposed* cancellation dated April 8, 2008. This later petition duplicated its petition dated September 25, 2008. The Division of Taxation then filed its answer dated March 31, 2009 in response, which duplicated its earlier answer filed in response to the petition dated September 25, 2008. These two related proceedings have now been consolidated for purposes of this determination.

2009 at 9:15 A.M., and continued to conclusion at the same location on January 22, 2009 at 10:30 A.M., with all briefs, as agreed upon by the parties, to be submitted by March 17, 2009, which date began the 30-day period “as practicable”² for the issuance of this determination.

Petitioner appeared by Allen & Overy LLP (Michael S. Feldberg, Esq., and Brian A. De Haan, Esq., of counsel). The Division of Taxation appeared by Daniel Smirlock, Esq. (Herbert M. Friedman, Jr., Esq., and Michelle M. Helm, Esq., of counsel).

ISSUES

I. Whether recordings and transcripts of conversations between an informant, acting in cooperation with state and federal investigators, and petitioner’s principal and other parties related to petitioner were properly admitted into evidence.

II. Whether the Division of Taxation is collaterally estopped from asserting that petitioner engaged in a scheme to deceive cigarette manufacturer Philip Morris in order to continue to sell Philip Morris cigarettes to a smoke shop which was a major source of bootlegged cigarettes sold in New York City despite petitioner’s agreement with Philip Morris not to do so.

III. Whether the introduction of evidence concerning the funding of terrorist activities by the bootlegging of non-tax paid (unstamped) cigarettes, obtained from vendors on Native American reservations in western New York, by individuals related to the Lackawana Seven, prejudiced petitioner’s ability to obtain a fair hearing.

² As detailed in Finding of Fact 6, the parties stipulated that they would request that the Division of Tax Appeals adjudicate the merits of the Division of Taxation’s attempt to cancel petitioner’s licenses in an expedited fashion, and that the administrative law judge would issue his determination within 30 days “as practicable.” Similarly, the parties stipulated that if “petitioner takes an exception to the ALJ’s decision to the Tax Appeals Tribunal, the Tribunal shall be requested to issue its determination *within three months* from the date of the filing of the exception” (Emphasis added.)

IV. Whether the Division of Taxation may cancel petitioner's licenses as a New York State cigarette stamping agent, wholesale dealer and distributor.

FINDINGS OF FACT

1. The Division of Taxation (Division) licenses petitioner, Gutlove & Shirvint, Inc., (1) as a "stamping agent," so it may purchase and affix cigarette tax stamps on packages of cigarettes, (2) as a "wholesale dealer," with the authority to sell cigarettes or tobacco products to retail dealers or other persons for purposes of resale and to "an Indian nation or tribe or to a reservation cigarette seller on a qualified reservation," and (3) as a "distributor," who may import or cause to be imported into New York any tobacco product for sale with the authorization "to make returns and pay the tax on tobacco products sold, shipped or delivered" by it to any person in New York. Started in 1939, petitioner was one of the first cigarette stamping agents in New York. It is now owned entirely by its corporate president, Joseph Ruda, who is a descendant of the original operators. Mr. Ruda controls all of petitioner's operations and is the sole signatory on all corporate checks. Of petitioner's approximately 50 employees, 10 to 12 are drivers, 10 to 15 perform warehouse duties, and the remainder are office staff, including a small accounting staff headed by Steven Sussner, petitioner's chief financial officer, who was hired by Mr. Ruda in late 2006. Petitioner also utilizes 10 to 15 nonemployee commission salespeople. In addition to cigarettes and tobacco, petitioner wholesales candy and confections. It maintains an inventory worth approximately \$6,000,000.00, which it turns over 30 to 40 times a year while filling more than 75,000 orders a year and doing approximately \$260,000,000.00 worth of business annually although its actual profit margin is relatively narrow.

2. As a wholesale dealer, petitioner was a major supplier of cigarettes to "Indian nations or tribes or reservation cigarette sellers on qualified reservations." Its sales to such customers for

the month of January 2008, as an example, which it reported on a Schedule E, Sale of Cigarettes to Dealers/Vendors on American Indian Reservations, totaled nearly 90 million cigarettes (4.5 million packs) to 16 dealers/vendors. Cigarettes are then sold tax free on tribal lands in New York, and according to an Associated Press story published in the Daily Gazette of April 7, 2008, the savings are “eye-popping”: smoke shops on New York’s Native American reservations sold over 6 billion cigarettes (304 million packs) in 2007 (nearly a third of the total sold in New York State).

3. The Division’s Registration, Bond and Cigarette Unit, within the Transaction and Transfer Tax Bureau/ Fuel, Alcohol, Cigarette and Carrier Tax Section (TTTB/FACCTS) of the Audit Division, issued a “Notice of *Proposed* Cancellation of Your Licenses as a Cigarette Stamping Agent & Wholesale Dealer, Distributor and Wholesaler of Tobacco Products Under Article 20 of the New York State Tax Law” (emphasis added) dated April 8, 2008 to petitioner, Gutlove and Shirvint, Inc. This notice provided the following explanation for the *proposed* cancellation of petitioner’s licenses:

1. You violated Tax Law §§ 480.3 and 20 NYCRR §§ 71.6 and 72.3 by committing fraud or deceit in the operation of your cigarette agency or wholesale dealer business. On December 20, 2007 you signed an agreement with Philip Morris acknowledging that you would no longer supply Philip Morris products directly or indirectly to Peace Pipe Smoke Shop. On at least (5) five separate occasions after that date you conspired and participated in a scheme with AJ’s Candy and Tobacco to circumvent the December 20, 2007 agreement and supply Philip Morris product directly or indirectly to Peace Pipe Smoke Shop.

2. You violated Tax Law § 474.4 and 20 NYCRR § 75.5 by providing false and/or inaccurate information on invoices for the sale of cigarettes during February and March 2008. Specifically, your invoices during this period falsely listed product being sold to Diane Anderson, Adlai’s Smoke Shop, Spirit Smokes and Native Smokes.

3. You violated Tax Law § 475 and 20 NYCRR § 75.1 by providing false information on your CG-6, Resident Agent Cigarette Tax Report with respect [to]

Schedule E- Sales of Cigarettes to Dealers/Vendors on American Indian Reservations and certified the information was true and correct.

4. A couple of months after its issuance of the notice of *proposed* cancellation detailed above, the Registration, Bond and Cigarette Unit within TTTB/FACCTS decided to *cancel* petitioner's licenses due to its belief that the assessment or collection of cigarette tax "will be jeopardized" unless the licenses were canceled immediately. Accordingly, it issued a "Notice of *Cancellation of Your Licenses as a Cigarette Stamping Agent & Wholesale Dealer, Distributor and Wholesaler of Tobacco Products Under Article 20 of the New York State Tax Law*" (emphasis added) dated June 30, 2008 to petitioner. This cancellation notice restated word-for-word the three grounds detailed above in the notice of *proposed* cancellation as well as three additional grounds, related to petitioner's involvement in shipments of cigarettes by Wholly Smokes of Kentucky, Inc.:

1. You violated Tax Law § 480.3 (a)(iii) by knowingly aiding and abetting Wholly Smokes of Kentucky, Inc. in the importation of at least 3750 cartons of unstamped cigarettes into New York State destined for 39-26 23rd St., Long Island City, NY 11110.

2. You violated Tax Law § 480.3 and 20 NYCRR §§ 71.6 and 72.3 by committing fraud or deceit in the operation of your cigarette agency and/or wholesale dealer business by failing to notify the Department pursuant to Regulation § 72.1(c)(1) that you were carrying on another business in conjunction with your warehouse facility as required in [Tax Law §] 480.1(d).

3. You violated Tax Law § 480.3(a)(ii) by failing to comply with [Tax Law] §§ 480.1(d) and 483(a)(2) with regard to maintaining a separate warehousing facility for the purpose of receiving and distributing cigarettes and conducting your wholesale business as product invoiced to Wholly Smokes of Kentucky, Inc. is being shipped to your warehouse located at 39-26 23rd Street, Long Island City, NY 11101.

5. On July 1, 2008, in conjunction with its issuance of the cancellation notice, the Division shut down all of petitioner's cigarette related business operations, which petitioner

immediately challenged by seeking a temporary restraining order in a court action in the New York State Supreme Court, Queens County, which was denied. On July 7, 2008, Justice John M. Leventhal, Associate Justice of the Appellate Division, Second Judicial Department, reversed the earlier order by the Queens County trial court and issued a temporary restraining order staying the Division's cancellation of petitioner's licenses and thereby ordering the Division to refrain from further interference with petitioner's cigarette related business operations pending an administrative hearing in the Division of Tax Appeals.

6. On September 8, 2008, petitioner and the Division entered into a stipulation staying the cancellation of petitioner's licenses pending a hearing on the merits in the Division of Tax Appeals of the six grounds asserted for the cancellation of petitioner's licenses. Pursuant to this stipulation, the parties agreed that a request would be made of the Division of Tax Appeals (1) to provide an "expedited hearing," and (2) to have the administrative law judge "render a determination within 30 days from the date of . . . [the last brief filed] *as is practicable*," and (3) if petitioner takes an exception to the administrative law judge's determination to the Tax Appeals Tribunal that "the Tribunal shall be requested to issue its determination within three months from the date of the filing of the exception to the ALJ's determination [emphasis added]."

Petitioner and Peace Pipe Smoke Shop

7. As a wholesale distributor of cigarettes and tobacco, as noted in Finding of Fact 2, petitioner is one of the principal suppliers of non-tax paid (unstamped) cigarettes³ to cigarette wholesalers and vendors located on Native American reservations in New York. Its sales to

³ As a stamping agent, petitioner is permitted to possess and otherwise deal in cigarettes on which taxes have not been paid and which do not bear the New York tax stamps that evidence such payments. Such cigarettes are commonly referred to as "non-tax paid cigarettes."

such customers are among the hundreds of thousands of orders petitioner receives each year.⁴ Peace Pipe Smoke Shop, a cigarette wholesaler and vendor located on the Poospatuck Reservation in Mastic on Long Island, was one of petitioner's largest customers, and petitioner has had a long-term business relationship with this smoke shop. In fact, petitioner received orders from Peace Pipe Smoke Shop every day. Peace Pipe Smoke Shop, in addition to being a brick and mortar retailer on a Native American reservation, had a large internet cigarette business and also accepted orders over the telephone. Although petitioner sold cigarettes produced by a variety of manufacturers, a large share of its total sales were of Philip Morris, USA, Inc. (Philip Morris) products, which include the most popular of all cigarette brands, Marlboro cigarettes. Approximately 40% of petitioner's sales to Peace Pipe Smoke Shop were of Philip Morris cigarettes. This smoke shop and major customer of petitioner had been the subject of law enforcement activity related to its cigarette sales, notably sales of large amounts of non-tax paid cigarettes to bootleggers that were regularly shipped into the New York City market.

8. With reference to *retail* sales of cigarettes on Native American reservations, the Division has had a policy of "forbearance."⁵ However, with reference to *wholesale* sales of

⁴ According to petitioner's chief financial officer, petitioner maintains a money room with currency and coin counters because "hundreds of thousands of dollars a day" are processed and deposited daily because "at least 50 percent or a little bit more of the money that we collect is in the form of cash" (tr., pp 624-625).

⁵ This policy of forbearance by the Division in its enforcement of Article 20 with respect to on-reservation retail sales of cigarettes to non-Native American consumers was upheld based upon the conclusion that it did not violate the equal protection rights of off-reservation retailers (*New York Association of Convenience Stores v. Urbach*, 275 AD2d 520, 712 NYS2d 220 [3rd Dept 2000], *appeal dismissed* 95 NY2d 931, 721 NYS2d 606 [2000], *lv denied* 96 NY2d 717, 730 NYS2d 790 [2000], *cert denied* 534 US 1056 [2001]). Nonetheless, it is observed, as noted in Finding of Fact 2, that smoke shops on Native American reservations in New York sold nearly 304 million packs of cigarettes in 2007- nearly a third of New York's total. The Poospatuck reservation where the Peace Pipe Smoke shop was located, with a population of about 270, accepted shipment of about 100 million packs of cigarettes in 2007. New York put its losses at more than \$576 million in a study released in 2006, which is prior to the latest substantial increase in the level of cigarette tax. Nonetheless, despite such forbearance, Chief Investigator Patrick Simet of the Division's Petroleum, Alcohol and Tobacco Bureau stated clearly and forcefully at the hearing: "If they're being sold at a wholesale level to non-Indians, it violates [the] law. If they're being sold over the internet, it violates [the] law. The only sales that are allowed by law would be a Native American to another Native American

cigarettes on Native American reservations, the Division did not apply its “forbearance” policy, but rather sought to limit such wholesale sales so as to impede the bootlegging of non-tax paid cigarettes. Philip Morris, aware of the law enforcement activity⁶ related to Peace Pipe Smoke Shop and fearful that it might be accused of aiding and abetting the bootlegging of non-taxed cigarettes into New York City, advised petitioner by a letter dated December 7, 2007 that it would no longer sell its products to wholesalers that supply its cigarettes “directly or indirectly” to Peace Pipe Smoke Shop. In order to continue its purchases of Philip Morris product, petitioner provided Philip Morris with a written acknowledgment, dated December 20, 2007, executed by its president, Joseph Ruda, stating that it would no longer supply “directly or indirectly” Philip Morris product to Peace Pipe Smoke Shop, given the ongoing criminal prosecution of this Long Island Native American smoke shop. This embargo on the sale of Philip Morris products to Peace Pipe Smoke Shop represented a major loss of business for petitioner and prompted petitioner to devise a plan to circumvent the restriction. Further pressure was placed upon petitioner’s operations by demands made by Philip Morris that it “must bring up our ratio from 40% to a minimum of 60% or lose direct account status” which permits it to purchase non-tax paid cigarettes directly from Philip Morris. The use of the term “ratio” refers to the ratio of sales to buyers who are viewed as “qualified” by Philip Morris as a percentage of petitioner’s total sales, which would include its sales to buyers who are viewed as “non-qualified” by Philip Morris. “Non-qualified” sales would be sales by petitioner to (1) internet

for their [sic] own personal use on the reservation where the sale took place.” (Tr., p. 900.)

⁶ Persons associated with Peace Pipe Smoke Shop, defendants in two actions filed in federal court by the United States, were charged with sales of large amounts of non-tax paid cigarettes that were regularly shipped into New York City in violation of the Contraband Cigarette Trafficking Act (18 USC § 2341 *et seq.*), among other crimes (including orchestrating the 2003 murder of an associate who opened a competing store). As of the hearing dates for this proceeding, these actions were ongoing.

sellers, (2) nondirect and nonreporting distributors (distributors who do not report their sales of cigarettes to Management Science Associates,⁷ who “do the data mining and send all the demographics for each store that we sold back to all the vendors or manufacturers [including Philip Morris],” and (3) retail outlets which are in excess of a 10,400 carton per quarter cap. This concern on the part of Philip Morris to control sales to “non-qualified” buyers reflects a desire to operate with some responsibility in its manufacture and sale of cigarettes to its wholesalers so as to exert some control over the potential bootlegging of its product and to limit sales of its cigarettes to consumers without the required imposition and collection of taxes.

9. The scheme devised by petitioner in order to continue its sale of Philip Morris brand cigarettes to Peace Pipe Smoke Shop involved the utilization of a cigarette wholesaler/vendor located on a Seneca Native American reservation⁸ in the Buffalo area: AJ’s Candies and Tobacco [AJ’s Candies] operated by Alyse Pierce.⁹ AJ’s Candies is a wholesale business which does not have an actual storefront, but rather wholesales cigarettes mostly to other smoke shops on the Cattaraugus reservation. Cigarette sales were documented to appear as sales to this Buffalo area cigarette wholesaler located on a Native American reservation, when in fact the cigarettes were merely shipped first to the Buffalo area and then reshipped to Peace Pipe Smoke Shop on Long

⁷ Management Science Associates is a reporting agency used by manufacturers of cigarettes so they can track the sales and purchases of their dangerous and highly taxed product.

⁸ The Seneca Nation of Indians has three reservations in Western New York: (1) a very small reservation known as Oil Spring Reservation; (2) the Allegany Reservation in the Saranac, New York, area where there are approximately a hundred or more smoke shops and/or cigarette retailers; and (3) the Cattaraugus Reservation in the Irving and Silver Creek, New York, area where there are also another hundred or so smoke shops and/or cigarette retailers. AJ’s Candies was located on the Cattaraugus Reservation in the area of Irving, New York.

⁹ Alyse Pierce is also referred to in the administrative record as Alyse Pierce Eggleston and Alyse Eggleston Pierce. Pierce is her given name, and Eggleston was a married name given up after a divorce. In this determination, she has been referred to as Alyse Pierce.

Island. AJ's Candies, in Chief Investigator Patrick Simet's¹⁰ words, would "place a small markup, I think 50 cents a carton, on the order to pay for AJ's cost to deliver it, handle it and a small profit margin" (Tr., pp 396-397.) Petitioner arranged these transactions and knew that Peace Pipe Smoke Shop was the ultimate purchaser. Money was wired from a bank account of AJ's Candies to petitioner for the product and then money was wired from a Peace Pipe Smoke Shop bank account to an account of AJ's Candies to pay for the product again. Care was taken to vary slightly the exact amount of the product in order to deceive anyone who might audit the trail of deceptive sales documents. In addition, Peace Pipe Smoke Shop, to make the deal more appealing to Ms. Pierce's enterprise, would order native brand cigarettes such as cigarettes called Native and Seneca which are made by Native Americans and carried by AJ's Candies in its own inventory.

10. Petitioner would fill the orders of the Buffalo area cigarette vendor at its Long Island City warehouse and use its own trucks to ship the cigarettes north to the Buffalo area in carrying out an arrangement which constituted a sham.¹¹ Upon arrival of the cigarettes, they would be unloaded from petitioner's trucks and reloaded onto other trucks under the control of the Buffalo area vendor for transport, generally on the same day, to Peace Pipe Smoke Shop on Long Island.

¹⁰ New York State Chief Investigator Simet also serves as a deputized United States Marshal which "gives me all the law enforcement duties of a special agent with the federal Bureau of Alcohol, Tobacco & Firearms [ATF] and it gives me broader jurisdiction . . . outside New York State into basically the entire United States" (tr., p. 390). Chief Investigator Simet serves on a task force formed out of the Buffalo ATF office to combat the bootlegging of non-tax paid cigarettes.

¹¹ The above use of the term "sham" was carefully considered. The first definition listed in the dictionary for "sham" is as follows: "1. A trick that deludes : hoax" (Webster's Ninth New Collegiate Dictionary 1081 [1989]. Other definitions which follow are: "2: cheap falseness : hypocrisy; 3: a decorative piece of cloth made to simulate an article of personal or household linen and used in place of or over it; 4: an imitation or counterfeit purporting to be genuine; 5: a person who shams." (Webster's Ninth New Collegiate Dictionary 1081 [1989].) As detailed in the findings of fact, although the invoices printed up by petitioner and by AJ's Candies were not "counterfeit" or "imitation" invoices, nonetheless a factual finding may properly be made that they constituted a trick to delude the authorities and Philip Morris in order to cover up the transfer of Philip Morris product by petitioner to Peace Pipe Smoke Shop.

The cigarettes for Peace Pipe Smoke Shop were separately wrapped and palletized by petitioner before shipment north to the Buffalo area. There were at least eight of these sham shipments of cigarettes as follows:

Shipment Number	Number of Cartons of Non-Tax Paid Cigarettes Shipped by Petitioner	Date of Shipment
1	2760	01/15/08
2	6510	01/22/08
3	1860	02/05/08
4	9900	02/12/08
5	8730	02/19/08
6	8010	02/26/08
7	8385	03/04/08
8	6450	03/11/08 ¹²

11. It was only after the third shipment noted above that federal and New York State authorities became aware of the scheme as the result of the decision by Gary Sanden, Commissioner of the Seneca Nation of Indians Import-Export Commission, to inform the authorities. On February 8, 2008, Investigator Patrick Simet and Special Agent Steve Dickey of the Federal Alcohol, Tobacco and Firearms (ATF) interviewed Alyse Pierce and Diane Anderson, in the presence of Seneca Nation Commissioner Sanden, and uncovered the scheme. Some very damaging information was obtained concerning the careful and misleading steps taken by petitioner to deceive Philip Morris and law enforcement, as well as the fact that

¹² Shipments 4 through 8 were reshipped to Peace Pipe Smoke Shop via undercover state investigators in a truck rented by them. On March 12, 2008, when the shipment was reshipped from AJ's Candies to Peace Pipe Smoke Shop in a truck which was driven by Tax Department employees acting as undercover agents, a seizure was staged in order to obtain damaging evidence against petitioner by recording the conversation where Joseph Ruda learns of the seizure from Alyse Pierce. As noted in Finding of Fact 11, the state obtained the damaging evidence it was seeking in order to establish its case.

petitioner's principal, Joseph Ruda, was the mastermind behind the scheme, including the following:

1. Petitioner's sales agent, Rodney Flores, instructed Alyse Pierce "to start adding some non Philip Morris product such as Newports and Rogers to the Peace Pipe orders" since Flores "was concerned that Philip Morris would be suspicious of orders for just Marlboro products;"
2. Alyse Pierce was instructed that she should not visit petitioner's premises "because [Joe] Ruda felt the facility was being watched by Law Enforcement;"
3. Rodney Flores noted to Alyse Pierce that "everything has to be approved by Joe [Ruda]."

After informing law enforcement, Alyse Pierce, beginning with the fourth shipment noted above, began working with state and federal law enforcement as an unpaid informant to establish a case against petitioner. The federal ATF decided to allow what it termed a "conspiracy" to continue so "they could learn more about the conspiracy and have the opportunity to gain further evidence against the people committing this conspiracy" (tr., p. 409). In fact, ATF would take responsibility for delivering the cigarettes down to Peace Pipe Smoke Shop using undercover New York State personnel employed by the Division's Petroleum, Alcohol and Tobacco Bureau. Alyse Pierce assisted the authorities in making recordings of her conversations with petitioner's principal, Joseph Ruda, and others related to petitioner, including Rodney Flores, a long-term sales agent for petitioner as well as individuals involved with the operation of Peace Pipe Smoke Shop. Initially, the Division of Taxation resisted the disclosure of these recordings to petitioner since they were part of a criminal investigation being conducted by federal authorities. Ultimately, the Division offered the recordings and transcripts of the conversations into evidence over the objection of petitioner. The recordings are damaging to petitioner and establish that Joseph Ruda was the mastermind of the scheme to continue to supply Philip Morris cigarettes to

Peace Pipe Smoke Shop despite petitioner's signed agreement to cooperate with the cutting off of such product to this smoke shop. Mr. Ruda in several conversations showed his intense concern to conceal his personal involvement in the scheme noting that if the truth of his involvement became known, "This would be a disaster for me" (Conversation # 28 on March 12, 2008).

When the eighth shipment of cigarettes noted in Finding of Fact 10 was seized in Nassau County on March 12, 2008 by the state investigators upon the reshipment to Peace Pipe Smoke Shop, Mr. Ruda was recorded telling Ms. Pierce not to worry because he would make good on the more than \$100,000.00 worth of cigarettes which had been seized. Petitioner would replace the load at no cost to Ms. Pierce.¹³ Further, these recorded conversations establish that petitioner by this scheme was "the only source of Philip Morris" for Peace Pipe Smoke Shop in the words of Peace Pike Smoke Shop's employee identified as Jennifer (Conversation # 29 on March 12, 2008).

These recordings also clearly show that Mr. Ruda was extremely calculating, valuing his lawyer's relationship with former Governor Spitzer as a way to prepare for changes in the state's policy of forbearance.¹⁴ He had been advised by legal counsel that there was nothing illegal about sales between one sovereign nation (Seneca Nation vendors in the Buffalo area) to another sovereign nation (smoke shop located on the Poospatuck Nation's Long Island reservation) which provided a "legal" patina for his scheme: Non-tax paid (unstamped) cigarettes could flow

¹³ However, petitioner by Joseph Ruda never made good on this promise after Mr. Ruda received legal counsel to not make a move because something more was going on. In the taped conversations, Mr. Ruda "explained that his attorneys talked to Alyse's attorney and red flags – red lights . . . went off and he was advised by his attorneys don't make a move. There's something more to it." (Tr., pp. 893-4.)

¹⁴ In one secretly recorded conversation, Mr. Ruda brags about his lawyer's close relationship, "buddy buddies for many, many, many years," with former Governor Eliot Spitzer and complains "I just think what Spitzer is doing is instead of doing it straightforward and saying you can't sell to the Seneca [Nation], he's going to the cigarette companies, and *Philip Morris already put a limit on me. Lorillard is going to put a limit on me too, and there's gonna be a limit on Newports.* I got the word from this guy in the Tax Department that that's what's going on because of the pressure they're getting from Spitzer" (Conversation # 18 on February 18, 2009 between Alyse Pierce and Joseph Ruda). (Emphasis added.)

freely between the two sovereign Native American nations so long as there was paperwork to support such flow. As noted above, care was taken so that additional cigarettes (nonpremium tiers of cigarettes) were added out of AJ's Candy's own stock to the cigarettes supplied by petitioner before reshipment to Peace Pipe Smoke Shop in order to make the paper trail of sales transactions more difficult to follow since they would not be "mirror images." However, the Seneca Nation was not willing to be used in this way, resulting in the undercover operation as noted above.

12. A difficulty faced by petitioner with respect to its scheme to continue supplying Philip Morris product to Peace Pipe Smoke Shop related to the fact that Philip Morris restricts the number of cartons that a wholesale distributor, like petitioner, can sell to a *single* vendor like AJ's Candies. Preferred wholesale prices, which provide a wholesaler with a significantly larger profit, are available only for sales by the wholesaler to a single retail account that do not exceed 10,000 cartons per quarter or 40,000 cartons per year. This restriction was the result of the desire of Philip Morris to place an allotment on all Native American smoke shops of 10,000 cartons per quarter "because [Philip Morris] knew that the amount of product going to the Native American reservations wasn't being consumed by Native Americans. They knew there was a problem with bootlegging." (Tr., p. 410.) As a result, petitioner sought to utilize additional cigarette vendors on Native American reservations in the Buffalo area in order to preserve the favorable prices from Philip Morris: shipment 4 noted in Finding of Fact 8 was shown on petitioner's invoice as a shipment to Diane Anderson, d/b/a Heron's Landing, shipment 6 was shown on petitioner's invoice as a shipment to Adlai's Smoke Shop, shipment 7 was shown on petitioner's invoice as a shipment to Spirit Smokes, and shipment 8 was shown on petitioner's invoice as a shipment to

Native Smokes. The cigarettes shipped by petitioner to the Buffalo area were never paid for by the other named entities. Rather, Alyse Pierce of AJ's Candy paid for the product.

13. When Philip Morris became aware of petitioner's scheme to continue supplying its product to Peace Pipe Smoke Shop, it terminated all direct sales of its Philip Morris brand cigarettes to petitioner by a notice issued on April 7, 2008 by Ross Webster, Philip Morris Vice President, Customer Service and Merchandising. According to this notice,

We have learned of the complaint filed by the City of New York against Gutlove & Shirvint, alleging that Gutlove & Shirvint made sales to Peace Pipe Smoke Shop that are in violation of the Contraband Cigarette Trafficking Act Such sales also contradict your representation to us on December 20, 2007 that Gutlove & Shirvint would not, directly or indirectly, supply Philip Morris USA products to Peace Pipe Smoke Shop.

Petitioner and Wholly Smokes of Kentucky, Inc.

14. With the termination of all direct sales by Philip Morris to petitioner, petitioner's principal devised a creative plan to continue to obtain at least some Philip Morris product. By an application dated July 1, 2008, petitioner's principal, Joseph Ruda, in his capacity of president of Wholly Smokes of Kentucky, Inc., applied for a State of Kentucky cigarette license as an "unclassified acquirer" and "transporter." On this Kentucky application, Mr. Ruda provided the Long Island City address of petitioner as the "location of business" for Wholly Smokes of Kentucky, Inc., as well as petitioner's telephone number as the Kentucky entity's telephone number. For "area of distribution," which required Mr. Ruda to "list states other than Kentucky in which cigarettes will be distributed", he noted "NY." For the "cigarette supplier" to be utilized by the applicant, Mr. Ruda named AA of Tupelo, Mississippi, doing business as Globe Distributing. Petitioner then utilized Wholly Smokes of Kentucky, Inc., to purchase Philip Morris brand cigarettes from Globe Distributing.

15. In the opinion of Emanuel Urzi, who has been an employee of the Division for 46 years and who has served as the director of the Cigarette Tax Bureau and currently serves as the Special Assistant to William Comiskey, the Deputy Commissioner for Enforcement, there were “no business reasons” for petitioner’s principal to form Wholly Smokes of Kentucky, Inc., and five or six other similar entities.¹⁵ According to Mr. Urzi, given the substantial New York taxes on cigarettes and heavy regulation of cigarettes in the state, New York must be able to monitor and control all cigarettes brought into New York, which was undermined by petitioner’s principal creating “a source of cigarettes outside the control of New York State taxing authorities” (tr., p. 90). Further, according to Mr. Urzi, two cigarette businesses cannot be operated under one roof because “it becomes impossible for [the State] to affix responsibility as to ownership of the product” (tr., p. 87). Mr. Urzi noted that the Division proceeded with an immediate Notice of Cancellation dated June 30, 2008, instead of merely a *proposed* cancellation, because with the establishment of the Wholly Smokes entities in other states by petitioner’s principal and the use of Wholly Smokes of Kentucky, Inc., to bring cigarettes into New York, the Division feared that it could no longer “be sure as to the safeguarding of our revenue since we were now denied third-party information [from manufacturers or other states] to verify receipt of cigarettes in this state” (tr., pp. 106-107).

¹⁵ Other similar sister corporations were formed as Wholly Smokes of Florida, Inc., Wholly Smokes of Kansas, Inc., Wholly Smokes of No. Carolina, Inc., and Wholly Smokes of Oklahoma, Inc. According to the testimony of Steven Sussner, petitioner’s chief financial officer, Joseph Ruda asked “me to work on setting up corporations, if appropriate, in various states which had Native American reservations on them for the purpose of being able to . . . sell them Native American brands and sell cigarettes to them (tr., p. 635). However, there was no evidence introduced to show that any of these Wholly Smokes entities were ever used for such purpose. Rather the sole use of *any* of these entities consisted of petitioner’s using Wholly Smokes of Kentucky, Inc, in order to obtain Philip Morris product in light of the termination of all direct sales to petitioner by Philip Morris on April 7, 2008, as detailed in Finding of Fact 14.

16. During a regulatory inspection of petitioner's Long Island City warehouse on May 22, 2008, Investigator Janet Mullins was concerned when she saw Philip Morris product in petitioner's warehouse because she knew that Philip Morris had barred petitioner from purchasing its product because of the Peace Pipe Smoke Shop scheme. As a result, she "requested and received invoices for the past two months on which Philip Morris product was ordered and delivered" including an invoice dated May 19, 2008 of A & A of Tupelo, Inc. d/b/a Globe Distributing of Tupelo, Mississippi, showing Philip Morris product billed to Wholly Smokes of Kentucky, Inc., 2333 Alexandria Drive, Lexington, KY, and shipped to Wholly Smokes of Kentucky, Inc., 39-26 23rd Street, Long Island City, NY. This invoice itemized over 3,000 cartons of Marlboro cigarettes. Petitioner's record of its wire transfers shows that it did not pay Wholly Smokes of Kentucky, Inc., for the cigarettes shown on the invoice until May 23, 2009, four days after the invoice's date and a day after the regulatory inspection. Consequently, it is reasonable to make a finding that 3,000 cartons of Marlboro cigarettes as noted on the invoice of the Mississippi cigarette distributor to Wholly Smokes of Kentucky, Inc., were in petitioner's warehouse on May 22, 2008, the date of the inspection with title to these cigarettes still in the Kentucky entity's name. Therefore, unstamped product was introduced into New York by a Mississippi cigarette distributor and delivered to Wholly Smokes of Kentucky, Inc., at petitioner's Long Island City facility. Little weight can be given to the invoice dated May 22, 2008 from Wholly Smokes of Kentucky, Inc., to petitioner since it was not available for the inspector's review on May 22, 2008, the date of her inspection, especially since it was created on petitioner's own computers and the date could have been manipulated.

17. As part of an ongoing investigation with the Nassau District Attorney's Office, state investigators conducted surveillance on June 6, 2008 in and around petitioner's warehouse

location in Long Island City. A tractor trailer with a delivery manifest indicating the delivery of Marlboro cigarettes to Wholly Smokes of Kentucky, Inc., 39-26 23rd Street, Long Island City, NY 11101, by a shipper identified as Globe Wholesale Inc., Tupelo, Mississippi, was stopped. The investigators seized 3,750 cartons of cigarettes.

SUMMARY OF THE PARTIES' POSITIONS

18. Petitioner argues vigorously that the Division *arbitrarily* “seeks to deprive [petitioner] and its 50 or so employees of their right to exist and their livelihood” because the State *cannot* prove that petitioner violated the law. Petitioner, relying on ***164th Bronx Parking LLC v. City of New York*** (20 Misc 3d 796, 892 NYS2d 248 [2008]), maintains that the Division may take away its licenses “only if [there exists] a clear violation of a statute which provides adequate notice of required conduct and provides standards to persons charged with enforcing that statute” (tr., p. 34). With reference to the charges related to its enabling of sales of Philip Morris cigarette products to Peace Pipe, petitioner stresses that it properly completed the necessary paperwork and that, moreover, the Division is collaterally estopped from pressing such charges based upon the decision in the case of ***City of New York vs. Gutlove and Shirvint, Inc.*** by Judge Carol Bagley Amon of the United States District Court of the Eastern District of New York. In dismissing the City of New York’s civil action against petitioner under the Contraband Cigarette Trafficking Act, 18 USC § 2341 et seq., Judge Amon rejected the position asserted here by the Division that petitioner was required to identify Peace Pipe as the “actual” purchaser on its paperwork. Petitioner’s position is that it “shipped cigarettes to AJ’s pursuant to orders from AJ’s which AJ’s paid for to Gutlove,” and “what AJ’s did thereafter with the merchandise was between AJ’s and its customers” (tr., p. 502). According to petitioner:

[E]ven if AJ's Candy subsequently sold those cigarettes to Peace Pipe, and even if Petitioner knew that that would happen and even arranged it, Petitioner properly filled out its invoices and monthly tax filings. (Petitioner's brief, p. 2.)

Petitioner maintains that it is simply "not against the law" for "a stamper . . . to sell unstamped cigarettes to Native Americans" (tr., p. 900). Further, even if the doctrine of collateral estoppel does not bar the Division from asserting the claims related to Peace Pipe Smoke Shop, petitioner properly filled out its invoices and resident agent tax reports "and did not commit fraud or deceit" (Petitioner's brief, p. 29). According to petitioner, "What AJ's may or may not have done with some of the [Philip Morris] merchandise . . . was between AJ's and Peace Pipe" (tr., p. 37). Petitioner maintains that the "'scheme' has been shown to not violate any law" and emphasizes that the state's Director of Cigarette Tax Enforcement "gave the order to plant one of Petitioner's invoices on AJ's Candy's delivery truck prior to [the state] seizing it" (Petitioner's reply brief, p. 6). Further, petitioner, relying upon *Khan v. Hakim* (201 Fed Appx 981 [5th Cir 2006]),¹⁶ contends that the recorded phone conversations between Alyse Pierce and Joseph Ruda and others connected to petitioner and Peace Pipe Smoke Shop "should be disregarded" (Petitioner's reply brief, p. 39). According to petitioner, the Tax Department should be barred from relying on the taped conversations based upon the "doctrine of judicial estoppel, also called the 'doctrine of inconsistent position'" (Petitioner's reply brief, p. 39). The Division of Taxation refused to disclose such evidence in the earlier federal proceeding based upon representations "that disclosure would endanger confidential informants and compromise the safety of officers in the field" and "should now be held to its word and the tapes should not be considered" (Petitioner's reply brief, pp. 43-44).

¹⁶ A copy of this decision was marked into the record as Exhibit EEE due to the difficulty of obtaining access to it since it was "not selected for publication in the Federal Reporter."

With reference to the charges related to the importation into New York of Philip Morris cigarette products from A & A, a wholesaler in Tupelo, Mississippi, via Wholly Smokes of Kentucky, Inc., a wholesaler licensed by Kentucky, which was also owned by petitioner's principal, Joseph Ruda, petitioner argues it did exactly what it was supposed to do with the paperwork and violated no law or regulation with transactions that were "perfectly" lawful: "Wholly Smokes bought them from A & A and Wholly Smokes sold them to Gutlove & Shirvint" (tr., p. 38). According to petitioner, the regulations at 20 NYCRR 74.3 permitted Wholly Smokes of Kentucky, Inc. to "*import*¹⁷ unstamped cigarettes into the state" since they were for sale exclusively to petitioner, a licensed stamping agent (Petitioner's brief, p. 17). (Emphasis added.) Petitioner denies that Wholly Smokes of Kentucky, Inc., was receiving cigarette deliveries at petitioner's warehouse in Long Island City because petitioner paid for the cigarettes prior to delivery of the cigarettes "such that at no point did Wholly Smokes own unstamped cigarettes in New York" (Petitioner's brief, p. 22). Further the cigarettes seized on June 6, 2008 by the Division "were sold from Wholly Smokes to Petitioner prior to the seizure" (Petitioner's brief, p. 24). According to petitioner, "Even if, however, the Division were correct in its argument that title to the cigarettes reflected on the invoice found during the May 22 inspection did not pass to Petitioner until they were paid for on May 23, the Division has failed to show that the cigarettes reflected on that invoice were delivered before that day" (Petitioner's reply brief, pp. 11-12). In the alternative, petitioner argues that under the Uniform Commercial Code § 2-401 title to the cigarettes passed from Wholly Smokes of Kentucky, Inc., to petitioner

¹⁷ The actual word used in the regulation cited by petitioner is "introduced," which the Division has interpreted as permitting the shipment of cigarettes into New York by an unlicensed distributor who is *introducing* a new brand of cigarettes to a new consumer market in New York. Marlboro cigarettes manufactured by Philip Morris are already in the New York market and the Division rejects petitioner's interpretation of this regulation.

upon physical delivery to the common carrier outside New York by Wholly Smokes of Kentucky, Inc. Similarly, according to petitioner the cigarettes seized by the Tax Department on June 6, 2008 were owned by petitioner, not Wholly Smokes of Kentucky, Inc., because “title passed to Petitioner when they were loaded on the truck, and an invoice and delivery manifest incorrectly filled in by A & A does not change this fact” (Petitioner’s reply brief, p. 16). Although pursuant to Tax Law § 474(1), “the faulty invoice from A & A may have created a prima facie case that Wholly Smokes owned the cigarettes, the evidence shows that Petitioner owned them in fact” (Petitioner’s reply brief, p. 17). Petitioner places emphasis upon “[t]he Tax Law’s requirement that unstamped cigarettes be shipped by common carrier [which] protects the seller and the buyer from the possibility that the seller might retain title, and therefore accrue tax liability, upon cigarettes it sells to purchasers in foreign jurisdictions” (Petitioner’s reply brief, p. 13). Petitioner also argues that it was not required “to update its stamping agent license application to reflect the fact that Wholly Smokes had listed, on its application for a Kentucky cigarette license, Petitioner’s office address as one of its two addresses” (Petitioner’s reply brief, p. 19). Petitioner insists that the business of Wholly Smokes of Kentucky, Inc., is located at its office in Kentucky and not at petitioner’s warehouse.

Petitioner maintains that it “fully supports the collection and payment of all appropriate taxes to New York State,” and that, “There is no allegation . . . nor is there evidence that Petitioner sold unstamped cigarettes that should have been stamped” (Petitioner’s letter dated March 27, 2009 in response to the administrative law judge’s letter dated March 12, 2009 concerning the taking of official notice of an advertisement appearing in the Albany Times Union newspaper of March 5, 2009 which offered to sell cigarettes by mail at prices without the imposition and collection of cigarette tax). Petitioner insists that the Division has waged a

“vendetta” against it by “initiating over 10 proceedings against Petitioner, none of which the Department has won, and engaging in unprecedented tactics such as threatening Petitioner’s employees and customers with personal criminal tax charges, none of which has ever been brought” (Petitioner’s brief, p. 2). Petitioner argues vigorously that the “charges” have “nothing to do with health or safety” and for the State to cancel its licenses for “jeopardiz[ing] the assessment or collection of tax imposed by Article 20” is “irrational” and “arbitrary” when it has paid “every cent of tax owed to the State” (Petitioner’s reply brief, pp. 1-2). Petitioner contends that “despite stunning provocation, [it] maintained at all times an attitude of good faith and cooperation toward the Tax Department” (Petitioner’s reply brief, p. 7). Finally, petitioner argues that the Division has denied petitioner access to its own records that were seized on October 2, 2008 by the Division working with federal agents, and “For that reason alone, it cannot be permitted to cancel petitioner’s license” (Petitioner’s reply brief, p. 47).

19. The Division rejects the contention that the only limitation on a stamping agent selling unstamped cigarettes to Native Americans is for proper paperwork to be utilized for such sales. Rather, if the stamping agent “had knowledge that these cigarettes weren’t sales to Native Americans for Native American use, and more specifically if [the stamping agent] had knowledge that these cigarettes were being trafficked in large quantities [of unstamped and untaxed cigarettes] off of the reservation, . . . it’s incumbent upon the stamping agent not to sell to [those Native Americans]. They’re complicit in that arrangement then. . . . The policy of forbearance would not allow wholesale large-scale smuggling off of the reservation” (tr., p. 901). Here, petitioner knew that Peace Pipe Smoke Shop was involved in such wholesale large-scale smuggling off of the reservation of untaxed cigarettes and had executed an agreement with Philip Morris to refrain from further sales of its popular cigarettes to this flagrant abuser of the

cigarette tax laws. Yet, petitioner by its principal, Joseph Ruda, masterminded a scheme to continue to profit from the sale of Philip Morris products to Peace Pipe Smoke Shop with knowledge of such flagrant violation of the cigarette tax laws: “Petitioner . . . astonishingly proceeded to create and implement a scheme to allow it to covertly provide Philip Morris product to Peace Pipe in direct contravention of the [Philip Morris] agreement” (Division’s brief, p. 4). The Division also contends that petitioner created invoices in violation of Tax Law § 474(4), which requires invoices identifying the name of the purchaser to whom delivery is made. Petitioner’s invoices “do not identify the true purchaser of the product” it shipped north to the Buffalo area since entities such as Spirit Smokes and Native Smokes were used merely “to allow the Petitioner to provide AJ’s (and ultimately Peace Pipe) with more than the . . . [limited] allotment called for by Philip Morris” (Division’s brief, pp. 12-13). In addition, according to the Division, petitioner violated Tax Law § 475 by listing sales to entities such as Spirit Smokes and Native Smokes on its monthly cigarette tax returns when “Petitioner knew AJ’s was buying the product . . . and that the product was destined for Peace Pipe” (Division’s brief, p. 14). According to the Division, it is no defense for petitioner to argue that its deceit was directed to Philip Morris, a private party:

The statute [Tax Law § 480(3)(b)] does not require that the fraud or deceit be directed towards the Division It simply requires that agents and wholesalers licensed by New York State reward the trust given to them and act in an honest manner when dealing in that capacity. (Division’s reply brief, p. 9.)

The Division also maintains that petitioner’s licenses were properly canceled on the basis that it “knowingly aided and abetted Wholly Smokes of Kentucky, Inc., an entity without New York State cigarette licenses, with the importation and possession of unstamped cigarettes in New York” (Division’s brief, p. 19). In addition, the Division contends that petitioner violated the

requirement to “maintain a secure separate warehousing facility” under Tax Law § 480(1)(d) on the basis that product of Wholly Smokes of Kentucky, Inc., was discovered in its warehouse. Similarly, it asserts that Wholly Smokes of Kentucky and other Wholly Smokes entities were located out of petitioner’s Long Island City building, and petitioner failed to notify the Division of this “change” to its license application under 20 NYCRR 71.1(f)(1) and 72.1(c)(1). Finally, the Division argues that petitioner’s licenses were properly cancelled by its failure to maintain a good faith and cooperative relationship as required by the regulations. The Division notes that “Cancelling a license is not an easy decision; but based on the evidence in the record in this case, it was the right one” (Division’s brief, p. 28). Finally, the Division rejects petitioner’s contention that it was waging a “vendetta” against it:

[T]he Department was only performing its statutorily mandated responsibilities by investigating potential violations by the Petitioner and other taxpayers who may or may not have had a relationship with the Petitioner (Division’s reply brief, p. 11).

The Division denies that “we’re putting 50 people out of work The actions of Gutlove & Shirvint and its principal, Joseph Ruda, is what put that company in the position they’re in” (tr., p. 53).

CONCLUSIONS OF LAW

A. The Division of Tax Appeals is a forum of limited jurisdiction with its power to adjudicate disputes defined exclusively by statute (Tax Law § 2008; ***Matter of Scharff***, Tax Appeals Tribunal, October 4, 1990, ***revd on other grounds sub nom New York State Department of Taxation and Fin. v. Tax Appeals Tribunal***, 151 Misc 2d 326, 573 NYS2d 140 [1991]). Consequently, the special expedited nature of this proceeding, as noted in Finding of Fact 2 and Finding of Fact 6, must first be addressed.

B. Tax Law § 480(5)(a) provides for the right to a hearing with reference to the Division of Taxation's issuance of a notice of *proposed* cancellation of a license regulated under Article 20, Tax on Cigarettes and Tobacco Products, "in the manner prescribed for a notice of deficiency of tax and all the provisions applicable to a notice of deficiency under article twenty-seven¹⁸ of [the Tax Law]." In addition, under this same provision, "Where a license is cancelled or suspended *prior to a hearing*, the cancellation or suspension may be challenged through the hearing process provided the petition for such challenge must be filed . . . within ninety days after the giving of notice." Consequently, petitioner properly commenced each of the two proceedings (which have been consolidated into this one administrative proceeding) pursuant to Tax Law § 2008, which provides that proceedings in the Division of Tax Appeals "shall be commenced by the filing of a petition . . . protesting any written notice of the division of taxation which has advised the petitioner of . . . a cancellation, revocation or suspension of a license . . . or any other notice which gives a person the right to a hearing in the division of tax appeals."

C. Pursuant to Tax Law § 2010, "An administrative law judge shall render a determination after a hearing, within *six months* after submission of briefs subsequent to completion of such a hearing [emphasis added]." However, as noted in Finding of Fact 6, the parties stipulated that they would request that the Division of Tax Appeals adjudicate the merits of the Division of Taxation's attempt to cancel petitioner's licenses in an *expedited* fashion, and that the administrative law judge would issue his determination within 30 days "as practicable." Consequently, although there is no explicit language in the Tax Law requiring the expedited issuance of a determination after a hearing with reference to a notice of cancellation of a license

¹⁸ Pursuant to Tax Law § 1089(b) of Article 27, the Division of Tax Appeals has jurisdiction to hear a petition contesting a notice of proposed cancellation if a petition is filed "within ninety days . . . after the mailing of the notice [of proposed cancellation]"

under Article 20, the administrative law judge agreed to treat this proceeding as a “quasi-expedited” matter in conformance with the parties’ stipulation and to be guided by the time frame set forth in the stipulation of the parties, i.e., that this determination should be issued within 30 days of the due date for the filing of the last brief “as practicable” (*cf.* Tax Law § 480[b] [which, in contrast, *specifies* an expedited time frame with reference to a notice of proposed refusal to license]). In sum, the Division of Tax Appeals clearly has jurisdiction over the two petitions consolidated in this one proceeding, and the quasi-expedited treatment of this proceeding is appropriate and reasonable given the stipulation of the parties and the important “as practicable” qualification, so as not to contradict directly the statutory time frame of “within six months” specified in Tax Law § 2010.

D. Before addressing the issues of substance concerning whether the Division may cancel petitioner’s licenses, petitioner’s procedural arguments must first be resolved. The Division is *not* collaterally estopped from asserting facts concerning the Peace Pipe Smoke Shop scheme in this administrative proceeding. The Division seeks to *cancel* petitioner’s licenses. This was not at issue in the federal court action in which the City of New York brought an action for violation of a federal statute and sought monetary damages and injunctive relief under the Contraband Cigarette Trafficking Act, 18 USC § 2341 *et seq.* Judge Carol Bagley Amon on petitioner’s motion to dismiss, ruled that the unstamped cigarettes shipped by petitioner to AJ’s Candy did not constitute “contraband cigarettes” for purposes of this federal act. In Judge Amon’s words: “if Gutlove persuades me that they filled out the papers right - - correctly, this case is dismissed” (*City of New York v. Gutlove & Shervint* [*sic*], US Dist Ct, ED NY [2008] [proceeding on defendant’s motion to dismiss]). Further, although the Division cooperated with the City of New York in the federal court action, the identity of parties required for the application of collateral

estoppel is lacking (*City of New York v. Beretta U.S.A. Corp.* 315 F Supp 2d 256, 264 [2004] *revd on other grounds* 524 F 3d 384 [2008]). The court, in an extremely learned opinion which reviewed in great detail the concept of privity of governmental entities, rejected the contention of the 41 defendants, who were manufacturers, importers and distributors of firearms, that the City of New York's claim should be barred "as a privy of the State," which had brought an earlier action that had been dismissed for failure to state a cause of action for public nuisance against a manufacturer of firearms. The court emphasized that "New York courts have largely refused to find two functionally independent governmental entities in privity with each other for purposes of preclusion" (*City of New York v. Beretta U.S.A. Corp.*, at 267). In addition, petitioner's reliance on *Khan v. Hakim* (201 Fed Appx 981 [5th Cir 2006]) which involves a lawsuit arising out of a dispute over the ownership of a piece of Texas commercial property is misplaced. In that case, the court addressed the inconsistency of a party who first invoked "his Fifth Amendment privilege in [a] bankruptcy proceeding based on the belief that his answers would subject him to criminal liability" and his later position in a civil claim where he exhibited a "willingness to provide answers to those same questions." In such situation, the court, in its *discretion*, applied the legal doctrine of judicial estoppel since "(1) the party's position is clearly inconsistent with his earlier position; and (2) the party has convinced a court to adopt the position urged, either preliminarily or as part of a final disposition." Here, the state and federal authorities refused to disclose taped conversations made by a confidential informant based upon their representations "that disclosure would endanger confidential informants and compromise the safety of officers in the field." A careful review of the taped conversations shows that this concern was legitimate and quite unlike the refusal of a litigant to answer questions based upon his invocation of the Fifth Amendment against self-incrimination. The legitimacy and

justification of the authority's fears concerning the revealing of the details of the taped conversations can be seen in the extraordinary facts revealed in the course of this undercover operation. As just one example, as noted in Footnote 14, there is disclosure that there is "this guy in the Tax Department" who is apparently revealing prematurely to petitioner's principal, Joseph Ruda, information concerning a changing executive policy in the administration of then Governor Eliot Spitzer's concerning a new approach to restraining the sale of unstamped cigarettes on Native American reservations by focusing on exerting pressure on cigarette manufacturers. There is a legitimate concern that, by revealing the contents of the recorded conversations, the state's ongoing policy making and investigation of the sale of non-tax paid cigarettes on Native American reservations might be jeopardized. The decision made by the Division of Taxation to disclose all of the recorded conversations so as to ensure its success in this proceeding and to shut down the operation of petitioner is understandable - the recorded conversations are devastating for petitioner's case showing egregious conduct that provides substantial justification for the Division's actions. This is not a matter of inconsistent positions but rather the difficult balancing by the Division of its desire to avoid jeopardizing the success of a developing and changing policy to restrain the illegal sale of non-tax paid cigarettes on Native American reservations and its concern in this proceeding that its notices to cancel petitioner's licenses are sustained. In sum, it would be an *abuse of discretion* if the doctrine of judicial estoppel were to be applied to bar the introduction of the recorded conversations in this proceeding given the societal need to control and regulate the sale of a very dangerous product, and neither collateral estoppel nor judicial estoppel is properly applied in this proceeding. Without the recorded tapes as evidence, the Division's task would not have been as easily accomplished.

E. Under the laws of New York, the sale of cigarettes is highly regulated, and this product may not be sold by anyone other than a licensed wholesale dealer in cigarettes or a licensed cigarette retailer (*see* Tax Law §§ 480, 480-a). There are two fundamental reasons for the highly regulated sale of cigarettes in New York: (1) cigarettes are poisonous and their use results in terrible consequences affecting the health and welfare of New Yorkers, and (2) the sale of cigarettes is heavily taxed and the loss of revenue to the state's treasury is severe if they are sold without the required imposition and collection of tax under Tax Law § 471(1), which provides as follows:

There is hereby imposed and shall be paid a tax on all cigarettes possessed in the state by any person for sale Such tax on cigarettes shall be at the rate of two dollars and seventy five cents¹⁹ for each twenty cigarettes or fraction thereof Such tax is intended to be imposed upon only one sale of the same package of cigarettes. It shall be presumed that all cigarettes within the state are subject to tax until the contrary is established, and the burden of proof that any cigarettes are not taxable hereunder shall be upon the person in possession thereof.

In addition, cigarette tax is also imposed under New York City Administrative Code § 11-1302(a)(1) “at the rate of seventy-five cents for each ten cigarettes [or \$1.50 per pack of

¹⁹The New York cigarette tax has increased substantially over the years as follows:

Effective Date of Tax	Tax per pack of cigarettes	Tax per carton of cigarettes
June 3, 2008	\$2.75	\$27.50
April 1, 2002	1.50	15.00
March 1, 2000	1.10	11.00
June 1, 1993	.56	5.60
June 1, 1990	.39	3.90
May 1, 1989	.33	3.30
April 1, 1983	.21	2.10

In addition, on February 4, 2009, President Barack Obama signed into law as Public Law 111-3 a federal cigarette tax increase of 62 cents, which brings the total federal cigarette tax to \$1.01 per pack (in order to fund an expansion of eligibility for the State Children's Health Insurance Program[(SCHIP]).

cigarettes since there are 20 cigarettes per pack which also equates to a tax of \$15.00 per carton since there are 10 packs of cigarettes per carton].” This rate of tax became effective on July 3, 2002 and will expire on December 30, 2011. Consequently, the total state and city cigarette tax on the sale of one pack of cigarettes in New York City is \$4.25, which equates to \$42.50 per carton since there are ten packs per carton. In fact, the total state and city cigarette tax on the sale of one pack of cigarettes in New York City may, more times than not, be more than the product itself. An internet seller of cigarettes, which did not impose and collect sales tax, uniformly charged less per carton for cigarettes than this per carton cigarette tax totaling \$42.50. According to an advertisement²⁰ appearing in the Albany Times Union, an internet seller of cigarettes, identified as “Order Smokes Direct.com,” noted the following per carton prices for cigarettes *all less than the \$42.50 tax* per carton including the premium brands of Marlboro and Newport and with nonpremium tier brands priced at a mere *fraction* of the tax per carton:

Brand	Price per carton
Marlboro	\$35.29
Newport	40.29
Seneca	14.89
Infinity	13.49
Roger	16.99

²⁰ Pursuant to State Administrative Procedure Act § 306(4), the administrative law judge took official notice of the prices shown in this advertisement (marked into the record as Exhibit GGG) which represent “certain facts of common and general knowledge, well-established and settled” concerning the substantially lower cost of cigarettes when cigarette tax is not imposed. By a letter dated March 27, 2009, petitioner noted that “There is no evidence connecting Order Smokes Direct.com to any of the parties in this proceeding” and “there is no allegation in this case, nor is there any evidence, that Petitioner has failed to turn over to New York State one penny of money to which New York State is entitled.” By a letter dated March 23, 2009, the Division of Taxation noted that “The tax-free sales in Exhibit GGG allow New York Residents (including potentially minors) to buy cheaper cigarettes and thereby defeats one of the main policies behind the high cigarette excise tax- the increased health benefits resulting from lower consumption.”

Ace	17.99
Kingsley	13.49
Skydancer	13.79

Chief Investigator Patrick Simet of the Division’s Petroleum, Alcohol and Tobacco Bureau testified that in 2007, about 50 million cartons of non- tax paid cigarettes were sold to Native American reservations in New York: “That is an enormous amount of money” (tr., p. 866). Multiplying the tax per carton of \$42.50 by 50 million cartons equals the eye-popping sum of \$2.125 *billion* in taxes not paid on the sale of cigarettes.

F. In addition, the pernicious health consequences resulting from the use of cigarettes, which are well established and settled as indicated in the 2004 Surgeon General’s Report- The Health Consequences of Smoking,²¹ also prompt the strict regulation of the sale of cigarettes. This report noted that smoking harms nearly every organ of the body, causing many diseases and reducing the health of smokers in general. Further, it notes that the list of diseases caused by smoking has been expanded to include abdominal aortic aneurysm, acute myeloid leukemia, cataracts, cervical cancer, kidney cancer, pancreatic cancer, pneumonia, periodontitis, and stomach cancer. These are in addition to diseases previously known to be caused by smoking, including bladder, esophageal, laryngeal, lung, oral, and throat cancers; chronic lung diseases; coronary heart and cardiovascular diseases, as well as reproductive effects and sudden infant death syndrome.

G. Tax Law Article 20, Tax on Cigarettes and Tobacco Products, and relevant regulations, 20 NYCRR parts 70-79, reflect this societal need to regulate cigarettes and control their

²¹ Relevant excerpts of this report are included in the administrative record as Exhibit FFF.

consumption by framing the grounds for cancellation of the licenses at issue very broadly. Tax

Law § 480(3) provides, in relevant part, as follows:

(a) Acts of licensee. The license of any wholesale dealer²² may be cancelled . . . upon:

(ii) Its failure to comply with *any* of the provisions of this article or article twenty-A [Cigarette Marketing Standards] of this chapter or *any rule or regulation* adopted pursuant to this article or article twenty-A of this chapter by the department or the commissioner

(iii) Its *knowingly aiding and abetting another person* in violating *any* of the provisions of this article or article twenty-A of this chapter or *any rule or regulation* adopted pursuant to this article or article twenty-A of this chapter by the department or the commissioner

(b) Acts of licensee or controlling person. A license may be cancelled . . . if the [commissioner] determines that a licensee or any *controlling person*:

(i) Commits *fraud or deceit in his or its operations* as a wholesale dealer (Emphasis added.)

The regulations mirror the above broadly defined statutory grounds for cancellation of a wholesale dealer's license at 20 NYCRR 72.3 and of a cigarette stamping agent's license at 20 NYCRR 71.6, and specifically provide that the determination for cancellation "will be made by the department *on the basis of the circumstances in each case.*" (Emphasis added.) Further, the regulations specify that "The relationship which exists between the department and a licensed cigarette agent must, at all times, be one of *good faith and cooperation,*" and that "As a licensee of the State, an agent is responsible for the *honest and expeditious payment and collection of the cigarette tax*"(20 NYCRR 71.1[a][ii]) (emphasis added). Petitioner's reliance on ***164th Bronx Parking LLC v. City of New York*** (20 Misc 3d 796, 892 NYS2d 248 [2008]), where the court annulled the cancellation by New York City of a license to operate a parking lot due to the

²² Pursuant to Tax Law § 472(1), the provisions of Tax Law § 480 relating to the cancellation of licenses of wholesale dealers are made applicable to cigarette stamping agents' licenses.

“statute’s vagueness” and “the statute’s invitation to arbitrary enforcement,” is simply inapposite. The state’s concern about the proper payment and collection of cigarette tax revenue as well as the *health and welfare* of New Yorkers is not at issue in the regulation of parking lots. Unlike the regulation of parking lots, it is entirely reasonable for the Tax Law to provide broad discretion to the State in monitoring and regulating the sale of a very *poisonous* product. Further, the State’s concern for the *unimpeachable integrity* that must be demanded of fiduciaries like petitioner, who have been given the authority by the State to purchase and affix cigarette tax stamps on packages of cigarettes and to properly account to the State for cigarette tax revenues it collects from its customers, is entirely reasonable. Moreover, the Division of Tax Appeals *lacks jurisdiction* to declare that the above liberal statutory discretion given to the State, which authorizes the State to cancel cigarette licenses for failure to comply with *any* of the provisions of the cigarette tax article, violates constitutional due process on the basis of vagueness. At the administrative level, statutes are presumed to be constitutional (*Matter of Lunding*, Tax Appeals Tribunal, February 23, 1995, *annulled on other grounds* 218 AD2d 268, *revd* 89 NY2d 283, *revd* 522 US 287).

H. Turning to the substance of the recorded conversations and what they establish concerning petitioner’s involvement with Peace Pipe Smoke Shop, it is clear that petitioner’s enterprise should not be permitted to continue. As emphasized in Finding of Fact 11, petitioner’s principal understood that “This would be a disaster for me” if his personal involvement in the Peace Pipe Smoke Shop scheme was revealed. The recorded conversations reveal his personal and, in fact, controlling involvement in the scheme. Mr. Ruda was correct in his unguarded moment - his masterminding of the Peace Pipe Smoke Shop scheme justifies shutting down the operation of Gutlove and Shirvint, Inc. The Division’s proof of this scheme established that

petitioner knowingly aided and abetted Peace Pipe Smoke Shop, which operated in blatant disregard of the legalities of selling non-tax paid cigarettes. Tax Law § 480(3) provides that a license may be cancelled for “knowingly aiding and abetting another person in violating any of the provisions of [Article 20].”

I. As noted in Finding of Fact 12, petitioner in conducting its scheme to continue to supply Philip Morris product to Peace Pipe Smoke Shop could ship only a limited amount of such product through AJ’s Candies and it sought to utilize additional cigarette vendors on Native American reservations in the Buffalo area in order to preserve favorable pricing. In its reply brief, petitioner insisted that “The only evidence the Division was able to muster supporting its notion that Petitioner’s sales to these entities were an effort to avoid non-qualified sales was the testimony of Mr. Simet, who merely said that Alyse told him this was the case and offered no independent proof” (Petitioner’s reply brief, p. 33). This argument is meritless. First, the burden of proof was upon petitioner to introduce evidence to contradict Investigator Simet’s testimony concerning what Alyse Pierce said to him, and her statements may be given weight since hearsay is admissible in proceedings of this type (*Matter of Jarwood*, Tax Appeals Tribunal, January 25, 1996; *Matter of Hopper*, Tax Appeals Tribunal, August 18, 1994). Moreover, petitioner *ignores* the following exchange between its principal Joseph Ruda and Alyse Pierce secretly recorded by the State’s investigators as Conversation # 38 on March 13, 2008:

Alyse: Yeah, I was wondering if you figured anything out cause I gotta get back .
Joe: Yeah we have enough, everything ready. *We just need* you to send us down
another license and another account. (Emphasis added.)

In addition, petitioner failed to produce the testimony of its principal, Joseph Ruda, which must be held against it (*cf. Matter of Meixsell v. Commissioner of Taxation*, 240 AD2d 860, 659 NYS2d 325 [1997]), *lv denied* 91 NY2d 811, 671 NYS2d 714 [1998], *Matter of Greenwald*, Tax

Appeals Tribunal, November 24, 1993). As the tapes show, he was the mastermind of the Peace Pipe Smoke Shop scheme, and his failure to testify bolsters reliance on the revelations disclosed by the taped conversation.

J. It is a much more substantial task for a taxpayer to sustain its burden of proof than for the Division merely to establish a rational basis for its action (*see Matter of Orvis*, Tax Appeals Tribunal, January 14, 1993, **annulled in part** 204 AD2d 916, 612 NYS2d 503 [1994], **modified** 86 NY2d 165, 630 NYS2d 680 [1995], **cert denied** 516 US 989, 133 L Ed 2d 426 [1995] [Tribunal noted that the Division of Taxation does not have the burden of proving the propriety of its action, but rather the failure of the petitioner in *Orvis* to “establish the specific fact” required the Tribunal to “conclude that petitioner has not sustained its burden”]). Here, as noted above, the Division has established much more than merely a rational basis for the cancellation of petitioner’s licenses by establishing petitioner’s disdain for the public good by its sale of cigarettes, motivated completely by the goal of maximizing profit, regardless of the consequences of its sales to a cooperative conduit who would then move the product along to a notorious vendor. A helpful analogy is to cases involving the revocation of liquor licenses pursuant to Alcohol Beverage Control Law § 118 wherein the courts have noted that the revocation must be based upon merely “sufficient evidence” (*see Matter of Tracey Anne Corp. v. New York State Liquor Authority*, 111 AD2d 860, 491 NYS2d 17 [1985]; *Matter of Kened Bar Inc. V. New York State Liquor Authority*, 99 AD2d 511, 471 NYS2d 12 [1984]). The facts in these State Liquor Authority matters involved the abetting of sales of alcohol at unlicensed premises, somewhat analogous to petitioner’s abetting the illegal sales of non-tax paid cigarettes by Peace Pipe Smoke Shop by continuing to supply unstamped cigarettes to that corrupt enterprise, which had been the source of non-tax paid cigarettes throughout New York City. It is

reasonable to conclude that Joseph Ruda, petitioner's principal, by masterminding the scheme to use AJ's Candy as a conduit, difficult to detect, betrayed petitioner's obligation "to maintain a good faith and cooperative relationship with the Department" under 20 NYCRR 71.1(a)(1)(ii) by ultimately abetting the illegal sales of unstamped cigarettes by Peace Pipe Smoke Shop.

K. Petitioner's complaint that the Division of Taxation has waged a vendetta against it is without merit. Rather, the Division's actions against petitioner are more fairly described as a cat and mouse game, in which the mouse has crafted various tricks for avoiding the cat. Perhaps the most telling testimony reflecting the relationship between the parties was that of Thomas Stanton, the Director of Enforcement for the Petroleum, Alcohol and Tobacco Bureau, who admitted that he directed the undercover state personnel to put Gutlove and Shirvint invoices on the truck which would be the subject of the staged seizure "because I wanted a conversation with Joseph Ruda" (tr., p. 499). It was a "technique," used by law enforcement officers, in which "you have a conversation with a target and either he lies to you or tells you the truth" (tr., p. 519). Director Stanton testified that Mr. Ruda lied to him and "denied knowing anything about those invoices" (tr., p. 495). He described his reaction to Mr. Ruda's denial as follows:

I had listened almost daily to the tape recordings made by Alyse at AJ's and I knew, indeed, he was not telling me the truth. And as the director of Tax Enforcement, I was shocked, shocked, that he lied to me.

Administrative Law Judge: That seemed a little Casablanca. I'm sorry. Would you elaborate on that so the record is clear. Because the record doesn't pick up a smile.

Thomas Stanton: It was meant somewhat in jest while looking at Mr. Feldberg. (Tr., p. 496.)

As noted in Finding of Fact 1, petitioner's business started in 1939, and petitioner and the State have had a lengthy relationship. There is no doubt that the Division has been closely watching

petitioner's operation, but that is as it should be given the substantial amounts of cash or currency flowing through the business and the Division's duty to ensure that the law on the sale of cigarettes is properly enforced or, at the least, the State's policy of forbearance is not grossly abused. For example, the Division's inspection of petitioner's premises which uncovered the invoice of Wholly Smokes of Kentucky, Inc., in petitioner's warehouse, as detailed in Finding of Fact 16, was part of its responsibility to conduct administrative inspections when it reasonably suspected violations of the law concerning the shipment of non-tax paid cigarettes into New York. The Division was not required to obtain a search warrant before conducting its administrative inspection of the premises operated by petitioner (*see People v. McIver*, 125 AD2d 263, 508 NYS2d 436 [1986]). Further, given the hundreds of thousands of orders petitioner receives each year and its hundreds of customers and the "payment by cash" nature of its operation, as noted in footnote 4, the number of investigations the Division has conducted of its customers and of its employees are far from unreasonable. Further, petitioner has exaggerated the significance of the determination of Administrative Law Judge Thomas Sacca in *Matter of Gutlove and Shirvint, Inc.* (Division of Tax Appeals, December 28, 2000) concerning the issue whether petitioner "issued to its customer, Cigpak, Inc., a \$200.00 rebate in violation of the Cigarette Marketing Standards Act." In that proceeding, petitioner's principal, Joseph Ruda, appeared *and testified*. The Division offered no evidence in contravention, and petitioner prevailed. Petitioner's success in this prior administrative proceeding fails to establish that the Division has waged a vendetta against it. Similarly, petitioner exaggerates its difficulty in obtaining access to documents seized by the authorities when its business was initially shut down prior to the litigation in federal court. By the time the administrative hearing here had commenced, petitioner had been given the opportunity to review its documents that had been

seized except for the apparent disappearance of one box of documents containing invoices.

Petitioner has never identified how its failure to have the “missing documents” available for its review prejudiced its defense. Given the weight of the evidence against it, the apparent loss of one box of records does not rise to the level of prejudice which would raise constitutional due process concerns especially since petitioner has never noted exactly what such documents would establish to counter the remarkable evidence of the Peace Pipe Smoke Shop scheme established by the secret recordings. This proceeding must not be mistaken for a criminal proceeding, where the prosecutor must prove, beyond a reasonable doubt, specified criminal charges. Similarly, there is no jury to be prejudiced by the testimony of one of the Division’s witnesses concerning the funding of terrorist activities by the bootlegging of non-tax paid cigarettes, obtained from vendors on Native American reservations in western New York, by individuals related to the Lackawana Seven. Such testimony has been given little weight in this determination, and petitioner’s motion for a “mistrial” is inapposite in an administrative proceeding before an administrative law judge. Here, instead, once the Division established a reasonable basis for its action, the burden of proof was upon petitioner to show error on the part of the Division in issuing the notices (*see* State Administrative Procedure Act § 306[1]). Given the evidence of misconduct and egregious behavior established by the recorded conversations, this proved an unsurmountable mountain for petitioner to get over. In sum, the facts and circumstances concerning petitioner’s involvement in the scheme masterminded by its president, Joseph Ruda, to continue to supply Philip Morris product to Peace Pipe Smoke Shop, clearly established by the transcripts of conversations secretly recorded by an informant, provided “sufficient evidence” for the Division’s cancellation of petitioner’s licenses (*see Matter of Tracey Anne Corp. v. New York State Liquor Authority; Matter of Kened Bar Inc. v. New York State Liquor Authority*).

L. In addition, the scheme for obtaining Philip Morris products by utilizing a sister corporation organized by petitioner's principal also supports²³ the cancellation of petitioner's licenses for the reasons summarized in paragraph 19: (1) petitioner knowingly aided and abetted Wholly Smokes of Kentucky, Inc., with the importation²⁴ and possession of non-tax paid cigarettes in New York; (2) with product invoiced to Wholly Smokes found in its warehouse, petitioner violated the requirement to maintain a secure and separate warehousing facility under Tax Law § 480(1)(d), and (3) petitioner failed to notify the Division of such usage of its warehouse by its sister corporation. As noted in Findings of Fact 16 and 17, the Division offered sufficient evidence to support this conclusion despite petitioner's contentions delineated in paragraph 18. Further, the opinion of Emanuel Urzi detailed in Finding of Fact 15 rings true: inserting a buffer company owned by petitioner's principal in order to import cigarettes into New York served no business purpose other than to make it more difficult to follow the paper trail of non-tax paid Philip Morris cigarettes, which is clearly seen from the inspection of petitioner's warehouse on May 22, 2008 as detailed in Finding of Fact 16, with the attendant confusion of paperwork and clear violation of 20 NYCRR 75.5 which provides that, "Every licensed cigarette agent must keep complete and accurate records of every purchase, sale or other acquisition or disposition of cigarettes and cigarette tax stamps handled."

²³ This alternative basis for canceling petitioner's licenses fades in significance given the much more serious basis for cancellation involving the scheme to provide non-tax paid cigarettes to Peace Pipe Smoke Shop discussed above, but nonetheless provides an additional basis in support of the Division's action. As noted in Finding of Fact 13, by a notice issued on April 7, 2008, Philip Morris terminated all direct sales of its cigarettes to petitioner after it became aware of the Peace Pipe Smoke Shop scheme concocted by petitioner, and this use by petitioner of a sister corporation to import cigarettes into New York was simply a crafty attempt to try to avoid the consequences of its Peace Pipe Smoke Shop scheme having been uncovered.

²⁴ As noted in footnote 17, the regulation permits the introduction of a new brand, not the importation of cigarettes.

M. Finally, some mention should be made concerning the Division's policy of forbearance in its enforcement of Article 20 with respect to on-reservation sales of cigarettes to non-Native American consumers, as detailed in Footnote 5. Although the Division has tolerated to some large extent the illegal sales of non-tax paid cigarettes by Native American smoke shops, it must be explicitly noted that this proceeding against petitioner does not arise from "an intentional invidious plan of discrimination on the part of the Division" against petitioner which might be considered unconstitutional selective enforcement (*see, Matter of Goetz Energy*, Tax Appeals Tribunal, November 18, 1999, quoting *Matter of Petro Enterprises, Inc.*, Tax Appeals Tribunal, September 19, 1991). Rather, this proceeding against petitioner arises from capable people who are strong, committed investigators and tax enforcers performing their professional duties. In closing, this proceeding is the result of petitioner's actions, which were much more egregious than driving 45 miles per hour in a 30 mile per hour speed zone which might have been subject to a policy of forbearance. Rather, the Peace Pipe Smoke Shop scheme concocted by petitioner's principal was comparable to speeding at 100 miles per hour in a 30 mile per hour speed zone. A policy of forbearance simply cannot be applied to petitioner's conduct, where the State has, in fact, *proven*, by the secretly recorded conversations detailed in the findings of fact, that petitioner aided and abetted the illegal sale of non-tax paid cigarettes by Peace Pipe Smoke Shop, a notorious on-reservation vendor, which was a major provider of non-tax paid cigarettes to a vast bootlegging operation.

N. The petitions of Gutlove & Shirvint, Inc. are denied, and the Notice of Proposed Cancellation of Licenses as a Cigarette Stamping Agent & Wholesale Dealer, Distributor and

Wholesaler of Tobacco Products dated April 8, 2008 and the Notice of Cancellation of such licenses dated June 30, 2008 are sustained.

DATED: Troy, New York
June 2, 2009

/s/ Frank W. Barrie
ADMINISTRATIVE LAW JUDGE