

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition :

of :

**ERW ENTERPRISES, INC.** :

for Revision of a Determination or for Refund of :  
Cigarette Tax under Article 20 of the Tax Law for :  
the Period ended December 3, 2012. :

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DECISION  
DTA NOS. 827209  
AND 827210

In the Matter of the Petition :

of :

**ERIC WHITE d/b/a ERW WHOLESALE** :

for Revision of a Determination or for Refund of :  
Cigarette Tax under Article 20 of the Tax Law for :  
the Period ended December 3, 2012. :

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Petitioners, ERW Enterprises, Inc., and Eric White d/b/a ERW Wholesale filed an exception to the determination of the Administrative Law Judge issued on March 15, 2018. Petitioners appeared by Lipsitz Green Scime Cambria LLP (Jeffrey F. Reina, Esq., and Paul J. Cambria, Jr., Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Brian L. Evans, Esq., of counsel).

Petitioners filed a brief in support of the exception. The Division of Taxation filed a brief in opposition. Petitioners filed a reply brief. An amicus curiae brief was filed by the Seneca Nation of Indians appearing by Lippes Mathias Wexler Friedman LLP (Carol E. Heckman, Esq., and Carson R. Cooper, Esq., of counsel). Oral argument was heard on November 29, 2018, in

Albany, New York, which date began the six-month period for issuance of this decision.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

### ***ISSUES***

I. Whether petitioners were in possession or had control of unstamped or unlawfully stamped cigarettes so as to be liable for the penalty imposed pursuant to Tax Law § 481 (1) (b) (i).

II. Whether, if so, the foregoing penalty should be canceled because the same violates the Excessive Fines Clause of the Eighth Amendment to the United States Constitution.

III. Whether the penalty should be canceled because the stop, search and resulting seizure of the cigarettes being transported in this case violated petitioners' rights under the Fourth Amendment to the United States Constitution and Article I, § 12 of the New York State Constitution.

### ***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge, except that we have modified findings of fact 15, 22 and 33 to more accurately reflect the record. We have also modified a footnote to finding of fact 53 to the extent that such footnote discusses an evidentiary point not in controversy on exception. We have not restated the Administrative Law Judge's findings of fact 60 and 61, which discuss the treatment of petitioners' proposed findings of fact and the Division's statement of facts as submitted below. As so modified, the Administrative Law Judge's findings of fact appear below.<sup>1</sup>

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<sup>1</sup> By the parties' stipulation, the record in this matter includes certain evidence from other, related proceedings. The Division's documentary evidence in the record consists of exhibits A through J, and exhibits AA through OO, as entered by the parties' stipulation, and exhibits PP through DDD, as submitted at hearing.

1. On December 16, 2014, the Division of Taxation (Division) issued to petitioner ERW Enterprises, Inc. (ERW Enterprises), a notice of determination (L-042291772). On December 19, 2014, the Division issued to petitioner Eric White d/b/a ERW Wholesale (ERW Wholesale), a notice of determination (L-042301388). Each notice of determination assessed a penalty against the petitioner named therein, in the amount of \$1,259,250.00 pursuant to article 20 of the Tax Law. The computation section of the notices states that:

“[o]n 12/03/12, you were found to be in possession and/or control of unstamped or unlawfully stamped cigarettes, and/or untaxed tobacco products.

Therefore, penalty is imposed under Article 20 of the New York State Tax Law.”

2. ERW Enterprises was incorporated September 25, 2008, and is registered to conduct business in the State of New York. It is solely owned by Eric R. White, and is a construction company engaged in heavy site work, including utilities installation, commercial paving, and the like. ERW Enterprises mainly employs heavy equipment operators. It also employs carpenters and electricians. ERW Enterprises has never been directly engaged in the business of tobacco trading, including the tobacco wholesale business conducted by petitioner ERW Wholesale. ERW Enterprises' only apparent connection to the matter at issue in this proceeding, as described hereinafter, comes from the undisputed fact that the vehicle used to transport certain unstamped cigarettes, though individually owned by Eric R. White, was registered to ERW Enterprises (*see* finding of fact 15).

3. ERW Wholesale, by contrast, operates a tobacco wholesale business. ERW Wholesale

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Petitioners' documentary evidence in the record consists of exhibits 1 through 22, as entered by the parties' stipulation, and exhibits 23 through 26, as entered at hearing. Exhibit DDD, labeled as a Division exhibit, is the parties' joint stipulation. The record does not include exhibits that would, in the ordinary course, be labeled K through Z (as Division exhibits). This break in exhibit labeling is intentional, so as to eliminate duplication and include only one copy of certain pre-marked exhibits that were offered by both parties.

commenced doing business in 2012, and is solely owned by Eric R. White. Mr. White is a member of the Seneca Nation of Indians. The Seneca Nation of Indians is recognized by the United States Bureau of Indian Affairs (BIA). Mr. White holds a business license issued by the Seneca Nation of Indians that permits him to operate as a tobacco wholesaler under the name ERW Wholesale. Under this business license, Mr. White is entitled to warehouse tobacco products, and to deliver tobacco products to Native American vendors. ERW Wholesale's warehouse, equipment and associated facilities are located on the Cattaraugus Reservation of the Seneca Nation of Indians, in the far western part of New York State.

4. ERW Wholesale is solely regulated by the Seneca Nation of Indians. All of ERW Wholesale's customers are Native Americans, including tribes and Native American individuals operating businesses (retail locations) that sell tobacco products, including cigarettes, on Native American territories. ERW Wholesale deals solely in Native American manufactured tobacco products including, as here relevant, cigarettes, and does not deal in "premium" cigarette brands (i.e., cigarettes, such as Marlboro, Winston, Newport, and other well-known brands, manufactured and sold by non-Native American entities). ERW Wholesale is not a New York State licensed stamping agent or wholesaler.

5. In addition to the construction and tobacco wholesale businesses described above, Eric R. White has multiple additional businesses, including a NAPA auto and truck parts retail store, all located on the Cattaraugus Reservation. Dwayne Clark is employed by Mr. White, and his multiple businesses, as controller or operations manager. With respect to ERW Wholesale, Mr. Clark is the operations manager, which position entails handling the day-to-day operations of the company. Mr. Clark's duties include processing orders, overseeing orders being processed, overseeing trucks being loaded, and overseeing employees. Mr. Clark was ERW Wholesale's

operations manager on December 1, 2012, as well as before and after that date.

6. On or about November 30, 2012, ERW Wholesale received, from Oien’Kwa Trading, an order for the purchase of 9,000 cartons (150 cases) of assorted types of cigarettes.<sup>2</sup> This order was entered into ERW Wholesale’s computer system on the next day, Saturday, December 1, 2012. Subsequent to purchasing the cigarettes from ERW Wholesale, Oien’Kwa Trading resold the cigarettes to Saihwahenteh.<sup>3</sup> ERW Wholesale agreed to perform a “drop shipment” of the cigarettes to Saihwahenteh, meaning that it agreed to transport the cigarettes from the Cattaraugus Reservation to the Ganienkeh territory, as a transporter for Oien’Kwa Trading. The total purchase price for the 9,000 cartons of cigarettes that ERW Wholesale sold to Oien’Kwa Trading was \$164,250.00. The total shipping or delivery fee for the drop shipment of the cigarettes from the Cattaraugus Reservation to the Ganienkeh territory was \$2,250.00, i.e., \$.25 per carton (*see* findings of fact 23 through 25). According to Mr. Clark, ERW Wholesale provides drop shipment services in the course of its business, and the delivery fees imposed by ERW Wholesale for drop shipments vary based upon the distance the cigarettes are transported.

7. John Kane, a member of the Mohawk Nation of Indians, provided testimony in a related case (*Matter of Snyder* [NY St Div Tax Appeals DTA No. 825785, June 22, 2017]). The transcripts, together with much of the documentary evidence from that proceeding, have been included as part of the record in this proceeding by agreement of the parties. In addition, official notice of the record of the proceedings in *Matter of Snyder* is taken pursuant to State

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<sup>2</sup> Oien’Kwa Trading is a Native American-owned business located on the St. Regis Mohawk Akwesasne Reservation near Hogansburg, New York. The St. Regis Mohawks are recognized by the BIA. There is no claim or evidence that Oien’Kwa Trading is a New York State licensed stamping agent or New York State registered dealer or retailer.

<sup>3</sup> Saihwahenteh is a Native American owned business located on the Ganienkeh territory near Altona, New York. There is no claim or evidence that Saihwahenteh is a New York State licensed stamping agent or New York State registered dealer or retailer.

Administrative Procedure Act § 306 (4). Pursuant to State Administrative Procedure Act § 306 (4), official notice can be taken of all facts of which judicial notice could be taken. Since a court may take judicial notice of its own records (*Matter of Ordway*, 196 NY 95 [1909]), the Division of Tax Appeals may take official notice of its record of proceedings (*see Bracken v Axelrod*, 93 AD2d 913 [3rd Dept 1983]). Mr. Kane was qualified without objection as an expert on Indian history, in general, and on the existence and history of the Ganiienkeh territory, in particular.

8. Mr. Kane explained that in July 1977, New York State created, and has since then utilized, a trust named the Turtle Island Trust, as a vehicle to establish an enclave for a band of Mohawk Indians (the Warrior Society of Mohawks) who had previously occupied an abandoned Girl Scout camp at Big Moose, located near Old Forge, New York. Mr. Kane confirmed that a formal transaction was performed by New York State to create the Turtle Island Trust and, through that trust, to provide for the Mohawk people's use of the land, generically the Miner Lake area, near Altona, New York, where the Ganiienkeh territory is located.

9. The inhabitants of the Ganiienkeh territory, a majority of whom are Mohawk, consider the territory sovereign land. Its governance, described by Mr. Kane as the Way of the Longhouse, is in accord with that practiced on other Native American territories. In addition to homes, Ganiienkeh includes a bingo hall with electronic gaming devices, smoke shop, gas station, sawmill, and other businesses, as well as a school and a health clinic.

10. Mr. Kane confirmed that the Mohawk people have always considered the Ganiienkeh territory to be their land; the other Native American nations fully recognize the Ganiienkeh territory as a sovereign territory; and there is little, if any, interaction between the Ganiienkeh territory and the State of New York. In this regard, New York State has a history of not collecting: (a) taxes from income earned by the bingo and electronic gaming hall, smoke shop,

and gasoline station located on the Ganienkeh territory; and (b) real estate taxes from those who own real property located on the Ganienkeh territory. There is a tribal police force at Ganienkeh, and testimony at the hearing confirmed that the New York State Police (State Police) do not generally enforce laws on the Ganienkeh territory.

11. Mr. Kane noted that the inhabitants of Ganienkeh do not receive any state or federal funds. He further explained that the tobacco industry, including the manufacturing and distribution of cigarettes, has become an important part of the Native American economy.

12. The record includes the Turtle Island Trust Agreement (Trust Agreement), dated July 25, 1977.<sup>4</sup> Pursuant to Article III, the trust shall exist and shall be administered and operated exclusively for charitable, religious and educational purposes. Specifically, the purpose of the trust is to encourage and to provide a source of financial support for:

“(A) the preservation of the traditional culture, heritage, history, religion, language and arts of the Indian Nations of North America;

(B) the education of Indians and other members of the public in the traditional culture, heritage, history, religion, language and arts of the Indian Nations of North America;

(C) the promotion of racial and cultural harmony and understanding between members of the North American Indian Nations and citizens of the United States;

(D) the relief of poverty among members of the North American Indian Nations.”

13. The record also includes a lease executed on September 28, 1977, between the People of the State of New York, acting by and through the Commissioner of Environmental Conservation (lessor) and the Turtle Island Trust (lessee). Under the terms of this lease, the

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<sup>4</sup> The settlor of the Turtle Island Trust was Ann Louise Maytag, and the trustees were Robert S. Charland, Jon L. Regier and Ann Louise Maytag. A committee, appointed by the Ganienkeh Council Fire, was to advise and consult with the trustees and the Ganienkeh Council Fire concerning the operation and administration of the trust, to make recommendations to the trustees concerning distribution or use of the trust fund or other property, and to assist the trustees in carrying out the purposes of the trust. The term of the trust is perpetual.

lessor leased a certain parcel of land located in Altona, New York, to the lessee for a period of five years commencing on July 29, 1977. The People of the State of New York, acting through the Commissioner of Environmental Conservation, also gave a temporary revocable permit, dated October 28, 1977, to the Turtle Island Trust that permitted the trust to use tracts or parcels of land situated in the towns of Schuyler Falls and Saranac (reforestation area), Clinton County, New York, for the purposes of hunting, fishing, trapping and forest management. Successive leases for the Altona parcel were entered into by the parties on July 29, 1982 (five-year term) and May 17, 1987 (five-year term), which extended the lease term to July 30, 1992. By letter dated July 30, 1992, Langdon Marsh, then-Executive Deputy Commissioner of the New York State Department of Environmental Conservation, notified the Turtle Island Trust that the trust became a month-to-month tenant under the same terms and conditions of the lease, because of ongoing negotiations to resolve an alleged violation of the then-present lease.

14. The cigarettes that ERW Wholesale sold to Oien’Kwa Trading were manufactured by King Mountain Tobacco Company, Inc. (King Mountain), a Native American-owned business located on the Yakama Indian Reservation in the State of Washington. The Confederated Tribes and Bands of the Yakama Nation is recognized by the BIA. King Mountain grows the tobacco for its cigarettes on the Yakama Reservation, and makes and boxes the cigarettes on the Yakama Reservation. All cigarettes that ERW Wholesale purchases from King Mountain are delivered to ERW Wholesale, by common carrier, at its Cattaraugus warehouse, in sealed cases.

15. Mr. Clark oversaw the processing and loading (fulfilling) of the Oien’Kwa Trading order on December 1, 2012. On that date, a total of 150 cases of King Mountain cigarettes were loaded onto a truck. On the dates at issue herein, the truck, a white 1999 Ford box truck (also described as a “cube van”) with a roll-up rear door, was owned, individually, by Eric R. White.



This vehicle was, however, registered to petitioner ERW Enterprises, as a commercial vehicle per Department of Transportation (DOT) rules, and it bore the name ERW Enterprises, Inc., as well as its DOT number, on its sides. Mr. Clark explained that the truck was used as a delivery vehicle for ERW Wholesale's tobacco business, as well as to transport materials, from time-to-time, for the construction business in which ERW Enterprises is engaged. The truck's registration to ERW Enterprises was done, initially, for DOT compliance purposes, due to the gross vehicle weight (GVW) capacity of the truck. As Mr. Clark testified in *Matter of Snyder*, at the time of the truck's acquisition, ERW Enterprises, and not ERW Wholesale, had "a designation to be able to put the DOT number on its side."<sup>5</sup> At about the time of the transactions at issue, the truck's registration was in the process of being changed from ERW Enterprises to ERW Wholesale because, according to Mr. Clark, the truck "no longer had a usefulness for the construction company." Subsequent to the dates at issue, and after performance of a significant amount of repair work, the truck was re-registered to ERW Wholesale.

16. On December 1, 2012, Shawn E. Snyder, then a 22-year-old member of the Seneca Nation of Indians, and an employee of ERW Wholesale, was asked to drive and deliver the load of cigarettes to Saihwahenteh at Ganienkeh. As an employee of ERW Wholesale, Mr. Snyder typically delivered cigarettes to Indian territories and retailers located in the Western New York area, i.e., local deliveries. However, because another employee had just left ERW Wholesale's employment, Mr. Snyder was asked to step in and make the longer distance drop shipment delivery at issue in this case.

17. The Division asserts that the record is "unclear" as to whether Mr. Snyder was

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<sup>5</sup> In the present matter, Mr. Clark similarly testified that, at the time of the truck's initial registration, ERW Enterprises was "the only ones [sic] that had the DOT clearance for that size vehicle."

employed by ERW Enterprises or by ERW Wholesale. The Division's assertion is principally based upon the narrative portion of an incident report, completed by State Police Investigator Joel Revette on December 4, 2012, in connection with the seizure of the cigarettes being delivered, indicating that Mr. Snyder stated he was employed by ERW Enterprises, as follows:

“On 12/03/12, I interviewed the driver, Shawn E. Snyder, . . . , who stated that he worked for ERW Enterprises, . . . , and was transporting cigarettes from the Oneida Indian Reservation to the Ganienkeh Territory. Snyder stated he was hauling 7260 cartons of cigarettes and provided an invoice. Snyder usually delivers cigarettes locally on the Oneida Indian Reservation but a driver quit the company earlier in the day and his employer asked him to drive to Ganienkeh and deliver the load of cigarettes. Snyder stated he met a subject in a hotel parking lot across from the Turning Stone Casino. The subject he met worked for a different wholesaler. Snyder stated they transferred the load from the other company's van to his in the parking lot. Snyder had no further information relative to the identity of the other company or driver.”

18. The balance of the evidence, including the clear, consistent and credible testimony given by Dwayne Clark in this matter, and in *Matter of Snyder*, supports the fact that Mr. Snyder was employed by ERW Wholesale, and not by ERW Enterprises. In *Matter of Snyder*, Mr. Snyder testified that he was “employed by Mr. White,” as opposed to ERW Enterprises or any other specific entity, and that he was “uncertain” as to which entity in particular he “fell under.” Mr. Clark, thereafter, specified in his testimony that Mr. Snyder was employed by ERW Wholesale, and that his duties did not “bleed over” into those of Mr. White's other businesses, including ERW Enterprises. This is consistent with Mr. Snyder's description of his regular employment activities as a local cigarette delivery person for ERW Wholesale. There is nothing in the record, beyond Mr. Snyder's (unwritten) statement at the time the vehicle was stopped by the State Police for inspection, to support a factual conclusion that he was employed by ERW Enterprises and not by ERW Wholesale. The ERW Enterprises logo on the sides of the truck, coupled with its registration to ERW Enterprises, appears to have simply given rise to an

erroneous assumption that Mr. Snyder was employed by that entity and not by ERW Wholesale.

19. Each case of cigarettes is a sealed cardboard box containing 60 cartons of cigarettes. Each case was sealed when it was delivered from King Mountain, by common carrier, to ERW Wholesale (*see* finding of fact 14). After the order was processed at ERW's facility, the sealed cases of cigarettes were loaded onto the truck, and the roll-up door to the truck was padlocked. Mr. Clark also put a seal on the back of the truck. Mr. Clark could not specifically recall if the seal was affixed before or after the padlock was secured to the back door of the truck. None of the 150 cases of cigarettes were open when they were loaded onto the truck. Because each case was sealed when loaded, it was not possible to see the cartons of cigarettes stored in the cases, or the packs of cigarettes stored in the cartons, without physically opening the cases. The only way to determine whether the cigarettes being transported in fact bore New York State tax stamps was to physically open a case, pull out a carton, open the carton and pull out and inspect a pack of cigarettes.

20. Before leaving to transport the cigarettes to Saihwahenteh on Sunday, December 2, 2012, Mr. Snyder was provided with copies of ERW Wholesale invoices Nos. 11 and 12, each dated December 1, 2012 (*see* finding of fact 23). There is no information on either invoice indicating that Shawn Snyder, on behalf of ERW Wholesale, was transporting King Mountain cigarettes, or whether tax stamps were affixed to the cigarette packs, including New York State tax stamps. Mr. Snyder was also provided with a copy of the ERW Wholesale Bill of Lading, dated December 1, 2012 (*see* finding of fact 25). Likewise, there is no information thereon indicating that Shawn Snyder, on behalf of ERW Wholesale, was transporting King Mountain cigarettes, or whether tax stamps were affixed to the cigarette packs, including New York State tax stamps. In addition, located in the truck was its registration, its New York State insurance

identification card, and a white packet prepared by ERW Wholesale.

21. The white packet contained, among other documents, a Seneca Nation of Indians Stamping Agent License, issued by the Seneca Nation Import-Export Commission on March 20, 2012, to “John Waterman d/b/a - Iroquois Wholesale,” a “[to] whom it may concern” letter, dated August 13, 2012, from Geraldine Huff, Deputy Clerk, Seneca Nation of Indians, advising that “Mr. John Waterman of Iroquois Wholesale holds a valid Seneca Nation business license as a Tobacco Wholesaler,” a Seneca Nation of Indians business license, that permitted John Waterman to operate as a tobacco wholesaler, “Iroquois Wholesale,” from August 16, 2011 through August 10, 2012; a letter dated May 8, 2012, from the Seneca Nation of Indians Import-Export Commission, indicating that Mr. Waterman’s license as a stamping agent of the Seneca Nation had been approved for the one-year period of May 10, 2012 through May 9, 2013; a Seneca Nation of Indians business license permitting Eric R. White to operate as a tobacco wholesaler, “ERW Wholesale,” from April 9, 2012 through January 14, 2013; and a copy of a July 6, 2011 email forwarded by Peter Persampieri to the Division’s “CID Investigators; CID supervisors” on the same date.

22. The author of the forwarded email was Richard Ernst, then-Deputy Commissioner for the Office of Tax Enforcement. Mr. Ernst sent this email to some of the chief investigators in the Division’s Criminal Investigation Division on July 6, 2011. The subject of the email was “Cigarette Enforcement,” and included possible scenarios “involving the movement of untaxed cigarettes in NYS (either premium alone, premium and native [sic] American or just native [sic] American and when we could seize and/or charge.” As relevant to this matter, the July 6, 2011 email states “Native Americans transporting untaxed native [sic] American cigarettes from one

reservation in NYS to another reservation in NYS. - **Don't Seize.**"<sup>6</sup> In testimony in *Matter of Snyder*, Mr. Ernst explained that the email was intended to provide direction to the Division's criminal investigators in the field.

23. The record includes copies of ERW Wholesale's invoices Nos. 10, 11, and 12, each dated December 1, 2012. The top portion of each of the invoices carries the name "ERW WHOLESALE-SOVEREIGN SENECA TERRITORY, 11157 Old Lakeshore Road, Irving, NY 14081." The invoices were issued "TO: Oien'Kwa Trading, St. Regis Mohawk Territory, 76 Geronimo Lane, Akwesasne, NY, 12655." Invoice No. 11 sets forth Oien'Kwa's purchase of various quantities of six types of cigarettes, totaling 9,000 cartons, from ERW Wholesale. Invoice No. 11 further specifies that the cigarettes are to be "SHIPPED TO: Saihwahenteh, Ganienkeh Territory, 102 Devils Den Road, Altona, New York, [phone number]." Review of the invoices indicates that the top third of each of the three invoices sets forth seven preprinted columns, while the lower portion of the invoices sets forth six preprinted columns, respectively. Each of the invoices clearly states that the cigarettes are "Exempt."<sup>7</sup> With respect to the cigarettes purchased by Oien'Kwa Trading from ERW Wholesale, and thereafter sold by Oien'Kwa to Saihwahenteh, with shipment and delivery to Saihwahenteh to be made by ERW Wholesale, Invoice No. 11 presents the following:

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<sup>6</sup> Shortly before the July 6, 2011 date of the Ernst email, New York State Senators George Maziarz and Tim Kennedy sent a letter to the New York State Department of Taxation and Finance, dated May 16, 2011, in which they stated: (i) "[i]t is our view that Native Brand cigarettes, which are produced and sold on lands owned by Native Nations, constitutes commerce that is essentially Native to Native, and therefore cannot be regulated or taxed by the State of New York;" and (ii) "[i]t is our view that the State should not pursue an effort to collect taxes on Native Brands because such an effort would be contrary to the sovereign rights of the Native American Nations, and would be a severe blow to the Native retail economy."

<sup>7</sup> To the left of the fill-in box on each invoice where the word "Exempt" appears are the preprinted words "Sales Tax." Although the cigarette tax at issue is an excise tax, the preprinted invoice listing of "Sales Tax" followed by the filled-in word "Exempt" is a distinction of no apparent consequence for purposes of this matter.

SALES PERSON	JOB	SHIPPING METHOD	SHIPPING TERMS	DELIVERY DATE	PAYMENT TERMS	DUE DATE
	SHIPPING CHARGE	ERW			PER AGREEMENT	

QTY	ITEM #	DESCRIPTION	UNIT PRICE	DISCOUNT	LINE TOTAL
1800.00	90	FF KG BOX	\$ 18.25		\$ 32,850.00
1800.00	91	LT KG BOX	\$ 18.25		32,850.00
1800.00	95	FF 100 BOX	\$ 18.25		32,850.00
1800.00	96	LT 100 BOX	\$ 18.25		32,850.00
900.00	98	MEN 100 BOX	\$ 18.25		16,425.00
900.00	99	MEN LT 100 BOX	\$ 18.25		16,425.00
9000.00					
				SUBTOTAL	\$164,250.00
				SALES TAX	EXEMPT
				TOTAL	\$164,250.00

24. As noted, invoice No. 12 contains the same information regarding the quantity, item number, and description of the cigarettes, totaling 9,000 cartons, as set forth above on invoice No. 11. However, on invoice No. 12, a unit price of \$.25 is set forth to the right of each of the particular carton listings in the “unit price” column, for a total of \$2,250.00. This amount represents the shipping charge (delivery fee) paid to ERW Wholesale for “drop ship” transporting the cigarettes from the Cattaraugus Reservation to Saihwahenteh at the behest of Oien’Kwa Trading.

25. Invoice No. 10 is ERW Wholesale's bill of lading. It contains the same information as appears on the top third of invoices Nos. 11 and 12. The balance of the bill of lading that contains only the information regarding the quantity, item number and description of the cigarettes, as detailed in the above invoices. There is no information on the bill of lading which indicates that King Mountain cigarettes (or any other manufacturer's particular brands of cigarettes) were being transported.

26. On December 2, 2012, Mr. Snyder departed from ERW Wholesale on the Cattaraugus Reservation with 150 cases of cigarettes. He departed driving the same truck that had been loaded, sealed and padlocked on the preceding day, as described above, and that was ultimately stopped by the State Police on December 3, 2012.

27. On December 2, 2012, at around 4:00 or 5:00 p.m., the truck Mr. Snyder was driving eastbound on the New York State Thruway (Interstate Route 90 or I-90) experienced a flat tire, forcing him to exit I-90 at Verona, New York, near the Turning Stone Casino. Mr. Snyder noted that the truck was losing braking power, and was leaning when he turned to the right. After pulling over to the side of the road, exiting the truck, and observing that the right front tire was shredded, Mr. Snyder called Mr. Clark, his supervisor at ERW Wholesale, for help. Mr. Clark tried contacting a local repair shop, but he was unsuccessful because it was late on a Sunday. After speaking by telephone with Mr. White, who was in Long Island, New York, helping with post-Hurricane Sandy clean up, Mr. Clark contacted Michael Webber, ERW Enterprises's in-house mechanic, to help Mr. Snyder. Mr. Webber was scheduled to drive to Long Island, on December 3, 2012, to deliver construction equipment (an excavator grapple) to Mr. White for use there by ERW Enterprises in its storm clean-up work. Mr. Webber obtained a replacement tire for the truck, and on December 2, 2012 at approximately 6:00 p.m. departed from the

Cattaraugus Reservation in a road service truck to meet Mr. Snyder.<sup>8</sup>

28. Mr. Webber arrived at Mr. Snyder's location at approximately 12:30 a.m. Although Mr. Webber's service truck was equipped to perform roadside repairs, and included an air compressor and tools to replace the flat tire on the truck Mr. Snyder was driving, Mr. Webber was only able to perform a temporary fix because the vehicle's wheel bearing was damaged. Mr. Webber used the truck's spare tire to make a temporary repair. Thereafter, Mr. Snyder drove the truck a short distance to a hotel (Fairfield Inn) located just off the I-90 exit, and Mr. Snyder and Mr. Webber stayed overnight until December 3, 2012. Mr. Snyder made the hotel reservation, while Mr. Webber parked the truck in a well-lit location, as directed by the hotel manager on duty, where it was backed up to a wall such that the contents were not accessible and were secure against theft.

29. On the morning of December 3, 2012, Mr. Webber and Mr. Snyder repaired the truck using parts they purchased at a local auto parts store, including a replacement wheel bearing, as well as a chisel, grinding wheels and emery cloth, needed to remove the damaged wheel bearing and clean and ready the truck's spindle for installation of the new wheel bearing. Upon completion of the repairs, Mr. Webber continued on his scheduled travel to Long Island. Mr. Snyder likewise proceeded with his travel to the Ganienkeh territory to deliver the cigarettes he was transporting. The route of travel followed by Mr. Snyder primarily traversed the eastbound I-90, and thereafter the northbound Adirondack Northway (Interstate Route 87 or I-87). The record includes a copy of the hotel bill for the overnight stay, but does not include receipts for the purchases of the described repair parts or tools. Mr. Webber stated that the parts receipts were either left in the service truck, or were dropped off with Mr. White in Long Island.

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<sup>8</sup> The record does not specify which entity, among the ERW entities, or if an individual owned the service truck.



30. On December 3, 2012, the State Police Commercial Vehicle Enforcement Unit was conducting a border checkpoint commercial truck inspection running northbound and southbound on I-87 in the Town of Peru, Clinton County, New York. Specifically, the commercial vehicle inspection stations were located at the northbound and southbound Valcour rest areas. Because the focus of the commercial vehicle inspections was international trucking, a State Police K-9 Unit was assigned to the Commercial Vehicle Enforcement Unit to sniff for drugs and explosives. Shortly before the exit into both the northbound and southbound Valcour rest areas, a sign indicated that the rest area was a “Commercial inspection station,” and that “All trucks must exit,” and go through the commercial vehicle inspection station checkpoint.<sup>9</sup>

31. On December 3, 2012, Trooper Stephen Posada was on routine patrol of I-87, northbound, in the town of Peru. At 2:10 p.m., Trooper Posada observed a white box truck, driven by Mr. Snyder, fail to stop at the commercial vehicle inspection station (inspection station), northbound in the town of Peru. At about 2:13 p.m., Trooper Posada initiated a vehicle and traffic stop of the truck. He radioed the Commercial Vehicle inspectors at the northbound inspection station that he had stopped a “drive-by” just north of their location. They advised Trooper Posada to “let them know what he had.” After approaching the truck, Trooper Posada asked Mr. Snyder for his license and the vehicle registration. He also asked Mr. Snyder about the contents of the load he was carrying. Mr. Snyder gave Trooper Posada his driver’s license, the truck’s registration, the bill of lading, and the two invoices, and stated that he was transporting cigarettes. Mr. Snyder also told Trooper Posada that he was transporting the cigarettes to the Ganienkeh territory. Trooper Posada instructed Mr. Snyder to follow him to the commercial

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<sup>9</sup> As part of a federally funded program, the Commercial Vehicle Enforcement Unit is charged with ensuring that commercial vehicles are safe and roadworthy. The primary objective of the program is to promote highway safety and reduce commercial vehicle related crashes and hazardous material incidents by removing trucks, unsafe loads, and unqualified drivers from the highways (*see* 20 NYCRR 820.7; 49 CFR §§ 396.9, 396.11).

vehicle checkpoint inspection station located on I-87 southbound. Trooper Posada described Mr. Snyder as being “very nervous,” and unable to follow Trooper Posada’s directions regarding how to get to the southbound inspection station. Trooper Posada radioed back to the Commercial Vehicle inspectors to let them know that he had a commercial vehicle stopped, and that he needed assistance escorting the truck back to the inspection station. Within a few minutes, Trooper Michael Spadaro arrived at the vehicle stop and assisted Trooper Posada in escorting Mr. Snyder to the southbound inspection station located in Peru, New York.

32. Upon arriving at the inspection station, Mr. Snyder was stripped of his keys for the truck. Mr. Snyder noted that he typically wears comfortable clothing for long drives, and was attired on the day in question in shorts and a tee shirt. He described the day as “cold,” and noted that without possession of the keys, he was unable to run the vehicle or use its heater.

33. At the inspection station, Trooper Posada gave the bill of lading and the invoices to the State Police investigator on duty, Joel Revette. Trooper Posada informed Investigator Revette that Mr. Snyder was transporting cigarettes to Ganienkeh. Trooper Posada then issued a uniform traffic ticket, number 1B88CMFSP, to Mr. Snyder. The ticket issued to Mr. Snyder indicated that the violation committed by Mr. Snyder was “Disobeyed Traffic Control Device.” Thereafter, Trooper Posada gave Mr. Snyder’s driver’s license and the truck’s registration to Trooper Spadaro, who had assisted in escorting Mr. Snyder to the inspection station.<sup>10</sup>

34. At no time did Mr. Snyder inform Trooper Posada of the brands of cigarettes he was transporting. Trooper Posada confirmed that neither the invoice that was provided to him nor the bill of lading provided to him identified the name of the cigarettes’ manufacturer. He also confirmed that at the time he stopped Mr. Snyder, he did not know the types of cigarettes being

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<sup>10</sup> The Administrative Law Judge’s finding of fact 33 also states that Trooper Posada told Investigator Revette that he (Posada) “believed the cigarettes did not bear tax stamps.” On exception, petitioners contend that the record does not support such a finding. We agree and have modified this finding of fact accordingly.

transported, the manufacturer of the cigarettes, or whether the cigarettes bore tax stamps.

35. Investigator Revette contacted his supervisor, Lieutenant Scott Heggelke, and informed him that a truck had been stopped for passing a safety inspection station, and that he believed the cigarettes Mr. Snyder was transporting, on behalf of ERW Wholesale, were unstamped. When Investigator Revette first spoke with Lieutenant Heggelke, he only assumed that the cigarettes did not bear tax stamps. Lieutenant Heggelke responded that he would make some telephone calls and call Investigator Revette back.

36. Investigator Revette was told to detain the driver and the load until a decision was made. Mr. Snyder was not placed under arrest. At the same time, Mr. Snyder was not free to leave during the stop or inspection. At no time did any of the troopers or investigators inform Mr. Snyder of his Miranda rights.

37. Investigator Revette did not perform safety inspections and had limited knowledge regarding safety inspections. During the stop, the truck was inspected by Trooper Spadaro. The vehicle safety inspection conducted by Trooper Spadaro was not a “full-blown” inspection, but rather a level 2 inspection, which includes checking brakes, tires and safety equipment. A State Police K-9 unit sniffed around the truck, but nothing was detected.

38. The driver/vehicle examination report prepared by Trooper Spadaro provides that the following violations were found: (i) “Fail to Obey Traffic Controll [sic] Device Driver Fails to Stop at I-87 Valcour Northbound Inspection Site;” (ii) “ABS Malfunction Indicators for HYDR Brake Sys - ABS Indicator Light remains on as Vehicle is Running;” and (iii) “Inadequate Rear Object Detection Device Not Properly Adjusted (Rear View Mirror).”<sup>11</sup> The driver examination report also listed the “Cargo” as “CIGARETTES,” and “HazMat” “NO HM TRANSPORTED.”

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<sup>11</sup> The driver/vehicle examination report indicates that no citations were issued for the ABS indicator light malfunction and the improperly adjusted rear view mirror violations.

According to the driver/examination report, the vehicle safety inspection conducted by Trooper Spadaro commenced at 2:20 p.m. and ended at 3:06 p.m. When the safety inspection concluded at 3:06 p.m, the back door of the truck had not yet been opened and the truck's contents had not been inspected.

39. According to Investigator Revette, during the stop and subsequent inspection of the truck, Mr. Snyder appeared "apparently normal." This contrasts with Trooper Posada's observation that Mr. Snyder was very nervous when first stopped, and had difficulty with the instructions concerning how to proceed to the inspection area on the southbound side of I-87. Mr. Snyder's testimony indicated that he was "initially nervous," but then he became calm.

40. At some point during the period of detainment, Mr. Snyder gave Investigator Revette the white packet of documents. The name and telephone number of Mr. Snyder's attorney was also provided to Investigator Revette.

41. After the safety inspection was completed, Mr. Snyder was asked for the key to the padlock securing the back door of the truck, in order to allow the State Police to unlock the back door. Mr. Snyder could not, initially, locate the key for the padlock. Nobody specifically asked Mr. Snyder for permission to open the back door of the truck or to enter the back of the truck. When Mr. Snyder was told that the padlock on the door was going to be cut, he responded by stating "whatever." Prior to Mr. Snyder locating the key, Trooper Posada used bolt cutters to cut off the padlock securing the back door of the truck and opened the roll-up door. According to Investigator Revette, Trooper Posada was permitted to cut off the padlock and open the back door of the truck because safety inspectors are permitted to check the safety of a truck's load, determine how it is placed and identify the content of the load. The vehicle is a panel truck and there are no windows affording a view to the inside cargo area of the vehicle. There is a door or

passage panel between the cab of the truck and the cargo area. However, because the truck was fully loaded, it was not possible to open this door or panel to gain access or a view into the cargo area of the vehicle.

42. In his notes, Investigator Revette wrote that upon opening the back door of the truck, he “observed many full cases of cigs - nothing unusual.” Investigator Revette admitted that the content of the cases, i.e., cigarettes, could be determined by reading the information provided on the outside of the cases.

43. Prior to cutting the padlock and opening the back door of the truck, Trooper Posada had no knowledge as to the manufacturer of the cigarettes stored in the truck, or if the cigarettes in the truck bore tax stamps.

44. After cutting the padlock and confirming that the contents of the truck matched Mr. Snyder’s description and corresponding documentation, i.e., sealed cases of cigarettes, and were not hazardous or dangerous to the public as improperly secured, Investigator Revette nonetheless removed one of the sealed cases from the truck and opened it. No warrant was obtained to open the case of cigarettes. No one from the State Police contacted Mr. Snyder’s attorney to tell him that they were going to cut the padlock off the back door of the truck and open the cases of cigarettes being stored on the truck.

45. The outside portion of the cases did not reveal whether the cigarettes bore tax stamps. At no time during the stop or inspection did anyone ask Mr. Snyder if the cigarettes in the truck bore tax stamps. The only way to confirm if the cigarettes in the cases bore tax stamps was to open a sealed case, open a carton, and view the cigarette packs in the carton.

46. After opening a case of cigarettes, Investigator Revette opened a carton and pulled out a pack of cigarettes. Upon removing the cigarette pack from the carton, Investigator Revette

observed and confirmed that there were no tax stamps on the cigarettes.

47. The State Police were unsure if they should seize the cigarettes, in part due to the July 6, 2011 email which stated (as relevant here) that unstamped Native American cigarettes being transported by a Native American from one New York State Indian reservation to another New York State Indian reservation should not be seized (*see* finding of fact 22).

48. Investigator Revette had several conversations with Lieutenant Heggelke concerning the cigarettes. Around 6:00 p.m. on December 3, 2012, Investigator Revette was instructed by Lieutenant Heggelke to seize the cigarettes, copy the documents and release Mr. Snyder and the truck. Investigator Revette was also informed that the Clinton County District Attorney was not going to pursue criminal charges.

49. After receiving the instruction to seize the cigarettes, Investigator Revette instructed Mr. Snyder to drive the truck to the Plattsburgh State Police station. Mr. Snyder complied with Investigator Revette's instructions and drove the truck to the Plattsburgh State Police station.

50. At the Plattsburgh State Police station, the cases of cigarettes were unloaded from the truck and placed into a garage located at the police station. Investigator Revette photocopied the documents provided by Mr. Snyder, and the originals were given back to Mr. Snyder. Once the cigarettes were unloaded at the Plattsburgh State Police station, and the original documents were returned to him, Mr. Snyder was free to leave in the truck at approximately 7:00 p.m.

51. On December 5, 2012, the State Police released "140 cases of assorted King Mountain cigarettes" to Investigator Anthony Vona, of the Division's Criminal Investigation Division, for transport to the Division's Rotterdam, New York, warehouse. After the cases of cigarettes were loaded into Mr. Vona's truck, he drove to the Rotterdam warehouse. On December 6, 2012, Mr. Vona completed a form EN-651, Office of Tax Enforcement property receipt/release, bearing

case number 201201452, so that the “140 cases of King Mountain Cigarettes” could be placed in the warehouse and documented in the warehouse computer system.

52. Petitioner’s exhibit 6 consists of two photographs. The first photograph depicts the cases of cigarettes that were found in the back of the truck, after their transport to the Division’s warehouse. Although some of the cases in the picture are open, all of the cases were sealed when the back door of the truck was first opened. Although multiple cases of cigarettes depicted in the photograph are open, at no point was a warrant obtained to open the cases. The cases of cigarettes are still being stored at the Division’s warehouse. The second photograph in exhibit 6 depicts an open carton of cigarettes, consisting of 10 cellophane packages of King Mountain cigarettes.<sup>12</sup>

53. Although 150 cases of cigarettes were purchased (by Oien’Kwa Trading), and loaded onto the truck at the ERW Wholesale warehouse at Cattaraugus, as testified to by Mr. Snyder and Mr. Clark and as shown per the ERW Wholesale documents described herein, the State Police reported that only 140 cases of cigarettes were seized. There is thus an unexplained discrepancy between the number of cases of cigarettes Mr. Snyder was transporting, per the invoices, bill of lading, and the testimony of Mr. Snyder and Mr. Clark, versus the number of cases of cigarettes the Division claims were seized, i.e., a discrepancy of 10 cases of cigarettes (the equivalent of 600 cartons of cigarettes). ERW Wholesale never received the “missing” 10 cases of cigarettes back from the State Police or the Division, never received any explanation as to what happened to such 10 cases, and has no knowledge as to what happened to the 10 cases. Likewise, the

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<sup>12</sup> The second photograph was taken by Investigator Revette at the request of the New York State Attorney General’s office for use in a related federal matter (*State of New York v Mtn. Tobacco Co. d/b/a King Mtn. Tobacco Co., Inc.*, 2016 WL 3962992 [United States Dist Ct, ED NY, July 21, 2016], 2-12-CV-6276 [JS] [SIL]; *appeal withdrawn* 2017 WL 6806655 [2d Cir, December 8, 2017]).

record includes no information or evidence concerning the 10 cases.<sup>13</sup>

54. The Division maintains that the record is “unclear” as to the location where the cigarettes were first loaded onto the truck being driven by Shawn Snyder. In particular, the Division references statements allegedly made by Mr. Snyder, as set forth in Investigator Revette’s incident report (*see* finding of fact 17), to the effect that Mr. Snyder was coming from the Akwesasne Reservation and transporting cigarettes to the Ganienkeh Territory, that he had left the Akwesasne Reservation earlier in the day (December 3, 2012), and had met an unnamed and unidentified individual in a parking lot across from the Turning Stone Casino near Verona, New York, where cigarettes were unloaded from the unknown person’s van and then loaded into the (presumably empty) box truck being driven by Mr. Snyder.

55. The balance of the evidence contradicts the factual accuracy of the foregoing scenario, and does not support its acceptance as a fact. First, the invoices and the bill of lading, each specify the amount of cigarettes being transported as 9000 cartons (150 cases). These documents were in existence and were located in the van on the date of seizure, and were provided to the State Police at that time. Further, there is the clear testimony of Dwayne Clark and Michael Webber in this proceeding, coupled with the testimony of Mr. Clark and Mr. Snyder in *Matter of Snyder*, concerning the events in question. In particular, Mr. Snyder directly testified that he did not receive any cigarettes at or during the repair stop near the Turning Stone Casino at the Oneida Reservation, but rather that the truck was loaded, locked and secured (as described) from the time he left the Cattaraugus Reservation until he was stopped by the State Police, at which time the lock was cut and the rear door of the truck was opened. Further, Mr. Snyder clarified that his

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<sup>13</sup> The narrative portion of the incident report notes Mr. Snyder’s alleged statement that he picked up and was transporting some 7,260 cartons (121 cases) of cigarettes. There is no other reference in the record to this number of cartons or cases, and there is no correlation between the calculation of the penalty at issue herein and this number of cartons of cigarettes (*see* findings of fact 17 and 57).



initial statement, to the effect that he was coming from the Oneida Indian Reservation, was made because “that’s where the truck broke down,” and that was, in fact, where he was coming from when he was stopped. Also noteworthy is the fact that the King Mountain cigarettes were initially delivered (by common carrier) to ERW Wholesale’s facilities at the Cattaraugus Reservation, and remained physically located there before their sale to Oien’Kwa Trading. This undisputed fact, coupled with the disparate geographic locations of, and distances between, the Cattaraugus Reservation, in far Western New York, the Akwesasne Reservation in far (upstate) Northeastern New York, and the Ganienkeh Territory, also in far (upstate) Northeastern New York, and in comparatively close proximity to the Akwesasne Reservation, casts significant doubt upon the accuracy and likelihood of an alternative finding, as suggested and founded upon the narrative portion of the incident report. Without more, there is simply insufficient basis to accept that an empty vehicle driven by Mr. Snyder left the Akwesasne territory, and traveled to the Oneida territory to meet with an unidentified person and accept a different quantity load of King Mountain cigarettes to be delivered to the Ganienkeh territory.

It is also noted that the factual accuracy of some of the information set forth on the incident report is belied by certain inconsistencies therein. In particular, that report lists the quantity of cigarettes allegedly accepted by Mr. Snyder at Oneida as 7260 cartons, which equates to 121 cases of cigarettes. This quantity appears nowhere else in the record, and differs significantly from both the 150 cases listed on the invoices as having been purchased by Oien’Kwa and loaded at Cattaraugus for drop shipment transport to Saihwahenteh, and the 140 cases listed as seized by the State Police and transferred to the custody of the Division (*see* finding of fact 53, footnote 12). Finally, 121 cases (7260 cartons) is not the quantity of cigarettes upon which the penalty assessed by the Division in this matter was calculated (*see* findings of fact 56 and 57). Without

more, the record supports the fact that on December 1, 2012, at ERW Wholesale's warehouse on the Cattaraugus Reservation, 150 sealed cases of cigarettes were loaded onto, secured and sealed within the truck that was to be driven by Mr. Snyder (*see* findings of fact 15 and 19), and remained within the truck, notwithstanding the December 2, 2012 overnight trip interruption for necessary tire and wheel bearing repair, until such time as the truck was stopped, inspected, and the cigarettes were seized.

56. As noted in finding of fact 1, the Division issued identical notices of determination to each petitioner, with each such notice asserting a penalty due in the amount of \$1,259,250.00 for the tax period ended December 3, 2012. At the time of the occurrence, a fine of up to \$150.00 per carton could be assessed against anyone possessing untaxed, i.e., unstamped, cigarettes in New York. The subject notices were drafted under the direction of the Division's Office of Counsel, and not by the Cigarette and Registration and Bond Unit of the Division, as is more typically the case.

57. The \$1,259,250.00 penalty assessed by the Division was calculated as follows: (a) 140 cases of cigarettes containing 60 cartons per case for a total of 8,400 cartons seized; (b) less five cartons because the law allows for a \$150.00 fine per carton in excess of five cartons, thus leaving; (c) 8,395 cartons that were (d) multiplied by \$150.00 to (e) result in a penalty of \$1,259,250.00. When questioned in *Matter of Snyder* as to the method of calculating the amount of the penalty, the Division's witness responded as follows:

“Q. Now, where does that \$150 penalty number come from?

A. Penalty number is for possession of unstamped cigarettes in Section 481 (b) (i).

Q. And is that number a fixed number, is it part of a range?

A. It's up to \$150 at that time. Subsequent to this action, it has been raised to \$600 per carton in excess of five [cartons].

Q. When the Department assesses a civil penalty assessment, what numbers do they generally use on that range?

A. In general at that time, we would assess the full amount of \$150 penalty per carton in excess of the five [cartons].

Q. So would you say the use of the \$150 was standard?

A. Yes.”<sup>14</sup>

58. The value of the cigarettes seized is, per the invoices, \$164,250.00. Although the Division asserts that each petitioner owes a \$1,259,250.00 penalty for the cigarettes that were seized on December 3, 2012, neither of the notices of determination imposes tax or interest on the cigarettes seized.

59. It is undisputed that in addition to the notices at issue herein, separate notices of determination, each in the amount of \$1,259,250.00, were also issued to Shawn E. Snyder, King Mountain Tobacco (Mountain Tobacco Company), Oien’Kwa Trading and Saihwahenteh.

#### ***THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE***

The Administrative Law Judge first reviewed the excise tax on cigarettes as set forth in article 20 of the Tax Law. The Administrative Law Judge observed that, although the tax is initially paid by a licensed stamping agent, it is ultimately intended to be borne by the consumer and is thus passed along through the distribution chain. The Administrative Law Judge also noted that, pursuant to article 20 and the relevant regulations, payment of such tax is shown by the affixation of a stamp on each package of cigarettes by a licensed stamping agent; that licensed stamping agents are the only entry point for cigarettes into New York; and that, with certain exceptions not relevant here, all packages of cigarettes sold in New York, including exempt sales to Native Americans, must be stamped. The Administrative Law Judge thus concluded that the

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<sup>14</sup> Exhibit 25, pp 51 - 52 (transcript of proceedings in *Matter of Snyder*).

cigarettes at issue improperly lacked stamps when seized on December 3, 2012. Accordingly, the Administrative Law Judge found that persons in possession and control of such cigarettes were subject to the penalty provided in Tax Law § 481 (1) (b) (i).

The Administrative Law Judge rejected petitioner ERW Enterprises' contention that it was not in possession or control of the cigarettes at issue. ERW Enterprises asserted that its only connection to the subject transaction was that the truck carrying the cigarettes was registered in its name. The Administrative Law Judge found that, in addition to the truck's registration, ERW Enterprises was connected to the transaction by the following facts: the truck was used to a greater degree in ERW Wholesale's tobacco business than in ERW Enterprises' construction business; the presence of the ERW Enterprises logo and DOT registration on the truck; the common ownership of ERW Wholesale and ERW Enterprises by Mr. White, who was actively involved in both businesses; and ERW Enterprises' status as a necessary party to the transaction, based on the Administrative Law Judge's finding that the truck was the only available vehicle with the capacity to make the delivery. The Administrative Law Judge thus concluded that ERW Enterprises and ERW Wholesale failed to operate in a manner that respected each's status as a separate entity and thereby failed to show that the imposition of penalty against ERW Enterprises was improper.

The Administrative Law Judge next addressed petitioners' argument that the sale of Native American-manufactured cigarettes shipped among and between Native American businesses located on Native American territories and reservations, as is the situation in the present matter, is beyond the jurisdiction of New York's excise tax on cigarettes. The Administrative Law Judge found that both case law and the Tax Law provide to the contrary. The Administrative Law Judge noted that the Tax Law requires all packs of cigarettes sold in New York to bear tax

stamps and that, while it does provide for exempt sales of cigarettes by qualified Indian nations or tribes to their own qualified members, such cigarettes must nonetheless be stamped.

The Administrative Law Judge also addressed petitioners' contention that they were "lawfully" transporting unstamped cigarettes as a contract carrier on the date in question and therefore qualified for the exception to the subject penalty as provided in Tax Law § 481 (2) (b). To the contrary, the Administrative Law Judge found that, although ERW Wholesale was acting as a contract carrier, it was not transporting the cigarettes lawfully because the intended recipient of the shipment, Saihwahenteh, was not a lawful recipient under Public Health Law § 1399-11, which defines such a recipient as an individual licensed or registered as an agent or dealer under article 20 of the Tax Law.

The Administrative Law Judge rejected petitioners' claim for relief under the Division's policy of forbearance regarding the seizure of untaxed Native American cigarettes as expressed in the Ernst email and the letter from Senators Maziarz and Kennedy (*see* finding of fact 22 and footnote 6). The Administrative Law Judge found that such policy does not modify or repeal the Tax Law provisions that authorize the imposition of penalty in the present matter.

The Administrative Law Judge also rejected petitioners' claim that the penalty as asserted in the present matter is an excessive fine under the Eight Amendment to the United States Constitution. The Administrative Law Judge noted that this Tribunal has upheld the imposition of penalty under Tax Law § 481 (b) (1) at the maximum allowable rate, as in the present matter.

As to petitioners' challenge to the validity of the warrantless search of the truck, the Administrative Law Judge determined that the opening of the back of the truck was permissible as part of the safety inspection. Once opened, the circumstances gave rise to a reasonable question as to whether the cigarettes bore stamps. Given the right to warrantless searches of

commercial premises under Tax Law § 474, the Administrative Law Judge concluded that the opening of the sealed case and carton of cigarettes contained therein was reasonable. The Administrative Law Judge thus rejected petitioners' claim that the subject penalties should be canceled because their imposition rests on the results of a prohibited search and seizure.

***ARGUMENTS ON EXCEPTION***

As they did below, petitioners contend that ERW Enterprises was not in possession of the subject cigarettes at any time and that penalty asserted against this petitioner must be canceled. Petitioners assert that ERW Enterprises did not participate in the transaction at issue and was not, contrary to the Administrative Law Judge's conclusion, a necessary party to that transaction. Petitioners challenge the Administrative Law Judge's finding of fact that the truck was the only vehicle available with the load capacity to carry out delivery of the order in question. Petitioners contend that the fact that the truck was registered in ERW Enterprises' name and contained its logo and DOT registration number on its side is insufficient to conclude that ERW Enterprises was ever in possession or control of the cigarettes. To the contrary, petitioners' note that ERW Enterprises did not hold title to the truck, was not in the tobacco trading business, and was not a party to any of the cigarette purchase and sale transactions herein.

Petitioners also continue to argue that the notices should be canceled based on the exception in Tax Law § 481 (2) (b) for common or contract carriers engaged in lawfully transporting unstamped packages of cigarettes. Petitioners note that the Administrative Law Judge expressly found that ERW Wholesale was acting as a contract carrier on December 3, 2012. Petitioners assert, however, that the Administrative Law Judge improperly relied on Public Health Law § 1399-II to determine that petitioners' transport of the unstamped cigarettes was unlawful. Petitioners contend that, as the Division did not raise Public Health Law § 1399-II

as a basis to deny petitioners the benefit of the contract carrier exception, it has waived all arguments based on this statute. Moreover, petitioners contend that the Administrative Law Judge inappropriately used Public Health Law § 1399-ll to reject petitioners' contract carrier exemption argument since neither party raised this ground. Petitioners thus request that this Tribunal consider petitioners' claim for the contract carrier exemption without giving any consideration to Public Health Law § 1399-ll. Alternatively, petitioners assert that, if this Tribunal does consider Public Health Law § 1399-ll, it should nonetheless decide the contract carrier exception issue in their favor because there is no evidence in the record showing that ERW Wholesale was in violation of that provision while transporting the cigarettes in question.

Petitioners also assert that the Administrative Law Judge erroneously determined that both the search of the truck and the search of the cases of cigarettes within the truck were reasonable and not contrary to petitioners' rights under the Fourth Amendment. Petitioners contend that the Administrative Law Judge made certain factual errors in reaching this conclusion. One such claimed factual error has been resolved in petitioners' favor by our modification of finding of fact 33. Additionally, petitioners' note that the Administrative Law Judge justified the cutting of the lock and the opening of the back of the truck as part of a highway safety inspection (*see* finding of fact 41), yet the Administrative Law Judge also found that the safety inspection ended before the truck's contents had been inspected (*see* finding of fact 38). Even if the opening of the truck was reasonable, petitioners contend that the opening of the boxes was not. Petitioners cite criminal case law in support of this contention. Petitioners also take issue with the Administrative Law Judge's finding that the search was authorized under Tax Law § 474 (4), a provision that allows warrantless searches of commercial premises where cigarettes may be stored. Petitioners contend that such authorized warrantless searches may not be forceful in

nature, as was the case here. Petitioners also contend that, even if such a search is authorized under Tax Law § 474 (4), the authorization to conduct the search extends only to searches conducted by the Commissioner of Taxation. Petitioners contend that such authority does not extend to members of the New York State Police, who conducted the search here. Finally, petitioners contest the Administrative Law Judge's justification of the search because it was "confirmatory," based on a finding that information present at the time of the stop indicated that the truck was carrying unstamped cigarettes. Petitioners assert that there was no probable cause to search the truck; that no exigent circumstances existed to justify a warrantless search; and that there was no arrest to justify a search incident to an arrest.

Petitioners also note that neither ERW Wholesale nor ERW Enterprises held title to the cigarettes at the time they were seized. Petitioners assert that title to the cigarettes passed to Oien'Kwa Trading when that entity resold the cigarettes to Saihwahenteh and hired ERW Wholesale as shipper. Accordingly, petitioners contend that neither of them legally possessed the cigarettes on December 3, 2012 and, therefore, neither may be assessed a penalty premised on possession.

Petitioners also contend that the Administrative Law Judge wrongly failed to use the forbearance policy expressed in the Ernst email (*see* finding of fact 22) as a basis to cancel the penalties at issue. Petitioners assert that the forbearance policy reflects the Division's uncertainty as to whether Native brand cigarettes in transit between two Native American territories could be taxed, and thus contend that it would be unjust for petitioners to be subject to penalties under such circumstances.

Petitioners argue that tax stamps are not required for all cigarettes sold in New York State. Specifically, petitioners contend that Native American brand cigarettes sold between two Native



American-owned businesses located on Native American land need not bear a tax stamp, even if the cigarettes are transported through New York State. Petitioners contend that such cigarette sales, as well as the imposition of penalties related to or arising from such sales, are beyond the jurisdiction of New York State. Petitioners rely on principles of Native American sovereignty as embodied in certain treaties and case law in making this argument.

Finally, noting that the penalties imposed herein are the maximum allowable under the statute, petitioners contend that such penalties are excessive fines contrary to the Eighth Amendment to the United States Constitution. Petitioners further contend that the Division and the Administrative Law Judge erred by not considering mitigating factors that justify a reduction in penalties.

The Division contends that, pursuant to the relevant provisions of article 20, the regulations promulgated thereunder and relevant case law, petitioners unlawfully possessed unstamped cigarettes on December 3, 2012. Hence, according to the Division, penalties were properly imposed.

The Division also asserts that petitioners did not qualify for the contract carrier exception from penalties under Tax Law § 481 (2) (b). In order to lawfully transport unstamped cigarettes under article 20 and thereby qualify for the exception, the Division contends that the carrier must be acting under the authority of a licensed stamping agent. The Division asserts that petitioners were not so acting and therefore do not meet the requirements for the exception. As an additional basis for finding that petitioners' transport of cigarettes was not lawful, the Division also asserts that petitioners failed to meet the record keeping requirements for persons transporting unstamped cigarettes because the invoice and bill of lading do not include the name of the brand of cigarettes. The Division further contends that the Administrative Law Judge's

finding that petitioners were in violation of Public Health Law § 1399-II was reasonable given the close links between that provision and article 20. The Division also asserts that petitioners' claim that they had no opportunity to challenge the Administrative Law Judge's finding with respect to Public Health Law § 1399-II is without merit because the question of whether the transport of the cigarettes at issue was lawful or unlawful has been the subject of this matter from the start.

The Division agrees with the Administrative Law Judge's rejection of petitioners' arguments based on Indian sovereignty. The Division contends that such arguments have also been rejected by the courts.

The Division also agrees with the Administrative Law Judge's conclusion that the Division's policy of forbearance regarding the seizure of untaxed Native American cigarettes does not provide a basis for relief for petitioners.

The Division rejects as irrelevant petitioners' contention that they lacked title to the cigarettes on December 3, 2012. The Division asserts that possession or control of unstamped cigarettes is the basis for the penalty under Tax Law § 481 (1) (b) (i).

Finally, the Division concurs in the Administrative Law Judge's rejection of petitioners' excessive fine and improper search arguments.

The amicus brief of the Seneca Nation of Indians (the Nation) focuses on whether New York has the authority to regulate intertribal commerce. The Nation asserts that New York lacked jurisdiction over each step in the shipment process; that is, from the time the cigarettes entered the Seneca Territory through its shipment to another Indian territory within New York. This is because, according to the Nation, pursuant to multiple treaties with the United States, its members have the inherent sovereign authority to freely engage in trade with members of other

Indian nations. Hence, the Nation asserts that New York lacked jurisdiction over the cigarettes in question and thus lacked authority to enforce article 20, including the penalties assessed against petitioners.

### ***OPINION***

New York State imposes an excise tax of \$4.35 per package on “all cigarettes possessed in this state by any person for sale” (Tax Law § 471 [1]). All cigarettes are presumptively subject to the tax and the burden is on the person in possession to prove otherwise (*id.*; Tax Law § 481 [2] [a]).

Although “[i]t is intended that the ultimate incidence of and liability for the tax shall be upon the consumer,” the tax is “advanced and paid” by licensed cigarette agents who purchase and affix stamps to each package to show payment (Tax Law § 471 [2]; *see also* 20 NYCRR 74.1 [b] [1], 74 [2] [a]). The tax is then incorporated into the price of the cigarettes as they are resold to dealers and, ultimately, to consumers (*see* Tax Law § 471 [2], 20 NYCRR 74.1 [b] [2] [i]).

A licensed cigarette agent is “[a]ny person licensed by the commissioner of taxation and finance to purchase and affix adhesive or meter stamps on packages of cigarettes under [article 20]” (Tax Law § 470 [11]). None of the entities involved in any of the transactions relevant to this matter (i.e., ERW Wholesale, ERW Enterprises, King Mountain, Oien’Kwa Trading or Saihwahenteh) were licensed cigarette agents.

Licensed cigarette agents are the only entry point for cigarettes into New York (20 NYCRR 74.3 [a] [1] [iii]; *Oneida Nation of New York v Cuomo*, 645 F3d 154, 158 [2d Cir 2011]), and except for certain limited circumstances, cigarettes possessed in New York State by someone other than a licensed cigarette agent must bear a tax stamp (*see* 20 NYCRR 74.1 [b] [2] [ii], 74.3 [a], 76.1 [b] [2]).

Tax Law § 471 (1) exempts from the excise tax “cigarettes sold under such circumstances that this state is without power to impose such tax, including sales to qualified Indians for their own use and consumption on their nations’ or tribes’ qualified reservation.”<sup>15</sup> This exemption does not extend to non-Indians making cigarette purchases on an Indian reservation or to qualified Indians purchasing cigarettes for their own use off of their reservations or on another nation or tribe’s reservation (20 NYCRR 74.6 [a] [1]). Accordingly, Tax Law § 471 (1) requires retailers located on reservation land to prepay the tax on cigarette sales to non-members of that nation or tribe (*White v Schneiderman*, 31 NY3d 543, 546 [2018]).

Exempt cigarette sales to Native Americans as noted above are effectuated through either a prior approval system (*see* Tax Law § 471 [5]) or a coupon system (*see* Tax Law § 471-e). Such exempt sales notwithstanding, “[a]ll cigarettes sold by agents and wholesalers to Indian nations or tribes located on an Indian reservation must bear a tax stamp” (Tax Law § 471 [2]).

Among the penalties enacted to ensure compliance with article 20, Tax Law § 481 (1) (b) (i) (A) provides for a penalty for each two hundred cigarettes (i.e., a carton), or fraction thereof, in excess of one thousand cigarettes [five cartons] in unstamped or unlawfully stamped packages “in the possession or under the control of any person.” On December 3, 2012, the date that the truck was stopped and the cigarettes seized, the statute gave the Division authority to impose a penalty of “not more than” \$150.00 per carton.<sup>16</sup> The notices of determination asserted such penalties against each petitioner at an amount equal to the maximum \$150.00 per carton for 8,395 cartons (*see* finding of fact 57).

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<sup>15</sup> The terms “Indian nation or tribe,” “qualified Indian,” and “qualified reservation” are defined at Tax Law § 470 (14), (15) and (16).

<sup>16</sup> The maximum penalty under this provision was increased in 2013 to \$600.00 per carton of unstamped cigarettes or fraction thereof (*see* L 2013, c 59, pt O, § 1, eff. June 1, 2013).

We first address petitioners' contention that the notice of determination issued to petitioner ERW Enterprises must be canceled because that corporation was not in "possession or control" of the cigarettes on December 3, 2012, as asserted in that notice. We agree. As noted, the delivery truck links ERW Enterprises to the transaction at issue. ERW Enterprises was not in the tobacco trading business and was not in direct control of the truck on December 3, 2012. Rather, ERW Wholesale agreed to deliver the cigarettes to Saihwahenteh for Oien'Kwa Trading and an ERW Wholesale employee drove the truck to make the delivery. Moreover, according to the "clear, consistent and credible" testimony of Mr. Clark, the truck was primarily used by ERW Wholesale to make deliveries of cigarettes and was used only "from time to time" by ERW Enterprises (*see* findings of fact 15 and 18). Additionally, title to the truck was held by Mr. White and not ERW Enterprises. Although the truck was registered to ERW Enterprises and bore that entity's name and DOT number on its side, this appears to have been a matter of convenience. That is, given its gross vehicle weight, the truck required a DOT number on its side and, at the time, ERW Enterprises, and not ERW Wholesale, had "DOT clearance" for such a vehicle, according to Mr. Clark (*see* finding of fact 15). The registration in ERW Enterprises' name was thus done for DOT compliance purposes (*id.*). Furthermore, consistent with the historical use of the truck, at the time of the transaction at issue, the truck's registration was in the process of being changed from Enterprises to Wholesale because, according to Mr. Clark, the truck "no longer had a usefulness for the construction company" (*id.*). The record thus shows that ERW Enterprises generally did not control the use of the truck and was clearly not in control of the truck on December 3, 2012. Given its lack of involvement with any other aspect of the transaction, we find that ERW Enterprises was not in "possession or control" of the load of unstamped cigarettes on that date for purposes of Tax Law § 481 (1) (b) (i) (A). The notice of

determination issued to petitioner ERW Enterprises must, therefore, be canceled.

We next address petitioner ERW Wholesale's contention that it was acting as a contract carrier while transporting cigarettes on December 3, 2012 and is entitled to the benefit of the common or contract carrier exception to the penalty imposed under Tax Law § 481 (1) (b) (i) (A). Specifically, Tax Law § 481 (2) (b) provides that such penalty shall not apply to "common or contract carriers . . . while engaged in lawfully transporting . . . unstamped packages of cigarettes as merchandise." Petitioner ERW Wholesale notes that the Administrative Law Judge found that it was acting as a contract carrier in transporting the cigarettes for Oien'Kwa Trading. We agree with this finding (*see* findings of fact 6, 24; 20 NYCRR 78.6 [a] [2]). ERW Wholesale thus contends that, on December 3, 2012, it was acting as a contract carrier "lawfully transporting" the cigarettes in question to Saihwahenteh on behalf of Oien'Kwa Trading and, therefore, is not subject to penalty under Tax Law § 481 (1) (b) (i) (A).

The phrase "lawfully transporting" as used in Tax Law § 481 (2) (b) refers to compliance with article 20. This is clear from the myriad of provisions in article 20 and regulations thereunder, noted previously, which restrict sales of unstamped cigarettes and which generally require all packages of cigarettes to be stamped, except in limited circumstances (*see* Tax Law § 471 [2], 20 NYCRR 74.1 [b] [2] [ii], 74.3 [a], 76.1 [b] [2]). Any other interpretation of this phrase would significantly inhibit enforcement of the stamping requirement by providing a means to avoid penalties despite illegally possessing unstamped cigarettes. Indeed, any other interpretation would mean that the imposition of penalty under Tax Law § 481 (1) (b) (i) (A) could depend on factors unrelated to the legality of the unstamped cigarettes themselves.

Petitioner ERW Wholesale's transport of the unstamped cigarettes was plainly not in compliance with article 20. We agree with the Administrative Law Judge's conclusion that

ERW Wholesale's purchase and receipt of the cigarettes from King Mountain was in violation of Tax Law § 471 because ERW Wholesale was not a stamping agent, the required New York entry point for cigarettes (*see State of New York v Mtn. Tobacco Co., d/b/a King Mtn. Tobacco Co., Inc.*; 20 NYCRR 74.3 [a] [1]). Additionally, we agree with the Administrative Law Judge that the subsequent sales to Oien'Kwa Trading and Saihwahenteh were also in violation of Tax Law § 471, as neither of those parties are licensed cigarette agents. Furthermore, as noted previously, article 20 makes no exception to the tax stamp requirement for cigarette sales to Indian Nations or Indian-owned businesses located on qualified reservations (Tax Law § 471 [2]).

Contrary to petitioner's claims, New York's system does not conflict with either Indian Law § 6 or the Buffalo Creek Treaty of 1842 (*White v Schneiderman*, 31 NY3d at 547). Additionally, the coupon system and the prior approval system have been deemed to be valid means by which New York's interest in taxing all cigarette sales within its jurisdiction is balanced against Native American sovereignty interests (*see Oneida Nation of New York v Cuomo*, 645 F3d at 164-165). The regulatory requirement that all cigarettes bear a tax stamp, other than those possessed by a licensed cigarette agent, is a necessary component of that system.

We also reject petitioners' contention, based on principles of Indian sovereignty, that the transactions at issue, although they occurred within the geographic boundaries of New York, did not actually occur within New York, but merely passed through New York en route to delivery. Petitioners contend that the subject cigarettes are thus beyond the State's authority to tax or to impose penalties. As the Administrative Law Judge observed, in *New York State Dept. of Taxation & Finance v Tyler Distrib. Ctrs.* (225 AD2d 936 [3d Dept 1996]) the Appellate Division described a similar argument pertaining to the transport of liquor to the St. Regis reservation as "patently sophistic" (225 AD2d at 938 citing, inter alia, *Surplus Trading Co. v*

*Cook*, 281 US 647, 651 [1930] [“reservations are part of the state within which they lie”]).

We also note here that we disagree with the Seneca Nation of Indians’ arguments, as stated in its amicus brief, that the subject transactions are beyond New York’s jurisdiction and that, accordingly, the subject penalty may not be imposed. To the contrary, we find that *Oneida Nation of New York v Cuomo*, *White v Schneiderman*, and *State of New York v Mtn. Tobacco Co., d/b/a King Mtn. Tobacco Co., Inc.*, as discussed above, make clear that such transactions are within New York’s jurisdiction and that those transactions are taxable under article 20. The Nation’s arguments thus do not provide a basis upon which to cancel the penalty imposed herein.

Petitioners have made no other arguments to show that the transport of unstamped cigarettes on December 3, 2012 was in compliance with article 20. Accordingly, we find that petitioners were not engaged in *lawfully* transporting the cigarettes at issue on that date within the meaning of Tax Law § 481 (1) (b) (i) (A) and the exclusion from the subject penalty is unavailable to petitioners.

On exception, petitioners make a process argument against the Administrative Law Judge’s finding on this issue. Specifically, petitioners argue that the Administrative Law Judge improperly relied on Public Health Law § 1399-ll in determining that the contract carrier exemption did not apply. Even if successful, however, this argument is insufficient to meet petitioners’ burden to show, on the merits, that they were lawfully transporting the cigarettes and are thus entitled to the exemption from the penalty (Tax Law §§ 471 [1], 481 [2] [a]). As discussed above, petitioners have failed to meet this burden.

In any event, we find that the Administrative Law Judge’s reliance on Public Health Law § 1399-ll did not put petitioners at a disadvantage given the similarity between that provision and the article 20 provisions upon which we rely herein. As noted, the Administrative Law Judge



determined via Public Health Law § 1399-ll that the penalty exclusion did not apply because the intended recipient of the shipment herein was not a licensed cigarette agent. We reach the same conclusion for the same reason using article 20 as our authority.

We next address petitioners' contention that the search of the truck was in violation of their rights under the Fourth Amendment to the United States Constitution and Article I, § 12 of the New York State Constitution. The consequence of such an improper search is the exclusion of the evidence obtained as a result (*see e.g. People v Jock*, 40 Misc 3d 457 [County Ct St. Lawrence County 2013, Richards, J.]). The exclusionary rule has been applied in administrative proceedings (*see Matter of Finn's Liq. Shop v State Liq. Auth.*, 24 NY2d 647 [1969]). Accordingly, assuming that the search of the truck was improper, application of the rule in the present matter would exclude from the record direct evidence of the fact that the cigarettes in the truck were unstamped.

It is well established that “[t]he Division does not have an affirmative burden to establish the rational basis for its assessment” (*Matter of Hemrajani*, Tax Appeals Tribunal, August 19, 1993). Furthermore, “a presumption of correctness attaches to a properly issued statutory notice, which, in itself, provides the rational basis so long as no evidence is introduced challenging the assessment (citations omitted)” (*Matter of Metzger*, Tax Appeals Tribunal, February 11, 1993; *see also Matter of Fakhouri*, Tax Appeals Tribunal, July 5, 2007).

The Division's assessment of penalties is premised on its finding that petitioner ERW Wholesale was in possession or control of unstamped cigarettes. Petitioner ERW Wholesale has not challenged this finding, but rather argues, on several bases, that its possession of such unstamped cigarettes should not result in the imposition of such penalties. Petitioner thus does not challenge the factual premise of the Division's assessment. Accordingly, direct evidence of

the fact that the cigarettes were unstamped is unnecessary to find a rational basis or to sustain the statutory notice following a hearing.

Even if petitioner had challenged the Division's audit finding that the cigarettes were unstamped, other evidence in the record is sufficient to provide a rational basis to conclude that the cigarettes were unstamped and, therefore, to issue the assessment. Specifically, the invoices and the truck itself establish that ERW Wholesale was in possession or control of approximately 9,000 cartons of cigarettes. The indication on the invoices that the cigarettes are "exempt," together with the truck's failure to stop at the inspection station provides a rational basis, independent of the direct evidence provided by the search, to conclude that the cigarettes were unstamped. Hence, the statutory notices would remain valid even if the search was unreasonable.

Additionally, even if petitioners challenged the Division's factual premise for its assessment at the hearing and contended that the cigarettes were stamped, it was petitioners' burden to prove that contention (Tax Law § 471 [1]). The suppression of the direct evidence that the cigarettes were unstamped is insufficient to meet that burden.

Therefore, while we do not diminish the importance of petitioners' Fourth Amendment rights, the exclusion of direct evidence that the cigarettes were unstamped would have no impact on our decision in the present matter. Accordingly, we do not rule on this question.

Next, we reject petitioners' claim that the notices of determination must be canceled because ERW Wholesale did not hold title to the cigarettes on December 3, 2012. As noted previously, Tax Law § 481 (1) (b) (i) (A) imposes a penalty for possession or control of unstamped cigarettes. Ownership is not required. Moreover, even assuming that legal possession is required to impose the penalty as petitioners claim, ERW Wholesale was plainly in lawful possession of the cigarettes as a contract carrier for Oien'Kwa Trading.

We also disagree with petitioners' contention that the "don't seize" directive in the Ernst email (*see* finding of fact 22) regarding the movement of untaxed Native American-manufactured cigarettes from one reservation in New York State to another reservation in New York State provides a basis to cancel the penalties at issue.

In 1998, the Division adopted a policy of forbearance with respect to the enforcement of article 20 in connection with Native American purchases and sales of cigarettes in New York (*Oneida Nation of New York v Cuomo*, 645 F3d at 159). The policy permitted untaxed cigarettes to be sold in unlimited amounts to recognized tribes and reservation retailers (*id.*). The policy was formally revoked in 2010 with the enactment of amendments to article 20 and corresponding regulations (*id.* at 159-160). Injunctions and stays against enforcement were subsequently granted, however, and the policy effectively remained in place until *Oneida Nation of New York v Cuomo*, issued in May 2011, lifted all such orders (*id.*). Accordingly, as the Administrative Law Judge noted, the Ernst email, dated July 6, 2011, was written soon after all injunctions and stays against enforcement had been removed. As Mr. Ernst explained in his testimony at the hearing in *Matter of Snyder*, the email was a directive to Division investigators in the field pertaining to the seizure of Native American-manufactured cigarettes. It did not purport to represent a Division policy regarding the taxability of Native American-manufactured cigarettes sold in an Indian-to-Indian transaction. In any event, even if the email could be construed as indicative of Division uncertainty regarding the taxability of Native American cigarette sales as petitioners' claim, the failure of the executive branch to enforce a law does not result in its modification or repeal (*see United States v Morrison*, 686 F3d 94, 106-07 [2d Cir 2012]). We conclude, therefore, that neither the Division's previous policy of forbearance nor the Ernst email provides any basis to cancel the penalties at issue.

Petitioners cite *People v Laughing* (113 AD3d 956 [3d Dept 2014]) in support of their argument that the Ernst email provides a basis to cancel the penalties at issue. In that case, the court affirmed an order denying a motion to quash subpoenas issued to two State officials, one of whom was Mr. Ernst, seeking testimony regarding the State's enforcement policy with respect to unstamped Native American-manufactured cigarettes. Although, as petitioners note, the court stated that "the taxability by New York of Native American manufactured cigarettes under the circumstances at play here lacked clarity," the court did not find that such a lack of clarity justified dismissal of the indictment in the interests of justice (*id.* at 958). Rather, in affirming the lower court's denial of the motion to quash, the court found that the issue of the State's enforcement policy was not "utterly irrelevant" to the question of whether the indictment should be so dismissed (*id.*). Consistent with *Laughing*, we have considered the Division's former policy of enforcement forbearance and the Ernst email and have determined that neither supports cancellation of penalties here.

Two other cases cited by petitioners in support of their argument on this point, *Cayuga Indian Nation of N.Y. v Gould* (14 NY3d 614 [2010], *cert denied* 562 US 953 [2010]) and *Day Wholesale, Inc. v State of New York* (51 AD3d 383 [4th Dept 2008]), involve events that occurred before the Division revoked its forbearance policy and are therefore distinguishable.

Petitioners also contend that the asserted penalties are excessive fines contrary to the Eighth Amendment to the United States Constitution. This is an as applied challenge to the constitutionality of Tax Law § 481 (1) (b) (i) (A), which we may consider (*see Matter of Eisenstein*, Tax Appeals Tribunal, March 27, 2003).

The excessive fines clause limits the government's power to extract payments as punishment for some offense (*Austin v United States*, 509 US 602 [1993]). Cash payments are

finer for purposes of the excessive fines clause if they constitute punishment for some offense (*United States v Bajakajian*, 524 US 321 [1998]). Where a civil forfeiture serves, at least in part, deterrent and retributive purposes, such forfeiture is punitive and subject to the excessive fines clause (*County of Nassau v Canavan*, 1 NY3d 134 [2003], *citing Austin* at 619-622 and *Bajakajian* at 328-329).

The \$150.00 per carton maximum penalty under Tax Law § 481 (1) (b) (i) during the period at issue served, at least in part, a deterrent purpose. Indeed, this Tribunal has noted that the purpose of an increase in the amount of the maximum penalty under Tax Law § 481 (1) (b) pursuant to Laws of 2000 (c 262) was “to be a more effective deterrent against cigarette smuggling” (*Matter of Bayridge Supermarket*, Tax Appeals Tribunal, January 2, 2003).

Accordingly, the penalties at issue are subject to the excessive fines clause.

A penalty or fine is excessive for purposes of the excessive fines clause if it is “grossly disproportional to the gravity of the defendant’s offense” (*County of Nassau v Canavan* 1 NY3d at 140 quoting *United States v Bajakajian* 524 US at 326).

As the Administrative Law Judge noted, the penalties at issue of \$150.00 per carton are about 3.5 times the \$43.50 per carton cigarette tax (\$4.35 per pack times 10 packs) imposed pursuant to Tax Law § 471 (1). This disparity notwithstanding, petitioners have not shown that the subject penalties are in fact so grossly disproportional as to violate the Eighth Amendment. Indeed, considering the costs of enforcement of article 20 of the Tax Law, a significant portion of the penalties necessarily serve the remedial purpose of compensating the government for its cost in discovering petitioner’s illegal activity (*see United States v Halper*, 490 US 435, 446 [1989] [“The government is entitled to rough remedial justice, that is, it may demand compensation according to somewhat imprecise formulas.”]). Furthermore, the potential loss to the State in

revenue from the sale of unstamped or illegally stamped cigarettes is well-established (*see Dept. of Taxation & Fin. of N.Y. v Milhelm Attea & Bros., Inc.*, 512 US 61, 65 [1994]). We also note, as did the Administrative Law Judge, that no criminal charges were brought in the present matter and that this fact militates against a finding of an excessive fine. As the Administrative Judge also noted, in 2013, the Legislature increased the maximum penalty under Tax Law § 481 (1) (b) (i) (A) from \$150.00 to \$600.00 (L 2013, c 59, pt. O, § 1). This fact also weighs against a finding that the penalty herein was excessive. Accordingly, we find that the penalties imposed in this matter are not grossly disproportional to petitioners' offense and thus not excessive under the Eighth Amendment.

Related to the excessive fines claim, petitioners contend that the Administrative Law Judge erred by not considering mitigating factors raised by petitioners. We disagree. Although, during the relevant period, Tax Law § 481 (1) (b) (i) (A) provided for the imposition of a penalty of "not more than" \$150.00 per carton, "there are no statutory [or regulatory] guidelines for the exercise of the Commissioner's discretion in imposing [the] penalty [and thus] it is not necessary for the Division to have considered any mitigating factors prior to the imposition of the penalty" (*Matter of Fakhouri*).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of ERW Enterprises, Inc., and Eric White d/b/a ERW Wholesale is granted in part and denied in part, as indicated below;
2. The determination of the Administrative Law Judge is affirmed in part and reversed in part, as indicated below;
3. The petition of ERW Enterprises, Inc. is granted;
4. The petition of Eric White d/b/a ERW Wholesale is denied;
5. The notice of determination, dated December 16, 2014, issued to ERW Enterprises, Inc.

is canceled; and

6. The notice of determination, dated December 19, 2014, issued to Eric White d/b/a ERW Wholesale is sustained.

DATED: Albany, New York  
May 29, 2019

s/ Roberta Moseley Nero  
Roberta Moseley Nero  
President

/s/ Dierdre K. Scozzafava  
Dierdre K. Scozzafava  
Commissioner

/s/ Anthony Giardina  
Anthony Giardina  
Commissioner