

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
SHAWN E. SNYDER : DETERMINATION
for Revision of a Determination or for Refund of : DTA NO. 825785
Cigarette Tax under Article 20 of the Tax Law for the :
Period ended December 3, 2012. :

Petitioner, Shawn E. Snyder, filed a petition 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.

A hearing was held before Winifred M. Maloney, Administrative Law Judge, in Rochester, New York on October 29, 2015, and continued to completion on October 30, 2015, with all briefs to be submitted by September 23, 2016, which date began the six-month period for issuance of this determination. Pursuant to Tax Law § 2010(3), the six month period was extended to nine months. Petitioner appeared by Lipsitz Green Scime Cambria LLP (Jeffrey F. Reina, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Jennifer Hink-Brennan Esq., of counsel, at hearing, and Brian Evans, Esq., of counsel, on brief).

ISSUES

I. Whether petitioner was a person in possession or had control of unstamped or unlawfully stamped cigarettes and, as such, is liable for the penalty imposed pursuant to Tax Law § 481(1)(b).

II. Whether the penalty should be canceled because the search and seizure violated petitioner's Fourth Amendment rights.

III. Whether the penalty imposed violates the Excessive Fines Clause of the United States Constitution.

FINDINGS OF FACT

1. On December 20, 2012, the Division of Taxation (Division) issued to petitioner, Shawn E. Snyder, a notice of determination, bearing audit identification number X-285525204-7,¹ that asserted penalty due in the amount of \$1,259,250.00 pursuant to Article 20 of the Tax Law. The Computation Section of the notice stated 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.

These cigarettes and/or tobacco products were seized and forfeited under Tax Law sections 1846 and/or 1846-a.”

2. Petitioner, a member of the Seneca Nation of Indians,² resides at Route 438, Gowanda, New York. On the date of the cigarette seizure at issue, petitioner was an employee of Eric White d/b/a/ ERW Wholesale. As an employee of ERW Wholesale, petitioner traditionally delivered cigarettes to Indian territories located within the Western New York area. At the time of the cigarette seizure, petitioner was 22 years old.

3. ERW Wholesale, a tobacco wholesale business solely owned by Eric R. White, is located on the Cattaraugus Reservation of the Seneca Nation of Indians. 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 also entitled to warehouse tobacco products, and to deliver tobacco products to Native vendors.

¹ No assessment identification number appears on this notice of determination.

² The Seneca Nation of Indians is recognized by the United States Bureau of Indian Affairs (BIA).

4. ERW Wholesale is solely regulated by the Seneca Nation of Indians. All of ERW Wholesale's customers are Native Americans, including tribes and individuals operating businesses on Native American territories.

5. 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, processing, overseeing orders getting processed, overseeing trucks loaded, [and] [sic] overseeing employees." Mr. Clark was ERW Wholesale's operations manager on December 1, 2012.

6. On or about December 1, 2012, ERW Wholesale received an order from Oien'Kwa Trading³ for its purchase of 9,000 cartons (150 cases) of assorted types of cigarettes to be shipped to Saihwahenteh, a Native American owned business located on the Ganienkeh territory in Altona, New York.⁴ The total purchase price for the 9,000 cartons of cigarettes ERW Wholesale sold to Oien'Kwa Trading was \$164,250.00.

7. ERW Wholesale agreed to perform a "drop shipment," which means that it agreed to transport the cigarettes from the Cattaraugus Reservation to the Ganienkeh territory as a transporter for Oien'Kwa Trading. ERW Wholesale charged Oien'Kwa Trading a delivery fee of \$2,250.00 (\$.25 per carton) for delivering the cigarettes to the Ganienkeh territory. According to Mr. Clark, delivery fees imposed by ERW Wholesale for drop shipments vary based upon the distance the cigarettes are transported.

8. The cigarettes that ERW Wholesale sold to Oien'Kwa Trading were manufactured by

³ Oien'Kwa Trading is a Native American owned business located on the St. Regis Mohawk Reservation in Akwesasne, New York. The St. Regis Mohawks are recognized by the BIA.

⁴ Subsequent to purchasing the cigarettes from ERW Wholesale, Oien'Kwa Trading sold the cigarettes to Saihwahenteh.

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

9. Mr. Clark oversaw the processing of the order on December 1, 2012. On that date, petitioner helped load a total of 150 cases of King Mountain cigarettes onto the truck⁵ he was to drive to Ganienkeh. None of the cases were open when they were loaded onto the truck. Each case of cigarettes, a cardboard box holding 60 cartons of cigarettes, was sealed before it was loaded onto the truck. Because each case was sealed, it was not possible to see the cartons of cigarettes stored in the cases without physically opening the cases. After the order was processed, Mr. Clark put a seal on the back of the truck. Mr. Clark could not recall if the seal was affixed before or after the padlock was secured to the back door of the truck.

10. Before leaving to transport the cigarettes to Ganienkeh on December 2, 2012, petitioner was provided with copies of ERW Wholesale invoices No. 11 and No. 12, each dated December 1, 2012, and a copy of an ERW Wholesale Bill of Lading, dated December 1, 2012. In addition, located in the truck was its registration, its New York State insurance identification card, and a white packet prepared by ERW Wholesale. 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”;

⁵ The truck, a 1999 Ford white box truck with a roll-up rear door, is owned by Mr. White. This commercial vehicle was registered to ERW Enterprises, Inc., one of Mr. White’s businesses. Mr. White uses the truck for ERW Wholesale’s business, and to transport materials for his construction business.

a “[t]o 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.⁶

11. The record includes copies of ERW Wholesale’s invoices No. 11 and No. 12, issued to Oien’Kwa Trading regarding its purchase of various quantities of six types of cigarettes, a total of 9,000 cartons, to be shipped to Saihwahenteh.⁷ Review of the invoices indicates that the top third of both invoices contained seven preprinted columns, including columns labeled “JOB”; “SHIPPING METHOD”; and “PAYMENT TERMS,” under which the following information was provided “SHIPPING CHARGE”; “ERW”; and “PER AGREEMENT,” respectively. With respect to the cigarettes purchased by Oien’Kwa Trading for shipment to Saihwahenteh, Invoice No. 11 provided, in relevant part, as follows:

⁶ 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.”

⁷ Saihwahenteh’s complete address and telephone number is listed next to “SHIP TO” on both invoices.

“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					
TOTAL					

SUBTOTAL \$ 164,250.00
 SALES TAX EXEMPT
 TOTAL \$ 164,250.00”

Review of Invoice No. 12 reveals that it contained the same six lines of information regarding the quantity, item number, and description of the cigarettes, totaling 9,000 cartons, as set forth above in Invoice No. 11. However, on Invoice No. 12, a unit price of \$.25 was listed for each of the 9,000 cartons, for a total \$2,250.00. There is no information on either Invoice No. 11 or Invoice No. 12 that indicates that petitioner was transporting King Mountain cigarettes.

12. The record also includes the ERW Wholesale Bill of Lading, bearing Invoice No. 10 and the date of December 1, 2012, issued to Oien’Kwa Trading regarding the 9,000 cartons of cigarettes to be shipped to Saihwahenteh, at the same address as listed on invoices No. 11 and No. 12. The top third of the Bill of Lading contains the same information as appeared on the top third of invoices No. 11 and No. 12, and the balance of the Bill of Lading 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 petitioner

was transporting King Mountain cigarettes.

13. There is no information on invoices No. 11 and No. 12, or the Bill of Lading indicating whether the cigarettes petitioner was transporting bore New York State tax stamps.

14. Packs of cigarettes can be stamped without having to cut a case in half. A carton of cigarettes can be removed from a case, placed into a stamping machine, and placed back into a case that is then sealed. The only way to determine whether the cigarettes petitioner was transporting bore New York State tax stamps was to physically open a case, pull a carton out of the case, open the carton and pull out a pack of cigarettes to see if a tax stamp was affixed to it.

15. On December 2, 2012, petitioner departed from ERW Wholesale on the Cattaraugus Reservation with the 150 cases of cigarettes. He departed driving the same truck that was ultimately stopped by the New York State Police (State Police) on December 3, 2012.

16. The cases of cigarettes remained sealed from the moment petitioner left the Cattaraugus Reservation on December 2, 2012 to the moment he was stopped by the State Police on December 3, 2013. The back door of the truck remained locked from the moment petitioner left the Cattaraugus Reservation to the moment it was opened by the State Police.

17. On December 2, 2012, at around 7:00 p.m., the truck petitioner was driving experienced a flat tire while he was exiting Interstate 90 (I-90) near the Turning Stone Casino. After pulling over to the side of the road, exiting the truck, and observing that the right front tire was shredded, petitioner 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 on Long Island helping with post-Hurricane Sandy clean up, Mr. Clark contacted Michael Webber, ERW Wholesale's in-house repairman, to help petitioner. Mr. Webber drove from the Cattaraugus Reservation and met with

petitioner on December 2, 2012. Although Mr. Webber brought tools to replace the flat tire on the truck, he was only able to perform a temporary fix because the wheel bearing was damaged as well. After making the temporary repair, petitioner and Mr. Webber drove the truck a short distance to the local Holiday Inn and stayed overnight until December 3, 2012.

18. On December 3, 2012, petitioner and Mr. Webber repaired the truck using parts they purchased at a local auto parts store. After the truck was repaired, petitioner proceeded to travel to the Ganienkeh territory to deliver the cigarettes he was transporting.

19. On December 3, 2012, the State Police Commercial Vehicle Enforcement Unit was conducting a border checkpoint truck inspection running northbound and southbound on Interstate 87 (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/or 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.⁸

20. 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 petitioner, fail to stop at the commercial vehicle inspection station (inspection station),

⁸ 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.

northbound in the town of Peru. At that point, Trooper Posada initiated a vehicle and traffic stop of the truck on or about 2:13 p.m. 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 petitioner for his license and the vehicle registration. He also asked what the load was. Petitioner 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. Petitioner also told Trooper Posada that he was transporting the cigarettes to the Ganienkeh territory. Trooper Posada instructed petitioner to follow him to the commercial vehicle checkpoint inspection station located on I-87 southbound. However, because petitioner was very nervous and was 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 Spadaro arrived at the vehicle stop and assisted Trooper Posada in escorting petitioner to the southbound inspection station located in Peru, New York.

21. Upon arriving 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 petitioner was transporting cigarettes to Ganienkeh and stated that he believed the cigarettes did not bear tax stamps. Then, Trooper Posada issued a uniform traffic ticket, number 1B88CMFSP, to petitioner. The ticket issued to petitioner provided that the violation committed by petitioner was "Disobeyed Traffic Control Device." Thereafter, Trooper Posada gave petitioner's driver's license and the truck's registration to Trooper Spadaro.

22. At no time did petitioner inform Trooper Posada of the brand of cigarettes he was transporting. At the hearing, Trooper Posada confirmed that neither the invoice that petitioner provided him nor the bill of lading provided to him identifies the name of the cigarettes' manufacturer. He also confirmed that at the time he stopped petitioner, he did not know the type of cigarettes petitioner was transporting, the manufacturer of the cigarettes, or whether the cigarettes bore tax stamps.

23. After a five or six minute discussion with petitioner, 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 petitioner was transporting 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.

24. 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 and tires. A State Police K-9 unit sniffed around the truck, but nothing was detected.

25. The Driver/Vehicle Examination Report prepared by Trooper Spadaro provides that petitioner was charged with the following violations: (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).”⁹

The Driver/Examination Report also listed the “Cargo” as “CIGARETTES,” and “HazMat” “NO HM TRANSPORTED.” 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 of the truck had not yet been inspected.

26. According to Investigator Revette, during the stop and subsequent inspection of the truck, petitioner appeared “apparently normal.”

27. At some point, petitioner gave Investigator Revette the white packet of documents. The name and telephone number of petitioner’s attorney was also provided to Investigator Revette.

28. After the safety inspection was completed, petitioner 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. Petitioner could not locate the key for the padlock. Shortly thereafter, Trooper Posada used bolt cutters to cut off the padlock securing the back door of the truck and opened the roll-up door.

29. 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.

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

⁹ 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.

information provided on the outside of the cases.

31. 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.

32. 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 petitioner was driving. 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.

33. After cutting the padlock and confirming the contents of the truck, i.e., the sealed cases matched petitioner's description and corresponding documentation and were not hazardous or dangerous to the public if improperly secured, the sealed cases were opened.

34. After the back door of the truck was opened, Investigator Revette removed one of the sealed cases of cigarettes from the truck and opened it. No warrant was obtained to open the case of cigarettes.

35. Nobody asked petitioner for permission to open the back door of the truck. Trooper Posada did not ask for permission from petitioner to enter the back of the truck. When petitioner was told that the padlock on the door was going to be cut, he responded by stating "whatever."

36. Nobody from the State Police contacted petitioner'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.

37. The outside portion of the cases did not provide whether the cigarettes were stamped. At no time during the stop or inspection did anyone ask petitioner 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 and view the cigarette packs in the cartons.

38. 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 claimed that there were no tax stamps on the cigarettes.

39. At no time during the stop, the inspection or investigation was petitioner free to leave. Investigator Revette was told to detain the driver and the load until a decision was made.

40. In fact, upon arriving at the inspection station, petitioner was stripped of his keys for the truck.

41. Although petitioner was not free to leave during the stop or inspection, at no time did any of the troopers or investigators inform petitioner of his Miranda rights.

42. The State Police were unsure if they should seize the cigarettes because on July 6, 2011, Richard Ernst, the Deputy Commissioner for the Office of Tax Enforcement at that time, issued an email which stated 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.

43. Similarly, on May 16, 2011, State Senators George Maziarz and Tim Kennedy sent a letter to the New York State Department of Taxation and Finance 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.”

44. 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 petitioner and the truck. Investigator Revette was also informed that the Clinton County District Attorney was not going to pursue criminal charges.

45. After receiving the instruction to seize the cigarettes, Investigator Revette instructed petitioner to drive the truck to the Plattsburgh State Police Station. Petitioner complied with Investigator Revette's instructions and drove the truck to the Plattsburgh State Police Station.

46. 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 petitioner's documents, and the originals were given back to petitioner. Once the cigarettes were unloaded at the Plattsburgh State Police station, and the original documents were returned to him, petitioner was free to leave in the truck at approximately 7:00 p.m.

47. 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 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.

48. The first photograph in petitioner's Exhibit 6 depicts the cases being stored at the Division's warehouse. 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.¹⁰

49. As noted in Finding of Fact 1, the Division issued a notice of determination to petitioner that asserted that a penalty was 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 \$1,259,250.00 penalty assessed by the Division was calculated as follows: (i) 140 cases were seized; (ii) 60 cartons per case for a total of 8,400 cartons seized; (iii) subtract five cartons because the law allows for a \$150.00 fine per carton in excess of five cartons; and (iv) 8,395 cartons multiplied by \$150.00 equals \$1,259,250.00. The notice of determination was drafted by the Division's Office of Counsel, not the Division's Audit Division's Transaction Desk Audit Bureau, Cigarette Tax Unit.

50. On April 26, 2013, the Division issued a Notice and Demand for Payment of Tax Due, bearing assessment identification number L-038992902-3, to petitioner demanding payment of the \$1,259,250.00 penalty assessed in the notice of determination.

51. Although the Division asserts that petitioner owes a \$1,259,250.00 penalty for the cigarettes that were seized on December 3, 2012, neither the Notice of Determination dated December 20, 2012, nor the Notice and Demand for Payment of Tax Due dated April 26, 2013, provides that petitioner is required to pay tax or interest for the seized cigarettes.

52. Separate notices of determination, each in the amount of \$1,259,250.00, were also issued to ERW Enterprises, Eric R. White, King Mountain, Saihwahenteh and Oien'Kwa

¹⁰ The second photograph was taken by Investigator Revette at the request of the New York State Attorney General's office for use in a federal matter, *State of New York v. Mountain Tobacco Company d/b/a King Mountain Tobacco Company, Inc.*

Trading.

53. On May 16, 2013, petitioner's representative, Jeffrey F. Reina, requested a Bureau of Conciliation and Mediation (BCMS) conciliation conference in protest of the notice issued to petitioner. By BCMS Conciliation Order, CMS No. 25870, dated June 14, 2013, petitioner's request was denied as untimely filed. On or about July 25, 2013, petitioner filed his petition challenging the \$1,259,250.00 penalty assessed against him. On or about September 25, 2013, the Division filed its Answer to the petition. On January 10, 2014, the Division brought a motion seeking an order of dismissal or, in the alternative, summary determination in this matter. By an Order, dated May 15, 2014, the undersigned denied the Division's motion. On August 19, 2014, a hearing was held in Rochester on the issue of the timeliness of petitioner's request for a conciliation conference with BCMS. By letter dated November 17, 2014, the Division withdrew its timeliness objection and agreed to proceed with a hearing on the merits.

54. The inhabitants of Ganienkeh, a majority of which are Mohawk, consider the territory sovereign land. Petitioner and other Native Americans consider Ganienkeh a Native American nation.

55. Trooper Posada considers Ganienkeh a Native American territory and confirmed that the New York State Police does not enforce laws on the Ganienkeh territory.

56. New York State has a history of not collecting: (i) taxes from income earned by the bingo hall, smoke shop and gasoline station located on the Ganienkeh territory; or (ii) real estate taxes from property owners who own real property located on the Ganienkeh territory.

57. John Kane, a Mohawk, testified at the hearing for petitioner. Mr. Kane was qualified without objection as an expert on Indian history, and on the existence and history of the Ganienkeh territory.

58. Mr. Kane confirmed that a formal transaction was performed by New York State to create the Turtle Island Trust and, through the trust, to provide for the Mohawk people's use of the land where the Ganiienkeh territory is located in Altona, New York.

59. 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.

60. Mr. Kane also confirmed that the tobacco industry, including the manufacturing and distribution of cigarettes, has become an important part of the Native American economy.

61. The record includes the Turtle Island Trust, Trust Agreement, dated July 25, 1977.¹¹ 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.”

¹¹ 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 Ganiienkeh Council Fire, was to advise and consult with the trustees and the Ganiienkeh 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.

62. 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 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, 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 as the lease, because of ongoing negotiations to resolve an alleged violation of then present lease.

63. As indicated by six certifications of non-registration, each sealed and signed by Deputy Commissioner Thomas Engel on February 10, 2016, the Division searched the files of the Registration and Bond Unit of the Transaction Desk Audit Bureau's Fuel, Alcohol, Cigarette and Carrier Tax Section for licenses or registrations as cigarette stamping agents or wholesale dealers in cigarettes issued to petitioner; Eric White d/b/a ERW Wholesale; ERW Enterprises, Inc.; Oien'Kwa Trading; King Mountain Tobacco Company, Inc.; and Saihwahenteh, Ganienkeh Territory, and no records of issuance of licenses or registrations to the same were found.

64. Petitioner submitted proposed findings of fact numbered 1 through 119. Proposed

findings of fact 10, 11, 51, 53 through 55, 58 through 59, 96 and 105 have been modified to more accurately reflect the record. Proposed findings of fact 27, 61 and 64 are rejected as unsupported by the record. In ruling on petitioner's proposed findings of fact, if any part of a proposed finding of fact is unsupported by the record the proposed finding of fact has been rejected in its entirety. Proposed finding of fact 111 is argumentative.

CONCLUSIONS OF LAW

A. During the period at issue, Tax Law § 481(1)(b)(i) provided, in pertinent part, as follows:

“In addition to any other penalty imposed by this article, the commissioner may (A) impose a penalty of not more than one hundred fifty dollars for each two hundred cigarettes, or fraction thereof, in excess of one thousand cigarettes in unstamped or unlawfully stamped packages in the possession or under the control of any person or (B) impose a penalty of not more than two hundred dollars for each ten unaffixed false, altered or counterfeit cigarette tax stamps, imprints or impressions, or fraction thereof, in possession or under the control of any person. . .”

B. Tax Law § 481(2) provides as follows:

“(a) The possession within this state of more than four hundred cigarettes in unstamped or unlawfully stamped packages or more than two hundred fifty cigars, or more than five pounds of tobacco other than roll-your-own tobacco, or more than thirty-six ounces of roll-your-own tobacco by any person other than an agent or distributor, as the case may be, at any one time shall be presumptive evidence that such cigarettes or tobacco products are subject to tax as provided by this article.

(b) Nothing in this section shall apply to common or contract carriers or warehousemen while engaged in lawfully transporting or storing tobacco products or unstamped packages of cigarettes as merchandise, nor to any employee of such carrier or warehouseman acting within the scope of his employment, nor to public officers or employees in the performance of their official duties requiring possession or control of tobacco products or unstamped or unlawfully stamped packages of cigarettes, nor to temporary incidental possession by employees or agents of persons lawfully entitled to possession, nor to persons whose possession is for the purpose of aiding police officers in performing their duties.”

The regulation at 20 NYCRR 78.6 provides, in relevant part, as follows:

“(a) Nothing in this Part shall apply to common or contract carriers or warehousemen while engaged in lawfully transporting or storing unstamped packages of cigarettes as merchandise, nor to any employee of such carriers or warehousemen who is acting within the scope of lawful employment. For purposes of this subdivision:

(1) Common carrier shall mean any person who, in the regular course of business, transports cigarettes for the general public for compensation.

(2) Contract carrier shall mean any person who, in the regular course of business, transports cigarettes for compensation under special and individual continuing contracts or arrangements with one or a limited number of persons for an extended period of time, or who, in the regular course of business, provides services that are not normally provided by common carriers.

(3) Warehousemen shall mean any persons who, in the regular course of business, store cigarettes for hire.”

C. There is no dispute that the seized cigarettes were unstamped. Petitioner asserts that he was transporting the unstamped Native brand cigarettes from one Native American territory (the Cattaraugus Reservation) to another Native American territory (the Ganienkeh territory) on behalf of Oien’Kwa Trading, a Native American owned business, that hired his employer, ERW Wholesale, as a contract carrier to transport the cigarettes. He further asserts that Tax Law § 481(2)(b) exempts a contract carrier, and an employee of such contract carrier acting within the scope of his employment from the penalty imposed pursuant to Tax Law § 481(1)(b)(i). The Division maintains that petitioner is not entitled to the exemption afforded by Tax Law § 481(2)(b) because he does not satisfy the statutory requirements of such section. It asserts that petitioner was not engaged in the lawful transportation of unstamped cigarettes because he was not a New York State licensed agent or distributor. The Division further contends that petitioner was not lawfully transporting the unstamped cigarettes on behalf of a New York State licensed agent or distributor.

D. Statutes creating exemptions from tax are to be strictly construed (*see Matter of Grace v. New York State Tax Commn.*, 37 NY2d 193 [1975], *lv denied* 37 NY2d 708 [1975]; *Matter of Blue Spruce Farms v. New York State Tax Commn.*, 99 AD2d 867 [3d Dept 1984], *affd* 64 NY2d 682 [1984]). In addition, it is well established that the interpretation given a statute by the agency authorized with its enforcement should generally be given weight and judicial deference if the interpretation is not irrational, unreasonable or inconsistent with the statute (*Matter of Trump-Equitable Fifth Avenue Co. v. Gliedman*, 62 NY2d 539 [1984]). However, in addition, the statutory language providing the exemption must be construed in a practical fashion with deference to the legislative intent behind the exemption (*see Majewski v. Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577 [1998]; *Matter of Qualex, Inc.*, Tax Appeals Tribunal, February 23, 1995). When construing a statute the primary focus is on the intent of the Legislature in enacting the statute (McKinney's Cons Laws of NY, Book 1, Statutes § 92[a]; *see Matter of Sutka v. Connors*, 73 NY2d 395 [1989]; *Matter of American Communications Technology v. State of New York Tax Appeals Tribunal*, 185 AD2d 79 [3d Dept 1993], *affd* 83 NY2d 773 [1994]). When the intent is clear from the wording of the statute itself the inquiry ends (McKinney's Cons Laws of NY, Book 1, Statutes § 76; *see id.*).

E. Statutory rules of construction provide that “[t]he legislative intent is to be ascertained from the words and language used, and the statutory language is generally construed according to its natural and most obvious sense, without resorting to an artificial or forced construction” (McKinney's Cons Laws of NY, Book 1, Statutes § 94). Where the statute is clear, the courts must follow the plain meaning of its words, and “there is no occasion for examination into extrinsic evidence to discover legislative intent . . .” (McKinney's Cons Laws of NY, Book 1, Statutes § 120; *see Matter of Raritan Dev. Corp. v. Silva*, 91 NY2d 98 [1997]; *Matter of*

Schein, Tax Appeals Tribunal, November 6, 2003). Where, as here, words of a statute have a definite and precise meaning, it is not necessary to look “elsewhere in search of conjecture so as to restrict or extend that meaning” (*Matter of Erie County Agricultural Society v. Cluchey*, 40 NY2d 194, 200 [1976]). As the language of the statute is clear, it is appropriate to interpret its phrases in their ordinary, everyday sense (*Matter of Automatique v. Bouchard*, 97 AD2d 183 [3d Dept 1983]).

The Division’s assertion is without merit. Tax Law § 481(2)(b) provides an exemption for common and contract carriers engaged in lawfully transporting unstamped packages of cigarettes as merchandise, and to any of such employee acting within the scope of his employment. Nowhere in this section does it state that a common carrier or a contract carrier must be a licensed agent or distributor to be protected under the exemption provided. Nor does the definition of contract carrier provided in 20 NYCRR 78.6(a)(2) contain any such requirement (*see* Conclusion of Law B). Since the statute and the regulation do not mention any license requirements, the statute must be read to extend the exemption to all carriers, licensed or not. Furthermore, the term “lawfully transporting” does not mean the carrier must be transporting stamped cigarettes. Rather, it means that other than transporting unstamped cigarettes, the carrier is acting in a lawful manner. Indeed, for the exemption to be triggered, the contract carrier or common carrier must first be found to be transporting unstamped cigarettes.

F. The record in this matter clearly establishes that ERW Wholesale was acting as a contract carrier when it agreed to transport the cigarettes for Oien’Kwa Trading. Mr. Clark, ERW Wholesale’s operations manager, credibly testified that ERW Wholesale, in the regular course of business, provides drop shipment services for compensation (*see* Finding of Fact 7). In addition, the contract entered into between ERW Wholesale and Oien’Kwa Trading for the

transportation of the cigarettes to the Ganienkeh territory is verified by ERW Whole's Invoice No. 12 which provides that ERW Wholesale charged Oien'Kwa Trading \$2,250.00 (\$.25 per carton) for transporting the cigarettes (*see* Finding of Fact 11). As is the case with many commercial carriers, after the cases of cigarettes were loaded onto the truck, a seal was placed on the back of the truck, along with a padlock (*see* Findings of Fact 9, 16). In addition, before leaving to transport the cigarettes to the Ganienkeh territory, petitioner was provided with the bill of lading and the invoices that identified the load as cigarettes (*see* Findings of Fact 10 - 12). Petitioner did fail to obey a traffic control device and stop at the I-87 Valcour northbound inspection station, and was issued a uniform traffic ticket for such failure (*see* Findings of Fact 20 - 21). However, the subsequent commercial vehicle inspection of the truck did not result in the issuance of any additional citations (*see* Findings of Fact 19, 24 - 25). After cutting the padlock, and confirming the contents of the truck, i.e., the sealed cases matched petitioner's description and corresponding documentation and were not hazardous or dangerous to the public if improperly secured, one of the sealed cases of cigarettes was removed from the truck and opened (*see* Findings of Fact 29, 30, 33 - 34). The fact that the truck's load consisted of unstamped packages of cigarettes was only discovered after a package of cigarettes was removed from an opened carton taken from the opened case (*see* Finding of Fact 34, 37 - 38). Clearly, ERW Wholesale was a contract carrier engaged in lawfully transporting unstamped cigarettes at the time the cigarettes were seized on December 3, 2012. On the date of the seizure, petitioner was the ERW Wholesale employee acting within the scope of his employment, i.e., transporting the cases of unstamped cigarettes to the Ganienkeh territory (*see* Findings of Fact 2, 15, 18). Therefore, he is entitled to claim the exemption provided in Tax Law § 481(2)(b), and the penalty in the amount of \$1,259,250.00 assessed against petitioner is cancelled.

G. Based upon Conclusion of Law F, issues II and II are rendered moot.

H. The petition of Shawn E. Snyder is granted, and the Notice of Determination, dated December 20, 2012, is hereby cancelled.

DATED: Albany, New York
June 22, 2017

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE