

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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. :

DETERMINATION
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. :

Petitioner, ERW Wholesale, Inc., 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.

Petitioner, Eric White d/b/a ERW Wholesale, 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 on both petitions was held before Dennis M. Galliher, Administrative Law Judge, in Rochester, New York, on January 11, 2017, at 10:30 A.M., with all briefs to be submitted by June 16, 2017, 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. Petitioners appeared by Lipsitz Green Scime Cambria LLP (Jeffrey F. Reina, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Brian L. Evans, Esq., of counsel).

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 and the New York State Constitution at Article 1, section 5.

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 the New York State Constitution at Article 1, section 12.

FINDINGS OF FACT¹

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

¹ 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. 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.

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’s 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 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.² This order was entered into ERW Wholesale's computer system on the next day, Saturday, December 1,

² 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.

2012. Subsequent to purchasing the cigarettes from ERW Wholesale, Oien’Kwa Trading resold the cigarettes to Saihwahenteh.³ 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 Shawn E. Snyder*, DTA No. 825785 [NYS Div. Tax App. 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 Shawn E. Snyder**, is taken pursuant to State 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 Ganienkeh territory, in

³ 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.

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

11. Mr. Kane noted that the inhabitants of Ganiienkeh 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, 1977.⁴ 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 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,

⁴ 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.

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 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. Its registration to

ERW Enterprises was described as having been done, initially, for DOT compliance purposes, due to the gross vehicle weight (GVW) capacity of the truck. 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 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 Shawn E. Snyder*, supports the fact that Mr. Snyder was employed by ERW Wholesale, and not by ERW Enterprises. In *Matter of Shawn E. 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 as follows:

“Native Americans transporting untaxed native [sic] American cigarettes from one reservation in NYS to another reservation in NYS. - **Don’t Seize.**”⁵

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

⁵ 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.”

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.”⁶ 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:

| 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 |

⁶ 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.

| | | | | | |
|---------|--|--|--|-----------|--------------|
| | | | | | |
| 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 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.⁷

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,

⁷ The record does not specify which entity, among the ERW entities, or if an individual owned the service truck.

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.

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/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

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 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.

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 (*see* 20 NYCRR 820.7; 49 CFR §§ 396.9, 396.11).

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, and stated that he believed the cigarettes did not bear tax stamps. Then, Trooper Posada issued a uniform traffic ticket, number 1B88CMFSP, to Mr. Snyder. The ticket issued to Mr. Snyder provided 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.

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 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 Control [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 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

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.

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 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. Nobody 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.¹⁰

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 record includes no information or evidence concerning the 10 cases.¹¹

54. The Division maintains that the record is "unclear" as to the location where the

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 related federal matter (*State of New York v Mountain Tobacco Company d/b/a King Mountain Tobacco Company, Inc.*, 2016 WL 3962992 [United States Dist. Ct., E.D. N.Y., July 21, 2016], 2-12-CV-6276 [JS] [SIL]; *motion for cert. to file interlocutory appeal* [Case # 0: 17-CV-03198, filed October 6, 2017, terminated December 8, 2017]) (*King Mountain*).

¹¹ In fact the narrative portion of the Incident Report notes Mr. Snyder's alleged statement that he picked up and was transporting some 7260 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). To the extent petitioner's reply brief states that Investigator Revette "signed a statement where he [Investigator Revette] claimed that 7260 cartons of cigarettes [or 121 cases of cigarettes] were seized from the truck," it is inaccurate. In fact, Exhibit 12 makes clear that Investigator Revette is relating his recall of what Mr. Snyder stated. It is not an affirmative statement by Investigator Revette of the number of cases (or cartons) of cigarettes actually discovered or seized on December 3, 2012.

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 Shawn E. 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 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 11). 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 Shawn E. 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.”¹²

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.

60. Petitioner submitted proposed findings of fact numbered 1 through 122. Such proposed facts are supported by the record and have been incorporated in the foregoing findings of fact. To the extent certain proposed facts are repetitive, they have been condensed or combined herein. Proposed findings of fact 120 through 122 set forth information concerning the filing of petitions herein, the filing of answers thereto, and the date upon which the proceedings herein were conducted, all of which is undisputed and need not be listed as separate findings of fact.

61. In its post-hearing brief, the Division provided a statement of facts, and noted that it “does not agree to stipulate to any of [petitioners’] proposed findings of fact to the extent they do not align and/or agree with the Division’s statement of facts.” The Division’s recitation of facts is presented in paragraph format (i.e., not as separately numbered proposed findings of fact). To the extent the Division’s recitation of facts, and its arguments based thereon, differ from petitioner’s proposed findings of fact, these differences are noted and are addressed in the

¹² See Exhibit 25, pp 51 - 52 (Transcript of Proceedings in *Matter of Shawn E. Snyder*).

Findings of Fact set forth above (*see* Findings of Fact 17, 18, 54 and 55).

CONCLUSIONS OF LAW

A. Tax Law article 20, section 471 provides, in relevant part, that:

“[t]here is hereby imposed and shall be paid a tax on all cigarettes possessed in this state by any person for sale, except that no tax shall be imposed on 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, . . . ” (Tax Law § 471 [1]).¹³

The foregoing tax “is imposed on all cigarettes sold on an Indian reservation to non-members of the Indian nation or tribe and to non-Indians, and evidence of such tax shall be by means of an affixed cigarette tax stamp” (*Id.*). The tax is imposed at the rate of \$4.35 per pack of cigarettes. It is presumed that “all cigarettes within [New York State] are subject to tax until the contrary is established, and the burden of proof that any cigarettes are not taxable hereunder shall be upon the person in possession thereof” (*Id.*).

B. Tax Law § 471 (2) provides as follows:

“[I]t is intended that the ultimate incidence of and liability for the tax shall be upon the consumer, and that any agent or dealer who shall pay the tax to the [commissioner of taxation] shall collect the tax from the purchaser or consumer. Except as hereinafter provided, the tax shall be advanced and paid by the agent. The agent shall be liable for the collection and payment of the tax on cigarettes imposed by [Article 20], and shall pay the tax to the commissioner by purchasing, under such regulations as [the commissioner] shall prescribe, adhesive stamps of such designs and denominations as [the commissioner] shall prescribe. The tax on cigarettes may also be paid by or through the use of metering machines if the commissioner so prescribes. Agents, located within and without the state, shall purchase stamps and affix such stamps in the manner prescribed to packages of cigarettes to be sold within the state, in which case any dealer subsequently receiving such stamped packages of cigarettes will not be required to purchase and affix such stamps on such packages of cigarettes. All cigarettes sold by agents and wholesalers to Indian nations or tribes located on an Indian reservation must bear a tax stamp.”

¹³ The terms “Indian nation or tribe,” “Qualified Indian,” and “Qualified reservation” are defined at Tax Law § 470 (14), (15) and (16).

C. The cigarette tax in New York is collected through licensed agents. As above, the licensed agent purchases tax stamps and affixes them to cigarette packs in advance of the first sale within the state as evidence of the payment of the tax. On this basis, the licensed agents function as wholesale stamping agents who pre-pay the tax, and affix tax stamps on all cigarette packs, including those intended for resale to Indian purchasers (Tax Law § 472 [2]; 20 NYCRR 74.6 [a] [2], [3]). In turn, “[t]he full amount of the tax is part of the price of stamped cigarettes at all subsequent stops in the distribution stream” (*Id.*; *see Dep’t of Taxation v Milhelm Attea & Bros.*, 512 US 61, 64 [1994]), with licensed stamping agents recovering their initial outlay (prepayment of tax in exchange for the stamps they are required to affix) upon inclusion of the tax amount in their subsequent sales of the stamped packs of cigarettes. Licensed stamping agents are the only entry point for cigarettes into New York (20 NYCRR 74.3 [a] [1] [iii]), and except for certain limited circumstances not present here, cigarettes possessed in New York State by someone other than a licensed stamping agent, must bear a tax stamp (*see* 20 NYCRR 74.3 [a]; 76.1 [b] [2]). A New York State licensed stamping 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] (*see* Tax Law § 470 [11]).¹⁴ “A package of cigarettes which bears no tax stamp, or which bears a tax stamp of another state or taxing jurisdiction, is considered to be an unstamped package of cigarettes” (Tax Law § 470 [13]).

D. The foregoing tax is imposed, by its explicit terms, on all cigarettes sold in New York State, with no distinction set forth in the statute based upon the manufacturer or particular brand of cigarette. Native American versus non-Native American manufacturers and brands are not

¹⁴ Some, though not all, wholesalers are licensed stamping agents. Petitioner ERW Wholesale is a wholesaler, but is not a New York State licensed stamping agent (*see* Finding of Fact 4).

separately addressed, and neither is excepted from being subject to the tax on that basis. The tax is also specifically imposed on all cigarettes sold on an Indian reservation to non-members of that particular Indian nation or tribe, and to non-Indians, and evidence of the tax is, as above, by means of an affixed cigarette tax stamp (Tax Law § 471 [1]). Tax exempt cigarette sales to qualified Indians for their own use and consumption on their qualified nations' or tribes' qualified reservation is provided for, per Tax Law § 471 (1), in accord with the explicit recognition that the State is without power to impose the tax upon such sales. To allow, and account for, such tax exempt sales, Tax Law § 471-e establishes an Indian tax exemption "coupon system," an elective mechanism by which Indian nations or tribes may obtain tax free cigarettes for their own use and for the personal use and consumption of their own qualified members on their own Nation or tribe's qualified reservation. If an Indian nation or tribe does not elect to participate in the coupon system, the "prior approval" system shall be the mechanism for the delivery of quantities of tax-exempt cigarettes to such nation or tribe for their use and for the personal use and consumption by qualified members of such nation or tribe (*Id.*, *see* Tax Law § 471 [5] [b]). Under either alternative, i.e., the coupon system or the prior approval system, the quantity of tax-exempt cigarettes is determined upon the probable demand of the qualified Indians on the nation or tribe's qualified reservation, plus the amount needed for official nation or tribal use (Tax Law §§ 471 [5] [b]), 471-e [2] [b]). The elective coupon system, in conjunction with the prior approval system, has been upheld as valid (*see Oneida Nation of New York v Cuomo*, 645 F3d 154, 164-65 [2d Cir 2011]).

E. It is undisputed on the record herein that the cigarettes seized by the State Police on December 3, 2012, and subsequently turned over to the Division, pursuant to the authority of Tax Law § 1846, were Native American manufactured and branded cigarettes that were initially

obtained by petitioner ERW Wholesale via purchase from Mountain Tobacco Company, d/b/a King Mountain Tobacco Company, Inc. The cigarettes were delivered, by common carrier, to ERW Wholesale's warehouse located on the Cattaraugus Reservation of the Seneca Indian Nation, and were not introduced into New York State by or through a sale to a licensed stamping agent. The cigarettes did not bear tax stamps, thus leaving King Mountain in violation of Tax Law § 471 (1) (*see State of New York v Mountain Tobacco Company, d/b/a King Mountain Tobacco Company, Inc.*, 2016 WL 3962992 [United States Dist. Ct., E.D. N.Y., July 21, 2016], 2-12-CV-6276 [JS] [SIL]; *motion for cert. to file interlocutory appeal* [Case # 0: 17-CV-03198, filed October 6, 2017, terminated December 8, 2017]) (*King Mountain*). In *King Mountain*, the Court stated as follows:

“[W]hile Section 471 permits the sale of unstamped cigarettes to licensed stamping agents who provide certifications that the cigarettes will not be resold in violation of Article 20, New York Tax Law § 471 (4) (a) - (b), it requires that ‘[a]ll cigarettes sold by agents and wholesalers to Indian nations or tribes or reservation cigarette sellers located on an Indian reservation must bear a tax stamp.’ (N.Y. Tax Law § 471 [2]). Thus, King Mountain violated Section 471 by admittedly failing to sell its unstamped cigarettes to licensed stamping agents. (*See City of N.Y. v Golden Feather Smoke Shop, Inc.*, No. 08-CV-3966, 2013 WL 3187049, at *27 [E.D.N.Y. Jun. 20, 2013] [Noting that agents are meant to be the sole point of entry for cigarettes and ‘[a]s a result, reservation retailers should theoretically no longer be able to obtain unstamped cigarettes.’]).”

The Court reached the foregoing conclusion notwithstanding that the cigarettes were Native American manufactured and branded, and were obtained by ERW Wholesale in a Native American to Native American, reservation to reservation, direct sale.

F. Having purchased and received the cigarettes without tax stamps affixed thereto, as required, it follows that prior to the December 3, 2012 seizure at issue herein, ERW Wholesale was in possession and control of unstamped cigarettes, and, therefore, was in violation of the

explicit provisions of Tax Law article 20. In turn, and also prior to December 3, 2012, ERW Wholesale sold the cigarettes to Oien’Kwa Trading, an Indian business located on the Akwesasne reservation, as described. ERW Wholesale also agreed, as part of the transaction, and for an additional, separately identified fee, to transport the cigarettes to Oien’Kwa Trading’s subsequent purchaser, Saihwahenteh, an Indian business located on the Ganienkeh territory, as a drop shipper for Oien’Kwa Trading (*see* Findings of Fact 6, 23 through 25; Exhibits WW, 4 and 5). These subsequent sales transactions would appear to be no less in violation of Tax Law article 20 than the initial transaction between King Mountain and petitioner ERW Wholesale. As noted, neither Oien’Kwa Trading nor Saihwahenteh were New York State licensed stamping agents (*see* Finding of Fact 6, footnotes 2, 3).

G. 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 . . .”¹⁵

H. 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

¹⁵ In this matter, the cigarette seizure upon which the penalties at issue are predicated occurred on December 3, 2012, and the notices of determination imposing such penalties were issued on December 16, 2014 (as to ERW Enterprises) and December 19, 2014 (as to ERW Wholesale). The penalties were computed at the maximum penalty rate allowed at the time of the seizures, i.e., \$150.00 per carton of unstamped cigarettes or fraction thereof. Between the date of the seizure and the dates of issuance of the notices of determination, the Legislature enacted an increase by which the maximum amount of penalty that could be imposed was raised, fourfold, to \$600.00 per carton of unstamped cigarettes or fraction thereof (*see* L 2013, c. 59, pt. O, § 1, eff. June 1, 2013).

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.” (emphasis added)

I. 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.” (emphasis added)

J. The penalty assessed and at issue in this matter is that imposed under Tax Law § 481 (1)

(b) (i), upon the premise that petitioners were in possession and control of 140 cases (8400 cartons) of unstamped cigarettes discovered and seized by the State Police, that such cigaretttes were presumably subject to tax per Tax Law §§ 471 (1) and 481 (2), and that their transport by petitioners was not lawful.

K. Petitioners maintain, first, that petitioner ERW Enterprises, a construction company,

was entirely uninvolved in the tobacco wholesale business operated by ERW Wholesale, and in the events at issue in this matter. ERW Enterprises notes that the cigarettes were sold and delivered directly to ERW Wholesale, and that all of the invoices and related documentary evidence surrounding the subject transactions (invoices for the sale to Oien’Kwa Trading and for the drop shipment to Saihwahenteh, and the bill of lading) identify only ERW Wholesale.

Petitioners argue that the only link between the cigarette transaction at issue here, and petitioner ERW Enterprises, arises from the use of a vehicle that was registered to ERW Enterprises and that was used, from time to time, to transport that entity’s construction items and materials.

Petitioners assert that the vehicle was mainly used in the tobacco business conducted by ERW Wholesale. Petitioners maintain that there was no “bleed over” between the two businesses (e.g., shared activities, common employees, regular common use of equipment and other assets).

Petitioners thus argue that the only connection to the transaction at issue rests upon the simple and undisputed fact that the vehicle involved was registered to ERW Enterprises, and that this basis is simply insufficient to support the imposition of the penalty in question against petitioner ERW Enterprises.

L. Petitioners argument that the mere use of the ERW Enterprises registered vehicle provides insufficient support to justify the imposition of penalty against ERW Enterprises is rejected. In fact, not only was the vehicle registered to ERW Enterprises, but it also bore an ERW Enterprises logo and DOT registration information on its sides. Further, the vehicle was admittedly used in both the wholesale tobacco business operated by ERW Wholesale, and in the construction business operated by ERW Enterprises, albeit allegedly to a greater degree by the former business and only “from time to time” by the latter entity (*see* Finding of Fact 15).

Moreover, this commercially registered vehicle was, in fact, packed full of unstamped cigarettes

for purposes of fulfilling delivery of the cigarettes sold and to be delivered by ERW Wholesale.¹⁶ As the Division points out, the transaction at issue (sale and delivery of the cigarettes as structured) could not have been accomplished without the involvement of both petitioners, to wit, ERW Wholesale was a necessary party as the owner and seller of the cigarettes, and ERW Enterprises was a necessary party by virtue of the fact that the only available commercially registered vehicle with the load capacity to carry out the delivery was in fact registered to that entity. Also, Mr. Webber, who performed the in-transit repairs to the vehicle, was identified as ERW Enterprise's in-house mechanic (*see* Finding of Fact 27). These undisputed facts militate against the claim that there was no "bleed over" with respect to the separate business activities in which the respective petitioners were engaged. In addition, Eric R. White was the sole owner of ERW Enterprises, and the sole owner and operator of Eric White d/b/a ERW Wholesale, and he was actively involved in the operation and control of each of such businesses. Petitioner ERW Enterprises essentially seeks the liability insulation afforded to separate entities as a result of their status as such, yet its actions are inconsistent with such a claim, and fail to establish that petitioners acted in a manner that respected such separation. Under all of these factors, it cannot be said that the entities involved observed the requisite formalities pursuant to which petitioner ERW Enterprises might legitimately claim it was, as a separate entity, improperly being subjected to the penalty at issue herein.

M. Turning to the main issue presented, petitioners' arguments, stripped to their bare essence, all fall within the following rubric: Native American manufactured cigarettes may be

¹⁶ This fact was not only confirmed by the examination (search and seizure) by the State Police at the time of the stop, but was discernable even without such intervention by virtue of the information set forth on the various invoices and the bill of lading accompanying the shipment, each of which identified the load as tax exempt cigarettes (*see* Findings of Fact 23 through 25, and 46).

sold and moved on, among and between Native American reservations, territories, businesses and purchasers, without obtaining cigarette tax stamps or otherwise imposing, collecting or remitting the New York State tax imposed under Tax Law article 20 on all cigarettes sold within New York State (other than those cigarettes sold to Indians for their own use and consumption on their nation or tribe's qualified reservation). In support of this effectively tax free business model, premised upon the foregoing, petitioners have argued that the transactions underlying the seizure and imposition of penalty against them arise within the context of an entirely Indian (a nation to nation, or reservation to reservation) event. On this score, it is undisputed that the cigarettes in question were Indian manufactured and were sold by the manufacturer (King Mountain in Yakama, Washington), to an Indian purchaser (ERW Wholesale), with direct delivery made to ERW Wholesale, by common carrier (at the Cattaraugus reservation in western New York). Petitioners maintain that this sale, by which ERW Wholesale initially and directly received the unstamped cigarettes, as well ERW Wholesale's subsequent sale of the cigarettes to Oien'Kwa Trading (and Oien'Kwa's sale thereafter to Saihwahenteh), as described, were each Native to Native, or reservation to reservation transactions, and that such sales are beyond the reach of New York State's power to impose taxes and penalties. Petitioners present various arguments in this respect that rely upon claims of Native American sovereignty, Indian to Indian commerce, alleged inconsistency with Indian Law § 6 and a variety of related treaties, and an infringement upon the value added to Native manufactured goods with a resulting decrease in benefits to Native Americans. Petitioners argue that although the cigarettes were unstamped (and hence untaxed) at all times from their entry into New York they were, when seized on December 3, 2012, merely "in transit" between two Native American reservations or territories, were therefore not taxable, and did not need to bear tax stamps. Finally, petitioners have also noted the

Division's undisputed policy of forbearance regarding the imposition and enforcement of taxes and penalties with regard to the sale and transport of Native American brand cigarettes between Native American territories or reservations.

N. All packs of cigarettes to be sold in New York are required to bear tax stamps. The Tax Law sets forth no exception or exemption from this requirement for cigarettes that are only "in transit" or "passing through" New York State while en route between two Native American reservations or territories that are located within the geographic bounds of New York State. Tax Law § 471 (1) explicitly recognizes that sales for use or consumption by qualified Indian Nations or tribes, and their own qualified members are not subject to the tax. This exemption from the cigarette tax is implemented and carried out by the exempt coupon and prior approval provisions of Tax Law article 20. However, the exempt coupon and prior approval systems do not provide relief from the requirement that all cigarettes in New York State must bear tax stamps, but rather serve only to allow for nontaxability upon sales made in accordance with the provisions of these systems (*see* Tax Law §§ 471-e, 471 [5]). Thus, there is nothing explicit in the Tax Law in support of petitioners' general Native to Native exemption claims.

O. In addition, petitioners' position is belied by case law (*see King Mountain; see also Wagon v Prairie Band Potawatomi Nation*, 546 US 95, 112 [2005] [tribal sovereignty is limited by and construed against the geographical component of tribal sovereignty]; *Washington v Confederated Tribes of Colville Reservation*, 447 US 134, 160 [1980] [upholding the imposition of tax on all cigarettes sold on an Indian reservation to non-members of the reservation and to non-Indians]; *White v Schneiderman*, 140 AD3d 1636 [4th Dept 2016], *mot for lv to appeal denied*, 142 Ad3d 1402 [4 Dept 2016], *mot for lv to appeal granted*, 28 NY3d 1170 [2017] [requirement to prepay tax on all cigarettes to be sold on reservations does not

violate Indian Law § 6 and related treaties]; *see also Oneida Nation of New York v Cuomo* [upholding coupon system and prior approval system as valid method of assuring tax is not imposed on cigarette sales that are beyond the State’s power to tax]). Furthermore, the argument that cigarette sales between reservations or territories located within the geographic boundaries of New York State do not occur within the State, but merely pass through the State for delivery purposes, and are thus beyond the reach of Tax Law article 20, is rejected as inconsistent with related and analogous precedent (*see NY State Dept of Taxation and Finance v Tyler Distribution Centers*, 225 AD2d 936 [3d Dept 1996] [“the suggestion that the St. Regis reservation is not ‘within the state’, and concomitantly that the transportation of liquor thereto is akin to shipment through, but not into, New York, is patently sophistic.”]).

P. Petitioners have also argued that on the date of the stop, search and seizure, they were merely lawfully transporting unstamped Native brand cigarettes from one Native American territory (the Cattaraugus Reservation) directly to another Native American territory (Ganienkeh) on behalf of Oien’Kwa Trading, a Native American owned business, as a drop shipment contract carrier.¹⁷ Petitioners point out that Tax Law § 481 (2) (b) exempts a contract carrier from the penalty imposed pursuant to Tax Law § 481 (1) (b) (i). The Division, in contrast, maintains that petitioners are not entitled to the exemption afforded by Tax Law § 481 (2) (b) because they do not satisfy the statutory requirements of such section. It asserts that petitioners were not engaged in the lawful transportation of unstamped cigarettes because neither petitioner was a New York

¹⁷ While ultimately not necessary for the resolution of this case, there remains some question as to whether the transaction at issue in fact constituted a reservation to reservation or territory to territory transaction. In this regard, the cigarettes were destined for delivery to an Indian retailer, Saiwahenteh, located on the lands denominated as Ganienkeh. The status of Ganienkeh as an Indian reservation or territory, as defined and recognized, as opposed to a group of persons, the majority of whom are Mohawk (*see* finding of Fact 9) occupying the described lands as a licensee of the Turtle Island Trust remains unclear, notwithstanding that New York State may be said to have acted to cloak Ganienkeh with reservation status, at least in practice, and that the inhabitants of such land consider the same to be an Indian territory (*see* Findings of Fact 6 through 13).

State licensed agent or distributor, and that petitioners were not lawfully transporting the unstamped cigarettes as a common or contract carrier on behalf of a New York State licensed agent or distributor.

Q. Tax Law § 481 (2) (b) provides an exemption from the penalty at issue herein for common and contract carriers engaged in lawfully transporting unstamped packages of cigarettes as merchandise. This provision does not 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. Since the statute and the regulation do not mention any such license requirements, the statute must be read to extend the exemption to all carriers, licensed or not. In fact, a carrier may transport unstamped cigarettes on behalf of a licensed agent. Furthermore, the term “lawfully transporting” does not mean the carrier must be transporting stamped cigarettes. Indeed, for the exemption to be triggered, the contract carrier or common carrier must first be found to be transporting unstamped cigarettes.

R. As noted, the cigarettes in question were unstamped when they were received by ERW Wholesale, and remained unstamped when they were, in turn, resold by ERW Wholesale to Oien’Kwa Trading. Notwithstanding that the cigarettes were thus possessed and sold by ERW Wholesale in violation of Tax Law § 471, petitioners would seek to avoid the penalty assessed here by their claim of having stepped into the shoes of a contract carrier allegedly transporting the unstamped cigarettes in a lawful manner. The record supports the claim that ERW Wholesale was acting as a contract carrier in transporting the cigarettes for Oien’Kwa Trading. Mr. Clark, ERW Wholesale’s operations manager, credibly testified that ERW Wholesale, in the regular course of its business, provides drop shipment services for compensation (*see* Finding of Fact 6).

In addition, the agreement entered into between ERW Wholesale and Oien’Kwa Trading for the transportation of the cigarettes to the Ganienkeh territory is verified by ERW Wholesale’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 24).¹⁸

S. Public Health Law § 1399-II provides, in relevant part:

“1. It shall be unlawful for any person engaged in the business of selling cigarettes to ship or cause to be shipped any cigarettes to any person in this state who is not: (a) a person licensed as a cigarette tax agent or wholesale dealer under article twenty of the tax law or registered retail dealer under section four hundred eighty-a of the tax law; For purposes of this subdivision, a person is a licensed or registered agent or dealer described in paragraph (a) of this subdivision if his or her name appears on a list of licensed or registered agents or dealers published by the department of taxation and finance, or if such person is licensed or registered as an agent or dealer under article twenty of the tax law.

2. It shall be unlawful for any common or contract carrier to knowingly transport cigarettes to any person in this state reasonably believed by such carrier to be other than a person described in paragraph (a), (b) or (c) of subdivision one of this section.”

Significantly, both the Tax Law and Public Health Law § 1399-II use the generic term “cigarettes,” and neither makes reference to, or draws any distinction upon the basis of, the manufacturer or brand of cigarette involved, i.e., Native versus non-Native manufactured brands of cigarettes (*Id.*, *see* Conclusions of Law D and E).

T. It is undisputed that the cigarettes in question were sold to petitioner ERW Wholesale by King Mountain, leaving petitioner in possession and control of such unstamped cigarettes

¹⁸ Among other considerations in this regard, there is no argument or supporting evidence upon which to conclude that the fee charged by ERW Wholesale for transporting the cigarettes was so unreasonably or comparatively low that it should be viewed as simply a part of the selling price of the cigarettes, and served merely as “window dressing” for petitioners’ claim of contract carrier status, under which circumstances the carrier exemption under Tax Law § 481 (2) (b) would not be available and would leave petitioners clearly liable for the penalty under § 481 (1) (b) (i).

upon the basis of that sale. Hence, it follows that petitioner was in violation of Tax Law § 471 at that point in time. Thereafter, petitioner ERW Wholesale, a person engaged in the business of selling cigarettes, and in possession of the untaxed cigarettes in question, sold them to Oien’Kwa Trading, and agreed to transport the same to Saihwahenteh. Thus, petitioner ERW Wholesale both caused the cigarettes to be shipped and in fact, together with petitioner ERW Enterprises, carried out such shipping. There is no evidence or argument that Saihwahenteh was licensed or registered as required under Public Health Law § 1399-II (1) (a), such that the transport of the cigarettes in question could be a “lawful” transport under either Public Health Law § 1399-II (1) or (2). As a result, petitioners’ cannot qualify for the penalty exception set forth at Tax Law § 481 (2) (b), which requires that the common or contract carrier be engaged in the lawful transport of unstamped cigarettes as merchandise. Given that ERW Wholesale was the initial purchaser and recipient of the unstamped cigarettes, and was subsequently the seller and (with petitioner ERW Enterprises) the transporter of the unstamped cigarettes, petitioners cannot reasonably make a claim that they were not “knowingly transporting” unstamped cigarettes to persons other than those identified under the Public Health Law (and the Tax Law) as lawful recipients (*see The State of New York et al. v United Parcel Service, Inc.*, No 1: 2015 cv 01136 [KBF], Document 526, pp. 162-165, S.D.N.Y, March 24, 2017, Forrest, J.). Accordingly, petitioners’ claim for relief under Tax Law § 481 (2) (b) is rejected.

U. Petitioners also note and seek relief under the Division’s policy of enforcement forbearance regarding the seizure of untaxed Native American manufactured cigarettes being transported from one reservation in New York State to another reservation in New York State, as articulated in the July 6, 2011 Ernst email (*see* Finding of Fact 22). Petitioners also reference the May 16, 2011 letter from State Senators Maziarz and Kennedy, in support of their arguments

in this vein (*see* Finding of Fact 22, footnote 6). The Division's undisputed prior forbearance policy was in place at the time when injunctions barring the enforcement of certain 2010 amendments to the Tax Law (L. 2010, c 134, pt D) were in effect. That policy of forbearance remained in effect pending the outcome of challenges to the elective alternative exempt coupon system and prior approval system under Tax Law §§ 471-e and 471 [b] [5], as impacted by such amendments. The Ernst email essentially articulates that policy at the point in time when those injunctions had only recently been removed (*see Oneida Nation of New York v Cuomo*). In *Matter of Laughing* (113 AD3d 956 [3d Dept 2014]), involving a 2012 indictment premised upon a State Police seizure of unstamped cigarettes in St. Lawrence County, the Court acknowledged the Division's policy of forbearance, and stated that “. . . at the time [the indictment for possession or transportation of unstamped cigarettes] was lodged against the defendant, and at present, the taxability by New York of [Native American manufactured cigarettes being transported between reservations] lacked clarity.” However, the Court further observed the following: “[t]o be sure, the policy of the Department and the issues surrounding the Division's actual enforcement of the Tax Law with respect to Native American manufactured cigarettes may very well be found *insufficient* to justify dismissal of [an indictment for possession or transportation of unstamped cigarettes] in the interest of justice” (emphasis added). This latter observation is fully consistent with the maxim that 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]). Similarly, the May 16, 2011 letter from Senators Maziarz and Kennedy, while consistent with petitioners' position herein, is inconsistent with Tax Law § 471, as then-recently amended (L. 2010, c 134, pt D), and with subsequent case law addressing such amendments (*see Oneida Nation of New York v Cuomo*). Accordingly, the Ernst email and the

letter from Senators Maziarz and Kennedy do not bar the Division's actions in this case, or serve to nullify the result herein.

V. Petitioners have also argued that the penalties at issue should be canceled as constituting excessive fines under the Eighth Amendment to the U.S. Constitution, and the New York State Constitution (Art. 1, § 5), and as resulting from a search and resulting seizure of property in violation of the Fourth Amendment to the U.S. Constitution, and the New York State Constitution (Art. 1, § 12).

W. The excessive fines clause “limits the government’s power to extract payments, whether in cash or in kind, as ‘*punishment* for some offense’” (*Austin v United States*, 509 US 602, 609-610 [1993] [emphasis added, citation omitted]). Cash payments are thus fines for purposes of the clause “if they constitute punishment for an offense” (*United States v Bajakajian*, 524 US 321, 328 [1998]). In the context of a civil forfeiture proceeding following a criminal conviction, the Court of Appeals has held that where such a 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, 139-140, 770 NYS2d 277 [2003] citing *Austin v United States*, 509 US at 619-622; *United States v Bajakajian*, 524 US at 328-329).

The penalty amount in this case was computed and imposed according to and in compliance with the terms of Tax Law § 481 (1) (b) (i), as in effect on the December 3, 2012 date in question (*see* Finding of Fact 57). Petitioners’ Eighth Amendment arguments based on the actual computation and imposition of the penalty in this regard present a challenge to the facial validity of the statutory provision itself. Since statutes are presumed to be constitutional at the administrative level, this forum is without jurisdiction to address this aspect of petitioners’

excessive fines argument (*see Matter of Bucherer, Inc.*, Tax Appeals Tribunal, June 28, 1990; *Matter of A&A Serv. Sta., Inc.*, Tax Appeals Tribunal, October 15, 2009).

This forum does, however, have jurisdiction to consider whether the application of a statute to a particular set of facts is unconstitutional (*see Matter of Eisenstein*, Tax Appeals Tribunal, March 27, 2003; *Matter of David Hazan, Inc.*, Tax Appeals Tribunal, April 21, 1988, *confirmed sub nom Matter of David Hazan, Inc. v Tax Appeals Trib. Of State of N.Y.*, 152 AD2d 765 [3d Dept 1989], *affd* 75 NY2d 989 [1990]). The balance of petitioners' Eighth Amendment arguments appear to set forth such an "as applied" challenge. That is, petitioners claim the Division simply imposed the penalty in this case at the maximum allowable amount, without any consideration toward exercising the discretion vested in the Commissioner of Taxation under the statute concerning the appropriateness of the amount of the penalty, i.e., the Commissioner *may* impose a penalty of *not more than* \$150.00 per carton of unstamped or unlawfully stamped packages, per Tax Law § 481 (1) (b) (i). In short, petitioners assert that the Division could (and should) have considered imposing a penalty of less than \$150.00 per carton, in view of the circumstances, but did not. Petitioners assert that the Division appears to assess the maximum penalty in all cases, notwithstanding the foregoing authority to exercise discretion with respect to such amount (*see* Finding of Fact 57). Petitioners maintain that this apparent failure to even consider the exercise of such vested discretion, in view of the particular facts of a given case, is an abuse of that discretion, and in this case resulted in an excessive penalty. Petitioners bear the burden of proving that the Division's application of the statute under the facts of this case was unconstitutional as resulting in an impermissibly excessive fine (*Matter of Brussel*, Tax Appeals Tribunal, June 25, 1992).

A fine is excessive under the Eighth Amendment if it is "grossly disproportional to the

gravity of the defendant's offense" (*United States v Bajakajian*; *see also County of Nassau v Canavan*). In support of their excessive penalty argument, petitioners note first that the amount of the penalty imposed against each of the petitioners was significantly greater than the stated untaxed value of the cigarettes (\$164,250.00), and was likewise significantly greater than the value of the tax not collected and remitted thereon (\$391,500.00).¹⁹ Petitioners also note that the same amount of penalty was imposed against a number of other entities and against one other individual (*see* Finding of Fact 59).

The Tax Appeals Tribunal has addressed the generic issue of whether the imposition of the maximum penalty under Tax Law § 481 (1) (b) was excessive. In *Matter of Bayridge Supermarket* (Tax Appeals Tribunal, January 2, 2003), the Tribunal found that, based upon the petitioner's "conduct in repeatedly acting in contravention of the Tax Law, we find that the penalties imposed are appropriate." In *Matter of Fakhouri* (Tax Appeals Tribunal, July 5, 2007), the Tribunal, relying on its decision in *Matter of Vinter* (Tax Appeals Tribunal, September 27, 2001, *appeal dismissed Matter of Vinter v Comm'r of Taxation & Fin.*, 305 AD2d 738, 757 NYS2d 911 [3d Dept 2003]), upheld the imposition of penalties at the maximum allowable rate, stating that, since "there are no statutory guidelines for the exercise of the Commissioner's discretion in imposing a penalty pursuant to Tax Law § 481(1)(b) . . . it is not necessary for the Division to have considered any mitigating factors prior to the imposition of the penalty at issue since this is neither mandated by statute nor regulation."

As concluded earlier, petitioners' actions properly authorized the Division to impose the penalty in question. At the same time, there was no criminal charge brought, and hence no

¹⁹ Calculated at the rate of \$4.35 per pack upon the 90,000 packs of unstamped cigarettes (or \$43.50 per carton upon the 9000 cartons each containing 10 unstamped packs of cigarettes) in the possession of ERW Wholesale and loaded for delivery to Saihwahenteh without tax stamps having been affixed thereto.

resulting criminal penalty in the form of a fine was levied with respect to petitioners' conduct. As a general initial consideration, this fact militates against a conclusion that the penalty imposed herein could be considered excessive as an additional (duplicative) penalty. The Tribunal has also noted that an earlier increase in the amount of the maximum penalty under Tax Law § 481 (1) (b), from \$100.00 per carton to \$150.00 per carton, pursuant to Laws of 2000 (ch 262), was intended "to be a more effective deterrent against cigarette smuggling" (*Matter of Bayridge Supermarket*). In the present matter, it follows that such \$150.00 per carton maximum penalty under Tax Law § 481 (1) (b) (I), was intended, in fact, to serve, at least in part, a deterrent purpose.

Petitioners have failed to show that the subject penalties are in fact so grossly disproportional as to violate the Eighth Amendment. Petitioners' arguments must be balanced against the costs of enforcement aimed at detecting and deterring activities involving bootlegging of contraband cigarettes, in light of the lost tax revenue resulting therefrom, and in consideration of the well-documented deleterious health consequences and costs associated with tobacco usage. The government's interest in deterring such activities and consequences is not insignificant. The \$150.00 per carton penalty amount is approximately 3.5 times greater than the \$43.50 per carton cigarette tax imposed pursuant to Tax Law § 471 (1). 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 at 446 ["The government is entitled to rough remedial justice, that is, it may demand compensation according to somewhat imprecise formulas"]). Furthermore, the potential tax revenue loss to the State resulting from the sale of unstamped or illegally stamped cigarettes is undoubtedly significant. Under such circumstances, and

considering that petitioners incurred no criminal penalties, it cannot be fairly said that the penalties imposed in this matter are grossly disproportional to the activities in which petitioners were admittedly engaged, so as to be considered excessive under the Eighth Amendment.

Finally, during the legislative session that immediately followed the year of the seizure herein at issue, the Legislature saw fit to increase the amount of the penalty by a fourfold factor, from \$150.00 to \$600.00 per carton of unstamped cigarettes (*see* Conclusion of Law G, footnote 15). At a minimum, this essentially contemporaneous penalty amount increase casts significant doubt on whether the amount of the penalty assessed herein, though computed at the maximum allowable statutory amount of \$150.00 per carton at the time of the seizure, can reasonably be considered grossly disproportional to the noted detection and enforcement costs and the Legislature's clearly intended deterrent value to be derived from the penalty.

X. Finally, petitioners also challenge the validity of the warrantless search, and the resulting seizure of the unstamped cigarettes discovered as a result thereof. As an initial matter, there appears to be no serious contention that the State Police were precluded from opening the back of the van to view the contents therein, in order to verify that the load was safely positioned and secured (*see* Finding of Fact 41). While access was achieved by cutting the padlock, as described, that action followed a request for the key to the padlock, Mr. Snyder's inability to locate the same, and his answer "whatever" when advised that the lock would be cut. Under such circumstances, cutting the lock was not unreasonable. It is also clear that the Tax Law specifically anticipates and allows for warrantless searches of commercial premises where cigarettes are located and stored, including in vehicles (*see* Tax Law § 474 [4]). In this case, the documents available and provided to the State Police at the time of the stop, clearly indicated that the cargo was cigarettes, and that the same were claimed to be tax exempt. At the same time, the

address from which the cigarettes were being transported as well as the address to which the cigarettes were destined for delivery, on such documents, were both listed as addresses in New York State, giving rise to a reasonable question as to the basis upon which exemption might legitimately be claimed. There was no indication that the cigarettes were being transported on behalf of a licensed agent or dealer. Further, even if such cigarettes were denominated as exempt because they were destined for consumption by Native Americans on their own qualified reservations, such cigarettes were nonetheless required to bear tax stamps under the exempt coupon system or prior approval system (*see* Tax Law § 471 [2]). Accordingly, the State Police had reasonable basis to open a case of cigarettes, and remove and open a carton of cigarettes therefrom, so as to determine whether the cigarettes bore the requisite tax stamps. The main purpose of the commercial vehicle safety inspection was to confirm that the vehicle was traversing the road in a fit and safe manner. Under the circumstances of this case, where a commercial vehicle initially fails to stop for inspection, as required, and thereafter is forced to stop, at which time the documents presented reveal the potential that contraband cigarettes are being transported, the scope of the State Police authority to verify the possession and transport of unstamped cigarettes, as occurred here, clearly falls within range of allowable activities. As such, the actions of the State Police in opening the cases and cartons are not properly viewed as merely exploratory in nature, but rather were confirmatory actions undertaken in view of the information presented at the time. Therefore, petitioners' arguments that the penalties must be canceled because their imposition rests on the results of a prohibited search and seizure are rejected.

Y. The petitions of ERW Enterprises, Inc., and Eric White d/b/a ERW Wholesale are hereby denied, and the notices of determination, dated December 16, 2014 and December 19, 2014, respectively, are sustained.

DATED: Albany, New York
March 15, 2018

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE