

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
SHAWN E. SNYDER	:	ORDER
for an Award of Costs Pursuant to Article 41, § 3030	:	DTA NO. 825785
of the Tax Law for the Period ended December 3, 2012.	:	

Petitioner, Shawn E. Snyder, filed a petition for revision of a determination or for refund of cigarette tax under article 20 of the Tax Law for the period ended December 3, 2012.

Administrative Law Judge Winifred M. Maloney issued a determination on June 22, 2017, which granted the petition of Shawn E. Snyder and canceled the notice of determination dated December 20, 2012.

On August 18, 2017, petitioner, appearing by Lipsitz Green Scime Cambria LLP (Jeffrey F. Reina, Esq., of counsel) filed an application for costs pursuant to Tax Law § 3030. The Division of Taxation, appearing by Amanda Hiller, Esq. (Brian Evans, Esq., of counsel) filed an affirmation in opposition on September 18, 2017. By leave granted to October 18, 2017, petitioner filed the reply affidavit of his representative, Jeffrey F. Reina, dated October 13, 2017, in further support of his application for costs. The 90-day period for issuance of this order commenced on October 18, 2017.

Based upon petitioner's application for costs and accompanying documentation,¹ the

¹ The accompanying documentation consisted of the affidavit of Shawn E. Snyder, with exhibit attached; the affidavit of Patrick J. Mackey, with exhibits attached; the affidavit of Jeffrey F. Reina, with exhibits attached; the affidavit of Joseph J. Gumkowski, with exhibits attached; and Petitioner's Memorandum of Law in Support of His Application for Administrative Costs and Litigation Costs.

Division of Taxation's response to the application, petitioner's reply, the determination issued June 22, 2017, and all pleadings and documents submitted in connection with this matter, Winifred M. Maloney, Administrative Law Judge, renders the following order.

ISSUE

Whether petitioner is entitled to an award of costs pursuant to Tax Law § 3030.

FINDINGS OF FACT

1. On December 20, 2012, the Division of Taxation (Division) issued to petitioner, Shawn E. Snyder, a notice of determination, bearing audit identification number X-285525204-7,² that asserted penalty due in the amount of \$1,259,250.00 pursuant to Article 20 of the Tax Law. The Computation Section of the notice stated that:

“[o]n 12/03/12, you were found to be in possession and/or control of unstamped or unlawfully stamped cigarettes, and/or untaxed tobacco products. Therefore, penalty is imposed under Article 20 of the New York State Tax Law.

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

2. Petitioner, a member of the Seneca Nation of Indians,³ resides at Route 438, Gowanda, New York. On the date of the cigarette seizure at issue, petitioner was an employee of Eric White d/b/a/ ERW Wholesale. As an employee of ERW Wholesale, petitioner traditionally delivered cigarettes to Indian territories located within the Western New York area. At the time of the cigarette seizure, petitioner was 22 years old.

3. ERW Wholesale, a tobacco wholesale business solely owned by Eric R. White, is located on the Cattaraugus Reservation of the Seneca Nation of Indians. Mr. White holds a

² No assessment identification number appears on this notice of determination.

³ The Seneca Nation of Indians is recognized by the United States Bureau of Indian Affairs (BIA).

business license issued by the Seneca Nation of Indians that permits him to operate as a tobacco wholesaler under the name ERW Wholesale. Under this business license, Mr. White is also entitled to warehouse tobacco products, and to deliver tobacco products to Native vendors.

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

5. Dwayne Clark is employed by Mr. White and his multiple businesses as controller or operations manager. With respect to ERW Wholesale, Mr. Clark is the operations manager, which position entails "handling the day-to-day operations of the company, processing, overseeing orders getting processed, overseeing trucks loaded, [and] [sic] overseeing employees." Mr. Clark was ERW Wholesale's operations manager on December 1, 2012.

6. On or about December 1, 2012, ERW Wholesale received an order from Oien'Kwa Trading⁴ for its purchase of 9,000 cartons (150 cases) of assorted types of cigarettes to be shipped to Saihwahenteh, a Native American owned business located on the Ganienkeh territory in Altona, New York.⁵ The total purchase price for the 9,000 cartons of cigarettes ERW Wholesale sold to Oien'Kwa Trading was \$164,250.00.

7. ERW Wholesale agreed to perform a "drop shipment," which means that it agreed to transport the cigarettes from the Cattaraugus Reservation to the Ganienkeh territory as a transporter for Oien'Kwa Trading. ERW Wholesale charged Oien'Kwa Trading a delivery fee of \$2,250.00 (\$.25 per carton) for delivering the cigarettes to the Ganienkeh territory. According to

⁴ Oien'Kwa Trading is a Native American owned business located on the St. Regis Mohawk Reservation in Akwesasne, New York. The St. Regis Mohawks are recognized by the BIA.

⁵ Subsequent to purchasing the cigarettes from ERW Wholesale, Oien'Kwa Trading sold the cigarettes to Saihwahenteh.

Mr. Clark, delivery fees imposed by ERW Wholesale for drop shipments vary based upon the distance the cigarettes are transported.

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

9. Mr. Clark oversaw the processing of the order on December 1, 2012. On that date, petitioner helped load a total of 150 cases of King Mountain cigarettes onto the truck⁶ he was to drive to Ganienkeh. None of the cases were open when they were loaded onto the truck. Each case of cigarettes, a cardboard box holding 60 cartons of cigarettes, was sealed before it was loaded onto the truck. Because each case was sealed, it was not possible to see the cartons of cigarettes stored in the cases without physically opening the cases. After the order was processed, Mr. Clark put a seal on the back of the truck. Mr. Clark could not recall if the seal was affixed before or after the padlock was secured to the back door of the truck.

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

⁶ The truck, a 1999 Ford white box truck with a roll-up rear door, is owned by Mr. White. This commercial vehicle was registered to ERW Enterprises, Inc., one of Mr. White's businesses. Mr. White uses the truck for ERW Wholesale's business, and to transport materials for his construction business.

card, and a white packet prepared by ERW Wholesale. The white packet contained, among other documents, a Seneca Nation of Indians Stamping Agent License, issued by the Seneca Nation Import-Export Commission on March 20, 2012, to “John Waterman d/b/a - Iroquois Wholesale”; a “[t]o whom it may concern” letter, dated August 13, 2012, from Geraldine Huff, Deputy Clerk, Seneca Nation of Indians, advising that “Mr. John Waterman of Iroquois Wholesale holds a valid Seneca Nation Business License as a Tobacco Wholesaler”; a Seneca Nation of Indians Business License, that permitted John Waterman to operate as a tobacco wholesaler, “Iroquois Wholesale,” from August 16, 2011 through August 10, 2012; a letter dated May 8, 2012, from the Seneca Nation of Indians Import-Export Commission, indicating that Mr. Waterman’s license as a stamping agent of the Seneca Nation had been approved for the one-year period of May 10, 2012 through May 9, 2013; a Seneca Nation of Indians Business License permitting Eric R. White to operate as a tobacco wholesaler, “ERW Wholesale,” from April 9, 2012, through January 14, 2013; and a copy of a July 6, 2011 email forwarded by Peter Persampieri to the Division’s “CID Investigators; CID supervisors” on the same date.⁷

11. The record includes copies of ERW Wholesale’s invoices No. 11 and No. 12, issued to Oien’Kwa Trading regarding its purchase of various quantities of six types of cigarettes, a total of 9,000 cartons, to be shipped to Saihwahenteh.⁸ Review of the invoices indicates that the top third of both invoices contained seven preprinted columns, including columns labeled “JOB”; “SHIPPING METHOD”; and “PAYMENT TERMS,” under which the following information

⁷ 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.”

⁸ Saihwahenteh’s complete address and telephone number is listed next to “SHIP TO” on both invoices.

was provided “SHIPPING CHARGE”; “ERW”; and “PER AGREEMENT,” respectively. With respect to the cigarettes purchased by Oien’Kwa Trading for shipment to Saihwahenteh, Invoice No. 11 provided, in relevant part, as follows:

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

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

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

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

third of invoices No. 11 and No. 12, and the balance of the Bill of Lading contains only the information regarding the quantity, item number and description of the cigarettes as detailed in the above invoices. There is no information on the Bill of Lading which indicates that petitioner was transporting King Mountain cigarettes.

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

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

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

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

17. On December 2, 2012, at around 7:00 p.m., the truck petitioner was driving experienced a flat tire while he was exiting Interstate 90 (I-90) near the Turning Stone Casino. After pulling over to the side of the road, exiting the truck, and observing that the right front tire was shredded, petitioner called Mr. Clark, his supervisor at ERW Wholesale, for help. Mr. Clark tried contacting a local repair shop, but he was unsuccessful because it was late on a Sunday.

After speaking by telephone with Mr. White, who was on Long Island helping with post-Hurricane Sandy clean up, Mr. Clark contacted Michael Webber, ERW Wholesale's in-house repairman, to help petitioner. Mr. Webber drove from the Cattaraugus Reservation and met with petitioner on December 2, 2012. Although Mr. Webber brought tools to replace the flat tire on the truck, he was only able to perform a temporary fix because the wheel bearing was damaged as well. After making the temporary repair, petitioner and Mr. Webber drove the truck a short distance to the local Holiday Inn and stayed overnight until December 3, 2012.

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

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

⁹ 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.

20. On December 3, 2012, Trooper Stephen Posada was on routine patrol of I-87, northbound, in the town of Peru. At 2:10 p.m., Trooper Posada observed a white box truck, driven by petitioner, fail to stop at the commercial vehicle inspection station (inspection station), northbound in the town of Peru. At that point, Trooper Posada initiated a vehicle and traffic stop of the truck on or about 2:13 p.m. He radioed the Commercial Vehicle inspectors at the northbound inspection station that he had stopped a drive-by just north of their location. They advised Trooper Posada to let them know what he had. After approaching the truck, Trooper Posada asked petitioner for his license and the vehicle registration. He also asked what the load was. Petitioner gave Trooper Posada his driver's license, the truck's registration, the bill of lading, and the two invoices, and stated that he was transporting cigarettes. Petitioner also told Trooper Posada that he was transporting the cigarettes to the Ganienkeh territory. Trooper Posada instructed petitioner to follow him to the commercial vehicle checkpoint inspection station located on I-87 southbound. However, because petitioner was very nervous and was unable to follow Trooper Posada's directions regarding how to get to the southbound inspection station, Trooper Posada radioed back to the Commercial Vehicle inspectors to let them know that he had a commercial vehicle stopped, and that he needed assistance escorting the truck back to the inspection station. Within a few minutes, Trooper Spadaro arrived at the vehicle stop and assisted Trooper Posada in escorting petitioner to the southbound inspection station located in Peru, New York.

21. Upon arriving at the inspection station, Trooper Posada gave the bill of lading and the invoices to the State Police investigator on duty, Joel Revette. Trooper Posada informed Investigator Revette that petitioner was transporting cigarettes to Ganienkeh and stated that he believed the cigarettes did not bear tax stamps. Then, Trooper Posada issued a uniform traffic

ticket, number 1B88CMFSP, to petitioner. The ticket issued to petitioner provided that the violation committed by petitioner was “Disobeyed Traffic Control Device.” Thereafter, Trooper Posada gave petitioner’s driver’s license and the truck’s registration to Trooper Spadaro.

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

23. After a five or six minute discussion with petitioner, Investigator Revette contacted his supervisor, Lieutenant Scott Heggelke, and informed him that a truck had been stopped for passing a safety inspection station and that he believed the cigarettes petitioner was transporting were unstamped. When Investigator Revette first spoke with Lieutenant Heggelke, he only assumed that the cigarettes did not bear tax stamps. Lieutenant Heggelke responded that he would make some telephone calls and call Investigator Revette back.

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

25. The Driver/Vehicle Examination Report prepared by Trooper Spadaro provides that petitioner was charged with the following violations: (i) “Fail to Obey Traffic Controll [sic] Device Driver Fails to Stop at I-87 Valcour Northbound Inspection Site”; (ii) “ABS Malfunction

Indicators for HYDR Brake Sys - ABS Indicator Light remains on as Vehicle is Running”; and (iii) “Inadequate Rear Object Detection Device Not Properly Adjusted (Rear View Mirror).”¹⁰

The Driver/Examination Report also listed the “Cargo” as “CIGARETTES,” and “HazMat” “NO HM TRANSPORTED.” According to the Driver/Examination Report, the vehicle safety inspection conducted by Trooper Spadaro commenced at 2:20 p.m. and ended at 3:06 p.m. When the safety inspection concluded at 3:06 p.m, the back of the truck had not yet been inspected.

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

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

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

29. According to Investigator Revette, Trooper Posada was permitted to cut off the padlock and open the back door of the truck because safety inspectors are permitted to check the safety of a truck’s load, determine how it is placed and identify the content of the load.

30. In his notes, Investigator Revette wrote that upon opening the back door of the truck, he “observed many full cases of cigs - nothing unusual.” At the hearing, Investigator Revette

¹⁰ 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.

admitted that the content of the cases, i.e., cigarettes, could be determined by reading the information provided on the outside of the cases.

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

32. Petitioner's Exhibit 6 consists of two photographs. The first photograph depicts the cases of cigarettes that were found in the back of the truck petitioner was driving. Although some of the cases in the picture are open, all of the cases were sealed when the back door of the truck was first opened.

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

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

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

36. Nobody from the State Police contacted petitioner's attorney to tell him that they were going to cut the padlock off the back door of the truck and open the cases of cigarettes being stored on the truck.

37. The outside portion of the cases did not provide whether the cigarettes were stamped. At no time during the stop or inspection did anyone ask petitioner if the cigarettes in the truck

bore tax stamps. The only way to confirm if the cigarettes in the cases bore tax stamps was to open a sealed case and view the cigarette packs in the cartons.

38. After opening a case of cigarettes, Investigator Revette opened a carton and pulled out a pack of cigarettes. Upon removing the cigarette pack from the carton, Investigator Revette claimed that there were no tax stamps on the cigarettes.

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

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

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

42. The State Police were unsure if they should seize the cigarettes because on July 6, 2011, Richard Ernst, the Deputy Commissioner for the Office of Tax Enforcement at that time, issued an email which stated that unstamped Native American cigarettes being transported by a Native American from one New York State Indian reservation to another New York State Indian reservation should not be seized.

43. Similarly, on May 16, 2011, State Senators George Maziarz and Tim Kennedy sent a letter to the New York State Department of Taxation and Finance in which they stated: (i) “[i]t is our view that Native Brand cigarettes, which are produced and sold on lands owned by Native Nations, constitutes commerce that is essentially Native to Native, and therefore cannot be regulated or taxed by the State of New York”; and (ii) “[i]t is our view that the State should not pursue an effort to collect taxes on Native Brands because such an effort would be contrary to the

sovereign rights of the Native American Nations, and would be a severe blow to the Native retail economy.”

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

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

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

47. On December 5, 2012, the State Police released “140 cases of assorted King Mountain cigarettes” to Investigator Anthony Vona, of the Division’s Criminal Investigation Division, for transport to the Division’s Rotterdam warehouse. After the cases of cigarettes were loaded into Mr. Vona’s truck, he drove to the Rotterdam warehouse. On December 6, 2012, Mr. Vona completed a Form EN-651, Office of Tax Enforcement Property Receipt/Release, bearing case number 201201452, so that the “140 cases of King Mountain Cigarettes” could be placed in the warehouse and documented in the warehouse computer system.

48. The first photograph in petitioner's Exhibit 6 depicts the cases being stored at the Division's warehouse. Although multiple cases of cigarettes depicted in the photograph are open, at no point was a warrant obtained to open the cases. The cases of cigarettes are still being stored at the Division's warehouse. The second photograph in Exhibit 6 depicts an open carton of cigarettes, consisting of 10 cellophane packages of King Mountain cigarettes.¹¹

49. As noted in Finding of Fact 1, the Division issued a notice of determination to petitioner that asserted that a penalty was due in the amount of \$1,259,250.00 for the tax period ended December 3, 2012. At the time of the occurrence, a fine of up to \$150.00 per carton could be assessed against anyone possessing untaxed, i.e., unstamped, cigarettes in New York. The \$1,259,250.00 penalty assessed by the Division was calculated as follows: (i) 140 cases were seized; (ii) 60 cartons per case for a total of 8,400 cartons seized; (iii) subtract five cartons because the law allows for a \$150.00 fine per carton in excess of five cartons; and (iv) 8,395 cartons multiplied by \$150.00 equals \$1,259,250.00. The notice of determination was drafted by the Division's Office of Counsel, not the Division's Audit Division's Transaction Desk Audit Bureau, Cigarette Tax Unit.

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

51. Although the Division asserts that petitioner owes a \$1,259,250.00 penalty for the cigarettes that were seized on December 3, 2012, neither the Notice of Determination dated

¹¹ The second photograph was taken by Investigator Revette at the request of the New York State Attorney General's office for use in a federal matter, *State of New York v. Mountain Tobacco Company d/b/a King Mountain Tobacco Company, Inc.*

December 20, 2012, nor the Notice and Demand for Payment of Tax Due dated April 26, 2013, provides that petitioner is required to pay tax or interest for the seized cigarettes.

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

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

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

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

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

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

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

59. Mr. Kane confirmed that: the Mohawk people have always considered the Ganienkeh territory to be their land; the other Native American nations fully recognize the Ganienkeh territory as a sovereign territory; and there is little, if any, interaction between the Ganienkeh territory and the State of New York.

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

61. The record includes the Turtle Island Trust, Trust Agreement, dated July 25, 1977.¹² 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

¹² 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.

“(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.”

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

63. As indicated by six certifications of non-registration, each sealed and signed by Deputy Commissioner Thomas Engel on February 10, 2016, the Division searched the files of the

Registration and Bond Unit of the Transaction Desk Audit Bureau's Fuel, Alcohol, Cigarette and Carrier Tax Section for licenses or registrations as cigarette stamping agents or wholesale dealers in cigarettes issued to petitioner; Eric White d/b/a ERW Wholesale; ERW Enterprises, Inc.; Oien'Kwa Trading; King Mountain Tobacco Company, Inc.; and Saihwahenteh, Ganiienkeh Territory, and no records of issuance of licenses or registrations to the same were found.

64. A hearing was held before an administrative law judge on October 29 and 30, 2015, at which both the Division and petitioner presented witnesses and documentary evidence. After the completion of the hearing, both parties submitted briefs in support of their respective positions.

65. The most significant issue in the proceeding was whether petitioner was a person in possession of unstamped cigarettes and, therefore, was liable for the penalty imposed pursuant to Tax Law § 481 (1) (b). Petitioner asserted that he was transporting the unstamped Native brand cigarettes from one Native American territory (the Cattaraugus Reservation) to another Native American territory (the Ganiienkeh territory) on behalf of Oien'Kwa Trading, a Native American business, that hired his employer, ERW Wholesale, as a contract carrier to transport the cigarettes. He further asserted that Tax Law § 481 (2) (b) exempts a contract carrier, and an employee of such contract carrier acting within the scope of his employment, from the penalty imposed pursuant to Tax Law § 481 (1) (b) (i). The Division maintained that petitioner was not entitled to the exemption afforded by Tax Law § 481 (2) (b) because he did not satisfy the statutory requirements of such section. It asserted that petitioner was not engaged in the lawful transportation of unstamped cigarettes because he was not a New York State licensed agent or distributor. The Division further asserted that petitioner was not lawfully transporting the unstamped cigarettes on behalf of a New York State licensed agent or distributor.

On June 22, 2017, a determination was issued by the undersigned administrative law judge in which it was concluded that the Division's assertion that ERW Wholesale was not entitled to the exemption provided by Tax Law § 481 (2) (b) was

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

The determination found in petitioner's favor and cancelled the penalty in the amount of \$1,259,250.00 assessed against him because the record clearly established that ERW Wholesale “was a contract carrier engaged in lawfully transporting unstamped cigarettes at the time the cigarettes were seized on December 3, 2012,” and petitioner, “the ERW Wholesale employee acting within the scope of his employment, i.e., transporting the cases of unstamped cigarettes to the Ganienkeh territory,” was entitled to claim the exemption provided in Tax Law § 481 (2) (b).

66. The Division did not file a written exception to the determination issued on June 22, 2017.

67. Petitioner's August 18, 2017 application seeks an award of administrative costs and litigation costs in the amount of \$91,166.50, consisting specifically of the following items:

(i) \$31,380.00 for attorney fees related to legal services provided by Jeffrey Reina, Esq., based upon a total of 104.60 hours of legal services provided at the rate of \$300.00 per hour;

(ii) \$9,599.00 for attorney fees related to legal services provided by Joseph J. Gumkowski, Esq., based upon a total of 33.10 hours of legal services provided at the rate of \$290.00 per hour; and

(iii) \$50,187.50 for attorney fees related to legal services provided by Patrick J. Mackey, Esq., based upon a total of 182.50 hours of legal services provided at the rate of \$275.00 per hour.

68. In support of these fees, petitioner submitted the affidavit of Mr. Reina, dated August 18, 2017, with exhibits attached; the affidavit of Mr. Gumkowski, dated August 18, 2017, with exhibits attached; and the affidavit of Mr. Mackey, dated August 18, 2017, with exhibits attached.

69. Mr. Reina is a Senior Partner at the law firm of Lipsitz Green Scime Cambria LLP (Lipsitz Green) attorneys for petitioner. He has been practicing law in New York State for 17 years. At Lipsitz Green, Mr. Reina concentrates his practice in business litigation, construction litigation, employment litigation, matrimonial law and intellectual property litigation. Within the realm of business litigation, he has experience working on matters related to the taxation of cigarette sales made by Native Americans. In his affidavit, Mr. Reina states that he spent 104.60 hours providing legal services related to petitioner's prosecution of this proceeding by, among other things, (i) researching various legal arguments to be presented to the Division of Tax Appeals; (ii) communicating with the Division of Tax Appeals; (iii) communicating with the Division's counsel; (iv) communicating with petitioner; (v) drafting pleadings; (vi) drafting papers opposing the Division's motion to dismiss; (vii) preparing for and attending a hearing related to the timeliness of petitioner's request for a conciliation conference in Rochester, New York in August 2014; (viii) reviewing the client file and preparing for the hearing held in

October 2015; (ix) attending the hearing held in Rochester on October 29, 2015 and October 30, 2015; and (x) reviewing and revising the post-hearing brief and reply brief submitted on behalf of petitioner. Attached to Mr. Reina's affidavit as Exhibit I is an itemized list of the legal services he provided petitioner and the time spent (hours or portion thereof) performing the identified tasks. According to Mr. Reina, the time set forth in Exhibit I was first recorded by him on firm billing sheets and then transferred to the firm's electronic billing system by his assistant. The billing information saved in the electronic billing system was used to prepare Exhibit I. The detailed reconstructed time records list the legal services provided by Mr. Reina and the amount of time spent on such services on various dates between May 15, 2013 and June 27, 2017. Mr. Reina, in his affidavit, avers that his current hourly rate is \$300.00 and, thus, the attorney's fees related to the legal services he provided petitioner in this proceeding total \$31,380.00 (104.60 X \$300.00). He further avers that his hourly rate is reasonable within the Buffalo, New York area and it is similar to the prevailing rates found in Buffalo for attorneys with his level of experience.

70. Attached to Mr. Reina's affidavit as Exhibit H, is a copy of a National Law Journal article dated December 10, 2007, titled "A nationwide sampling of law firm billing rates," in which the average rates for two Buffalo area law firms were as follows: (i) Hodgson Russ LLP had average hourly rates of \$337.00 for partners and \$219.00 for associates; and (ii) Phillips Lytle LLP had average hourly rates of \$309.00 for partners and \$205.00 for associates.

Considering that the article is 10 years old, Mr. Reina asserts that his "current hourly rate of \$300.00 is well within reason." He further asserts that the "complexity and uniqueness of the legal issues encountered in this proceeding validate the \$300.00 hourly rate charged to the Petitioner."

71. Mr. Gumkowski, currently of counsel at Lipsitz Green, has been practicing law in New York State for 37 years. At Lipsitz Green, Mr. Gumkowski concentrates his practice in tax law, business and corporate law, banking, and intellectual property law. He has vast experience working on matters involving state and federal tax law. In his affidavit, Mr. Gumkowski states that he spent 33.10 hours providing legal services related to petitioner's prosecution of this proceeding by, among other things: (i) researching various legal arguments to be presented to the Division of Tax Appeals; (ii) communicating with the Division's counsel; (iii) communicating with petitioner; (iv) drafting pleadings; and (v) reviewing various pleadings. Mr. Gumkowski further states that he performed the legal services as a member of the Lipsitz Green staff working under the direction of attorney Reina. Attached to Mr. Gumkowski's affidavit as Exhibit B is an itemized list of the legal services he provided petitioner and the time spent (hours or portion thereof) performing the identified tasks. According to Mr. Gumkowski, the time set forth on Exhibit B was first recorded by him on firm billing sheets and then transferred to the firm's electronic billing system by his assistant. The billing information saved in the electronic billing system was used to prepare Exhibit B. The detailed reconstructed time records list the legal services provided by Mr. Gumkowski and the amount of time spent on such services on various dates between May 15, 2013 and November 16, 2014. Mr. Gumkowski, in his affidavit, avers that his current hourly rate is \$290.00 and, thus, the attorney's fees related to the legal services he provided petitioner in this proceeding total \$9,599.00 (33.10 X \$290.00). He further avers that his hourly rate is reasonable within the Buffalo, New York area and it is similar to the prevailing rates found in Buffalo for attorneys with his level of experience.

72. Mr. Mackey, currently a junior partner at Lipsitz Green, has been practicing law in New York State for almost ten years. Prior to practicing in New York State, Mr. Mackey

practiced law in Chicago, Illinois for almost six years. Mr. Mackey concentrates his practice in business litigation, construction litigation and employment litigation. Within the realm of business litigation, he has experience working on matters related to taxation of cigarette sales made by Native Americans. In his affidavit, Mr. Mackey states that he spent 182.5 hours providing legal services related to petitioner's prosecution of this proceeding by, among other things: (i) researching various legal arguments to be presented to the Division of Tax Appeals; (ii) communicating with the Division of Tax Appeals; (iii) communicating with the Division's counsel; (iv) communicating with petitioner; (v) drafting the Hearing Memorandum; (vi) reviewing the client file and preparing for the hearing held in October 2015; (vii) conducting legal research for, and drafting, the post-hearing brief and reply brief submitted on behalf of petitioner; and (viii) conducting legal research for, and drafting, petitioner's application for administrative costs and litigation costs. Mr. Mackey further states that he performed the legal services as a member of the Lipsitz Green staff working under the direction of attorney Reina. Attached to Mr. Mackey's affidavit as Exhibit B is an itemized list of the legal services he provided petitioner and the time spent (hours or portion thereof) performing the identified tasks. According to Mr. Mackey, the time set forth on Exhibit B was first recorded by him on firm billing sheets and then transferred to the firm's electronic billing system by his assistant. The billing information saved in the electronic billing system was used to prepare Exhibit B. The detailed reconstructed time records list the legal services provided by Mr. Mackey and the amount of time spent on such services on various dates between October 9, 2015 and August 17, 2017. Mr. Mackey, in his affidavit, avers that his current hourly rate is \$275.00 and, thus, the attorney's fees related to the legal services he provided petitioner in this proceeding total \$50,187.50 (182.50 X \$275.00). He further avers that his hourly rate is reasonable within the

Buffalo, New York area and it is similar to the prevailing rates found in Buffalo for attorneys with his level of experience.

73. Also accompanying petitioner's application for costs is his affidavit, dated August 16, 2017, setting forth, in pertinent part, the following information:

"10. It is my understanding that to be awarded administrative costs and litigation costs as the prevailing party, I must confirm that my net worth on the date the Petition was filed (July 25, 2013) did not exceed \$2,000,000.

11. I submit that on July 25, 2013, my individual net worth did not exceed \$2,000,000. On said date, I was 23 years old. . . .

12. On July 25, 2013, I owned the following assets: (i) monthly employment income in the approximate amount of \$1,200.00; (ii) a bank account with Community Bank, N.A. . . . with a balance of approximately \$2,500.00; (iii) a 2010 Toyota Previa worth approximately \$25,000; and (iv) a Can-Am Commander (an all terrain vehicle) worth approximately \$15,000. I did not own any other considerable assets.

13. On July 25, 2013, I did not owe any considerable debts.

14. In light of the above, my total net worth as of July 25, 2013, was well below \$2,000,000. As such, I submit that I am eligible to be awarded reasonable administrative costs and litigation costs as the prevailing party in this proceeding."

SUMMARY OF THE PARTIES' POSITIONS

74. Petitioner maintains that he substantially prevailed with respect to the amount in controversy. Throughout the proceeding, he contends that he sought the cancellation of the \$1,259,250.00 penalty assessed against him. Petitioner points out that the June 22, 2017 determination canceled the penalty in the amount of \$1,259,250.00. He further maintains that he substantially prevailed with respect to the most significant issue presented, i.e., whether petitioner, as an employee of ERW Wholesale, the company transporting the unstamped cigarettes, could be penalized under Tax Law § 481 (1) (b) for being in possession of unstamped cigarettes. Petitioner points out that the determination held that he could not be penalized

because: (i) petitioner was an employee of ERW Wholesale “acting within the scope of his employment” when the cigarettes were seized by the New York State Police; and (ii) “ERW Wholesale was a contract carrier engaged in lawfully transporting unstamped cigarettes at the time the cigarettes were seized on December 3, 2012.” Petitioner also maintains that he is a prevailing party under Tax Law § 3030 because he has submitted this application in a timely manner. He asserts that the Division did not file a written exception to the determination issued on June 22, 2017 and, therefore, he had 60 days from June 22, 2017 to file his application for administrative costs and litigation costs. He further asserts that the 60 day period ended on August 21, 2017. By mailing his application to the Division of Tax Appeals and counsel for the Division on August 18, 2017, petitioner maintains that he has filed the application in a timely manner. Finally, petitioner claims that he is a prevailing party because he has confirmed in his affidavit that his net worth on the date the proceeding was commenced (July 25, 2013) was below \$2,000,000.00.

75. Petitioner contends that he is entitled to an award of administrative costs and litigation costs because the Division’s position in the proceeding was not substantially justified. He asserts that he should be awarded \$91,166.50 in administrative costs and litigation costs. Petitioner further asserts that the hourly rates he is seeking, i.e., (i) \$300.00 for the legal services provided by attorney Reina; (ii) \$290.00 for the legal services provided by attorney Gumkowski; and (iii) \$275.00 per hour for legal services provided by attorney Mackey, should be utilized rather than the statutory rate of \$75.00 per hour because this matter concerned novel and complex tax issues not normally encountered in litigation, as well as, complex constitutional issues regarding the illegal search and seizure of the truck petitioner was driving and the cases stored in the truck (Fourth Amendment argument) and regarding the excessive penalty that was levied against

petitioner (Eighth Amendment argument). Petitioner avers that the requested rates are reasonable when compared to attorney rates traditionally charged in the Buffalo, New York area. In the event that the requested hourly rates are not approved, petitioner requests that the statutory rate of \$75.00 per hour be increased to \$200.00 per hour. He claims that as of 2016, an hourly rate of \$200.00 was permitted under Internal Revenue Code (IRC) § 7430. Petitioner further avers that if the \$200.00 rate is not utilized, the \$75.00 hourly rate set forth in Tax Law § 3030 should be applied to the total number of hours of legal services provided by the three attorneys, i.e., a total of 320.20 hours (104.60 hours provided by attorney Reina plus 33.10 hours provided by attorney Gumkowski plus 182.50 hours provided by attorney Mackey).

76. The Division, citing Tax Law § 3030, asserts that petitioner's application must be denied on the following grounds: the position of the Commissioner was substantially justified; petitioner failed to establish that his net worth did not exceed \$2,000,000.00; petitioner failed to establish his litigation and/or administrative costs with sufficient detail to determine if the claimed expenses were reasonable; and the costs sought to be recovered are unauthorized and unreasonable.

77. Petitioner, in reply to the Division's response, asserts that: he has established under oath that his net worth was less than \$2,000,000.00 on July 25, 2013; the reconstructed time records attached to his attorneys' affidavits are entirely appropriate to support his application for administrative costs and litigation costs; the Division has not challenged any specific legal work performed by his attorneys or identified any specific time entry that it deems unreasonable; evidence was provided that the hourly rates sought are reasonable and consistent with the hourly rates charged in the Buffalo, New York area; evidence was also provided concerning an increase

in the statutory rate of \$75.00 per hour to reflect a cost of living increase; and the Division's position in the underlying matter was not substantially justified.

CONCLUSIONS OF LAW

A. Tax Law § 3030 (a) provides, generally, as follows:

“In any administrative or court proceeding which is brought by or against the commissioner in connection with the determination, collection, or refund of any tax, the prevailing party may be awarded a judgment or settlement for:

(1) reasonable administrative costs incurred in connection with such administrative proceeding within the department, and

(2) reasonable litigation costs incurred in connection with such court proceeding.”

Reasonable administrative costs include reasonable fees paid in connection with the administrative proceeding, but incurred after the issuance of the notice or other document giving rise to the taxpayer's right to a hearing (Tax Law § 3030 [c] [2] [B]). Similarly, the term “reasonable litigation costs” includes:

“reasonable fees paid or incurred for the services of attorneys in connection with the court proceeding, except that such fees shall not be in excess of seventy-five dollars per hour unless the court determines that an increase in the cost of living or a special factor . . . justifies a higher rate” (Tax Law § 3030 [c] [1] [B] [iii]).

B. A prevailing party is defined by the statute, in part, as follows:

“[A]ny party in any proceeding to which [Tax Law § 3030 (a)] applies (other than the commissioner or any creditor of the taxpayer involved):

(i) who (I) has substantially prevailed with respect to the amount in controversy, or (II) has substantially prevailed with respect to the most significant issue or set of issues presented, and

(ii) who (I) within thirty days of final judgment in the action, submits to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this section, and the amount sought, including an itemized statement from an attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at

which fees and other expenses were computed . . . and (II) is an individual whose net worth did not exceed two million dollars at the time the civil action was filed

(B) Exception if the commissioner establishes that the commissioner's position was substantially justified.

(i) General rule. A party shall not be treated as the prevailing party in a proceeding to which subdivision (a) of this section applies if the commissioner establishes that the position of the commissioner in the proceeding was substantially justified.

(ii) Burden of proof. The commissioner shall have the burden of proof of establishing that the commissioner's position in a proceeding referred to in subdivision (a) of this section was substantially justified, in which event, a party shall not be treated as a prevailing party.

(iii) Presumption. For purposes of clause (i) of this subparagraph, the position of the commissioner shall be presumed not to be substantially justified if the department, inter alia, did not follow its applicable published guidance in the administrative proceeding. Such presumption may be rebutted.

* * *

(C) Determination as to prevailing party. Any determination under this paragraph as to whether a party is a prevailing party shall be made by agreement of the parties or (i) in the case where the final determination with respect to tax is made at the administrative level, by the division of tax appeals, or (ii) in the case where such final determination is made by a court, the court" (Tax Law § 3030 [c] [5]).

C. As noted above, the application must be brought within 30 days of final judgment in the matter (Tax Law § 3030 [c] [5] [A] [ii] [I]). The determination in the underlying matter was issued on June 22, 2017. An exception to a determination must be filed with the Secretary to the Tax Appeals Tribunal within 30 days after the giving of such determination (*see* Tax Law § 2006 [7]). In this instance, the Division did not take a written exception to the determination issued on June 22, 2017. Petitioner's application for administrative costs and litigation costs was timely filed on August 18, 2017, within 60 days of the notice of the underlying determination in this matter.

D. The determination as to whether petitioner is the “prevailing party” first requires a showing that his “net worth did not exceed two million dollars at the time the civil action was filed . . .” (Tax Law § 3030 [c] [5] [A] [ii] [II]). Petitioner has satisfied this requirement through his provision of an affidavit in which he affirms this fact (*see* Finding of Fact 73).

Next, it is incumbent on petitioner to prove that he has substantially prevailed with respect to either “the amount in controversy” or “the most significant issue or set of issues presented” (Tax Law § 3030 [c] [5] [A] [i]) and it is petitioner who carries this burden (*see Rustam v. Commissioner*, 89 TCM 829 [2005]; *Minahan v Commissioner*, 88 TC 492 [1987]). Here, the most significant issue presented was whether petitioner, as an employee of ERW Wholesale, the company transporting the unstamped cigarettes, could be penalized under Tax Law § 481 (1) (b) for being in possession of unstamped cigarettes. The determination found in petitioner’s favor and cancelled the penalty in the amount of \$1,259,250.00 assessed against him because the record clearly established that ERW Wholesale “was a contract carrier engaged in lawfully transporting unstamped cigarettes at the time the cigarettes were seized on December 3, 2012,” and petitioner, “the ERW Wholesale employee acting within the scope of his employment, i.e., transporting the cases of unstamped cigarettes to the Ganienkeh territory” was entitled to claim the exemption provided in Tax Law § 481 (2) (b) (*see* Finding of Fact 65). Petitioner was clearly the prevailing party with respect to the amount in controversy and the most significant issue presented (Tax Law § 3030 [c] [5] [A] [i]). In turn petitioner, as the prevailing party and as an individual whose net worth did not exceed two million dollars at the time the civil action was filed, is entitled to bring this application and receive an award of costs, unless the Division meets its burden of proving its position was substantially justified (Tax Law § 3030 [c] [5] [B] [i]).

E. Tax Law § 3030 is modeled after IRC § 7430. It is proper, therefore, to use Federal cases for guidance in analyzing this state law (*see Matter of Levin v Gallman*, 42 NY2d 32 [1977]; *Matter of Sener*, Tax Appeals Tribunal, May 5, 1988).

The Division must establish that its position was substantially justified (*see* Tax Law § 3030 [c] [5] [B] [ii]). This standard requires that the Division show a reasonable basis in both law and fact (*see Powers v Commissioner*, 100 TC 457 [1993], *aff'd in part and rev'd in part*, 43 F3d 172 [5th Cir. 1995] ; *see also Pierce v Underwood*, 487 US 552 [1988]), with this showing properly based “on all the facts and circumstances surrounding the case, not solely upon the final outcome” (*Phillips v Commissioner*, 851 F2d 1492, 1499 [1988]; *Heasley v Commissioner*, 967 F2d 116, 120 [1992]). The fact that the notice of determination was canceled by the administrative law judge is a factor to be considered (*Heasley*). The Division will be said to have met its burden of showing substantial justification when it has shown that the issuance of the notice was “justified to a degree that could satisfy a reasonable person” (*Pierce v Underwood* at 565), in view of what the Division knew at the time its position was taken (Tax Law § 3030 [c] [8] [B]; *see DeVenney v Commissioner*, 85 TC 927, 930 [1985]). As explained hereinafter, petitioner is the prevailing party within the meaning and intent of Tax Law § 3030 because the Division was not substantially justified in issuing the notice to petitioner based upon the information in its possession at the time the notice was issued.

F. On or about 2:10 p.m. on December 3, 2012, a white box truck driven by petitioner failed to stop at the I-87 Valcour northbound inspection station. Shortly thereafter, petitioner was stopped by Trooper Posada, who asked petitioner for his license, the vehicle registration and what the load was. Petitioner gave Trooper Posada his driver’s license, the truck’s registration, the ERW Wholesale bill of lading, dated December 1, 2012, and ERW Wholesale invoices No.

11 and No. 12, each dated December 1, 2012, and stated that he was transporting cigarettes. Petitioner also told Trooper Posada that he was transporting cigarettes to the Ganienkeh territory. Based upon petitioner's statements and the documentation presented to him, Trooper Posada determined that petitioner was transporting a commercial load of cigarettes. Subsequently, Trooper Posada, with the assistance of Trooper Spadaro, escorted petitioner to the southbound inspection station located in Peru, New York. Upon arriving at the inspection station, Trooper Posada gave the bill of lading and the invoices to the State Police Investigator on duty, Joel Revette. Shortly thereafter, as a result of his failure to obey a traffic device and stop at the I-87 Valcour northbound inspection station, Trooper Posada issued a uniform traffic ticket to petitioner for such failure. Then, Trooper Posada gave petitioner's driver's license and the truck registration to Trooper Spadaro, who proceeded to conduct a safety inspection of the truck that ended at 3:06 p.m. The commercial vehicle inspection did not result in the issuance of any additional citations. When the safety inspection concluded at 3:06 p.m., the back of the truck had not yet been inspected. After Trooper Spadaro cut the padlock, and confirmed that the contents of the truck, i.e., the sealed cases, matched petitioner's description and corresponding documentation and were not hazardous or dangerous to the public if improperly secured, one of the sealed cases was removed from the truck by Investigator Revette and opened. The fact that the truck's load consisted of unstamped cigarettes was only discovered after a package of cigarettes was removed from an open carton taken from the opened case. Around 6:00 p.m. on December 3, 2012, Investigator Revette was instructed by his supervisor, Lieutenant Heggelke, to seize the cigarettes, copy the documents provided by petitioner, and release petitioner and the truck. In compliance with Investigator Revette's instructions, petitioner drove the truck to the Plattsburgh State Police Station, where the cases of cigarettes were unloaded from the truck and

placed into a garage located at the police station. Investigator Revette photocopied petitioner's documents, and the originals were given back to petitioner. Thereafter, petitioner was free to leave.

Documents photocopied by the State Police included, among other items, ERW Wholesale's invoices No. 11 and No. 12, the ERW Wholesale bill of lading, petitioner's driver's license and the commercial vehicle registration for the truck. Petitioner had presented those documents to Trooper Posada at the time of the vehicle stop. That documentation clearly indicated that petitioner was merely the 22 year old driver responsible for transporting the commercial load of cigarettes to the Ganienkeh territory. The ERW Wholesale Invoice No. 12 and the ERW Wholesale bill of lading clearly indicated that ERW Wholesale was acting as a contract carrier at the time the load of unstamped cigarettes was seized on December 3, 2012. Invoice No. 12 provided that ERW Wholesale was transporting 9,000 cartons (150 cases) of cigarettes to Saihwahenteh, a Native American business located in Ganienkeh territory, on behalf of Oien'Kwa Trading, a Native American business, and that Oien'Kwa Trading was charged \$2,250.00 for such transportation. The ERW Wholesale bill of lading indicated that ERW was transporting 9,000 cartons from the Cattaraugus Reservation to Ganienkeh territory, on Oien'Kwa Trading's behalf. ERW Wholesale Invoice No. 11 indicated that Oien'Kwa Trading was shipping 9,000 cartons of cigarettes, valued at a total of \$164,250.00, to Saihwahenteh. ERW Wholesale facilitated commerce between two Native American businesses, Oien'Kwa Trading and Saihwahenteh, through its compensated transportation of the unstamped Native brand cigarettes from one Native American territory to another Native American territory. Although a citation was issued to petitioner for his failure to obey a traffic device and stop at the I-87 Valcour northbound inspection station, there were no additional citations issued as a result

of the subsequent commercial vehicle inspection. Additionally, the Clinton County District Attorney did not pursue any criminal charges related to the seizure of the truck's load of unstamped cigarettes. On December 20, 2012, the Division issued a notice of determination to petitioner that assessed a penalty in the amount of \$1,295,250.00 for the tax period ended December 3, 2012 (the date the cigarettes were seized), pursuant to Tax Law § 481 (1) (b) (i) in effect during the period at issue.¹³ The notice of determination did not provide that petitioner was required to pay tax for the seized cigarettes. The documentation provided by petitioner and all other information available regarding the traffic stop, the commercial vehicle inspection and the seizure of the unstamped cigarettes clearly showed that ERW Wholesale was a contract carrier engaged in lawfully transporting unstamped cigarettes at the time they were seized on December 3, 2012, and that petitioner was the ERW Wholesale employee, acting within the scope of his employment, transporting the cases of unstamped cigarettes to the Ganienkeh territory. Inasmuch as Tax Law § 481 (2) (b) provides an exemption for common and contract carriers engaged in lawfully transporting unstamped packages of cigarettes as merchandise, and to any of such employee acting within the scope of his employment, the Division's assessment of the \$1,259,250.00 against petitioner was unreasonable. Moreover, the \$1,259,250.00 penalty assessed against petitioner was grossly disproportionate to the value of the unstamped cigarettes, i.e., \$164,250.00. As such, the Division's position was not substantially justified, and petitioner, as the prevailing party, is entitled to reasonable administrative costs and litigation costs.

G. Petitioner seeks administrative costs and litigation costs totaling \$91,166.50, consisting of \$31,380.00 for attorney's fees related to legal services provided by attorney Reina, based upon

¹³ Separate notices of determination, each in the amount of \$1,259,250.00, were also issued to ERW Enterprises, Eric R. White, King Mountain, Saihwahenteh and Oien'Kwa Trading.

a total of 104.60 hours of legal services provided at the rate of \$300.00 per hour; \$9,599.00 for attorney's fees related to legal services provided by attorney Gumkowski, based upon a total of 33.10 hours of legal services provided at the rate of \$290.00 per hour; and \$50,187.50 for attorney's fees related to legal services provided by attorney Mackey, based upon a total of 182.50 hours of legal services provided at the rate of \$275.00 per hour. Petitioner contends that the hourly rates he is seeking should be utilized rather than the statutory rate of \$75.00 per hour allowed by Tax Law § 3030 (c) (1) (B) (iii) because the underlying matter concerned novel and complex tax issues and complex constitutional issues. He also contends that the requested rates are reasonable when compared to attorney rates traditionally charged in the Buffalo, New York area. In the event that the requested hourly rates are not approved, petitioner requests that the statutory rate be increased to \$200.00, the cost of living adjusted rate permitted under IRC § 7430, to be equitable. The Division asserts that petitioner failed to establish his litigation and/or administrative costs with sufficient detail to determine if the claimed expenses were reasonable; and the total costs sought to be recovered are unauthorized and unreasonable. In support of the \$91,166.50 in attorneys' fees requested by petitioner, he submitted the affidavits of attorneys Reina, Gumkowski and Mackey, with exhibits attached to the same. Among the exhibits attached to each affidavit were detailed reconstructed time records that listed the legal services provided by the particular attorney and the amount of time (hour or portion thereof) spent on such services on specified dates. I have reviewed the affidavits of attorneys Reina, Gumkowski and Mackey and the detailed reconstructed time records attached to the same, and find each attorney's detailed reconstructed times records to contain sufficient detail to determine that each attorney did provide the identified legal services to petitioner. Specifically, attorney Reina provided a total of 104.60 hours of legal services for petitioner on various dates between May 15,

2013 and June 27, 2017; and as part of the Lipsitz Green staff working under attorney Reina, attorney Gumkowski performed a total of 33.10 hours of legal services for petitioner on various dates between May 15, 2013 and November 16, 2014, and attorney Mackey performed a total of 182.50 hours of legal services for petitioner on various dates between October 9, 2015 and August 17, 2017. In sum, the three attorneys provided a total 320.20 hours of legal services to petitioner on various dates between May 15, 2013 and August 17, 2017, representing both administrative and litigation legal services. With respect to petitioner's request for an award of administrative costs and litigation costs based upon hourly fees for each attorney in excess of the statutory rate of \$75.00 per hour, the Legislature set the statutory rate for the services of an attorney at \$75.00 per hour, and no special factors exist in this matter that warrant an increase in the same (*see* Tax Law § 3030 [c] [1] [B] [iii]). Therefore, applying the statutory rate of \$75.00 per hour to the total of 320.20 hours of legal services provided by attorneys Reina, Gumkowski and Mackey equals an award of costs in the amount of \$24,015.00.

H. Petitioner, as the prevailing party, is hereby granted administrative costs and litigations costs totaling \$24,015.00 pursuant to Tax Law § 3030.

I. Petitioner's application for costs is granted to the extent indicated above.

DATED: Albany, New York
January 11, 2018

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE