STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ERW ENTERPRISES, INC.	:	ORDER DTA NO. 827209
for an Award of Costs Pursuant to Article 41, § 3030 of the Tax Law for the Period ended December 3, 2012.	:	

On June 27, 2019, petitioner ERW Enterprises, Inc., 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 L. Evans, Esq., of counsel), filed an affirmation in opposition on August 8, 2019. By leave granted on August 22, 2019, the parties were afforded the opportunity to submit reply briefs on or before September 27, 2019, and did so on such date. The 90-day period for issuance of this order commenced on September 27, 2019. By a letter dated December 19, 2019, this period was extended pursuant to 20 NYCRR 3000.5 (d).

Based upon petitioner's application for costs and accompanying documentation, and all pleadings, proceedings and documents submitted in connection with this matter, Dennis M. Galliher, 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]

1. On December 14, 2014, the Division issued to petitioner, ERW Enterprises, Inc., (ERW Enterprises) a notice of determination (L-042291772). On December 19, 2014, the Division issued to Eric R. White d/b/a ERW Wholesale (ERW Wholesale), a notice of determination (L-042301388). Each notice of determination assessed a penalty 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 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).

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[1] The findings of fact herein are those set forth in the Tax Appeals Tribunal's decision ***Matter of ERW Enterprises, Inc.***, Tax Appeals Tribunal, May 29, 2019), including the modifications to the administrative law judge's findings of fact 15, 22, and 33, the modification of the administrative law judge's footnote to finding of fact 53, and the elimination of the administrative law judge's findings of fact 60 and 61 (discussing the treatment of petitioner's proposed findings of fact and the Division's statement of facts as submitted to the administrative law judge).

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. This order was entered into ERW Wholesale's computer system on the next day, Saturday, December 1, 2012. Subsequent to purchasing the cigarettes from ERW Wholesale, Oien'Kwa Trading resold the cigarettes to Saihwahenteh.[2] 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

[2] 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.

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 [3d 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 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 Ganienkeh territory is located.

9. The inhabitants of the Ganienkeh 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, Ganienkeh 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 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. In this regard, New York State has a history of not

collecting: (a) taxes from income earned by the bingo and electronic gaming hall, smoke shop, and gasoline station located on the Ganienkeh territory; and (b) real estate taxes from those who own real property located on the Ganienkeh territory. There is a tribal police force at Ganienkeh, and testimony at hearing confirmed that the New York State Police (State Police) do not generally enforce laws on the Ganienkeh territory.

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

12. The record includes the Turtle Island Trust Agreement (Trust Agreement), dated July 25, 1977.[3] Pursuant to its 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

[3] 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.

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, 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. The truck's registration to ERW Enterprises was done, initially, for DOT compliance purposes, due to the gross vehicle weight (GVW) capacity of the truck. As Mr. Clark testified in ***Matter of Snyder***, at the time of the truck's acquisition , ERW Enterprises, and not ERW Wholesale, had "a designation to be able to put the DOT number on its side."[4] At about the time of the transactions at issue, the truck's registration was in the process of being changed from ERW Enterprises to ERW Wholesale because, according to Mr. Clark, the truck "no longer had a usefulness for the construction company." Subsequent to the dates at issue, and after performance of a significant amount of repair work, the truck was re-registered to ERW Wholesale.

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

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

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

coupled with its registration to ERW Enterprises, appears to have simply given rise to an erroneous assumption that Mr. Snyder was employed by that entity and not by ERW Wholesale.

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

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

tax stamps. In addition, located in the truck was its registration, its New York State insurance identification card, and a white packet prepared by ERW Wholesale.

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

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

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

In testimony in ***Matter of Snyder***, Mr. Ernst explained that the email was intended to provide direction to the Division's criminal investigators in the field.

23. The record includes copies of ERW Wholesale's Invoices Nos. 10, 11, and 12, each dated December 1, 2012. The top portion of each of the invoices carries the name "ERW WHOLESALE–SOVEREIGN SENECA TERRITORY, 11157 Old Lakeshore Road, Irving, NY 14081." The invoices were issued "TO: Oien'Kwa Trading, St. Regis Mohawk Territory, 76 Geronimo Lane, Akwesasne, NY, 12655." Invoice No. 11 sets forth Oien'Kwa's purchase of various quantities of six types of cigarettes, totaling 9,000 cartons, from ERW Wholesale. Invoice No. 11 further specifies that the cigarettes are to be "SHIPPED TO: Saihwahenteh, Ganienkeh Territory, 102 Devils Den Road, Altona, New York, [phone number]." Review of the invoices indicates that the top third of each of the three invoices sets forth seven preprinted columns, while the lower portion of the invoices sets forth six preprinted columns, respectively. Each of the invoices clearly states that the cigarettes are "Exempt."[6] With respect to the cigarettes purchased by Oien'Kwa Trading from ERW Wholesale, and thereafter sold by

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[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."

[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.

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
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, 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, 3012, 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

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

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

[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).

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 his directions regarding how to get to the southbound inspection station. Trooper Posada radioed back to the Commercial Vehicle inspectors to let them know that he had a commercial vehicle stopped, and that he needed assistance escorting the truck back to the inspection station. Within a few minutes, Trooper Michael Spadaro arrived at the vehicle stop and assisted Trooper Posada in escorting Mr. Snyder to the southbound inspection station located in Peru, New York.

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

33. At the inspection station, Trooper Posada gave the bill of lading and the invoices to the State Police investigator on duty, Joel Revette. Trooper Posada informed Investigator Revette that Mr. Snyder was transporting cigarettes to Ganienkeh. Trooper Posada then issued a uniform traffic ticket, number 1B88CMFSP, to Mr. Snyder. The ticket issued to Mr. Snyder 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.[9]

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

[9] The Administrative Law Judge's finding of fact 33 also states that Trooper Posada told Investigator Revette that he (Posada) "believed the cigarettes did not bear tax stamps." On exception petitioners contend that the record does not support such a finding. This finding of fact has been modified accordingly.

rather a Level 2 inspection, which includes checking brakes, tires and safety equipment. A State Police K-9 unit sniffed around the truck, but nothing was detected.

38. The Driver/Vehicle Examination Report prepared by Trooper Spadaro provides that the following violations were found: (i) "Fail to Obey Traffic Controll [sic] Device Driver Fails to Stop at I-87 Valcour Northbound Inspection Site;" (ii) "ABS Malfunction Indicators for HYDR Brake Sys - ABS Indicator Light remains on as Vehicle is Running;" and (iii) "Inadequate Rear Object Detection Device Not Properly Adjusted (Rear View Mirror)."[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 door of the truck had not yet been opened and the truck's contents had not been inspected.

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

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

[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.

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.[11]

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.[12]

54. The Division maintains that the record is "unclear" as to the location where the cigarettes were first loaded onto the truck being driven by Shawn Snyder. In particular, the Division references statements allegedly made by Mr. Snyder, as set forth in Investigator Revette's Incident Report (***see*** finding of fact 17), to the effect that Mr. Snyder was coming from the Akwesasne Reservation and transporting cigarettes to the Ganienkeh Territory, that he had

[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 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***).

[12] 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).

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 9,000 cartons (150 cases). These documents were in existence and were located in the van on the date of seizure, and were provided to the State Police at that time. Further, there is the clear testimony of Dwayne Clark and Michael Webber in this proceeding, coupled with the testimony of Mr. Clark and Mr. Snyder in ***Matter of Snyder***, concerning the events in question. In particular, Mr. Snyder directly testified that he did not receive any cigarettes at or during the repair stop near the Turning Stone Casino at the Oneida Reservation, but rather that the truck was loaded, locked and secured (as described) from the time he left the Cattaraugus Reservation until he was stopped by the State Police, at which time the lock was cut and the rear door of the truck was opened. Further, Mr. Snyder clarified that his 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 7,260 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 13). Finally, 121 cases (7,260 cartons) is not the quantity of cigarettes upon which the penalty assessed by the Division in this matter was calculated (***see*** findings of fact 56 and 57). Without more, the record supports the fact that on December 1, 2012, at ERW Wholesale's Warehouse on the Cattaraugus Reservation, 150 sealed cases of cigarettes were loaded onto, secured and sealed within the truck that was to be driven by Mr. Snyder (***see*** findings of fact 15 and 19), and remained within the truck, notwithstanding the December 2, 2012 overnight trip interruption for necessary tire and wheel bearing repair, until such time as the truck was stopped, inspected, and the cigarettes were seized.

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

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

> "Q. Now, where does that $150 penalty number come from?
> A. Penalty number is for possession of unstamped cigarettes in Section 481 (b) (i).
> Q. And is that number a fixed number, is it part of a range?
> A. It's up to $150 at that time. Subsequent to this action, it has been raised to $600 per carton in excess of five [cartons].
>
> * * *
>
> Q. When the Department assesses a civil penalty assessment, what numbers do they generally use on that range?
> A. In general at that time, we would assess the full amount of $150 penalty per carton in excess of the five [cartons].
> Q. So would you say the use of the 150 was standard?
> A. Yes."[13]

[13] ***See*** exhibit 25, pp 51 - 52 (Transcript of Proceedings in ***Matter of Snyder***).

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.

ADDITIONAL FACTS

60. A hearing was held before the undersigned administrative law judge on January 11, 2017, 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. The issues identified, and applicable to both ERW Enterprises and ERW Wholesale, were:

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 forgoing 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.

61. On the first issue (possession and control), ERW Enterprises asserted at hearing that it was a construction company, and was entirely uninvolved in the tobacco wholesale business operated by ERW Wholesale, including the events concerning the transport of the unstamped Native American brand cigarettes from one Native American territory (the Cattaraugus

Reservation) to another Native American territory (the Ganienkeh territory) on behalf of Oien'Kwa Trading, a Native American business, as allegedly entirely carried out by ERW Wholesale, as a contract carrier simply transporting such cigarettes. Petitioners asserted that Tax Law § 481 (2) (b) exempts a contract carrier, acting within the scope of his employment, from the penalty imposed pursuant to Tax Law § 481 (1) (b) (i). At the January 11, 2017 hearing, both petitioners argued that ERW Enterprises's only connection to the transaction at issue was the fact that the vehicle involved was registered to ERW Enterprises, and that such basis was simply insufficient to support imposition of the penalty at issue as against ERW Enterprises. The Division maintained that petitioner was not entitled to the exemption afforded by Tax Law § 481 (2) (b) because it did not satisfy the statutory requirements of such section. The Division asserted that ERW Enterprises was not engaged in the lawful transportation of unstamped cigarettes because it was not a New York State licensed agent or distributor, and was not lawfully transporting the unstamped cigarettes on behalf of a New York State licensed agent or distributor.

62. On March 15, 2018, a determination was issued by the undersigned administrative law judge which decided each of the foregoing issues in favor of the Division, and thus upheld the penalty as assessed by the Division against both ERW Enterprises and ERW Wholesale. In relevant part, that determination rejected ERW Enterprises's claim that there was insufficient basis to impose the penalty because that entity was not in "possession or control" of the unstamped cigarettes on December 3, 2012, concluding as follows:

> "[p]etitioners' 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 the delivery of the cigarettes sold and to be delivered by ERW Wholesale.[14] As the Division points out, the transaction at issue (sale and delivery of 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 Enterprises'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 R. 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."

63. Both ERW Enterprises and ERW Wholesale challenged the determination of the administrative law judge on all issues presented by filing an exception with the Tax Appeals Tribunal. By a decision dated May 26, 2019, the Tribunal affirmed the determination of the administrative law judge as to ERW Wholesale, but reversed the determination of the administrative law judge as to ERW Enterprises, upon the following basis:

> "[w]e first address petitioners' contention that the notice of determination issued to petitioner ERW Enterprises must be canceled because that corporation was not in "possession or control" of the cigarettes on December 3, 2012, as asserted in

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[14] This fact was not only confirmed by the examination (search and seizure) by the State Police at the time of the stop, but was discernible 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 [footnote set forth as in original determination, but renumbered herein as footnote 15 for continuity).

> that notice. We agree. As noted, the delivery truck links ERW Enterprises to the transaction at issue. ERW Enterprises was not in the tobacco trading business and was not in direct control of the truck on December 3, 2012. Rather, ERW Wholesale agreed to deliver the cigarettes to Saihwahenteh for Oien'Kwa Trading and an ERW Wholesale employee drove the truck to make the delivery. Moreover, according to the 'clear, consistent and credible' testimony of Mr. Clark, the truck was primarily used by ERW Wholesale to make deliveries of cigarettes and was used only 'from time to time' by ERW Enterprises (***see*** findings of fact 15 and 18). Additionally, title to the truck was held by Mr. White and not ERW Enterprises. Although the truck was registered to ERW Enterprises and bore that entity's name and DOT number on its side, this appears to have been a matter of convenience. That is, given the gross vehicle weight, the truck required a DOT number on its side and, at the time, ERW Enterprises, and not ERW Wholesale, had 'DOT clearance' for such a vehicle, according to Mr. Clark (***see*** finding of fact 15). The registration in ERW Enterprises' name was thus done for DOT compliance purposes (***id***.). The record thus shows that ERW Enterprises generally did not control the use of the truck and was clearly not in control of the truck on December 3, 2012. Given its lack of involvement with any other aspect of the transaction, we find that ERW Enterprises was not in 'possession or control' of the load of unstamped cigarettes on that date for purposes of Tax Law § 481 (1) b) (i) (A). The notice of determination issued to petitioner ERW Enterprises must, therefore, be canceled."

64. Petitioner's June 27, 2019 application seeks an award of administrative costs and litigation costs in the amount of $62,412.75, consisting specifically of the following items:

(i) $8,027.50 for attorney fees related to legal services provided by Paul Cambria, Esq., based upon a total of 24.70 hours of legal services provided at the rate of $325.00 per hour;

(ii) $224.00 for attorney fees related to legal services provided by Joseph J. Gumkowski, Esq., based upon a total of 0.70 hours of legal services provided at the rate of $320.00 per hour;

(iii) $44,703.50 for attorney fees related to legal services provided by Patrick J. Mackey, Esq., based upon a total of 154.15 hours of legal services provided at the rate of $290.00 per hour;

(iv) $5,664.00 for attorney fees related to legal services provided by Jeffrey Reina, Esq., based upon a total of 17.70 hours of legal services provided at the rate of $320.00 per hour

(v) $3,506.25 for attorney fees related to legal services provided by Erin McCampbell Paris, Esq., based upon a total of 12.75 hours of legal services provided at the rate of

$275.00 per hour; and

(vi) $287.50 for legal services provided by law clerks and paralegals, based upon a total of 5.75 hours of legal services provided at the rate of $50.00 per hour.

65. In the event costs are approved for the foregoing hours, but not in the amounts calculated upon the requested hourly rates, as above, petitioner seeks an award of costs calculated at the rate of $200.00 per hour, as is permissible under IRC (26 USC) § 7430 (Federal Taxpayers Bill of Rights). In the event costs are approved for the foregoing hours, but not in the amounts calculated upon either of the above-requested hourly rates, petitioner seeks an award of costs calculated at the rate of $75.00 per hour, as is permissible under Tax Law § 3030 (c) (1) (B) (iii).

66. In support of its request for an award of fees, petitioner submitted the affidavits of Mr. Cambria, dated June 27, 2019, with exhibits attached; Mr. Reina, dated June 27, 2019, with exhibits attached; Mr. Gumkowski, dated June 25, 2019, with exhibits attached; Mr. Mackey, dated June 27, 2017, with exhibits attached; and Ms. McCampbell Paris, dated June 25, 2019, with exhibits attached. These affidavits provide the following information:

a) Mr. Cambria is a Senior Partner at Lipsitz Green Scime Cambria LLP (Lipsitz Green), attorneys for petitioner, and has been practicing law in New York State for over 46 years. Mr. Cambria concentrates his practice in criminal law, constitutional law, First Amendment law, zoning and professional licensing defense, and has received numerous awards and recognitions in connection therewith. In his affidavit, Mr. Cambria states that he spent 24.70 hours providing legal services related to petitioner's prosecution of this proceeding by, among other things: (i) communicating with petitioner; (ii) reviewing pleadings; and (iii) preparing for and attending oral argument held before the Tribunal concerning the exception filed to the determination of the administrative law judge. Attached to Mr. Cambria'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, as recorded by him in the firm's electronic billing system and used to prepare Exhibit B. The detailed reconstructed time records list the legal services provided by Mr. Cambria and the amount of time spent on such services on various dates between August 28, 2015 and November 28, 2018. Mr. Cambria avers that his hourly rate is reasonable within the Buffalo, New York area, and is similar to the prevailing rates found in Buffalo for attorneys with his level of experience. He specifically notes that none of the time set forth in Exhibit B is for

the legal services he provided to ERW Wholesale in relation to DTA No. 827210.

b) Mr. Reina is a Senior Partner at Lipsitz Green, and has been practicing law in New York State for 19 years. 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 17.70 hours providing legal services related to petitioner's prosecution of this proceeding by, among other things, (i) communicating with petitioner; (ii) communicating with witnesses; (iii) communicating with counsel for the Division of Taxation; (iv) reviewing pleadings; (v) preparing for and attending a hearing in April 2015 relating to petitioner's request for a conciliation conference; (vi) reviewing the client file and preparing for the hearing held in January 2017; (vii) attending the hearing held in Rochester, New York on January 11, 2017; (viii) reviewing and revising the post-hearing brief and reply brief submitted on behalf of petitioner; and (ix) reviewing and revising the notice of exception that petitioner filed with the Tribunal and the brief submitted in support thereof. Attached to Mr. Reina's affidavit as Exhibit H is an itemized list of the legal services he provided petitioner and the time spent (hours or portion thereof) performing the identified tasks, as recorded by him in the firm's electronic billing system and used to prepare Exhibit H. 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 December 26, 2014 and June 14, 2017. Mr. Reina avers that his hourly rate is reasonable within the Buffalo, New York area, and is similar to the prevailing rates found in Buffalo for attorneys with his level of experience. He specifically notes that none of the time set forth in Exhibit H is for the legal services he provided to ERW Wholesale in relation to DTA No. 827210. Finally, attached to Mr. Reina's affidavit as Exhibit I is an itemized list of the legal services provided to petitioner by law clerks and paralegals employed by Lipsitz Green, and the time they spent (hours or portion thereof) performing certain identified tasks in connection with this matter, as recorded in the firm's electronic billing system by such paralegals and clerks, and used to prepare Exhibit I. The detailed reconstructed time records list the legal services provided the firm's paralegals and clerks, and the amount of time spent on such services on various dates between June 15, 2015 and January 9, 2017. Such records list a total of 5.75 hours that was billed at a rate of $50.00 per hour (***see*** finding of fact 64 [vi]).[15]

c) Mr. Gumkowsky is of counsel at Lipsitz Green, and has been practicing law in New York State for 39 years. Mr. Cambria concentrates his practice in tax law, business and corporate law, banking and intellectual property law. He has extensive experience in matters of state and federal tax law, and has received numerous awards and recognitions. In his affidavit, Mr. Gumkowski states that he spent .70 hours, under the direction of Jeffrey Reina, providing legal services related to petitioner's prosecution of this proceeding by, among other things: (i) researching various legal issues related the petition filed by petitioner; (ii) drafting a petition for

[15] Attached to Mr. Reina's affidavit, as Exhibit G, 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 12 years old, Mr. Reina and the other affiants assert that the hourly rates charged by them are well within reason.

ERW; and (iii) reviewing various pleadings. 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, as recorded by him in the firm's electronic billing system and 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 December 29, 2014 and June 27, 2016. Mr. Gumkowski avers that his hourly rate is reasonable within the Buffalo, New York area, and is similar to the prevailing rates found in Buffalo for attorneys with his level of experience. He specifically notes that none of the time set forth in Exhibit B is for the legal services he provided to ERW Wholesale in relation to DTA No. 827210.

d) Mr. Mackey, is a partner at Lipsitz Green, has been practicing law in New York State for 12 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. Reina states that he spent 154.15 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 and the Tax Appeals Tribunal; (ii) communicating with the Division of Tax Appeals; (iii) communicating with petitioner; (iv) communicating with counsel for the Division of Taxation; (v) drafting brief in support of ERW's petition; (vi) drafting the hearing memorandum; (vii) reviewing the client file and preparing notes for the hearing held in January 2017; (viii) drafting subpoenas for the hearing and having the subpoenas served; (ix) conducting legal research for, and drafting, the post-hearing brief and reply brief submitted on behalf of petitioner; (x) drafting and filing the exception to the administrative law judge's determination; (xi) conducting legal research for, and drafting, brief and reply brief in support of exception; (xii) reviewing client file and preparing notes for oral argument held in November 2018 before the Tribunal; and (xiii) drafting the application for administrative costs and litigation costs communicating with petitioner; (iv) reviewing pleadings; (v) preparing for and attending a hearing in April 2015 relating to petitioner's request for a conciliation conference; (vi) reviewing the client file and preparing for the hearing held in January 2017; (vii) attending the hearing held in Rochester, New York on January 11, 2017; (viii) reviewing and revising the post-hearing brief and reply brief submitted on behalf of petitioner; and (ix) reviewing and revising the notice of exception that petitioner filed with the Tribunal and the brief submitted in support thereof. Attached to 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, as recorded by him in the firm's electronic billing system and used to prepare Exhibit B. 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 June 11, 2015 and June 27, 2019. Mr. Mackey avers that his hourly rate is reasonable within the Buffalo, New York area, and is similar to the prevailing rates found in Buffalo for attorneys with his level of experience. He specifically notes that none of the time set forth in Exhibit H is for the legal services he provided to ERW Wholesale in relation to DTA No. 827210.

e) Ms. McCampbell Paris is a Partner at Lipsitz Green and has been practicing law in New York State for over 12 years. Mr. McCampbell Paris concentrates her practice in appellate and complex trial litigation in the areas of criminal law, white-collar crimes and business litigation, and criminal law. In her affidavit, Ms. McCampbell Paris states that he spent 12.75 hours providing legal services related to petitioner's prosecution of this proceeding by, among other things: (i) conferring with various attorneys representing ERW in this matter; and (ii) reviewing and revising various pleadings. Attached to Ms. McCampbell Paris's affidavit as Exhibit B is an itemized list of the legal services she provided petitioner and the time spent (hours or portion thereof) performing the identified tasks, as recorded by her in the firm's electronic billing system and used to prepare Exhibit B. The detailed reconstructed time records list the legal services provided by Ms. McCampbell Paris and the amount of time spent on such services on various dates between July 28, 2015 and June 14, 2018. Ms. McCampbell avers that her hourly rate is reasonable within the Buffalo, New York area, and is similar to the prevailing rates found in Buffalo for attorneys with her level of experience. She specifically notes that none of the time set forth in Exhibit B is for the legal services she provided to ERW Wholesale in relation to DTA No. 827210.

67. Also accompanying petitioner's application for costs is an affidavit of Eric R. White, dated June 18, 2019, setting forth, in pertinent part, the following information:

> "11. In light of the Decision issued by the Tax Appeals Tribunal, it is my understanding that [petitioner] is the prevailing party in this proceeding (DTA # 827209) and, thus, [petitioner] is entitled to request an award of reasonable administrative costs and litigation costs.
>
> 12. It is also my understanding that to be awarded administrative costs and litigation costs as the prevailing party, [petitioner] must confirm that at the time the petition was filed (September 8, 2015): [petitioner's] net worth did not exceed $7,000,000.00; and (ii) [petitioner] did not have over 500 employees.
>
> 13. I submit that on September 8, 2015, [petitioner's] net worth did not exceed $7,000,000.00. I further submit that on September 8, 2015, [petitioner] did not have over 500 employees.
>
> 14. In light of the above, I submit the [petitioner] is eligible to be awarded reasonable administrative costs and litigation costs as the prevailing party in this proceeding."

SUMMARY OF THE PARTIES' POSITIONS

68. Petitioner maintains that it substantially prevailed with respect to the amount in controversy. Throughout the proceeding, petitioner contends that it sought the cancellation of

the $1,259,250.00 penalty assessed, and further maintains that in light of the Tribunal's reversal and cancelation of the penalty, it prevailed with respect to the most significant issue presented. Petitioner claims that it is a prevailing party because, as confirmed in the affidavit of its owner, Eric R. White, its net worth on the date the proceeding was commenced (September 8, 2015) was below $7,000,000.00, and it did not employ more than 500 employees.

69. Petitioner more specifically contends that it is entitled to an award of administrative costs and litigation costs because the Division's position in the proceeding was not substantially justified, as shown by the Tribunals' reversal of the administrative law judges determination and consequent cancelation of the notice of deficiency against petitioner (***see*** finding of fact 63). Petitioner asserts that it should be awarded $62,412.75 in administrative costs and litigation costs, based upon the hours and hourly rates set forth in the affidavits of the five attorneys involved in this matter. Petitioner maintains that the hourly rates charged by the attorneys involved 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 allegedly illegal warrantless search of the truck and the seizure of the contents (cases of unstamped cigarettes) stored therein (Fourth Amendment argument), and regarding the allegedly excessive penalty that was levied against petitioner (Eighth Amendment argument). Petitioner further avers that the requested rates are reasonable when compared to attorneys' hourly fees charged in the Buffalo, New York area (***see*** findings of fact 64 and 66).

70. The Division asserts that the Commissioner was substantially justified in issuing a penalty assessment against petitioner, noting not only the initial determination by the administrative law judge upholding the penalty, but also in particular the facts and circumstances

concerning the vehicle in which the cigarettes were contained and its connection to the possession and transport of such cigarettes. The Division further maintains that the affidavit furnished by petitioner's owner, Eric R. White, standing alone, is not sufficient to establish that petitioner did not exceed the $7,000,000.00 net worth and 500 employee qualifying limitations set forth under the statute. The Division further contends that the affidavits and exhibits of the attorneys involved in this matter are not sufficient to establish that the amounts sought as legal fees are reasonable and are sufficiently detailed so as to support an award of costs, at any of the levels requested therein. In this regard, the Division is particularly concerned that the time expended by petitioner's attorneys on this matter (ERW Enterprises) did not overlap and include time spent in the representation of ERW Wholesale, the counterpart party represented by the same attorneys and against whom an identical penalty was imposed. Lastly, the Division maintains that the evidence does not establish that petitioner actually incurred any costs for legal representation in this matter, noting that the record does not include bill(s) for payment, a retainer agreement, letter of engagement or other documents outlining the scope of duties for which legal fees were incurred and paid.

71. Petitioner, in reply to the Division's response, asserts that it has established it met the net worth and employee number statutory requirements by the submission of its owner's statements confirming the same under oath. Petitioner further maintains that the reconstructed time records attached to its attorneys' affidavits provide appropriate and sufficient evidence for an award costs, noting that the Division has not challenged any specific legal work performed by petitioner's attorneys, identified any specific time entry that it deems unreasonable, countered with any evidence to show that the hourly rates sought are unreasonable or inconsistent with the hourly rates charged in the Buffalo, New York, area, or provided any argument against an

increase in the statutory rate of $75.00 per hour to reflect a cost of living increase. In specific response to the Division's concerns about whether payment of fees for legal services was actually made, petitioner's counsel Mr. Reina asserts the information provided as to time spent and hourly fees charged is sufficient to establish entitlement to an award of costs, and further specifically confirms as part of his affidavit in response that:

> "[a]lthough not necessary, I confirm, under oath, that Lipsitz Green billed Petitioner for the legal services the firm provided Petitioner in relation to this matter, and Petitioner has provided payment to Lipsitz Green for those services. Indeed, Lipsitz Green has not been litigating this matter on Petitioner's behalf for over four years for free."

Finally, petitioner continues to assert that the evidence does not support a conclusion that the Division's position in the underlying matter was substantially justified as against ERW Enterprises.

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 . . . owner of . . . [a] corporation . . . the net worth of which did not exceed seven million dollars at the time the civil action was filed, and which had not more than five hundred employees 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]). Since the Tribunal's decision in favor of ERW Enterprises, issued on May 29, 2019, was not subject to further appeal (***see*** Tax Law § 2016), the same constituted the final judgment in this matter. Hence, petitioner's application for administrative costs and litigation costs was timely filed on June 27, 2019, i.e., within 30 days of notice of the Tribunal's decision.

D. There are several criteria to be met in order to determine whether entitlement to an award of costs is warranted. In order to be granted an award of costs, it must first be determined that the taxpayer is the "prevailing party" pursuant to Tax Law § 3030 (c) (5) (A). As to this first criterion, it is necessary for petitioner to establish that it 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]). Clearly, petitioner has satisfied this first criterion. In this case, the Tribunal concluded, on the facts, that ERW Enterprises was not in "possession or control" of the unstamped cigarettes being transported on the December 3, 2012 date of the stop and seizure for purposes of the penalty imposed under Tax Law §481 (1) (b) (i) (A), and on that basis reversed the determination of the undersigned administrative law judge and cancelled the penalty assessed by the Division (***see*** finding of fact 63). Inasmuch as petitioner prevailed with respect to the amount in controversy, it was the prevailing party under Tax Law § 3030 (c) (5) (A) (i)

E. While petitioner prevailed with respect to the amount in controversy, any grant of costs is also subject to the limitation provision of Tax Law Tax Law § 3030 (c) (5) (B). That

limitation provides that a taxpayer may not be treated as a "prevailing party," and thus is ineligible to receive an award of costs, if the Division's position was "substantially justified" (Tax Law § 3030 [c] [5] [B] [i]).

F. 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 bears the burden of proof in establishing that its position was substantially justified (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 sustained by the administrative law judge, but was thereafter canceled on appeal by the Tribunal, is clearly a factor to be considered (***see 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*** 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 not the prevailing party within the meaning and intent of Tax Law § 3030 because the Division was substantially justified in issuing the notice to petitioner based upon the information in its possession at the time the notice was issued, i.e., on December 16, 2014.

G. The notice issued against petitioner was premised upon the Division's assertion that on

December 3, 2012, petitioner was "found to be in possession and/or control of unstamped or unlawfully stamped cigarettes, and/or untaxed tobacco products." In fact, on that date, a truck driven by Shawn Snyder failed to stop at the I-87 Valcour northbound inspection station. The truck was thereafter stopped by a State trooper who asked Mr. Snyder for his license, the vehicle registration and what the load was. Mr. Snyder provided 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 to the Ganienkeh territory From the time of the stop until the proceedings conducted in ***Matter of Snyder*** and in ***Matter of ERW Wholesale and ERW Enterprises***, the status of the driver's employment, i.e. either by ERW Wholesale or ERW Enterprises, was uncertain. The responses of the driver, Mr. Snyder, specifically with respect to the entity by whom he was employed at the time of the stop, were at best equivocal, and the status of his employment was not clarified with any certainty until the time of the subsequent hearings, most specifically in the related ***Matter of Snyder*** (see findings of fact 17 and 18). Moreover, as the Tribunal stated in its decision, "the delivery truck links ERW Enterprises to the transaction at issue." The truck was used by both ERW Wholesale, to deliver cigarettes, and by ERW Enterprises, albeit only "from time to time," to transport construction materials. Still, the transaction at issue could not have been accomplished without use of the truck, and at the time of the stop, the truck was in fact registered to petitioner, ERW Wholesale, that entity's name and the vehicle's DOT number appeared on the vehicle's sides, and petitioner "had a designation to be able to put the vehicle's DOT identification number on the vehicle's side" (***see*** finding of fact 15). While the truck was registered to petitioner, the fact that is was titled to and owned by Eric R. White was not specified until after the notice in question was issued, and the subsequent change of registration

from petitioner to ERW Wholesale was likewise not completed until after the notice in question was issued. There is no evidence that petitioner had presented all such relevant information under its control as of the date the notice in question was issued, or, indeed, at any time prior to the noted proceedings held in ***Matters of ERW Enterprises, ERW Wholesale*** and ***Matter of Snyder***, all of which concerned the same transaction upon which the Division's issuance of the notice in question to petitioner was predicated. Ultimately, the Tribunal's ruling in petitioner's favor was based upon facts developed and established at proceedings held after the date of issuance of the notice in question. In light of all of these circumstances, the Division has established that its position at the time the notice was issued against petitioner was substantially justified. Accordingly, petitioner may not be treated as the prevailing party for purposes of Tax Law § 3030, and is not entitled an award of administrative costs and litigation costs.

H. Given the foregoing, the remaining question concerning whether petitioner has met the additional cost award eligibility criteria by establishing that its net worth was less than $7,000,000.00 and that it did not have more than 500 employees has been rendered moot. Further, and assuming that it has met such criteria, the question of whether petitioner has established that it is entitled to an award of costs in excess of the statutorily allowable $75.00 per hour amount is likewise rendered moot. However, in the interest of creating a complete record for consideration in the event of any appeal of this determination, those issues will be briefly addressed.

I. As to the first question, it is incumbent upon petitioner to establish that its net worth did not exceed $7,000,000.00, and that it did not have more than 500 employees at the time the civil action was filed (Tax Law § 3030 [c] [5] [A] [ii] [II]). Here, petitioner submitted the bare affidavit of its sole owner, specifically stating that petitioner's net worth was not in excess of

$7,000,000.00 and that petitioner did have over 500 employees (***see*** finding of fact 67). Petitioner maintains that this alone is sufficient to show that it met the relevant eligibility criteria concerning net worth and number of employees. While affidavits may be submitted as evidence in proceedings before the Division of Tax Appeals (20 NYCRR 3000.15 [d] [1]; ***see Matter of Orvis Co. v Tax Appeals Tribunal***, 86 NY2d 165 [1995], ***cert denied*** 516 US 989 [1995], it remains that the use of an affidavit precludes the opposing party from conducting any cross examination of the affiant, and thus there always exists a question of assigning the amount of weight to be accorded an affidavit. For its part in response, the Division did not, in turn, go forward with any evidence to countermand petitioner's owner's affidavit, notwithstanding that such evidence would presumably be in the Division's possession. For example, petitioner was incorporated in 2008, and is registered to do business in New York (***see*** finding of fact 2), yet no information from its tax returns and reports, including information concerning the dollar amount of employee wage expenses reported thereon, was provided by the Division as a basis to call into question or counter the accuracy or credibility of the assertions set forth in petitioner's owner's affidavit. Nonetheless, it remains petitioner's burden to establish that it met the net worth and employee number eligibility criteria under Tax Law § 3030 (c) (5) (A) (ii) (II).

J. As concluded earlier, it is appropriate to rely upon federal cases for guidance in analyzing Tax Law § 3030 (***see*** conclusion of law F). In ***Park v Commr.***, 84 TCM (CCH) 319 (T.C. 2002), where the taxpayer submitted a statement, accompanied by an affidavit, the Court, citing ***Johnson v Commissioner*** (TCM 1999-127 [T.C. April 16, 1999], held that it was not "compelled to accept petitioners' unsubstantiated, conclusory, and self-serving assertion that they meet the net worth requirements" [for an award of costs], but that "the taxpayer must provide supporting information (i.e., evidence) to establish his net worth" (compare ***Mylander v***

Commr. [109 TCM (CCH) 1520 (T.C. 2015)] [affidavits stating net worth less than $2 million coupled with net worth statement prepared by CPA sufficient to establish taxpayers met net worth criterion for award of costs]). Similarly, in ***Shooting Star Ranch, LLC v United States*** (230 F3d 1176 [10th Cir. 2000]), the Court observed that a party seeking an award of costs must provide more that a bare assertion that it meets the net worth limitation (***see also Cintron v Calogero*** 99 AD3d 456 [1st Dept 2012] [affidavit without concrete supporting facts, e.g., statement of assets and liabilities, is insufficient to support an award of costs and fees, citing CPLR 8601 (b) (1)]). In ***Matter of Broaddus v U.S. Army Corps of Engineer***s, (380 F3d 162 [4th Cir. 2004]), the Fourth Circuit stated that "We . . . hold that a district court is capable of determining an applicant's net worth based upon a sworn affidavit by the applicant's CPA, provided that the affidavit includes documentation of the applicant's liabilities and assets. If the CPA's affidavit allows the court to subtract liabilities from assets, thereby enabling the court to determine the applicant's net worth, then no further documentation is required" (380 F3d at 169; ***see U.S. v R.D. Prabhu, et al***, 2007 WL 3119854 (US Dist. Ct., D. Nevada, No. 2:04-cv-00589-RCJ-LRL, Oct. 23, 2007; not reported in F. Supp. 2d [2007]).

K. The text of Tax Law § 3030 does not define the term "net worth," or how to calculate or establish the same for purposes of an award of costs, and sets forth no requirement for a cost applicant to submit any accompanying additional specific financial information or other documentation to verify its net worth or number of employees at the time of commencement of the civil action (***see*** Tax Law § 3030 [c] [5] [ii] [II]). At the same time, however, Tax Law § 3030 (c) (5) (A) (ii) requires an applicant for an award of costs to "show" that it met the net worth and employee number criteria. The use of the word show clearly indicates that the Legislature contemplated something more than the submission of a bare affidavit merely

claiming the relevant criteria have been met. Here, the affidavit of petitioner's sole owner simply states that petitioner met the requisite criteria, but provides nothing further to "show" the same. A bare averment, with no further substantiation, leaves the trier of fact with nothing upon which to conduct any review and, consequently, no objective basis upon which to arrive at any conclusion regarding a claimant's net worth or the number of its employees. A conclusion accepting a bare affidavit as sufficient proof is inconsistent with both the statutory directive to "show" the requisite criteria have been met, as well as with the federal case law on this issue.

L. Finally, and as to the amount of costs, petitioner has sought an award of costs totaling $62,412.75, consisting of attorneys' fees and associated administrative costs, as specifically detailed in findings of fact 64 and 66. Petitioner contends that the hourly rates charged by its various attorneys 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. Petitioner further contends that the requested rates are reasonable when compared to attorney rates typically 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, as an equitable cost of living adjustment, noting by comparison that such rate is permitted under IRC § 7430. The Division counters that petitioner failed to describe its litigation and/or administrative costs with sufficient detail to determine if the claimed expenses were reasonable, arguing that the amounts sought to be recovered are unauthorized, unsubstantiated, and unreasonable. Among the exhibits attached to each of the attorney's affidavits submitted by petitioner were detailed reconstructed time records listing the legal services provided by each particular attorney, and the amount of time (hour or portion thereof) spent on such services on specified dates. Review of the affidavits of each attorney, together

with the detailed time records attached to the same, reveals that the submitted records provide sufficient detail to determine that each attorney did provide the identified legal services to petitioner. Such evidence specifies that the time and services listed thereon pertained only to this petitioner (ERW Enterprises), and not to the companion petitioner (ERW Wholesale), notwithstanding that both of these associated cases were tried at the same time and as part of the same proceeding. Accordingly, if petitioner was a prevailing party, the evidence concerning the costs incurred by petitioner is sufficiently detailed to conclude that an award of costs would be appropriate. At the same time, and 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, the Legislature set the statutory rate for the services of an attorney at $75.00 per hour. That rate has not been increased by the Legislature, notwithstanding the increase to the federal rate noted earlier, and despite petitioner's assertion, there are no clearly identified special factors in this matter that warrant an increase to the statutory rate (***see*** Tax Law § 3030 [c] [1] [B] [iii]).

M. Petitioner's application for costs is hereby denied.

DATED: Albany, New York
March 26, 2020

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE