

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition :  
of :  
**ERW ENTERPRISES, INC.** :  
for Revision of a Determination or for Refund of :  
Cigarette Tax under Article 20 of the Tax Law for :  
the Period ended December 3, 2012. :

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ORDER  
DTA NOS. 827209  
AND 827210

In the Matter of the Petition :  
of :  
**ERIC WHITE D/B/A ERW WHOLESALE** :  
for Revision of a Determination or for Refund of :  
Cigarette Tax under Article 20 of the Tax Law for :  
the Period ended December 3, 2012. :

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On March 15, 2018, the Administrative Law Judge issued a determination denying the petitions filed by petitioners and sustaining the notices of deficiency issued by the Division of Taxation in this matter. On May 15, 2018, petitioners ERW Enterprises, Inc. and Eric White d/b/a ERW Wholesale, filed an exception to the determination of the Administrative Law Judge. Both petitioners and the Division of Taxation (Division) subsequently filed briefs on exception and the matter is now scheduled for oral argument on November 29, 2018. Petitioners are appearing by Lipsitz Green Scime Cambria LLP (Jeffrey F. Reina and Patrick J. Mackey, Esqs., of counsel). The Division of Taxation is appearing by Amanda Hiller, Esq. (Brian Evans, Esq., of counsel).

On July 20, 2018, the Seneca Nation of Indians (Seneca Nation), appearing by Lippes Mathias Wexler Friedman LLP (Carol E. Heckman and Carson R. Cooper, Esqs., of counsel) filed a notice of motion with the Tax Appeals Tribunal for amicus curiae relief, together with a proposed amicus brief. Petitioners did not respond to the notice of motion or the proposed amicus brief. The Division filed a letter in response to the proposed amicus brief. The 90-day period for the issuance of this order began on August 30, 2018, the date the Division's response was received.

### ***OPINION***

The Seneca Nation seeks permission to file an amicus brief in this matter based on the assistance it can provide this Tribunal because of its unique knowledge regarding the issue of whether the State has the authority to regulate native-manufactured cigarettes that are being transported between Indian territories located within the State. Also, the Seneca Nation explains that it has a self-interest in the outcome of this particular case and in the issue presented by the case in general. The Division submitted a substantive response to the proposed amicus brief. While not formally contesting the filing of the proposed amicus brief, the Division noted that the Seneca Nation advances several reasons for the Tribunal to accept the proposed amicus brief, including not only the special assistance the proposed amicus brief would provide to this Tribunal, but also the Seneca Nation's own self-interest in the outcome. Petitioners did not submit any comments regarding the proposed amicus brief.

This Tribunal has no rules or regulations governing the filing of amicus briefs in matters before it. In the past, we have looked to the rules regarding the filing of amicus briefs before the Court of Appeals (*Matter of Standard Mfg. Co.*, Tax Appeals Tribunal, July 11, 1991). While the rules of the Court of Appeals regarding the filing of amicus briefs have been amended and

renumbered since the Tribunal's decision in *Matter of Standard Mfg. Co.*, we see no reason not to continue to look to the court's current rules for guidance in determining whether to grant amicus curiae relief. Such rules require a non-party to obtain permission to file an amicus brief through the filing a motion (22 NYCRR 500.23). The criteria for granting relief are as follows:

“(4) Criteria. Movant shall not present issues not raised before the courts below. A motion for amicus curiae relief shall:

(i) demonstrate that the parties are not capable of a full and adequate presentation and that movant could remedy this deficiency; movant could identify law or arguments that might otherwise escape the Court's consideration; or the proposed amicus curiae brief otherwise be of assistance to the court.

(ii) include a statement of the identity of the movant and its interest in the matter . . . ” (22 NYCRR 500.23 [a]).

The proposed amicus brief meets the above criteria in that the unique historical perspective of a federally recognized Indian nation, together with the Seneca Nation's familiarity with the complexity of the issues herein, lead us to conclude that the proposed amicus brief will be of assistance to this Tribunal. The Division implies that the Seneca Nation's interest in the outcome of this matter somehow negates the value of the proposed brief. However, the rules of the Court of Appeals require only that an interest in a matter be set forth in the moving papers so that the parties and the court are aware of the interest, not that an interest in any way precludes the granting of amicus curiae relief (*id.*). Indeed, this Tribunal has previously granted amicus curiae relief to similarly interested amicus applicants (*see e.g., Matter of P-H Fine Arts, Ltd., et al.*, Tax Appeals Tribunal, January 20, 1994).

Accordingly, it is ORDERED, ADJUDGED and DECREED that the motion of Seneca Nation of Indians for amicus curiae relief is hereby granted and its proposed amicus brief is accepted.

As the Division has already provided its response to the amicus brief, and petitioners had no comment regarding the same, no additional opportunity will be allowed for submission of written comments regarding the amicus brief. Consequently, this case will proceed to oral argument as scheduled on November 29, 2018.

DATED: Albany, New York  
October 22, 2018

/s/ Roberta Moseley Nero  
Roberta Moseley Nero  
President

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

/s/ Anthony Giardina  
Anthony Giardina  
Commissioner