

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ST. LAWRENCE

MAR - 1 2012

HCI Distribution, Inc.,

Petitioner,

VERIFIED PETITION

-vs-

Index No. 138276
I.A.S. # 44-1-2012-0145

New York State Police, Troop B Commander,
Ray Brook, New York;
New York State Police Evidence Custodian,
Ray Brook, New York;
St. Lawrence County District Attorney Nicole M. Duvé;
St. Lawrence County Assistant District Attorney John Becker;
Does 1-20.

Respondents.

RECEIVED AT
ST. LAW. CO.
CLERKS OFFICE
MAR 2 2012 2:10:59

TO THE SUPREME COURT OF THE STATE OF NEW YORK:

Petitioner, through its Counsel, Fredericks Peebles & Morgan LLP, pursuant to Article 78 of the New York Civil Practice Law and Rules respectfully alleges as follows. This Petition is supported the affidavits of Leisa Guerrero, Justin E. Tarbell, William Michael Cagle and Joseph Messineo.

I. PARTIES

1. Petitioner HCI Distribution, Inc. ("HCI") is an economic and political subdivision of the Winnebago Tribe of Nebraska, a federally recognized Indian tribe.
2. Upon information and belief Respondent Nicole M. Duve' is the District Attorney of St. Lawrence County. Her responsibilities include enforcing New York laws and regulations, including tax laws and regulations, within St. Lawrence County. Mr. Duve' also supervises assistant district attorneys.

3. Upon information and belief Respondent John Becker is an Assistant District Attorney for St. Lawrence County. His responsibilities include enforcing New York laws and regulations, including tax laws and regulations, within St. Lawrence County.

4. Upon information and belief Respondent Commander of the New York State Police Troop B Barracks at Ray Brook, New York is an officer of the State Police of New York. His responsibilities include enforcing New York laws and regulations, including tax laws and regulations, within St. Lawrence County.

5. Upon information and belief Respondent Evidence Custodian for the New York State Police Troop B Barracks at Ray Brook, New York is an officer of the New York State Police. His/Her responsibilities include accounting for and maintaining seized property held by the New York State Police at the Ray Brook barracks.

II. FACTS

6. On January 23, 2012, HCI purchased 26,160 cartons of Signal brand cigarettes and cigars and 72 bags of Signal brand pipe tobacco with the sale occurring entirely on the St. Regis Mohawk Indian Reservation. The purchased cigarettes were then consigned to a common carrier, D and T Transport, Inc., (“D and T”, the “common carrier”) under a bill of lading indicating the quantity, source and destination of the purchased cigarettes. (Affidavit of Michael Cagle (“Cagle Affidavit”) at ¶¶ 5, 6).

7. The destination of the cigarettes, as set forth on the bill of lading and attested to by D and T’s driver, Michael Cagle, was HCI’s facilities on the Winnebago Tribe’s reservation located within the exterior boundaries of the State of Nebraska. (Cagle Aff. at ¶¶ 6, 9.)

8. The Signals brand is manufactured by Ohserase Manufacturing, LLC (“Ohserase”), a federally licensed cigarette manufacturer, license number TP-NY-15042. (Affidavit of Justin

Tarbell (“Tarbell Affidavit”) at ¶ 4). Ohserase is a company organized under the laws of the St. Regis Mohawk Tribe and is wholly owned by members of the St. Regis Mohawk Tribe. (Tarbell Affidavit at ¶ 3). All Signal brand cigarettes are manufactured on the St. Regis Mohawk Indian Reservation outside the jurisdiction of the State of New York. (Tarbell Affidavit at ¶ 6).

9. On January 23, 2012, the common carrier was stopped at a routine U.S. Boarder Patrol checkpoint south of Hogansburg, New York in St. Lawrence County. (Cagle Affidavit at ¶ 8).

10. Upon information and belief, the New York State Police were contacted and arrived at the U.S. Boarder Patrol checkpoint sometime before noon on January 23, 2012.

11. The New York State Police then broke the seal on the cargo doors of the semi-trailer and searched the contents of the semi-trailer. (Cagle Affidavit at ¶8).

12. Upon information and belief the New York State Police did not have a search warrant allowing for a search of the semi-trailer contents. (Cagle Affidavit at ¶8).

13. After the search, and detaining the driver for hours, the New York State Police seized the truck and the contents of the truck: the 26,160 cartons of Signal brand cigarettes, cigars, and 72 bags of Signal brand pipe tobacco purchased by HCI earlier that day on the St. Regis Indian Reservation. (“HCI’s seized property”). (Cagle Affidavit at ¶ 8).

14. Upon information and belief the New York State Police did not have a warrant for seizure of the truck or HCI’s seized property. (Cagle Affidavit at ¶8).

15. Upon information and belief the truck and HCI’s seized property were taken to the New York State Police barracks in Ray Brook, New York, and, as of the date of this filing, are still being held at this location. (Affidavit of Joseph Messineo (“Messineo Affidavit”) at ¶ 5).

16. On January 25, 2012, counsel for HCI, Joseph Messineo, had a telephone conversation with Respondent St. Lawrence County Assistant District Attorney, John Becker, (“Respondent

Becker”). (Messineo Affidavit at ¶ 2). At that time, Respondent Becker informed HCI’s counsel that HCI’s seized property would not be returned to HCI. (Messineo Affidavit at ¶ 4).

17. Mr. Becker informed HCI’s counsel that HCI’s seized property were required to bear New York excise tax stamps indicating that the New York tax had been paid, despite that HCI’s seized property was manufactured on Indian land by members of a tribe and purchased by a tribally-owned company for shipment out of the state to other Indian land. (Messineo Affidavit at ¶¶ 3, 4; Tarbell Affidavit at ¶¶ 5, 6).

18. No criminal charges or civil complaint have been filed against HCI, D and T Transport, its driver, or any other person involved in the purchase or shipment of HCI’s seized property.

III. THE LAW

19. New York Tax Law Section 471 imposes a tax upon all cigarettes possessed for sale in the state upon which the state has the power to impose a tax. (Tax Law § 471[1]) (“no tax shall be imposed on cigarettes sold under circumstances that this state is without power to impose such tax . . .”). This tax is “precollected” by stamping agents, but the tax liability is actually on the consumer when the cigarette is sold to the consumer or used by the consumer in the state. (Tax Law § 471 [2]).

20. New York Department of Tax and Finance (“DTF”) regulations recognize as “axiomatic” that New York is without the power to tax a sale to a consumer in another state. “The Constitution of the United States prohibits any state from imposing a tax which directly burdens or unduly impedes interstate or foreign commerce and from attempting to impose a tax on any person, property, or privilege which is not within such state’s jurisdiction.” (20 NYCRR 76.3 [a]).

21. 20 NYCRR 76.3 (b) then provides that unstamped cigarettes, i.e., cigarettes on which the tax is not “precollected,” may be exported from the state when they “are sold for purposes of resale or use outside of the State of New York” (20 NYCRR 76.3 [b]). Thus, New York law unquestionably allows unstamped cigarettes to leave the state.

22. New York Department of Tax and Finance regulations further provide that the State does not tax any cigarettes sold to out-of-state purchasers, whether by state-licensed stamping agents or others: “In general and as provided for in this Title, no tax will be imposed under article 20 of the Tax Law on cigarettes sold . . . to out-of-state purchasers” (20 NYCRR 74.1 [c][4]).

23. New York State stamping regulations only apply within the “State’s taxing authority.” [See, e.g., 20 NYCRR 76.3]. Wholesales made on the St. Regis Mohawk Indian Reservation between Indians for export out of the state are not within the State’s taxing authority. States generally lack taxing jurisdiction over transactions in Indian Country. (*Oklahoma Tax Com’n v. Chickasaw Nation*, 515 U.S. 450 [1995]). Limits on state jurisdiction to regulate cigarette transactions involving Indians in Indian Country was recently reaffirmed by Congress with the passage of the Prevent All Cigarette Trafficking Act. (See Pub. L. No. 111-154, § 5).

24. Where the U.S. Supreme Court has ruled that states have taxing jurisdiction on cigarette sales in Indian Country, the salient fact in all of those rulings was that the cigarettes were unquestionably being held in Indian Country for sale to non-Indian consumers *in the state*. (See, e.g., *Moe v. Confederated Salish and Kootenai Tribe of the Flathead Reservation*, 425 U.S. 463 [1976] (cigarettes sold to non-Indian consumers in state on tribal land). See also *Washington v. Confederated Tribe of the Coleville Indian Reservation*, 447 U.S. 134 [1980] (same)).

25. The U.S. Supreme Court has also ruled that where Indians conduct activity on their reservation lands that “add value” to goods and service, as opposed to just importing a product

for resale, that activity is beyond the regulatory power of the state. (*California v. Cabazon Band of Mission Indians*, 480 U.S. 202 [1987]). (See also Messineo Affidavit at ¶ 6, 7, Attachments 1 and 2). Here, as the Signals brand is manufactured by St. Regis Mohawk Tribal members on the St. Regis Mohawk Indian Reservation, sales of the Signal brand on the St. Regis Mohawk Indian Reservation is beyond the regulatory authority of the State of New York.

26. Nor can New York assert jurisdiction and require the unstamped cigarettes to be sold by a New York stamping agent once they leave Indian Country and travel through the state to simply leave the state. Such a proposition would be counter to any practice or interpretation of the Tax Law by the Department of Taxation and Finance, which administers the Tax Law, and in any event would undoubtedly constitute a violation of the Interstate Commerce Clause of the United States Constitution. (*City of Philadelphia v. New Jersey*, 437 U.S. 617, 623-29 [1978]). Such a regime would place undue burdens on the movement of products through the State of New York for sale in another jurisdiction.

27. Should New York be possessed of the power to subject products simply traveling through the state to its excise tax laws, any other state on the route between the St. Regis Mohawk Indian Reservation and the Winnebago Reservation could make the same claim. This is clearly not the law. Only the jurisdiction where the goods come to rest might claim such power. Even then, a state government would have to overcome federal law limiting state jurisdiction in Indian country, as discussed above, in order to assert a tax on any product located within Indian country.

IV. CAUSE OF ACTION

28. New York law does not provide for any tribunal, body or officer to review cigarette seizures by the State Police or county authorities prior to bringing an Article 78 proceeding.

29. Upon information and belief, the State Police are maintaining custody of HCI's seized property at the direction of, or upon the request of the St. Lawrence County District Attorney.

30. There is no cognizable basis in law for the Respondents' seizure and continued detention of HCI's seized property. HCI's seized property was purchased outside of New York's taxing jurisdiction. HCI's seized property was not destined for any location within the State of New York. It was simply being shipped through the State with its ultimate destination being in another jurisdiction.

31. In seizing HCI's seized property the respondents proceeded without or in excess of their jurisdiction as there is simply no basis in law for their actions.

32. In seizing HCI's seized property the respondents determinations were made in violation of lawful procedure, were affected by an error of law or were arbitrary and capricious or an abuse of discretion as there is simply no basis in law for their actions.

33. No previous application for the same or similar relief has been made.

WHEREFORE, petitioner prays for a judgment under Article 78 of the Civil Practice Law and Rules and an order temporarily and permanently enjoining respondents from selling or otherwise disposing of the cigarettes illegally seized from petitioners, directing respondents to immediately release HCI's seized property and return the same to HCI with costs to Petitioner, and granting such further relief as this Court might deem just and proper.

Dated: February 28, 2012

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Ben Fenner", written over a horizontal line.

Ben Fenner, Esq.

Attorney for Petitioners HCI Distribution, Inc.

Fredericks Peebles & Morgan LLP

3610 N. 163rd Plaza

Omaha, Nebraska 68116

T:(402) 333-4053

F:(402) 333-4761

E:bfenner@ndnlaw.com

VERIFICATION

STATE OF NEBRASKA
CITY OF OMAHA
COUNTY OF DOUGLAS

The undersigned, Ben Fenner, being duly sworn, states that he is the attorney for the plaintiff in this action and that the foregoing complaint is true to his own knowledge, except as to matters therein stated on information and belief and as to those matters he believes it to be true; that the grounds of his belief as to all matters not stated upon his knowledge are correspondence and other writings furnished to him by plaintiff and interviews with officers and employees of plaintiff; and that the reason why the verification is not made by plaintiff is that plaintiff is not in the county where the attorney has his office.



Ben Fenner, Esq.

Attorney for Petitioners HCI Distribution, Inc.
Fredericks Peebles & Morgan LLP
3610 N. 163rd Plaza
Omaha, Nebraska 68116
T:(402) 333-4053
F:(402) 333-4761
E:bfenner@ndnlaw.com

Sworn to before me this 28 Day of February, 2012



Notary Public

