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

In the Matter of the Application of

HCI DISTRIBUTION, INC.,

Petitioner,

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules

-against-

NEW YORK STATE POLICE, TROOP B. COMMANDER, RAY BROOK, NY; NEW YORK STATE POLICE EVIDENCE CUSTODIAN, RAY BROOK, NY; ST. LAWRENCE COUNTY DISTRICT ATTORNEY, NICOLE M. DUVE', ST. LAWRENCE COUNTY ASSISTANT DISTRICT ATTORNEY, JOHN BECKER; DOES 1-20

Respondents.

Index No. 138276
IAS No. 44-1-2012-0145

Demarest, J.

MEMORANDUM OF LAW IN SUPPORT OF THE STATE POLICE RESPONDENTS' ANSWER, IN OPPOSITION TO THE PETITION, AND IN OPPOSITION TO PETITIONER'S REQUEST FOR A PRELIMINARY INJUNCTION

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PRELIMINARY STATEMENT

In this proceeding, couched under CPLR Article 78, petitioner HCI Distribution, Inc. ("HCI"), seeks return of an illegal shipment of tobacco products which was seized by the New York State Police and is being held as evidence pending anticipated criminal prosecution by the St. Lawrence County District Attorney. Petitioner also seeks a preliminary injunction "enjoining respondents from selling or otherwise disposing of the cigarettes ...[and]...directing respondents to immediately release HCI's seized property and return the same to HCI." See, Amended Petition, "Wherefore" clause.[1]

This Memorandum of Law is respectfully submitted on behalf of respondents New York State Police Troop B Commander, Ray Brook, New York and New York State Police Evidence Custodian, Ray Brook, New York ("the State Police respondents") in support of their Answer and in opposition to both the Amended Petition and petitioner's request for a preliminary injunction. The State Police respondents also submit the Affidavit of Trooper Jason West, the Affidavit of State Police Investigator Timothy Peets, the Affirmation of Richard Ernst, Deputy Commissioner of Enforcement of the New York State Department of Taxation and Finance, the Affirmation of Nebraska Assistant Attorney General Lynne R. Fritz, and the Affirmation of AAG Aaron Baldwin, with their referenced exhibits.

For the reasons set forth below, the Amended Petition should be dismissed and the relief requested therein, including petitioner's prayer for a preliminary injunction, should be denied.

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1 Petitioner's request for a temporary restraining order was denied, first through the striking of such proposed language from the Order to Show Cause dated March 2, 2012 and then again through a letter Order of the Court dated March 8, 2012, denying petitioner's request for reconsideration.

STATEMENT OF FACTS

The seizure of tobacco products challenged in this proceeding must be put into proper context by first setting forth those aspects of the New York State Tax Law and regulations relevant to such seizure, and also by examining the true nature of petitioner's tobacco distribution business.

A. The Tax Law

Article 20 of the New York Tax Law imposes an excise tax on cigarettes and tobacco. Under Article 20, the ultimate incidence of the cigarette excise tax is on the consumer. See, Affirmation of Richard Ernst ("Ernst Aff."), ¶4. The chain of taxation, however, begins with cigarette stamping agents, who purchase unstamped cigarettes from manufacturers. Ernst Aff., ¶4. Agents advance the tax by purchasing cigarette excise tax stamps, which they affix to each pack of cigarettes as evidence that the tax has been paid. Id. Sometimes agents act as wholesale dealers and sell cigarettes directly to retailers. Sometimes agents sell to wholesale dealers, who then sell to retailers. Either way, the tax is eventually passed through to the consumer as part of the cost of cigarettes. Id. Prepaid sales taxes are also included in the cost of the tax stamp, as required by Tax Law section 1103.

Tax Law section 471, contained in Article 20, imposes an excise tax on all cigarettes possessed in New York by any person for sale, except that no tax is imposed on cigarettes sold where New York does not have power to tax. All cigarettes within New York State are presumed to be subject to tax until the contrary is established. Tax Law §471(1); Ernst Aff., ¶5. Only agents are allowed to possess unstamped cigarettes with a few limited exceptions that are not applicable here. Ernst Aff., ¶5. Any unstamped cigarettes found in the

possession of a non-agent wholesale or retail dealer[s] will be presumed to be held in violation of the Tax Law. Ernst Aff., ¶5.

Tax Law §1814 criminalizes the possession or transportation of unstamped or unlawfully stamped cigarettes and, as specifically relevant to this proceeding, provides that any person other than an agent licensed by the commissioner who willfully possesses or transports more than 30,000 unstamped cigarettes shall be guilty of a class D felony. As to unlicensed persons, the possession in New York State of more than 5000 unstamped or unlawfully stamped cigarettes is presumptive evidence that the cigarettes are possessed for the purposes of sale and are subject to tax under the Tax Law. Ernst Aff., ¶5; Tax Law §1814(d). The person possessing the cigarettes has the burden to prove that the cigarettes are not taxable. Id.

The Commissioner's regulations at 20 N.Y.C.R.R. §76.3 address the sale of unstamped cigarettes out-of-state and provide a process by which such transactions may take place without incurring tax liability, but only through a state licensed agent that has received proper accompanying documentation and is subject to proper reporting requirements. Ernst Aff.,¶6. None of the entities involved in the shipment at issue herein, however, is a licensed New York State stamping agent. Ernst Aff., ¶10.

The regulation states that "[n]o person other than a duly licensed cigarette agent (or its employees) may possess in this State cigarettes upon which the tax has not been prepaid and precollected for purposes of making out-of-state sales where such cigarettes have come within the jurisdiction of New York State for purposes of taxation. An agent must report all sales of cigarettes to out-of-state purchasers in its monthly cigarette tax return." 20 N.Y.C.R.R. §76.3(c); Ernst Aff., ¶6. The regulation also states that "[w]hen such cigarettes

upon which the cigarette tax has not been prepaid and precollected are sold for purposes of resale or use outside of the State of New York, the licensed cigarette agent shall require and receive from the out-of-State purchaser, at the time of each delivery and as proof of the exempt sale, a certificate to the effect that the cigarettes (evidenced by an attached detailed invoice or other such document) will be immediately removed from the State to an identified location for such purposes and that such cigarettes shall not be returned to the State for sale or use herein." 20 N.Y.C.R.R. §76.3(b); Ernst Aff., ¶6.

As part of an agent's responsibilities, an agent, exact requirements depending on whether a resident or non-resident agent, must report every month their inventory of stamped cigarettes and cigarette stamps as well as the unstamped cigarettes that are manufactured, purchased or otherwise acquired and sales, returns, and transfers of cigarettes within and outside New York State, and sales of cigarettes to Indian nations or tribes or reservation cigarette sellers. Ernst Aff., ¶8. This information allows the State to protect the revenue of New York State by tracking all sales of cigarettes in New York State to ensure that all applicable cigarette taxes are paid where New York State can impose tax. Id. The requirements of 20 NYCRR 76.3 also serve to ensure that cigarette sales purporting to be destined out of state are, in fact, so delivered and not returned to the state for sale or use herein.[2] Id.

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2 New York's requirement that out-of-state destined sales be made through a state licensed agent in order to be lawful is by no means unique. Most other states have such requirements in their cigarette tax laws, including for example: Pennsylvania (72 P.S. §8273 et seq.); Hawaii (Haw. Rev. Stat. §§245-2, 245-16); California (CA Tax & Rev Code §30140; CA Bus. & Prof. Code §22975); Oklahoma (Okla. tit. 68, §§302-402, et. seq.); Idaho (Idaho Code §63-2505 and IDAPA 35.01.10.013); Iowa (Iowa Code §453A.17); Utah (Utah UCA §59-14-201(1)); Illinois (35 ILCS 130/3); and, Georgia (O.C.G.A. 48-11-4).

B. The Business of HCI Distribution, Inc

According to the Amended Petition, HCI is an "economic and political subdivision of the Winnebago Tribe of Nebraska, a federally recognized Indian Tribe." Amended Petition, ¶1. HCI is a "distribution company" which obtains tobacco products from various suppliers and then provides them to its customers. Affidavit of Lisa Guerrero, ¶¶2, 6. HCI, for example, purchases "Signal brand" cigarettes from Ohserase Manufacturing, one of HCI's "major suppliers," which is located on the St. Regis Mohawk Reservation. Amended Petition, ¶8; Guerrero Aff., ¶7. It is such brand of cigarettes that were seized in the incident giving rise to this proceeding.

According to HCI's website and information that can be found on it, "the company markets a wide selection of Tribal and other brands of cigarettes and tobacco products at discount prices" and offers "FREE shipping within the continental U.S." See, Baldwin Aff., ¶8; http://www.hcidistribution.com/aboutus.html (screen shot printout at Exhibit F). HCI advocates for a "Nation-to-Nation tobacco supply chain ... outside the state taxation system." See, Baldwin Aff., ¶9; http://www.hcidistribution.com/sovereignty.html (screen shot printout at Exhibit F). By participating in tribe-to-tribe "reselling" and avoiding state cigarette taxes, HCI advertises that "your tribe will receive 100% of the tax benefit" helping to "undersell your competition by 35%-50%," "increase your share of the market," and "leverage your tribal sovereignty." See, Baldwin Aff., ¶10; (screen shot printout at Exhibit F) http://www.hcidistribution.com/becomeareseller.html. HCI encourages its customers to participate in "the modern day emergence of Tribe-to-Tribe commerce. When one tribe sells to another tribe, they are much more likely to ignore the state laws and their threats." See, Baldwin Aff., ¶11; Indianz.com - http://www.indianz.com/News/2010/018769.asp

(3/12/2010 editorial by Lance Morgan, CEO of HCI, also available at http://64.38.12.138/News/2010/018769.asp) (screen shot printout at Exhibit F).

Under this scheme, HCI has in the past and apparently continues in the present, to resell and deliver vast quantities of unstamped cigarettes into New York State, including shipments of the Signal brand as were seized in the incident giving rise to the proceeding. Baldwin Aff., ¶12.

The voluntary statement of the truck driver carrying the seized shipment at issue herein reflects that he transported cigarettes on a regular basis from the Winnebago Reservation in Nebraska to the Poospatuck Reservation in New York. Affidavit of State Police Investigator Timothy Peets ("Peets Aff."), ¶8; Exhibit C. The driver also stated that he often continues his delivery route north to the St. Regis reservation where he regularly delivers more cigarettes, picks up additional cigarettes on the St. Regis reservation, and transports them back to his point of origin on the Winnebago reservation in Nebraska, to begin the process anew. Id.

Further, HCI Distribution documents obtained by the State confirm that in 2009 and 2010, HCI re-sold enormous wholesale quantities of cigarettes into New York State – including the Signal brand – and had an entire distribution and marketing network set up for New York "native manufactured" sales. See, Baldwin Aff., ¶15; Exhibit H (HCI Distribution sales and marketing documents). Indeed, HCI correspondence openly describes how, due to increased New York State regulation, it has "had to become even more creative regarding a variety of distribution issues, including transportation." Baldwin Aff., ¶16; Exhibit H (December 7, 2010 letter).

C. The Seizure of January 23, 2012

On January 23, 2012, New York State Police Trooper Jason West was assisting United States Border Patrol officers with a stationary checkpoint located on State Route 37, in the Town of Waddington, County of St. Lawrence. Affidavit of Jason West (hereinafter "West Aff.") at ¶3. The checkpoint was approximately fifteen miles from the nearest Canadian border crossing. Id.

At approximately 10:30 am, Border Patrol Agent Daryl Zook informed Trooper West that Agent Zook had stopped a tractor trailer driven by William Cagle and that the driver had admitted to him that he was transporting cigarettes out of Hogansburg. Id., ¶4. Because Agent Zook has witnessed many untaxed cigarettes being transported illegally from Indian reservations, he directed the driver to the secondary inspection area for further investigation. Id., ¶6; Exhibit A (United States Border Patrol Report of Apprehension of Seizure).

After Agent Zook instructed the driver to proceed to a secondary inspection point, Trooper West approached the vehicle with Agent Zook and together they interviewed Mr. Cagle. West Aff., ¶7. Mr. Cagle was cooperative and freely answered questions. Id. The officers asked Mr. Cagle if the cigarettes were taxed and Cagle replied that he did not know if they were. Id. Mr. Cagle produced a Bill of Lading which itemized the freight he was carrying as 25,920 cartons of Signal brand cigarettes, 240 cartons of Signal brand filtered cigars, and 72 bags of Signal brand pipe tobacco, for a total of 26,232 pieces of freight (hereinafter referred to alternatively as "contents" "seized product" or "cigarettes"). Id., ¶8; Exhibit B (Bill of Lading). The Bill of Lading did not include any reference to the seller or purchaser being New York State duly licensed cigarette agents (see, Exhibit B) and, when asked, Cagle stated that he was not such a licensed agent. West Aff., ¶9.

The facts that Mr. Cagle was transporting cigarettes from a reservation, that he was not a licensed agent, that the shipping documentation did not include reference to the seller or purchaser being New York State duly licensed cigarette agents, and that Mr. Cagle could not definitively state that the cigarettes were taxed, all gave rise to a reasonable suspicion that Mr. Cagle was transporting untaxed cigarettes in violation of New York's Tax Law. West Aff., ¶10. Both Trooper West and Agent Zook then asked Mr. Cagle for consent to search the trailer and inspect its contents. Id., ¶11.

Mr. Cagle gave permission for the search on the condition that the officers have a seal available to reseal the doors in the event the he was able to continue his delivery. Id., ¶12. Agent Zook indicated that he had seals for this purpose and Mr. Cagle then consented to allow to a search of the trailer. Id., ¶13. The seal on the trailer was then removed by Officer Zook to gain entry to the trailer. West Aff., ¶14. During the search, Trooper West verified that the cigarettes were in fact untaxed. Id., ¶15.

Trooper West notified his chain of command that he had a load of untaxed cigarettes and requested instructions. ¶16. West was advised to bring Mr. Cagle to the Ogdensburg station for questioning. Id., ¶17. Trooper West then brought Mr. Cagle to SP Ogdensburg and turned him over to Investigator Timothy Peets for further questioning about possible violations of the New York State Tax Law relating to the possession and transportation of untaxed cigarettes. Id., ¶18. Trooper West was also advised by Investigator Peets that the vehicle and its contents be secured as evidence for possible criminal charges. Id., ¶19. The vehicle and its contents were subsequently taken to Troop B Headquarters in Ray Brook. Id., ¶20. See also, Peets Aff., ¶¶1-5.

At approximately 3:30 PM, Investigator Peets advised Mr. Cagle of his Miranda rights and Mr. Cagle agreed to answer questions without a lawyer being present. Peets Aff., ¶7. Investigator Peets secured a New York State Police General 19, Voluntary Statement, from Mr. Cagle. Id., ¶8; Statement at Exhibit C. During this interview, Mr. Cagle stated that he is employed by D & T Truck Transporters of Nebraska and, in this capacity, he had transported cigarettes on a regular basis from the Winnebago Indian Reservation in Nebraska to the Poospatuck Indian Reservation on Long Island, New York. Peets Aff., ¶8; Exhibit C. Mr. Cagle further stated that he often continued his delivery route north to the St. Regis reservation where he regularly delivers more cigarettes. He also disclosed that, on several occasions, he picked up additional cigarettes on the St. Regis reservation and transported them back to his point of origin on the Winnebago reservation in Nebraska. Id.

Mr. Cagle was not charged at that time and, after the interview was completed, he was released. Peets Aff., ¶9. The truck and its contents were secured as evidence for anticipated criminal prosecution at the request of the St. Lawrence County District Attorney's office. Id., ¶10; Exhibit D (Evidence Records); Exhibit E (New York State Police Incident Report). ADA Jonathan Becker subsequently advised Investigator Peets that the DA's office would be pursuing criminal charges under Tax Law section 1814(c)(2) against the driver such that the tractor trailer and tobacco products seized on January 23, 2012 should continue to be held as evidence in this regard. Peets Aff., ¶15; Exhibit E.

With the permission of the DA's office, the tobacco products were thereafter taken to a Department of Taxation and Finance warehouse in Rotterdam, NY, for secure storage. Peets Aff., ¶¶16-19; Exhibit D; Exhibit E. The tractor trailer remained at SP Troop B headquarters in Ray Brook at the direction of the St. Lawrence County District Attorney's

Office until March 22, 2012, at which time the tractor trailer was released to the driver, Mr. Cagle. Peets Aff., ¶20; Exhibit D.

SUMMARY OF ARGUMENT

The State Police respondents respectfully submit that the Court should refrain from hearing the claims raised in the Amended Petition and should decline the petitioner's invitation to disturb the seizure at issue given the anticipated criminal prosecution, in which the legality of the seizure can be properly adjudicated (Point I).

Even if the Court were inclined to entertain the Amended Petition, petitioner's claims should be dismissed because the cigarettes were properly seized as being in violation of the Tax Law and are being duly held as evidence pending anticipated criminal prosecution (Point II). In this regard, the State has the power and authority to tax on-reservation sales to non-members of an Indian tribe, as well the ability to make off-reservation seizures of illegally transported products (Point II(A)). Further, petitioner's argument that since the cigarettes were supposedly destined out of State, they are not taxable and therefore not subject to seizure or potential criminal prosecution ignores the statutory presumption of taxability (which the defendants submit cannot be rebutted under the facts of this case) and flouts the state licensed agent and recordkeeping requirements. Violations of those requirements provide support for the seizure and potential criminal charges even if no taxes are yet technically due (Point II(B)). Also, the exemption for unstamped cigarettes being "lawfully transported" by a common or contract carrier has no application here (Point II(C)). Finally, the state licensed agent requirement does not impose an undue burden under the Commerce Clause or otherwise (Point II(D)).

Additionally, there was no Fourth Amendment violation as implied (but not expressly argued) by petitioner (Point III). Finally, petitioner has not satisfied the requirements for a preliminary injunction, has not shown any extraordinary circumstances warranting an immediate grant of the ultimate relief it seeks, and even if the Court determines that the State Police respondents cannot continue to hold the cigarettes as evidence, then the Court should still not grant preliminary injunctive relief in the manner requested by the petitioner (Point IV).

POINT I
THE COURT SHOULD REFRAIN FROM HEARING THE CLAIMS RAISED IN THE AMENDED PETITION

The general rule is that once a criminal action has been initiated, a defendant may not bring a civil action to raise an issue that can be adjudicated in the criminal proceeding. Cayuga Indian Nation of New York v. Gould, 14 N.Y.3d 614, 633 (2010). The prohibition is based upon the fact that a criminal defendant has "an adequate opportunity to raise legal arguments and receive appropriate relief . . . in the criminal prosecution, particularly given a defendant's right to appeal adverse rulings in the event of a conviction." Id. at 633-34. However, if a criminal action has not been commenced, a court in its discretion may entertain an action provided two criteria are met: "the constitutionality or legality of a statute or regulation is in question and no question of fact is involved." Id. at 634, quoting, Ulster Home Care v. Vacco, 255 A.D.2d 73, 77 (3d Dept. 1999). See also, Reed v. Littlejohn, 275 N.Y. 150, 153 (1937) (The court should not "ordinarily intervene to enjoin the enforcement of the law by the prosecuting officials unless...the sole question involved is one of law where a clear right to the relief is established.").

Here, petitioner fails to meet the first criterion as it does not challenge the constitutionality or legality of a statute or regulation on it face. Rather, petitioner challenges the seizure of the unstamped cigarettes. See generally, Amended Petition. Because petitioner does not challenge the constitutionality or the legality of a statute or regulation, this action may not be maintained. To the extent the petition could be read to challenge whether the possession and transportation of unstamped cigarettes constitutes a crime (i.e., whether Tax Law § 1814 applies), it fails to satisfy the second prong because of the factual nature of such inquiry. Pursuant to the Tax Law §1814(d), "[t]he possession within this state of more than four hundred cigarettes in unstamped or unlawfully stamped packages by any person other than an agent at any one time shall be presumptive evidence that such cigarettes are subject to tax as provided by article twenty of this chapter." It is an inherently factual exercise to determine whether the statutory presumption has been rebutted. See e.g., DeLoronde v. NYS Tax Commission, 142 A.D.2d 90 (3d Dept. 1988) ("petitioners' claim turns on the resolution of factual issues, such as the status of petitioners and of the intended distributes of the cigarettes, as well as questions of ... the application of the statute . . . to exempt sales"). See also, Point II(B), below.

Even if the petition could be construed to challenge the constitutionality of a statute or regulation, the Court should nonetheless decline to entertain the petition. Petitioner appears to seek a writ of prohibition[3] pursuant to CPLR 7803(2) arguing that the respondents are proceeding in excess of jurisdiction. Petition, ¶ 31. As an initial matter, neither the New York State Police Troop B Commander or the New York State Police Evidence Custodian

3 Petitioner also appears to assert a claim under CPLR 7803(3) of arbitrary and capricious conduct. Petition ¶ 32. That claim is addressed in Point II, below.

are proper parties to an action seeking prohibition. A writ of prohibition may only be "directed to some inferior judicial tribunal or officer and lies to prevent or control judicial or quasi-judicial action only, as distinguished from legislative, executive or ministerial action." B.T. Productions, Inc. v. Barr, 44 N.Y.2d 226, 231-32 (1978); accord Morgenthau v. Erlbaum, 59 N.Y.2d 143, 147 (1983) ("It may not issue against legislative, executive, or ministerial action."). As the search of the tractor-trailer and the seizure of the unstamped cigarettes were not judicial or quasi-judicial acts, prohibition does not lie. Landmark West! v. Tierney, 9 Misc.3d 1102(A), *3 (Sup. Ct. N.Y. County, Sept. 1, 2005).

Moreover, "[t]he extraordinary writ of prohibition is available to address 'whether [a] body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction.'" Town of Huntington v. New York State Div. of Human Rights, 82 N.Y.2d 783, 786 (1993), quoting CPLR 7803(2). Because it is an "extraordinary" remedy, a writ of prohibition will not lie if there is an adequate alternative remedy. Morgenthau, 59 N.Y.2d at 147. As noted by the Court of Appeals, "if there is an adequate 'ordinary' remedy, then there is no need to invoke an extraordinary remedy." Id. Here, petitioner has an "ordinary" remedy as it may object to the seizure of the cigarettes in the context of the anticipated criminal action. See, Agresta v. Roberts, 66 A.D.2d 929, 930 (3d Dept. 1978) (denying writ of prohibition where petitioners could raise objections if they are named as defendants in criminal action). See also, CPL §710.60 (motion for suppression); CPL §710.70(1) (criminal court may, upon suppressing evidence, order return of the property if it is not otherwise subject to lawful retention).

Notably, petitioner is not without recourse should the criminal prosecution be unreasonably delayed. See, B.T. Productions, Inc., 44 N.Y.2d at 33 (writ of prohibition is

available two years after seizure where it appears criminal proceeding will not be commenced). However, the District Attorney must be provided a reasonable amount of time to investigate and commence a criminal prosecution. See, Agresta, 66 A.D.2d at 930; Moss v. Spitzer, 19 A.D.3d 599, 600 (2d Dept. 2005). Here, petitioner has "not demonstrated a clear legal right to the relief sought, first because the seized property has not been held for an inordinately long period of time, and second, because the petitioner[] [is] seeking, in effect, little more than a pre-indictment order suppressing evidence." Moss, 19 A.D.3d at 600.

Finally, while this action was commenced as an Article 78 proceeding, it is at its core an action for replevin. Indeed, the primary relief petitioner seeks is the return of the unstamped cigarettes. See Amended Petition, Wherefore Clause. However, replevin is not an appropriate remedy because "it would constitute an unjustified and unacceptable interference with a pending or potential criminal prosecution." B.T. Productions, Inc., 44 N.Y.2d at 233, n.2; accord SSC Corp. v. New York State Organized Crime Task Force, 128 A.D2d 860, 861 (2d Dept. 1987).[4] The unstamped cigarettes that were seized will unquestionably be an important, if not the most important, piece of evidence in connection with the anticipated criminal prosecution. Additionally, ordering their return would eliminate the deterrent effect that the criminal prosecution should carry with it.

4 Both B.T. Productions, Inc. and SSC Corp. involved a warrant. In this matter, the need for a warrant was obviated by the tractor-trailer driver's consent to search the truck. See Point III, below. The validity of the warrantless search and seizure may similarly be raised in the anticipated criminal action.

POINT II
THE PETITION SHOULD BE DISMISSED BECAUSE THE CIGARETTES WERE PROPERLY SEIZED AS BEING IN VIOLATION OF THE TAX LAW AND ARE BEING DULY HELD AS EVIDENCE PENDING CRIMINAL PROSECUTION

If the Court reaches the merits, it should find that the Amended Petition fails to state a cause of action, whether the respondents' actions are assessed under the alternative standards of arbitrary and capricious, affected by an error of law or in excess of jurisdiction,. The cigarettes at issue were properly seized and are being duly held as evidence pending anticipated criminal prosecution. Each of the petitioner's arguments against the seizure are entirely without merit as discussed in the sub-points that follow.

On these issues, it must not be overlooked that under Article 78 of the CPLR, the burden of proof rests on the petitioner and it would be improper to shift this burden to the respondents and require them to defend their actions in the first instance. New York State Inspection, Security and Law Enforcement Employees v. N.Y.S. Civil Service Commission, 213 A.D.2d 826 (3d Dept. 1995).

A. The Cigarettes Are Within the Jurisdiction and Authority of the State And Its Tax Laws

Petitioner argues that since the cigarettes were purchased on the St. Regis Mohawk Reservation and destined for the Winnebago Reservation in Nebraska, they are not within the State's taxing authority and should not have been seized off-reservation. Amended Petition, ¶¶27-28. This argument – consistent with the petitioner's purported business model of a Nation to Nation tobacco supply chain allegedly outside the reach of state taxation systems – flies in the face of now well-established Supreme Court precedent regarding the State's ability to tax on-reservation sales to non-members of an Indian tribe, as well as various

precedents recognizing the ability of the State to make off-reservation seizures of illegally transported products.

It is well settled that there is no tax exemption for commerce between members of different Indian tribes. While an early case relied upon by the petitioner expressly did not decide and left open the question of whether cigarette sales tax could be applied to on-reservation sales to Indians who resided off the reservation (Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation, 425 U.S. 463, 481 & n16 (1976) (hereinafter "Moe")), the United States Supreme Court has since that time repeatedly and unequivocally answered such question in the affirmative.

In State of Washington v. Confederated Tribes of the Colville Indian Reservation ("hereinafter "Colville") (447 U.S. 134 (1980)), the Supreme Court held that a state has the power and authority to apply its sales and cigarette taxes, including record keeping requirements for both taxable and tax exempt sales, to on-reservation purchases *by nonmembers of tribes*. The Supreme Court thereafter reiterated that a Tribe's sovereign immunity does not deprive a state of the authority to tax cigarette sales to nonmembers of the Tribe and, further, that the Tribe has an obligation to assist in the collection of validly imposed state taxes on such sales and to comply with all statutory recordkeeping requirements. Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 498 U.S. 505 (1991).

It is therefore now beyond dispute that the State has authority to tax and regulate "[o]n-reservation cigarette sales to persons other than reservation Indians." Dept. of Taxation and Finance of New York v. Milhelm Attea & Bros., 512 U.S. 61, 64 (1994) (hereinafter "Attea"). See also, Rice v. Rehner, 463 U.S. 713, 720 & 734 (1983) (tribal

member's commerce with "Indians who are not members of the tribe with jurisdiction over the reservation on which the sale occurred" is fully subject to state tax, licensing, and other regulation – tribes and their members are not "'super citizens' who [can] trade in a traditionally regulated substance free from all but self-imposed regulations"); Oneida Nation of New York v. Cuomo, 645 F.3d 154 (2d Cir. 2011) (State may tax on-reservation cigarette sales to persons other than reservation Indians); Gristede's Foods, Inc. v. Unkechauge Nation, 532 F.Supp.2d 439 (E.D.N.Y. 2007) (on-reservation cigarette sales to persons other than reservation Indians are legitimately subject to state taxation and regulation).

Therefore, the Court should reject as untenable petitioner's suggestion that it is part of some Nation to Nation tobacco supply chain allegedly outside the reach of state taxation systems.

Moreover, to suggest as petitioner does, that since the transaction began on an Indian reservation, it is a shipment "through" but not originating "within the state" is an argument that has no merit and has been repeatedly rejected by the courts of this State as "patently sophistic." New York State Dept. of Taxation and Finance v. Tyler Distribution Centers, 225 A.D.2d 939 (3d Dept. 1996). See also, New York State Dept. of Taxation and Finance v. Bramhall, 235 A.D.2d 75, 86 (4th Dept. 1997); Matter of 1750 Cases of Liquor, 231 A.D.2d 947, 85-86 (3d Dept. 1996) affg. 166 Misc.2d 739. New York State clearly has authority to make off-reservation seizures of illegally transported products such as unstamped cigarettes. Colville, 447 U.S. at 161-62; Potawatomi, 498 U.S. at 514 ("States may of course collect the sales tax from cigarette wholesalers...by seizing unstamped cigarettes off the reservation"); Muscogee (Creek) Nation v. Pruitt, 669 F.3d 1159, 1178-79 (practice of enforcing tax laws by seizing unstamped cigarettes off reservation does not infringe upon tribal sovereignty);

New York State Dept. of Taxation and Finance v. St. Regis Group, 217 A.D.2d 214, 219 (3d Dept. 1995) (state may seize cargo off Indian reservations but destined for delivery thereon); Bramhall, 235 A.D.2d at 85-86 (same) ; see generally, Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148-49 (1973) ("absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been subject to non-discriminatory state law otherwise applicable to citizens of the State. That principle is as relevant to a State's tax laws as it is to state criminal laws . . .").

Therefore, the Court should reject petitioner's threshold contentions that since the cigarettes were purchased on one Indian reservation and destined for another, they are allegedly not within the State's taxing authority and should not have been seized off-reservation.

B. The Cigarettes Were Properly Seized as Being In Violation of The Tax Law And The Statutory Presumption of Taxability Has Not Been Rebutted

Petitioner argues that since the cigarettes were supposedly destined out of State, they are not taxable and therefore not subject to seizure or potential criminal prosecution. Amended Petition, ¶¶21-24. Petitioner's argument in this regard, however, ignores the statutory presumption of taxability (which the defendants submit cannot be rebutted under the facts of this case) and flouts the State's licensed agent and recordkeeping requirements. Violations of those requirements provide support for the seizure and potential criminal charges even if no taxes are yet technically due.

All cigarettes within New York State are presumed to be subject to tax until the contrary is established. Tax Law §471(1); Ernst Aff., ¶5. Only licensed agents are allowed to possess unstamped cigarettes with a few limited exceptions that are not applicable here.

Ernst Aff., ¶5. In turn, Tax Law §1814 criminalizes the possession or transportation of unstamped or unlawfully stamped cigarettes and, as specifically relevant to this proceeding, provides that any person other than an agent licensed by the commissioner who willfully possesses or transports more than 30,000 unstamped cigarettes shall be guilty of a class D felony. As to unlicensed persons, the possession in New York State of more than 5000 unstamped or unlawfully stamped cigarettes is presumptive evidence that the cigarettes are possessed for the purposes of sale and are subject to tax under the Tax Law. Ernst Aff., ¶5; Tax Law §1814(d). The person possessing the cigarettes has the burden to prove that the cigarettes are not taxable. Tax Law §471(1).

The Commissioner's regulations at 20 N.Y.C.R.R. §76.3 address the sale of unstamped cigarettes out-of-state and provide a process by which such transactions may take place without incurring tax liability (i.e., a method to rebut the presumption of taxability), but only through a state licensed agent that has received proper accompanying documentation and is subject to proper reporting requirements. Ernst Aff.,¶6. Such agent must report all sales of cigarettes to out-of-state purchasers in its monthly cigarette tax return (20 N.Y.C.R.R. §76.3(c); Ernst Aff., ¶6) and the licensed cigarette agent is required to receive from the out-of-State purchaser, at the time of each delivery and as proof of the exempt sale, a certificate to the effect that the cigarettes "will be immediately removed from the State to an identified location for such purposes and that such cigarettes shall not be returned to the State for sale or use herein." 20 N.Y.C.R.R. §76.3(b) (emphasis added); Ernst Aff., ¶6. These requirements allow tax free out-of-state transactions while maintaining the State's ability to track all sales of cigarettes in New York State to ensure that all applicable cigarette taxes are paid where New York State can impose tax. The requirements of 20 NYCRR 76.3

also serve to ensure that cigarette sales purporting to be destined out of state are, in fact, so delivered and not returned to the state for sale or use herein. Ernst Aff., ¶8.

Here, the presumption of taxability serves to support the seizure and potential criminal charges since a New York State licensed cigarette stamping agent was not involved in any part of the transaction and the possession of these cigarettes was not lawful under Article 20 of the Tax Law. Ernst Aff., ¶10. Notably, there is no indication that the sale was reported to the State as would be required for a lawful transaction through a licensed agent. Moreover, the shipping document, while indicating that the destination was out-of-state, lacks the certification that that such cigarettes shall not be returned to the State for sale or use herein. See, Exhibit B.

Petitioner has not offered any evidence to rebut the statutory presumption of taxability, beyond the mere out-of-state addressee on the shipping document, which should be considered insufficient to rebut the presumption. See e.g., Bramhall, 235 A.D.2d at 79-80; Savemart, Inc. v. State Tax Commission of the State of New York, 105 A.D.2d 1001 (3d Dept. 1984). In Savemart, for example, the Third Department held that sale of 9,600 televisions by a large volume retailer and wholesaler distributor of electronics to one buyer was properly presumed by statute to be a retail sale, subject to tax, absent the required certificate from the buyer or other evidence to indicate what the buyer intended to do with the televisions. 105 A.D.2d at 1002-03. This was the case notwithstanding the seller's contention that the transaction was destined for an out of state purchaser. Id.

Bramhall in particular should inform the Court's analysis here. In Bramhall, the Fourth Department confirmed the seizure of motor fuel deliveries destined for an Indian reservation based in part upon certain statutory presumptions, document requirements and

licensed distributor requirements in the Tax Law's provisions regarding motor fuel – much in the same way the Tax Law and its regulations regarding cigarette distribution out-of-state operate here. The motor fuel tax and regulatory system had, in fact, been specifically updated in order to combat abuse of previously tax-free transfers of fuel between distributors who would engage in "daisy-chain" schemes, transferring the same fuel, often on paper only, between themselves in order to avoid taxation. 235 A.D.2d at 78.

The Appellate Division in Bramhall held that the respondent drivers' failure to produce proper documentation identifying a registered distributor for the transaction, coupled with the fact that the on-reservation intended recipients of the fuel were not registered distributors, gave rise to presumptions that the fuel was illegally intended for sale within the state by someone other than a duly licensed distributor. Id., at 81. Since the respondent drivers offered no proof in rebuttal, the seizures should have been confirmed based on the uncontroverted proof that the drivers failed to produce the requisite manifest and were transporting fuel that was being improperly imported by an unregistered distributor.[5] Id. The same result should be reached in this instance. See also, Tyler Distribution Centers, 225 A.D.2d at 937 (reinstating action to confirm forfeiture of shipment of liquor seized en-route to reservation, where bill of lading indicated that none of the parties associated with the transaction was a registered liquor distributor as required by Tax Law); Matter of 1750 Cases of Liquor, 231 A.D.2d 947, affg., 166 Misc.2d at 752 (confirming seizure of liquor based

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5 In reaching the conclusion that the seizure was proper, the Fourth Department in Bramhall also rejected each of the arguments that the petitioner here has or could have made – that the recipients of the fuel were "sovereign and beyond the reach of state law," that the sale was not "within the state," and that the State's enforcement of its valid tax laws unnecessarily intruded on core tribal interests. 235 A.D.2d at 85-86. See also, Matter of 1750 Cases of Liquor, 166 Misc.2d at 752 (confirming seizure of liquor based in part upon U.S. Supreme Court precedent that state had authority to regulate the transportation and taxation of liquor to an Indian tribe or reservation).

upon statutory presumptions and facts that the Tribe at issue was not a registered or licensed distributor and the operator of the motor vehicle carrying the liquor did not have the manifest required by the Tax Law and regulations).

The respondents therefore submit that, in line with the foregoing cases, because petitioner has not offered any evidence to rebut the statutory presumption of taxability, the seizure at issue herein should not be disturbed.

Indeed, aside from the statutory presumption itself and the demonstrated violations of licensed agent and documentation requirements, the respondents here have supplied the Court with additional evidence suggesting that HCI, in fact, intended to resell these cigarettes into New York State after the product was temporarily taken to Nebraska under HCI's self-styled "Nation to Nation tobacco supply chain." Under this scheme, HCI has in the past and apparently continues in the present, to resell and deliver vast quantities of cigarettes into New York State, including shipments of the Signal brand as were seized in the incident giving rise to the proceeding.

The voluntary statement of the truck driver for the seized shipment at issue herein reflects that Cagle transported truck loads of cigarettes on a regular basis from the Winnebago Indian Reservation in Nebraska to the Poospatuck Indian Reservation on Long Island, New York. Peets Aff., ¶8; Exhibit C. The driver also stated that he often continued his delivery route north to the St. Regis reservation where he regularly delivered more cigarettes and then picked up additional cigarettes on the St. Regis reservation, transporting them back to his point of origin on the Winnebago reservation in Nebraska, to begin the process anew. Id.

Further, HCI Distribution documents obtained by the State confirm that in 2009 and 2010, HCI re-sold enormous wholesale quantities of cigarettes into New York State – including the Signal brand – and had an entire distribution and marketing network set up for New York "native manufactured" sales. See, Baldwin Aff., ¶¶15-16; Exhibit H (HCI Distribution sales and marketing documents). Indeed, HCI correspondence openly describes how, due to increased New York State regulation, it has "had to become even more creative regarding a variety of distribution issues, including transportation." Id.

In light of all the foregoing, there is probable cause to believe that a violation of the Tax Law has occurred, sufficient for the State Police respondents to hold the evidence at the request of the District Attorney for anticipated criminal prosecution.

Indeed, the seizure should not be disturbed even if the Court were to credit petitioner's suggestion that no state tax might yet be due on the cigarettes. For example, in St. Regis Group, the Appellate Division confirmed seizures of liquor based upon lack of compliance with laws which mandated, among other things, that distributors be registered, importers be licensed, and that cargo be accompanied by detailed paperwork outlining whether taxes have been paid and, if not, why not. 217 A.D.2d at 220. This was the result even if the statutes in dispute did not require that taxes be collected on liquor that is to be sold to Indians on the reservation. Id. "Significantly, there is no assurance that a particular importer will sell only to Indians, even if all of the liquor is initially delivered to the reservation." Id. Compliance with laws imposing regulatory requirements on Indians and those trading with them, including licensing and recordkeeping, are not overly burdensome and are reasonably necessary to prevent fraudulent transactions. Id.

Likewise here there has been no assurance that the cigarettes will not be brought back to the State for sale or use herein and violations of the State's minimally burdensome laws and regulations should not be tolerated, much less judicially countenanced.

The Colville case is again instructive on this latter point. In that case, the Supreme Court rejected the Tribe's argument, as petitioner essentially argues here, that because sales by out-of-state wholesalers to tribal businesses are exempt from state taxation, no state tax was due in transit such that unstamped cigarettes should not have been seized as contraband en-route to the reservation. 447 U.S. at 161-62. The Supreme Court found that the state's "interest in enforcing its valid taxes is sufficient to justify the seizures. Although the cigarettes are as yet exempt from state taxation, they are not immune from seizure when the Tribes, as here, have refused to fulfill collection and remittance obligations which the State has validly imposed." Id. (emphasis added). See also, id. at 2085 (recordkeeping requirements for both taxable and non-taxable transactions were valid and reasonably necessary to prevent fraudulent transactions).

Just as in the foregoing cases, this Court should decline to disturb the seizures even if were to credit petitioner's suggestion that no State tax might yet be due on the cigarettes.

C. The Exemption For Cigarettes Being "Lawfully Transported" By a Common Carrier Does Not Apply

Petitioner argues that potential criminal charges cannot be maintained because of an exemption in Tax Law §1814(e) which provides that "[n]othing in [section 1814] shall apply to common or contract carriers....while engaged in lawfully transporting...unstamped packages of cigarettes as merchandise....nor to any employee of such carrier...acting within the scope of his employment..." See, Amended Petition, ¶¶ 25, 39.

Even assuming, however, that D& T Truck Transporters is a "common or contract carrier," petitioner's argument improperly ignores the statutory requirement that the carrier be "lawfully transporting" the unstamped cigarettes in order for the exemption to be applicable. The only way a common or contract carrier can lawfully transport unstamped cigarettes from New York is if the common or contract carrier is acting on behalf of a New York State licensed cigarette stamping agent. Ernst Aff., ¶9.

As in any case involving questions of statutory interpretation, it is the duty of the Court to "discern and give effect to the Legislature's intent." Ramroop v. Flexo-Craft Print, Inc., 11 N.Y.3d 160, 165 (2008). "As the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof." Majewski v. Broadalbin-Perth Cent. Sch. Dist., 91 N.Y.2d 577, 583 (1998). Cardinal principles of statutory construction mandate that meaning and effect be given to all words in a statutory phrase and words are not to be discarded as superfluous when it is practicable to give each a distinct meaning. Statutes §231. "Effect should be given to all words of statute, particularly where the relevant language forms part of an integral statutory scheme, as is true of the statutes at issue here." Guido v. New York State Teachers' Retirement System, 94 N.Y.2d 64, 69 (1999).

Employing these maxims, the Second Circuit has explained that where the legislature provided no definition of "lawful conduct" in a statutory exception to criminal activity, the phrase must be interpreted by "giving the words used their ordinary meaning." United States v. Johnson, 868 F.2d 208, 212 (2d Cir. 1992). "Lawful" should therefore be interpreted to mean "conformable to law" or "allowed or permitted by law." Id., (citing WEBSTER'S THIRD INTERNATIONAL DICTIONARY, 1279 (1971) ("LAWFUL implies law of any kind and often

comes close to PERMISSIBLE")). Therefore, the court held that conduct which constitutes a "violation" under New York law cannot be considered "lawful." Id.

This Court should similarly interpret "lawfully" in §1814(e)'s exemption for common or contract carriers "lawfully transporting" in accordance with its plain meaning – to mean in conformance with the law or as permitted by law – and should give effect to this portion of the statutory phrase, rejecting petitioner's suggestion that the exemption applies for any carrier regardless of the lawfulness of the shipment. For example, in United States v. Skoczen, 405 F.3d 537 (7th Cir. 2005), in affirming a conviction under the Contraband Cigarette Trafficking Act, the Seventh Circuit Court of Appeals rejected the defendant's contention that he was not violating the Illinois cigarette tax laws because the unstamped cigarettes he possessed were to be sold out of state. 405 F.3d at 547. Since the defendant was not a licensed distributor and, under Illinois law only distributors can ship cigarettes out of state tax free, the defendant's possession of the unstamped cigarettes was not lawful. Id.

Indeed, petitioner herein makes absolutely no attempt to show that the subject shipment was lawful. In contrast, the State Police respondents have amply demonstrated that the carrier was not "lawfully transporting" the unstamped cigarettes in that they were being transported without going through a New York State licensed stamping agent (Ernst Aff., ¶¶9-11), with the attendant requirements that there be an accompanying certification that the cigarettes shall not be returned to the State for sale or use herein (id., at ¶6), and be reported to the State for tracking purposes by the licensed agent (id., at ¶8).[6]

6 Indeed, if the shipment had not been seized in New York and had continued to Nebraska as intended, it would not have been "lawful" under Nebraska law either and would have been subject to seizure in that state. See Affidavit of Nebraska AAG Lynne Fritz, at ¶¶ 6-11. The Nebraska AAG also explains how the Nebraska OAG Opinion cited by the petitioner has no application to the facts of this proceeding. Id., at ¶ 3.

Therefore, the exemption to the criminal statute for unstamped cigarettes being "lawfully transported" by a common or contract carrier has no application here.

D. The State's Licensed Agent Requirement Does Not Impose An Unreasonable Burden In Violation of the Commerce Clause

In a single paragraph, HCI suggests in conclusory fashion that requiring unstamped cigarettes destined out-of-state be sold through a New York State licensed stamping agent is unreasonably burdensome and "would undoubtedly constitute a violation of the Interstate Commerce Clause of the United States Constitution." Amended Petition, ¶30. The petitioner's lone citation in support of its argument in regard – to City of Philadelphia v. State of New Jersey, 437 U.S. 617 (1978) – is not persuasive since the State of New York has not erected any wholesale barrier against the movement of interstate trade by prohibiting the import of a particular substance into the State. New York's licensed agent requirement does not violate the Commerce Clause in either its interstate or Indian aspect. See, U.S. Const., Art. I, §8, cl. 3 (Congress has power to regulate commerce "with foreign Nations, and among the several States, and with the Indian Tribes").

Although the criteria for determining the validity of state statutes affecting interstate commerce has been variously stated, the general rule is: "Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

Under these standards, New York's cigarette tax law as well as statutory schemes similar to it have been upheld as constitutionally permissible under both the Interstate

commerce clause and the Indian commerce clause, as well as other challenges alleging that such statutes were unduly burdensome on Indian trading. As the Court of Appeals noted in Snyder v. Wetzler,:

> The United States Supreme Court has clearly established that State tax statutes requiring Indian retailers to collect and remit taxes on sales to non-Indian purchases, and to keep the records necessary to ensure compliance, violate neither the Commerce Clause nor the constitutional proscription against direct taxation of Indians absent explicit congressional consent.

84 N.Y.2d 941, 942 (1994) (citing Potawatomi, 498 U.S. 505; Colville, 447 U.S. 134; Moe, 425 U.S. 463).

The fact that HCI claims that the cigarettes were being exported from New York does not deprive New York of the power to impose the reasonable requirements of 20 N.Y.C.R.R. § 76.3 in order to ensure that the transaction is in fact an export sale and that the cigarettes will not be returned to New York State for sale. In State of Maryland v. Sedecca (249 A.2d 456 (Md. 1969)), the Maryland Court of Appeals held that a statute relating to the transportation within the state of untaxed cigarettes was not an unreasonable burden on interstate commerce. Much like New York's Tax Laws at issue here, the Maryland statutes at issue in Sedecca required that a person transporting unstamped cigarettes have certain documentation in his possession to verify out-of-state destination, regardless of whether or not the cigarettes might ultimately be determined to be subject to exemption under the statute 249 A.2d at 461. Like New York, Maryland's statute further contained a presumption of taxability and provided for criminal liability for failure to comply with the statute's requirements. Id.

Noting that the statute's requirements for interstate transporters of cigarettes was necessary for "the safeguarding of the State's vital interest in preventing the diversion of

cigarettes into illicit channels of trade in Maryland where the State would be unable to collect its tax," the Maryland Court of Appeals concluded that the "police regulation is a reasonable one, is one with which honest and law abiding citizens can readily comply and is no impediment to the free flow of trade and commerce between the several States." Id., at 463. The statute's requirements were therefore not invalid as unreasonable restraints upon interstate commerce or as regulations in an interstate commerce regulatory area where Congress has preempted the field. Id., at 464. See also, State of New Jersey v. Gillman, 273 A.2d 617 (N.J. Super. 1971) (statute forbidding transportation of unstamped cigarettes on public highways by person not in possession of required documentation was not unconstitutional as in violation of commerce clause or as intrusion upon field preempted by federal legislation); United States v. Boggs, 775 F.2d 582, 585 (4th Cir. 1985) (requirement that defendant who claimed to be transporting cigarettes through the state for sale in another state possess documents ensuring the payment of tax in the destination state was not an undue burden on interstate commerce).

The Maryland Court of Appeals reaffirmed Senacca more recently in Chen v. State of Maryland, (803 A.2d 518 (Md. 2001)), and it should be noted that in both of those cases, the criminal convictions were upheld despite the defendants' contentions that the cigarettes were not intended for use, distribution or sale within the state of prosecution.

Under these analogous authorities, New York's Tax Laws at issue are consistent with the Commerce Clause. New York does not ban exports of unstamped cigarettes, but simply requires that they proceed through authorized channels that the State licenses and can regulate. These requirements serve the legitimate purposes of ensuring that the sale is, in fact, for export and that any New York State taxes that may be due (if it is not truly for

export) are not evaded. Further, the means that the State has chosen in this regard are reasonable and do not excessively burden interstate commerce when balanced against the State's substantial local interests. Finally, in the Contraband Cigarette Trafficking Act, 18 U.S.C. §2345, Congress has expressly authorized, ratified and adopted state laws governing cigarette distribution, negating any argument that petitioner might raise that Congress preempted this area. See, 18 U.S.C. § 2345(a) ("[n]othing in this chapter shall be construed to affect the concurrent jurisdiction of a State or local government to enact and enforce its own cigarette tax laws, to provide for the confiscation of cigarettes or smokeless tobacco and other property seized for violation of such laws, and to provide for penalties for the violation of such laws").

Nor does the fact that this transaction involved Indian entities mean that the Commerce Clause divested the State of its authority. The Attea case should inform the Court's analysis here. That case analyzed arguments that New York's cigarette tax and regulatory scheme (including the licensed agent requirements) imposed undue burdens under the federal Indian Trader Statutes (25 U.S.C. §261, et seq.), as opposed to the Commerce Clauses, but it is also relevant here. In Attea, the Supreme Court upheld New York's (prior) regulations under which a quota was imposed on the number of tax exempt cigarettes that wholesalers (who were required to be state licensed agents) could sell for resale on reservation, imposing record keeping and reporting requirements on them as licensed agents and requiring that retailers obtain state tax exemption certificates. 512 U.S. at 76-78. Such mandates did not impose an excessive burden on Indian traders since they served the State's valid interest in ensuring compliance with lawful taxes that might otherwise easily be evaded through the purchases of tax-exempt cigarettes on reservations. Id., at 73.

As explained above (pp. 15-16), on reservation sales to persons other than that reservation's Indians are legitimately subject to state taxation (see e.g., Attea, 512 U.S. at 65) and the State law in this instance *does not require* that taxes be collected on out of state sales or limit the amounts that may be purchased, or even require pre-approval of deliveries as was upheld in Attea. Rather, Tax Law §471 and the associated regulations only require that such out-of-state destined tax-free sales proceed through a state licensed stamping agent with the associated certification and record keeping requirements, to ensure that all applicable cigarette taxes are paid where New York State can impose tax.

In addition to Attea, the Supreme Court and other courts have upheld laws requiring purchase of cigarettes only from state-licensed wholesalers against various challenges. See e.g., Potawatomi, 498 U.S. at 514; U.S. v. Baker, 63 F.3d 1478, 1489 (9th Cir. 1995), cert. den. 516 U.S. 1097; Keweenaw Bay Indian Community v. Rising, 477 F.3d 881, 884 (6th Cir. 2007); Muscogee, 669 F.3d at 1176-77 (requirement that purchases be made through state licensed wholesalers does not infringe upon tribal self-governance and helps protect state's valid interests in preventing evasion of taxes).

In light of the above, contrary to petitioner's conclusory suggestion, the requirements in New York's Tax Laws are not an undue burden under the Commerce Clause. See also, Seneca Nation of Indians v. Paterson, 2010 WL 4027796, *12-13 (W.D.N.Y. 2010) (copy provided in Appendix hereto) (rejecting argument that Tax Law's 2010 amendments prevent tax-free cigarette sales to out-of-state customers in violation of the Commerce Clause since under a refund provision, the plaintiff "retailers will be treated the same as all other cigarette retailers who ship out of state. The refund provision represents a legitimate, non-discriminatory state law that applies equally to reservation and non-reservation cigarette

sellers operating in New York") citing Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148-49 (1973) ("absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been subject to non-discriminatory state law otherwise applicable to citizens of the State. That principle is as relevant to a State's tax laws as it is to state criminal laws . . ."). See also, Oneida Indian Nation of New York, 645 F.3d at 169 (pre-collection mechanism for sale of tax-free cigarettes "reasonably necessary" to prevent "wholesale evasion of [New York's] own valid taxes"); St. Regis Group, 217 A.D.2d at 214 (mandating compliance with laws requiring liquor distributors be registered and licensed and that cargo be accompanied by detailed paperwork outlining whether taxes have been paid and if not, why not, did not run afoul of Indian Trader Statutes and did not impose an unreasonable burden); Bramhall, 235 A.D.2d at 86 (same holding with respect to motor fuel tax and its enforcement scheme).

Consequently, HCI's Commerce Clause arguments are without merit and this Court should reject them.

POINT III
THE SEARCH AND SEIZURE DID NOT VIOLATE THE FOURTH AMENDMENT

Although no Fourth Amendment claim is expressly made in the Amended Petition, the petitioner, in passing, recites that the State Police did not have a warrant for the search and seizure. Amended Petition, ¶¶12, 14. In case the Court reads the Amended Petition so liberally as to include a potential Fourth Amendment claim – an issue that would be better left to the anticipated criminal proceedings – the State Police respondents brief this issue.

"It is well settled that Fourth Amendment protections extend only to unreasonable government intrusions into . . . legitimate expectations of privacy." United States v. Reyes,

283 F.3d 446, 457 (2d Cir. 2002), quoting, United States v. Thomas, 729 F.2d 120, 122 (2d Cir. 1984). As stated by the United States Supreme Court, the "touchstone of the Fourth Amendment is reasonableness." Samson v. California, 547 U.S. 843, 855 n.4 (2006); cf. U.S. v. Jones, 132 S.Ct. 945 (2012) ("At bottom, the Court must 'assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted'" – in addition to any reasonable expectation of privacy).

Here there can be no Fourth Amendment violation because the search of the tractor trailer was inherently reasonable since it was conducted at a Border Patrol checkpoint, was on consent, and the eventual seizure was in any event based upon probable cause.

A. This Was a Routine Stop At a Border Patrol Checkpoint

"Since the founding of our Republic, Congress has granted the Executive plenary authority to conduct routine searches and seizures at the border, without probable cause of a warrant, in order to regulate the collection of duties and to prevent the introduction of contraband into this country." United States v. Montoya de Hernandez, 473 U.S. 531, 537 (1985). "[A] suspicionless search at the border is permissible under the Fourth Amendment so long as it is considered to be 'routine.'" Tabbaa v. Chertoff, 509 F.3d 89, 97 (2d Cir. 2007). The reasonableness of border searches is premised on the Government's needs to protect its borders. Montoya de Hernandez, 473 U.S. at 538. "[T]he Fourth Amendment's balance of reasonableness is qualitatively different at the international border than in the interior." Id.

Routine stops at Border Patrol checkpoints, within a reasonable distance from the border, may also be carried out without a need to articulate reasonable suspicion. Id.; U.S. v. Martinez-Fuerte, 428 U.S. 543, 557-58 (1976). Similarly, at such a checkpoint, a motorist

may be required to proceed to a second inspection area without a particularized reason. Martinez-Fuerte, 428 U.S. at 563-64. Under the United States Supreme Court's decision in Martinez-Fuerte, it is constitutionally permissible for Border Patrol agents to stop a vehicle up to 100 miles away from an international border. People v. Sinzheimer, 15 AD3d 732, 733 (3d Dept. 2005). The Border Patrol checkpoint at issue here was a mere fifteen miles from the closest border crossing. West Aff., ¶ 3. Accordingly, the stop was valid. Sinzheimer, 15 A.D.3d at 733. Petitioner does not dispute that the stop was a routine border stop. Amended Petition, ¶ 9.

B. Consent Was Obtained For The Search

"[O]ne of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent." Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973). "So long as the police do not coerce consent, a search conducted on the basis of consent is not an unreasonable search." U.S. v. Garcia, 56 F.3d 418, 422 (2d Cir. 1995), citing, Schneckloth, 412 U.S. at 228. While a consent must be voluntary, it need not be a "knowing and intelligent waiver." Id. at 422. Rather, a court must examine the "totality of the circumstances" to determine whether the consent was coerced. Schneckloth, 412 U.S. at 227; Garcia, 56 F.3d at 422; U.S. v. Kon Yu-Leung, 910 F.2d 33, 41 (2d Cir. 1990). The "'Fourth Amendment is satisfied when, under the circumstances, it is objectively reasonable for the officer to believe that the scope of the suspect's consent permitted him to [conduct the search that was undertaken].'" Garcia, 56 F.3d at 423 (alteration in original), quoting, Florida v. Jimeno, 500 U.S. 248, 249 (1991).

There is nothing on this record to even suggest that the search at issue was anything other than voluntary.[7] The driver, Michael Cagle, freely answered the questions posed by the Border Patrol Agent and, when asked whether they could inspect the contents of the trailer, Mr. Cagle granted consent. West Aff., ¶¶11-13, Exhibits A, E. While Michael Cagle, asserts that the he was not provided a search warrant, he does not refute that he voluntarily gave consent for the search. See generally, Affidavit of Michael Cagle. Because Mr. Cagle provided consent, the search of the tractor trailer was reasonable and did not violate the Fourth Amendment.

C. The State Police Had Probable Cause to Seize the Cigarettes

Police may seize property if they have probable cause to believe it is or contains contraband. See e.g., People v. Snyder, 200 A.D.2d 901, 903 (3d Dept. 1994) (consent to search and revelation of marijuana in truck gave probable cause to arrest defendant and seize van). "Probable cause requires, not proof beyond a reasonable doubt or evidence sufficient to warrant a conviction . . . , but merely information which would lead a reasonable person who possesses the same expertise as the officer to conclude, under the circumstances, that a crime is being or was committed." People v. McRay, 41 N.Y.2d 594, 602 (1980) (internal citations omitted); People v. Dolly, 12 A.D.3d 1157 (4th Dept. 2004).

Here, similar to the facts in Snyder, the tractor-trailer driver provided the authorities with consent to search. West Aff., ¶¶ 11-13. The search revealed thousands of cartons of

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7 Under the circumstances at the Border Patrol Checkpoint, reasonable suspicion was not required prior to requesting consent to search. Nevertheless, the facts that Mr. Cagle was transporting cigarettes from a reservation, that Agent Zook had witnessed many untaxed cigarettes being transported illegally from Indian reservations, that Cagle was not a licensed agent, that the shipping documentation did not include reference to the seller or purchaser being New York State duly licensed cigarette agents, and that Mr. Cagle could not definitively state that the cigarettes were taxed, all gave rise to a reasonable suspicion that Mr. Cagle was transporting untaxed cigarettes in violation of New York's Tax Law. West Aff., ¶¶6, 10.

unstamped cigarettes. West Aff., ¶¶8, 15. In light of the presumption found in Tax Law § 1814(d), along with the facts indicating that no New York State duly licensed agent appeared to be involved in the transaction (West Aff., ¶9), it was reasonable to believe that the cigarettes were being transported in violation of the Tax Law. Accordingly, seizure of the cigarettes was appropriate. See Dolly, 12 A.D.3d at 1158; Snyder, 200 A.D.2d at 903.

For all these reasons, to the extent that the Court may read the Amended Petition as containing a Fourth Amendment claim, such claim is without merit.

POINT IV
PETITIONER'S REQUEST FOR A PRELIMINARY INJUNCTION SHOULD BE DENIED

Petitioner seeks a preliminary injunction "enjoining respondents from selling or otherwise disposing of the cigarettes ...[and]...directing respondents to immediately release HCI's seized property and return the same to HCI." See, Amended Petition, "Wherefore" clause.[8]

While the determination to grant or deny a preliminary injunction rests in the sound discretion of the Court (Cooperstown Capital, LLC v. Patton, 60 A.D.3d 1251 (3d Dept. 2009); CPLR 6301), it is a drastic remedy that should not be lightly granted (Elkund v. Pinkey, 31 A.D.3d 908, 910 (3d Dept. 2006)). Before preliminary injunctive relief may issue, an applicant must show that it has: (a) a strong likelihood of success on the merits (i.e., a clear legal right to the relief sought); (b) that the applicant will be irreparably injured if the injunctive relief is not granted; and (c) that the equities balance in its favor. Doe v. Axelrod,

8 While the proposed Order to Show Cause included a request for temporary restraint pending a hearing preventing respondents from further "seizing petitioner's tobacco products which are traveling in interstate commence," (see, Order to Show Cause at pp. 1-2), neither the Petition nor Amended Petition contain a request for such broad injunctive relief.

73 N.Y.2d 749, 750 (1988); Armitage v. Carey, 49 A.D.2d 496, 498 (3d Dept. 1973); McCall v. State, 215 A.D.2d 1, 5-6 (3d Dept. 1995).

Here, petitioner has not satisfied these requirements and, as an initial matter, has not shown any extraordinary circumstances which would warrant immediately granting petitioner the ultimate relief it seeks.

A. There Is No Extraordinary Circumstance Sufficient to Warrant Granting Petitioner the Ultimate Relief It Seeks

The purpose of a preliminary injunction is to preserve the *status quo*, *pendente lite*, and to prevent the dissipation of property which might make a judgment ineffectual. Rattner & Assocs. v. Sears, Roebuck & Co., 294 A.D.2d 346 (2d Dept. 2002); CPLR §6301. The purpose of a preliminary injunction is not "to determine the ultimate rights of the parties and mandate corrective action" before a determination on the full merits. Jamie B. v. Hernandez, 274 A.D.2d 335, 336 (1st Dept 2000); see also Uniformed Firefighters Ass'n v. City of New York, 79 N.Y.2d 236, 239 (1992); Morgan v. New York City Racing Ass'n, 72 A.D.2d 740, 741 (2d Dept 1979) ("...we note that the court is loathe to grant such an injunction, whereby the petitioner would receive his ultimate relief sought...").

The requested preliminary injunction, directing immediate return of HCI's property seized by the State Police and presently held as evidence for anticipated criminal prosecution by the District Attorney, would grant petitioner all the relief to which it would ultimately be entitled if successful in this proceeding. Since the requested preliminary relief would upset, rather than maintain the status quo, and would award the ultimate relief sought, petitioner bears the heightened burden of establishing that "extraordinary circumstances" warrant the

relief. See, Rosa Hair Stylists, Inc. v. Jaber Food Corp., 218 A.D.2d 793, 794 (2d Dept. 1995); Village of Westhampton Beach v. Cayea, 38 A.D.3d 760 (2d Dept. 2007).

Petitioner, however, has not made any such showing of "extraordinary circumstances" here. While petitioner makes conclusory suggestions of lost revenue and customers due to the inability to distribute this product (addressed further below), these allegations cannot serve to satisfy the extraordinary circumstances requirement. See e.g., Egan v. New York Care Plus Ins. Co., 266 A.D.2d 600 (3d Dept. 1999) (litigant demonstrated "extraordinary circumstances" in that he would suffer dire physical consequences if the therapy sought to be maintained through a preliminary injunction was discontinued).

Even if the failure to demonstrate extraordinary circumstances were overlooked, petitioner has not in any event satisfied the other elements necessary to obtain preliminary injunctive relief.

B. Petitioner is Not Likely To Prevail on the Merits

"The requirement of showing a likelihood of success . . . should be seen as a protection against the exercise of the court's formidable equity power in cases where the moving party's position, no matter how emotionally compelling, is without legal foundation." Tucker v. Toia, 54 A.D.2d 322, 326 (4th Dept. 1976). This admonition is especially apt here, where the petitioner seeks preliminarily what amounts to the ultimate relief sought.

In this regard, petitioner bears the burden of demonstrating "a strong probability of ultimate success and thus a clear right to the relief sought." Rick J. Jarvis, Assoc. Inc. v. Stotler, 216 A.D.2d 649, 659 (3d Dept. 1995). See also, Zanghi v. State of New York, 204 A.D.2d 313, 314 (2d Dept. 1994) (preliminary injunctive relief should not be granted "unless

a clear right to it is established under the law and upon undisputed facts found in the moving papers, and the burden of showing an undisputed right rests upon the movant").

Petitioner has failed to meet its burden of demonstrating a strong probability of ultimate success and a clear right to the relief sought for the reasons set forth above in Points II and III. Respondents have disproven that petitioner has any clear right to the relief sought or has shown any probability of success by demonstrating, among other things, that the cigarettes at issue were properly seized as they are presumptively taxable, are within the jurisdiction and authority of the State, and that the shipment at issue was unlawful for failure to comply with the State's licensed agent requirements. Further, respondents have demonstrated that the seizure did not run afoul of the Fourth Amendment.

C. Petitioner Has Not Demonstrated Irreparable Harm

Nor has petitioner demonstrated irreparable harm as is necessary to support the issuance of a preliminary injunction.

The Court of Appeals more than a century ago described what constitutes sufficiently irreparable harm: "[i]njury, material and factual, not fanciful or theoretical, or merely possible, must be shown as the necessary or probable results of the action sought to be restrained." State of New York v. Canal Board of State of N.Y., 55 N.Y. 390, 397 (1874). Proof establishing irreparable harm must be made "by affidavit and other competent proof, with evidentiary detail." Counsel of City of New York v. Guiliani, 248 A.D.2d 1, 4 (1st Dept. 1998). "Conclusory statements lacking factual evidentiary detail warrant denial of a motion seeking a preliminary injunction." 1234 Broadway LLC v. West Wide SRO Law Project, 86 A.D.3d 18, 23 (1st Dept. 2011).

HCI makes only two conclusory allegations to support its claim of irreparable harm. First, HCI avers that it is "losing customers" because of the seizures. Guerrero Affidavit, ¶6. Second, HCI suggests that Ohserase Manufacturing, one of HCI's "major suppliers," will cease to supplying HCI with tobacco products. Id., at ¶7. Each of these allegations lack the requisite evidentiary detail and are, in any event, patently insufficient to carry petitioner's burden in this regard.

Alleged loss of sales is unquestionably insufficient to justify a preliminary injunction. Marcone APW, LLC v. Servall Co., 85 A.D.3d 1693, 1696 (4th Dept. 2011). See also, Hoppmann v. Sergeant Stein, Inc., 141 A.D.2d 332 (financial harm does not warrant the granting of an injunction). Conclusory allegations of loss of customers, with no evidentiary detail, does not support the drastic remedy of a preliminary injunction. Genesis II Hair Replacement Studio v. Vallar, 251 A.D.2d 1082 (4th Dept. 1998).

As to the suggestion that HCI has or will be irreparably harmed because one of its "major suppliers" will cease supplying it with tobacco products,[9] the determination by HCI and/or its suppliers not to comply with the State's simple licensed agent requirements for tax-free export sales is not a proper basis for granting preliminary injunctive relief. See, Akwesasne Convenience Store Association v. State of New York, Index No. I2011-2843, 8/18/2011 Memorandum Decision (Sup. Ct., Erie Co. (Siwek, J.S.C.)) (refusal of wholesalers to avail themselves of or participate in State's prior approval system for tax

9 Notably, there is no suggestion in the affidavit of Ohserase's principal that such company has or will cease supplying HCI with tobacco products. See, Affidavit of Justin Tarbell.

exempt cigarette sales insufficient to support preliminary injunctive relief by retailers who claimed irreparable harm because of inability to obtain supply from such wholesalers).[10]

Petitioner may lawfully make its desired purchases from or through any State licensed agent, both petitioner and its supplier are free to seek State licensure themselves, or they can simply complete their desired transactions through any one of the presently licensed State agents. Because petitioner's professed inability to obtain supply from Ohserase is not an "injury that can be traced to the challenged action of the defendants," but instead "results from the independent action of some third party not before the court" (Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 41-42 (1976)), such claim cannot support the issuance of a preliminary injunction. See also, Seneca Nation of Indians v. Paterson, 2010 WL 4027796, *16 (W.D.N.Y. 2010) (harm caused by practices of agents, wholesalers or retailers "would not be by virtue of conduct by the state"), aff'd, Oneida Nation, 645 F.3d at 175 (speculation about "private behavior" limiting supply cannot serve to support injunction against state taxation scheme that is valid as written and State does not have to ensure access to tax-free cigarettes or a certain supply thereof). Indeed, in Oneida Nation, the court rejected the Indian nations' federal claims in part because of governmental or regulatory actions and/or agreements that the nations could undertake to avoid alleged supply problems the Indian nations claimed to be facing without injunctive relief. 645 F.3d at 174.

D. The Balance of Equities Weighs Against a Preliminary Injunction

The final element to be considered – the balance of the equities – also weighs heavily against the issuance of a preliminary injunction. To show that the balance of the equities tips

10 A copy of the Akwesasne Memorandum Decision as well as the corresponding Order of the Supreme Court and further Order of the Appellate Division, Fourth Dept., similarly denying the motion for a preliminary injunction pending appeal, are all attached hereto in an Appendix of unreported cases and cases cited herein that are reported only electronically.

in a movant's favor, "it must be shown that the irreparable injury to be sustained by the plaintiff is more burdensome to it than the harm caused to defendant through imposition of the injunction." Nassau Roofing & Sheet Metal Co. v. Celotex Corp., 70 A.D.2d 1021, 1022 (3d Dept. 1979).

In contrast to petitioner's conclusory allegations of purely economic harm, a preliminary injunction in this proceeding would improperly prevent the respondents from prosecuting a violation of its tax system, which system is necessary to prevent fraudulent transactions. "[A]ny time a State is enjoined by a court from effecting statutes enacted by representatives of its people, it suffers a form of irreparable injury." New Motor Vehicle Bd. of Calif. v. Orrin W. Fox Co., 434 U.S. 1345, 1351 (1977).

The State has an undeniable "valid interest in ensuring compliance with lawful taxes that might easily be evaded through purchases of tax-exempt cigarettes on reservations" which outweighs tribal retailers' modest interest in offering a tax exemption to customers. Attea, 512 U.S. at 73. It cannot be seriously disputed that the State's interest in maintaining the integrity of its cigarette taxing scheme is entitled to greater equitable weight than is the petitioner's alleged interest in continued operations as a tax haven. See e.g., Colville, 447 U.S. at 164 (state's interest in enforcing its valid taxes was sufficient to justify seizures even where taxes were not yet due); Narragansett Indian Tribe v. Rhode Island, 449 F.3d 16, 23 (1st Cir. 2006) ("Appropriate enforcement measures are needed to check wholesale transgressions of the State's scheme ....The Tribe's countervailing interest is not impressive."). See also, St. Regis Group, 217 A.D.2d 220 (compliance with laws reasonably necessary to prevent fraudulent transactions); Tyler Distribution Centers, 225 A.D.2d 939

(same); Bramhall, 235 A.D.2d 78 (requirements imposed on registered distributors necessary to avoid large-scale tax evasion).

Since petitioner has not satisfied any of the requirements necessary for the grant of a preliminary injunction and has not shown any extraordinary circumstances which would warrant immediately granting petitioner the ultimate relief it seeks, the Court should reject the request in the Amended Petition seeking immediate return of the seized cigarettes.

E. If The Court Determines to Order Release of The Cigarettes, It Should Only Be Done Through A State Licensed Agent

If the Court were to conclude that the State Police respondents cannot continue to hold the cigarettes as evidence at the request of the District Attorney for anticipated criminal prosecution, then the Court still should not grant preliminary injunctive relief in the manner requested by the petitioner.

Instead, the Court should direct the release of the cigarettes only in a manner that complies with the law and ensures the integrity of the transaction – through a State licensed stamping agent with the required certification that the tobacco products will not be returned to the State for sale or use herein and the attendant reporting requirement.

A court order allowing the seized shipment to be released directly to HCI, as requested, would frustrate the State's lawful requirements in this regard and would be contrary to the State's valid interests in preventing fraudulent transactions. St. Regis Group, 217 A.D.2d at 220 (compliance with laws reasonably necessary to prevent fraudulent transactions, even if no tax might be due); Colville, 447 U.S. at 161-62 (recordkeeping requirements non-taxable transactions were valid and reasonably necessary to prevent fraudulent transactions even if cigarettes were as yet exempt from state taxation).

CONCLUSION

For the foregoing reasons, the Amended Petition should be dismissed and the relief requested therein should be denied, including petitioner's prayer for a preliminary injunction.

Dated: Albany, New York
April 4, 2012

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