

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

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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

**AFFIRMATION IN OPPOSITION  
TO THE PETITION AND IN  
SUPPORT OF THE ANSWER BY  
THE STATE POLICE  
RESPONDENTS**

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

Return Date: April 2, 2012

Demarest, J.

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RICHARD S. ERNST, an attorney admitted to practice in the courts of New York State, hereby affirms under penalties of perjury that the following is true:

1. Since January 17, 2011, I have served as Deputy Commissioner for Enforcement of the New York State Department of Taxation and Finance (the Department).
2. I am familiar with the provisions of the Tax Law, departmental regulations, published guidance, and policies.
3. I make this affirmation in opposition to the Petition and in support of the Answer by the State Police respondents.

Article 20 of the Tax Law

4. 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. The chain of taxation, however, begins with cigarette stamping agents, who purchase unstamped cigarettes from manufacturers. 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. 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

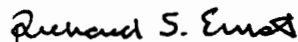
cost of cigarettes. Prepaid sales taxes are also included in the cost of the tax stamp, as required by Tax Law section 1103.

5. 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. Only agents are allowed to possess unstamped cigarettes with a few limited exceptions that are not applicable here. 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. As to unlicensed persons, the possession in New York State of more than 400 unstamped or unlawfully stamped cigarettes is presumptive evidence that the cigarettes are subject to tax under the Tax Law. The person possessing the cigarettes has the burden to prove that the cigarettes are not taxable.
6. 20 NYCRR 76.3 addresses the sale of cigarettes out-of-state and provides 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. 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.” 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.”
7. The Department licenses cigarette stamping agents under Tax Law sections 472 and 480 to possess unstamped product and apply stamps. In order to make sales of unstamped cigarettes out-of-state, an entity would have to be licensed as an agent. 20 NYCRR 71.1 addresses the licensing of agents. The Department licenses “financially responsible cigarette dealers, importers, exporters, manufacturers and other persons, located within or outside of the State, as agents to buy and affix stamps to be used for paying the tax imposed on the possession of cigarettes for sale pursuant to article 20 of the Tax Law.”
8. 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. 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. The requirements of 20 NYCRR 76.3 also serve to ensure that cigarette sales purporting to be destined out of state in fact are so delivered and not returned to the state for sale or use herein. As detailed in 20 NYCRR 75.1, a failure to file and fully complete these returns subjects the agent's license to cancellation or suspension under Tax Law section 480(3).

9. Pursuant to Tax Law sections 481(2)(b) and 1814(e) and 20 NYCRR 78.6, common or contract carriers or warehousemen can transport unstamped cigarettes while engaged in lawfully transporting or storing unstamped packages of cigarettes as merchandise. The only way a common or contract carrier can lawfully transport unstamped cigarettes to and from New York is if the common or contract carrier is acting on behalf of a New York State licensed cigarette stamping agent.
10. A search of the Department's records reveals that HCI Distribution, Inc., Ho-Chunk, Inc., Ohserase Manufacturing, LLC, D and T Transport, Inc., and Mohawk Distribution, Inc. are not New York State licensed cigarette stamping agents. Cigarettes being transported by any of these entities from New York State, without the cigarettes going through a New York State licensed cigarette stamping agent, would not be lawfully transported under Article 20 of the Tax Law.
11. The bill of lading attached to HCI's article 78 petition does not reference any New York State licensed cigarette stamping agents.

DATED: March 26, 2012  
Albany, New York



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RICHARD S. ERNST  
DEPUTY COMMISSIONER FOR ENFORCEMENT  
NYS Department of Taxation and Finance

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

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HCI Distribution, Inc.,

*Petitioner,*

-against-

**AFFIDAVIT**

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. Duve;  
St Lawrence County Assistant District Attorney John  
Becker; Does 1-20.

Index No. 138276

(Hon. David Demarest)

*Respondents.*

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STATE OF NEW YORK            )  
  ) ss.:  
COUNTY OF ST. LAWRENCE    )

Jason West, being duly sworn, deposes and says:

1. I, Jason West, am currently employed by the New York State Police. I hold the rank of Trooper.

2. I respectfully submit this Affidavit in opposition to the Petition and in support of the Answer by the New York State Police respondents.

3. On January 23, 2012, I 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. The check point was approximately fifteen miles from the nearest Canadian border crossing.

4. At approximately 10:30 am, Border Patrol Agent Daryl Zook informed me that he 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.

5. A copy of the United States Border Patrol Report of Apprehension of Seizure regarding this incident, received and maintained by the New York State Police at Ray Brook in the normal course of business, is submitted herewith as Exhibit A.

6. 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. See, Exhibit A.

7. After Agent Zook instructed the driver to proceed to a secondary inspection point, I approached the vehicle with Agent Zook and we interviewed Mr. Cagle. Mr. Cagle was cooperative and freely answered our questions. We asked Mr. Cagle if the cigarettes were taxed and he replied that he didn't know if they were or not.

8. 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. A copy of the Bill of Lading provided by Mr. Cagle is submitted herewith as Exhibit B.

9. 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.

10. 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.

11. Both I and Agent Zook then asked Mr. Cagle for consent to search the trailer and inspect its contents.

12. Mr. Cable gave permission for the search on the condition that we have a seal available to reseal the doors in the event the he was able to continue his delivery.

13. Agent Zook indicated that he had seals for this purpose and Mr. Cagle then consented to allow us to conduct a search of the trailer.

14. The seal on the trailer was then removed by Officer Zook to gain entry to the trailer.

15. During the search, I was able to verify that the cigarettes were in fact untaxed.

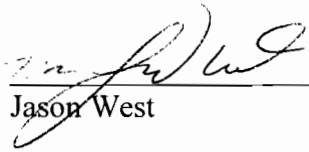
16. I notified my chain of command that I had a load of untaxed cigarettes and requested further instructions.

17. I was advised to bring Mr. Cagle to the Ogdensburg station for questioning.

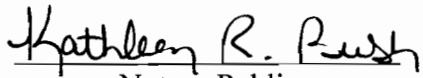
18. I brought Mr. Cagle to SP Ogdensburg and turned him over to Investigator Timothy Peets for further questioning.

19. I was also advised by Investigator Peets that the vehicle and its contents were to be secured as evidence for possible criminal charges.

20. The vehicle and its contents were subsequently taken to Troop B Headquarters in Ray Brook.

  
\_\_\_\_\_  
Jason West

Sworn to before me this  
30<sup>th</sup> day of March, 2012

  
\_\_\_\_\_  
Notary Public

**KATHLEEN R BUSH**  
Notary Public State of New York  
Lewis County  
Lic. #04BU4897542  
Comm. Exp. 7/27/2013





4. The tractor-trailer, along with the untaxed tobacco products, were then transported to SP Ray Brook.

5. The truck driver was taken into custody and was transported to SP Ogdensburg for questioning about possible violations of the New York State Tax Law relating to the possession and transportation of untaxed cigarettes.

6. Trooper West and I made arrangements to interview the driver to discover additional facts surrounding the incident.

7. At approximately 3:30 PM, I advised the driver, William M. Cagle, of his Miranda rights. He agreed to answer questions without a lawyer being present.

8. During this interview, Mr. Cagle admitted to me 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. Mr. Cagle also 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. I secured a New York State Police General 19, Voluntary Statement, from Mr. Cagle in this regard, a copy of which is submitted herewith as Exhibit C.

9. After the interview was complete, I was advised by my superiors at Troop B Headquarters that Mr. Cagle was not going to be charged at that time and that he could be released. At Mr. Cagle's request, arrangements were made to take him and his dog to the Stone Fence Motel, located just west of Ogdensburg, New York on State Route 37.

10. I was further advised that the truck and its contents were to be secured as evidence for anticipated criminal prosecution at the request of the St. Lawrence County District Attorney's office. Accordingly, such evidence was so secured pending disposition of any criminal charges, as reflected on the Evidence Records submitted herewith as Exhibit D.

11. A copy of the New York State Police Incident Report prepared by me regarding this incident is submitted herewith as Exhibit E.

12. On January 25<sup>th</sup>, 2012, I was contacted by Mr. Cagle who stated that he wanted to retrieve some personal items from the truck which was located at SP Ray Brook. Mr. Cagle stated that one of the items he wanted to retrieve was a GPS device. See, Exhibit E.

13. I contacted Assistant District Attorney ("ADA"), Jonathan Becker, of the St Lawrence County District Attorney's office, to determine if the GPS could be returned to the driver. ADA Becker advised me that his office considered the GPS to be evidence and that he did not want us to allow Mr. Cagle to retrieve it. See, Exhibit E.

14. On January 26, 2012, Mr. Cagle retrieved his other personal items from the tractor, which was still located at Troop B headquarters in Ray Brook, New York. See, Receipt and Release of Property form contained within Exhibit D.

15. ADA Becker subsequently advised me that his office would be pursuing criminal charges under Tax Law section 1814(c)(2) against the driver. ADA Becker further advised me that the tractor trailer and tobacco products seized on January 23, 2012 should continue to be held as evidence in this regard. See, Exhibit E.

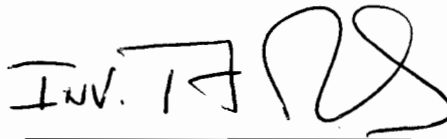
16. I asked ADA Becker if it would be acceptable to store the tobacco products and the tractor-trailer as evidence in a secure warehouse of the New York State Department of Taxation and Finance ("DTF"). See, Exhibit E.

17. ADA Becker thereafter advised me that storing the tobacco products and the tractor-trailer with the DTF was acceptable. See, Exhibit E.

18. I then contacted Chief Investigator John Connolly of DTF, to inform him that the District Attorney's office requested that we hold the items as evidence and inquired as to where we could store the cigarettes and the tractor trailer. Chief Investigator Connolly informed me that DTF had no location to store the tractor-trailer, but that the Tax Department had a warehouse facility in Rotterdam, New York, and that the cigarettes could be securely held there. See, Exhibit E.

19. Between February 14, 2012 and February 21, 2012, I and other State Police investigators transported all of the untaxed tobacco products seized on January 23<sup>rd</sup> to the DTF's warehouse in Rotterdam where they were turned over to the custody of DTF. See, Receipt and Release of Property forms and corresponding DTF Property Receipts contained within Exhibit D.

20. The tractor trailer remained at SP Troop B headquarters in Ray Brook at the direction of the St. Lawrence County District Attorneys Office until March 22, 2012, at which time the tractor trailer was released to the driver, Mr. Cagle. See, Receipt and Release of Property form contained within Exhibit D.



Timothy J. Peets

Sworn to before me this  
29<sup>th</sup> day of March, 2012



Notary Public

Aimee M. Meacham  
Notary Public, State of New York  
No. 01ME6220356  
Qualified in St. Lawrence County  
Commission Expires 4/12/2014

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

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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, RAYB  
ROOK, NY; ST. LAWRENCE COUNTY DISTRICT  
ATTORNEY, NICOLE M. DUVE', ST. LAWRENCE  
COUNTY ASSISTANT DISTRICT ATTORNEY,  
JOHN BECKER; DOES 1-20

Respondents

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**AFFIRMATION**

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

April 6, 2012

Demarest, J.

Aaron M. Baldwin, an attorney admitted to practice in the courts of the State of New York, affirms the following under penalty of perjury pursuant to CPLR 2106.

1. I am an Assistant Attorney General, of counsel in this matter to Eric T. Schneiderman, Attorney General of the State of New York, attorney for the State Police respondents.

2. I respectfully submit this Affirmation in support of the Answer on behalf of the State Police respondents and in opposition to the Amended Petition.

3. The matters contained in this Affirmation are true to my knowledge, except as to those matters alleged on information and belief, and as to those matters, I believe them to be true.

4. According to the Amended Petition, HCI Distribution, Inc. (“HCI”) is an “economic and political subdivision of the Winnebago Tribe of Nebraska, a federally recognized Indian Tribe.” Amended Petition, ¶1.

5. 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.

6. HCI, for example, purchases “Signal brand” cigarettes from Ohserase Manufacturing, one of HCI’s “major suppliers,” which supplier located on the St. Regis Mohawk Reservation. Amended Petition, ¶8; Guerrero Aff., ¶7.

7. The cigarettes and other tobacco products which were seized in the incident giving rise to this proceeding were Signal brand. West Aff., ¶8; State Police respondents’ Exhibit B (Bill of Lading).

8. 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, <http://www.hcidistribution.com/aboutus.html> (screen shot printout at State Police respondents’ Exhibit F).

9. HCI advocates for a “Nation to Nation tobacco supply chain ... outside the state taxation system.” See, <http://www.hcidistribution.com/sovereignty.html> (screen shot printout at State Police respondents’ Exhibit F).

10. 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, <http://www.hcidistribution.com/becomeareseller.html> (screen shot printout at

State Police respondents' Exhibit F).

11. 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, 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 State Police respondents' Exhibit G).

12. Upon information and belief, 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.

13. 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. Peets Aff., ¶8; State Police respondents' Exhibit C (driver's statement).

14. 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.

15. Further, HCI Distribution documents obtained by the State in the course of its investigation into this lawsuit confirm, upon information and belief, 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, State Police respondents’ Exhibit H (HCI sales and marketing documents).

16. 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.” State Police respondents’ Exhibit H (December 7, 2010 letter).

WHEREFORE, the State Police respondents respectfully request that the Court deny the relief requested in the Amended Petition, dismiss the Amended Petition, and award respondents costs and disbursements, together with such other or further relief as may be just.

Dated: Albany, New York  
April 4, 2012



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Aaron M. Baldwin