

**In The
Supreme Court of the United States**

GRAND RIVER ENTERPRISES SIX NATIONS, LTD.,

Petitioner,

v.

STATE OF OKLAHOMA EX REL. E. SCOTT PRUITT,
ATTORNEY GENERAL OF OKLAHOMA, ET AL.,

Respondents.

**On Petition For Writ Of Certiorari
To The Court Of Civil Appeals
Of Oklahoma, Second Division**

BRIEF IN OPPOSITION

E. CLYDE KIRK
Counsel of Record
Assistant Attorney General
OFFICE OF THE ATTORNEY
GENERAL OF OKLAHOMA
313 Northeast 21st Street
Oklahoma City, OK 73105
(405) 521-3921
Fax: (405) 522-4534
clyde.kirk@oag.ok.gov
Attorney for Respondent
Oklahoma Attorney General

LARRY D. PATTON
Assistant General Counsel
OKLAHOMA TAX COMMISSION
120 N. Robinson,
Suite 2000W
Oklahoma City, OK 73102
(405) 319-8538
Fax: (405) 601-7144
lpatton@tax.ok.gov
Attorney for Respondent
Oklahoma Tax Commission

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**RESPONDENT STATE OF
OKLAHOMA'S COUNTERSTATEMENT
OF QUESTIONS PRESENTED**

1. Whether the State of Oklahoma may require a Canadian corporation that manufactures cigarettes sold in Oklahoma to pay into an escrow account for the sales of its cigarettes calculated by the number of taxed and stamped sales, which may include sales by compacting and non-compacting Indian Tribes that are taxed at a reduced excise tax rate.

2. Whether Oklahoma's Escrow Statute lacks procedural safeguards to prevent an unconstitutional deprivation of property without due process of law.

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STATEMENT OF THE CASE

Plaintiff, State of Oklahoma ex rel. E. Scott Pruitt, filed a civil action in the District Court of Oklahoma County, State of Oklahoma against Grand River Enterprises Six Nations, Ltd. (“GRE”) for a knowing failure to make its statutorily required escrow deposit for its “Units Sold” during calendar year 2005. During the pendency of the litigation, GRE again failed to make its statutorily required escrow deposit for sales in calendar year 2006 and the State of Oklahoma was granted leave to file a Supplemental Petition against GRE for a second knowing violation of Oklahoma’s Escrow Statute.

GRE and one of its importers, Tobaccoville, USA, Inc. (“Tobaccoville”), a private, for profit, South Carolina corporation, filed a Declaratory Judgment Action (CJ-06-6671) asserting the Attorney General (“AG”) misinterpreted when a “Unit Sold” occurs for escrow obligation purposes. They argued that a “Unit Sold” occurs when a manufacturer, or its importer, sells unstamped cigarettes to a licensed Oklahoma wholesaler, not when the wholesaler affixes tax stamps to the cigarettes destined to Oklahoma retailers and eventually purchased by Oklahoma consumers. GRE and Tobaccoville also claimed that cigarettes sold to Oklahoma consumers on Indian land by tribally owned or licensed retailers are not “Units Sold” upon which escrow is due. GRE and Tobaccoville also asserted that some of the GRE cigarettes reported as “Units Sold” in 2005 may have been reported twice thereby resulting in “double counting” and an

over-assessment. The two cases were consolidated for discovery and trial.

After an evidentiary hearing, wherein the state presented three witnesses and GRE and Tobaccoville presented no evidence, the District Court granted judgment to the state finding that a “Unit Sold” occurs in the year that an Oklahoma tax stamp is actually affixed to a pack of cigarettes; that GRE owes escrow on cigarettes bearing an Oklahoma excise tax stamp sold to Oklahoma consumers by tribally owned or licensed retailers; and ordered GRE to pay a total unpaid escrow obligation of \$5,077,869.71 for calendar years 2005 and 2006 and a civil penalty in the amount of \$507,786.97.

GRE and Tobaccoville filed a Petition in Error listing ten (10) issues to be raised in their state court appeal, but only two (2) issues were preserved in GRE’s Petition for a Writ of Certiorari: whether [t]he trial court erred in ruling that cigarettes sold on tribal lands are to be included as “Units Sold” for purposes of calculating escrow obligations and whether the court erred in failing to rule upon GRE’s claimed denial of its due process rights.

The Oklahoma Court of Civil Appeals affirmed the decision of the trial court and the Oklahoma Supreme Court declined GRE’s Petition for a Writ of Certiorari.



SUMMARY OF THE ARGUMENT

Neither of the questions presented by GRE merits this Court's review under the standards of Sup. Ct. R. 10. The first question presented is based upon a false premise that the state courts misinterpreted and misapplied this Court's decisions in "*Moe, Colville, and Attea*" by allowing the state to impose an escrow obligation upon "certain manufacturers" based partly upon sales by Indian Tribes for on-reservation cigarette sales to tribal members. See GRE Petition for a Writ of Certiorari ("Pet.") at ii and at p. 10.

GRE is a private, for profit corporation organized under Canadian law. It does not operate as the arm of any Indian Tribe, Canadian or American, and it is not located on Tribal land in the United States. During the time at issue, GRE sold its cigarettes to two companies for distribution in the United States: Tobaccoville and Native Wholesale Supply. Native Wholesale Supply sold cigarettes exclusively on Native American reservations in the United States, see *State of Oklahoma ex rel. Edmondson v. Native Wholesale Supply*, 2010 OK 58, 237 P.3d 199 (Okl. 2010), cert. denied, 131 S.Ct. 2150 (2011), and Tobaccoville sold cigarettes off reservation in Oklahoma and six other states. See *Grand River Enterprises Six Nations, Ltd. v. Pryor*, 2006 WL 1517603. This case only concerns sales of cigarettes bearing an Oklahoma excise tax stamp that GRE distributed in

Oklahoma through Tobaccoville to Oklahoma licensed wholesalers in 2005 and 2006.¹

No Tribal sovereignty issues were raised or are applicable in this case. Instead, GRE and Tobaccoville sought a Declaratory Judgment that the Attorney General wrongfully interpreted 37 O.S. §600.22(10) by including in “Units Sold” cigarettes sold by distributors or wholesalers to retailers during an applicable period, for which Compacting Tribes made a payment in lieu of the regular excise tax. According to GRE and Tobaccoville:

No stamp excise tax is required on cigarettes sold on tribal land. Instead, the tribe makes a “payment in lieu” of cigarette sales

¹ GRE applied and was on Oklahoma’s Directory of Compliant Tobacco Product Manufacturers, until it was removed in August, 2006. As a result of its removal from the Oklahoma directory, GRE’s cigarette brands became contraband and Tobaccoville stopped distributing cigarettes in Oklahoma. From 2007 until 2010, GRE’s other importer, Native Wholesale Supply, illegally distributed untaxed, unstamped GRE brand cigarettes directly to the Muscogee (Creek) Nation, a non-compacting Tribe. This spawned a lawsuit between the State of Oklahoma and Native Wholesale Supply and several lawsuits were brought by the Muscogee (Creek) Nation against the State. See *State of Oklahoma ex rel. Edmondson v. Native Wholesale Supply*, 2010 OK 58, 237 P.3d 199 (Okla. 2010), cert. denied, 131 S.Ct. 2150 (2011); *Muscogee (Creek) Nation v. Oklahoma Tax Comm’n*, 611 F.3d 1222 (10th Cir. 2010); *Muscogee (Creek) Nation v. Henry, et al.*, 867 F. Supp. 2d 1197 (E.D. Okla. 2010); and *Muscogee (Creek) Nation v. Pruitt*, 669 F.3d 1159 (10th Cir. 2012). In 2012, Oklahoma entered into a compact with the Muscogee (Creek) Nation. <https://www.sos.ok.gov/documents/filelog/88574.pdf>

and excise taxes pursuant to the terms of tax compacts between the tribes and the Governor on behalf of the state. 68 O.S. §§346-350.

GRE's Amended Pet. §12.

Both the excise taxes paid under the general provisions of 68 O.S. §§301, et seq., and those paid by Tribes, whether they compact or otherwise, are all evidenced by a tax stamp affixed to the cigarettes. Specifically, the definition of stamp at 68 O.S. §301(8) includes stamps evidencing payment by a) the non-Tribal tax levy, b) sales by non-compacting Indian Tribes and c) sales by compacting Tribes. The Court properly found that cigarettes sold bearing an Oklahoma stamp reflecting payment of a reduced excise tax, in lieu of the general excise tax by compacting, 68 O.S. §346(C), and non-compacting Tribes, 68 O.S. §346(B), come within 37 O.S. §600.22(10)'s definition of "Units Sold."

GRE's second question fares no better because, other than the argument that the escrow statute lacked adequate procedural requirements to prevent a prejudgment deprivation of property without due process of law, the other "federal law rights of NPMS, Indian Tribes, Tribal members and Indian Tribes," Pet. at 14, that GRE now claims the state trial and appellate court gave short shrift to, were never raised in the Oklahoma trial court or appellate court. The Oklahoma Court of Appeals correctly ruled on GRE's procedural due process claim as presented and found

that Oklahoma's escrow statute did not deny GRE due process of law under the United States Constitution.



COUNTERSTATEMENT OF FACTS

1. GRE, a Canadian corporation, the fourth largest Tobacco Product Manufacturer in Canada, is not located on Tribal land in the United States. It is located on the Six Nations Reservation in Oshweken, Canada. *Grand River Enterprises Six Nations, Ltd. v. Pryor*, 2006 WL 1517603.

2. GRE sells its cigarettes in the United States through two companies: Native Wholesale Supply for on-reservation sales and Tobaccoville, USA, a South Carolina corporation for non-reservation sales. *Grand River Enterprises Six Nations, Ltd. v. Pryor*, 2006 WL 1517603. Only sales through Tobaccoville are at issue in this case.

3. GRE and Tobaccoville's sale of cigarettes in Oklahoma, and 6 other states, totaled 3.6 billion cigarettes in 2005. *Grand River Enterprises Six Nations, Ltd. v. Pryor*, 2006 WL 1517603.

4. GRE applied to be on Oklahoma's Directory of Tobacco Product Manufacturers and was listed on that directory until it was removed in August, 2006, for failure to provide information about its sales in Oklahoma. Stambeck letter dated August 1, 2006.

5. GRE admitted that it had failed to pay a combined \$10,000,000.00 escrow obligation in calendar year 2005, to Oklahoma and Arkansas, and for pre-2004 sales in those states, GRE failed to pay a combined escrow obligation of \$6,000,000.00. *Grand River Enterprises Six Nations, Ltd. v. Pryor*, 2006 WL 1517603.

6. GRE sought a declaratory judgment that: “No stamp excise tax is required on cigarettes sold on tribal land.” Instead, the Tribe makes a “payment in lieu” of cigarette sales and excise taxes pursuant to the terms of tax compacts between the Tribes and the Governor on behalf of the state.” 68 O.S. §§346-350. See GRE’s Amended Pet. at ¶12.

7. In Response to the State’s Trial Court Motion for Summary Judgment GRE asserted, for the first time, that Oklahoma’s escrow statute violated the Due Process Clause of the Fourteenth Amendment by failing to provide procedural safeguards against unlawful tax exactions by: (1) making assessments against NPMs based upon informational reports from third parties (wholesalers) unrelated to the NPM without providing information to the NPM to review their accuracy and validity and (2) failing to provide a meaningful opportunity to challenge their validity in a pre-deprivation hearing sufficient in itself to satisfy the Due Process Clause of the Fourteenth Amendment, or provide a process to appeal the amount of the Attorney General’s escrow assessment. See GRE’s

Response to Motion for Summary Judgment at pgs. 14-17.



REASONS FOR DENYING THE PETITION

PROPOSITION I: THE PETITION SHOULD BE DENIED BECAUSE THE STATE COURT DECISIONS ARE NOT IN CONFLICT WITH THIS COURT'S DECISIONS IN *MOE*, *COLVILLE*, AND *ATTEA*.

Contrary to GRE's assertion in footnote 5, of its Petition, Oklahoma's escrow statute is not designed to confiscate the assets of Native owned cigarette manufacturers and independent tobacco companies. To the contrary, the Tenth Circuit Court of Appeals, found Oklahoma's escrow statute and complementary legislation, are non-discriminatory state laws of general application that do not specifically pertain to Indian Tribes, Tribal Members, or Indian Country. *Muscogee (Creek) Nation v. Pruitt*, 669 F.3d 1159, 1179 (10th Cir. 2012).

Under Oklahoma's escrow statute, an NPM places funds into an escrow account in proportion to the number of its "Units Sold" in the State. "Units Sold" is defined as the number of individual cigarettes sold as measured by excise taxes collected by the state on packs bearing a state excise stamp. See 68 O.S. §360.4. The manufacturer receives interest

on these funds and at the end of twenty-five years any funds not used to pay a judgment are returned to the manufacturer. Unlike cigarette excise tax statutes, the burden of funding an escrow account is upon the upstream manufacturer, not wholesalers, retailers, or consumers.

The relevant Oklahoma statutes that levied a tax on sales through tribally owned or licensed stores, in effect at the time, were 68 O.S. §346 for compacting tribes, and 68 O.S. §349 (repealed effective Jan. 1, 2010), for non-compacting Tribes.

Under 68 O.S. §346(C) and 349, compacting Nations collected a reduced State cigarette excise tax in a negotiated amount set forth in each cigarette tax compact without distinction between member and non-member sales. It also required that each pack of cigarettes “ . . . shall bear a payment in lieu of tax stamp evidencing that payment in lieu of state taxes has been paid to the state.”

Under 68 O.S. §§346(B) and 349, non-compacting Tribes or Nations collected a reduced State Cigarette Tax which was “seventy-five percent (75%) of the regular cigarette excise taxes imposed in 68 O.S. §301 of the Oklahoma Tax Code,” 68 O.S. §349(A). A non-compacting Nation was eligible for a quarterly refund for a portion of the tax imposed if it could show that sales to its own members exceeded twenty-five percent of its total sales, 68 O.S. §349(B). All cigarettes “sold or held for sale at a tribally owned or licensed store” by a non-compacting Nation were required to

“have affixed thereto a stamp or stamps evidencing payment of the in lieu tax imposed by 68 O.S. §§349(A) and (C).”

The Oklahoma Legislature stated its intent of §349 was to allow non-compacting Indian Tribes or Nations, or their licensees, to make sales of cigarettes and tobacco products to Tribal members free of state taxation, 68 O.S. §346(B).

Escrow, unlike an excise tax, is due from the NPM manufacturer, not the consumer. Therefore, unlike an excise tax, there is no need to identify the ultimate consumer, Tribal member or not, because escrow comes directly from the manufacturer and is not collected and remitted by a Tribal retailer. Even if the escrow obligation could be considered a tax, it is a permissible off-reservation tax, by the State, on the manufacturer, even if ultimately passed on to Tribal retailers in the form of higher prices for its product. See *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95 (2005). “[T]he ‘who’ and the ‘where’” of the activity regulated by state law “have significant consequences.” First, as to the “where,” there is no unlawful infringement of tribal autonomy when a state taxes *off*-reservation economic activity, even if the activity was undertaken by tribal entities or the tax affects goods that are ultimately resold on tribal land. See *id.* at 110-15 (Tribal self-government not implicated when a nondiscriminatory state tax is applied to activity off Tribal land merely because the tax may have “downstream economic consequences”

for the Tribe). *Mescalero Apache Tribe Co. v. Jones*, 411 U.S. 145, 148-149 (1973).

GRE is not located on Tribal land in the United States, nor is its non-Native distributor Tobaccoville, USA Inc., a South Carolina corporation. Even if GRE was located on Tribal land in the United States, all of its sales occurred off the reservation upon which it sits and were made to non-Tribal members. Such sales are subject to the same escrow requirements that apply to sales by non-Native American manufacturers. This Court has repeatedly held that the activities of Indians occurring off Indian reservations are subject to regulation by the State. See *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-149 (1973); *Puyallup Tribe v. Dept. of Game of Wash.*, 391 U.S. 392, 398 (1968); and *Organized Village of Kake v. Egan*, 369 U.S. 60, 75-76 (1962). Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory State law otherwise applicable to all citizens of the State. *Mescalero Apache Tribe*, 411 U.S. at 148-149.

This Court has ruled that in respect to on-reservation sales that States have authority to enforce their excise tax laws as to cigarettes sold on a Tribe's reservation to non-members of that Tribe. It has also ruled that States lack such authority, because of tribal sovereignty, *only* where the cigarettes are sold on a Tribe's reservation by Tribal entities to members of that particular Tribe. See *Moe v. Confederated Salish & Kootenai Tribes of the Flathead*

Reservation, 425 U.S. 463 (1976); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980); *California State Board of Equalization v. Chemehuevi Indian Tribe*, 474 U.S. 9 (1985); *Oklahoma Tax Comm'n v. Citizen Band Pottawatomie Indian Tribe of Oklahoma*, 498 U.S. 505 (1991); *Dept. of Taxation and Finance of New York v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61 (1994). All of GRE's sales in Oklahoma are off-reservation sales.

Because all of GRE's sales in Oklahoma are off-reservation sales, the argument that GRE makes in this case is essentially the same argument that was made, and rejected, in *Grand River Enterprises Six Nations, Ltd. v. Pryor*, 425 F.3d 158, 174 (2d Cir. 2005) wherein the Second Circuit Court of Appeals found:

Here, Grand River states in its complaint that it is a "Canadian limited liability company that is owned by Native North Americans[, the Six Nations or Iroquois Confederacy]," and that it "operates and is located on tribal land in Ontario, Canada." Compl. ¶ 26. Although the Iroquois Confederacy reservation includes land in both the United States and Canada, Grand River itself operates *only* on land that is outside of the United States. Thus, the activities of Grand River in Canada are no different than the off-reservation activities in *Mescalero*. The fact that the Canadian part of the reservation may be given some special recognition by the Canadian government has no bearing on the question of whether Grand River is conducting business in "Indian country," as

defined in §1151. Thus, the imposition of an escrow requirement for cigarette manufacturing in Canada does not run afoul of the Indian Commerce Clause, and the district court correctly dismissed this cause of action.

GRE presented no evidence that any of the cigarettes sold through Tobaccoville, for which Oklahoma imposed an escrow obligation, were sold by an Indian Tribe to its members. Instead, as stated in its Pet. in Error (App. 1A), it presumed some of its cigarettes were sold on Tribal lands to Tribal members were subject to “payment in lieu of taxes” and exempt from an escrow obligation.²

GRE has no proof of the truth of its assertion that the Oklahoma Courts misinterpreted this Court’s decisions in “*Moe, Colville, and Attea*.”

² GRE now claims, despite not presenting any evidence of Tribal member sales to the trial court, that its escrow obligation “necessarily” included, instead of “presumably” included, sales by Indian Tribes to Tribal members despite not presenting any proof that this occurred.

**PROPOSITION II: THE PETITION SHOULD
BE DENIED BECAUSE OK-
LAHOMA COURTS COR-
RECTLY REJECTED GRE'S
PROCEDURAL DUE PRO-
CESS CLAIM**

In its second proposition, GRE asserts that "The state trial and appellate courts gave short shrift to the important federal questions raised by the State authorities' unprecedented assertion of power over on reservation conduct involving only Indians." Pet. 14. This statement is based upon the false premise that GRE raised more than a procedural due process challenge to Oklahoma's escrow statute. GRE never claimed in the state trial court or in its appellate brief that the state was somehow asserting "power" over reservation conduct involving only Indians or imperiling the federal law rights of NPMs, Indian Tribes, Tribal members or Indian Traders.

It was not until GRE's response to the State's Motion for Summary Judgment that it asserted Oklahoma's escrow statute violated the Due Process Clause of the Fourteenth Amendment by failing to provide procedural safeguards against unlawful tax exactions by: (1) making assessments against NPMs based upon informational reports from third parties (wholesalers) unrelated to the NPM without providing information for the NPM to review their accuracy and validity, and (2) failing to provide a meaningful opportunity to challenge their validity in a pre-deprivation hearing sufficient in itself to satisfy the

Due Process Clause of the Fourteenth Amendment or provide a process to appeal the amount of the Attorney General's escrow assessment.

The Oklahoma Court of Civil Appeals correctly denied GRE's procedural due process claim. As noted by the Court, escrow payments required from NPMs by the Escrow Statute are *not taxes*. *First*, unlike the taxes collected by the States in the cases cited by GRE and Tobaccoville, Oklahoma has no right to the funds deposited into escrow by an NPM unless it obtains a settlement or judgment for tobacco-related claims against the NPM. See 37 O.S. §600.23(B)(1). Unlike taxes, if the escrowed amounts are not claimed, they are released to the NPM after twenty-five (25) years. In the meantime, the NPM receives the interest on the escrowed amounts as earned. See 37 O.S. §600.23(B). In the context of Escrow Statutes, *not taxes*, the above referenced post-deprivation remedies contained in the Escrow Statute (either return of the escrowed funds after 25 years or litigation if the State disputes the right to return) have been determined to contain procedural safeguards that are constitutionally sufficient to satisfy Due Process. See *Grand River Enterprises Six Nations, Ltd. v. Beebe*, 418 F. Supp. 2d 1082, 1099 (W.D. Ark. 2006); and 37 O.S. §600.23(B).

Second, unlike the taxpayers who actually paid the challenged taxes in the cases cited by GRE and Tobaccoville, GRE has not deposited any of the funds that are currently in dispute into its escrow account. Thus, in the case at bar, in contrast to the legal authorities upon which GRE and Tobaccoville relied,

there has been no deprivation of property. To set forth an actionable procedural due process claim, a [party] *must* demonstrate: (1) *the deprivation of a . . . property interest* and (2) that no due process of law was afforded. *Stears v. Sheridan County Memorial Hosp. Bd. Trustees*, 491 F.3d 1160, 1162 (10th Cir. 2007); see also *Teigen v. Renfrow*, 511 F.3d 1072, 1078 (10th Cir. 2007).

Third, unlike the cases cited by GRE and Tobaccoville where taxpayers did not get a hearing until *after* the taxes were already paid, GRE and Tobaccoville filed a declaratory judgment action seeking procedural relief prior to paying the contested escrow amounts. When property rights are at stake, due process requirements are met if there is an adequate opportunity given for an ultimate judicial determination of liability. See *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 611-612 (1974). The underlying court action provided GRE with an adequate opportunity for an ultimate judicial determination as to its liability in regard to its escrow obligation, including a remedy as to its challenges to the outstanding escrow obligation. Accordingly, the state court proceeding gave GRE and Tobaccoville all the process that is due in that it, in and of itself, constitutes a pre-deprivation hearing. Moreover, even if the escrow deposits were a tax, which they are not, and had been paid, which they have not, the authorities cited by GRE and Tobaccoville hold that Procedural Due Process does not require a predeprivation hearing. See *McKesson Corp. v. Div. of Alc. Bev.*, 496 U.S. 18,

36-39 (1990); *Harper v. Va. Dept. of Tax.*, 509 U.S. 86, 100-102 (1993); and *Williams v. Vermont*, 589 A.2d 840, 845-850 (Vt. 1991). Those cases merely hold that Due Process only requires a meaningful remedy, but not any particular remedy, before a final deprivation occurs.

Fourth, GRE and Tobaccoville complain of their access to the NPM Reports upon which the escrow obligation was calculated. However, prior to this lawsuit and prior to GRE's escrow payment due date, AG provided "Special Aggregated Reports" to GRE identifying the licensed Oklahoma wholesalers that reported "Units Sold" by number so as to maintain the confidentiality requirements of 68 O.S. §205. Additionally, AG referred GRE to a list of licensed wholesalers so that it could identify and contact the ones its product may have been stamped and sold by to assist in verification of its records. Moreover, all of the NPM Reports filed by licensed Oklahoma wholesalers during 2005 and 2006 were turned over to GRE and Tobaccoville years ago in their unredacted form during discovery. All of these reports were provided to GRE and Tobaccoville without any of the contested escrow deposit being made.

Fifth, 68 O.S. §360.4(a)(3)(a) requires a non-participating manufacturer to track the sales of its cigarettes in the state and as part of its yearly certification provide: "a list of all its brand families and the number of 'Units Sold' for each brand family that were sold in the state during the preceding calendar year." GRE submitted no evidence to contradict the

sales reports submitted by Oklahoma licensed wholesalers. Other than speculation and conjecture, GRE presented no evidence that any of its sales in Oklahoma were tax free sales by an Indian Tribe to its Tribal members. GRE, not the State, had the burden, to produce evidence that the cigarettes for which it is seeking a valid exemption were ultimately retailed to tribal members. See *Oklahoma Tax Commission v. City Vending of Muskogee, Inc.*, 1992 OK 110, ¶10, 835 P.2d 97, 101 (Okl. 1992).

There were no “on reservation” activities involved in GRE’s sales in this case, it has no sovereign interest to assert and it, like all other tobacco product manufacturers selling cigarettes in Oklahoma, is subject to non-discriminatory State regulation.

GRE’s Petition for a Writ of Certiorari should be denied because it is advancing misstatements of fact and the law applied thereto, concerning the nature and location of the activities upon which the underlying action was based.



CONCLUSION

For the above stated reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

E. CLYDE KIRK
Counsel of Record
Assistant Attorney General
OFFICE OF THE ATTORNEY
GENERAL OF OKLAHOMA
313 Northeast 21st Street
Oklahoma City, OK 73105
(405) 521-3921
Fax: (405) 522-4534
clyde.kirk@oag.ok.gov
Attorney for Respondent
Oklahoma Attorney General

LARRY D. PATTON
Assistant General Counsel
OKLAHOMA TAX COMMISSION
120 N. Robinson,
Suite 2000W
Oklahoma City, OK 73102
(405) 319-8538
Fax: (405) 601-7144
lpatton@tax.ok.gov

Attorney for Respondent
Oklahoma Tax Commission

October 25, 2013

APPENDIX A
IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

GRAND RIVER ENTERPRISES)		
SIX NATIONS, LTD., a)		
Canadian corporation, and)		
TOBACCOVILLE, USA, INC.,)		
a South Carolina corporation,)		
Plaintiffs/Appellants,)		No. <u>#109484</u>
vs.)		
STATE OF OKLAHOMA)		Oklahoma County
<i>ex rel.</i> OKLAHOMA)		Case No.
TAX COMMISSION)		CJ-2006-6341
and)		Consolidated With
STATE OF OKLAHOMA)		CJ-2006-6673
<i>ex rel.</i> OFFICE OF THE)		Judge Parrish
ATTORNEY GENERAL)		
OF OKLAHOMA,)		
Defendants/Appellees.)		

PETITION IN ERROR

(Filed May 19, 2011)

<u> X </u>	PETITION IN ERROR
<u> </u>	AMENDED OR SUPPLEMENTAL
<u> </u>	PETITION
<u> </u>	CROSS PETITION
<u> </u>	COUNTER PETITION
<u> </u>	DATE FIRST PETITION
	IN ERROR FILED: _____

I. TRIAL COURT HISTORY

COURT/ TRIBUNAL:	District Court
COUNTY:	Oklahoma
CASE NO.:	CJ-2006-6341, Consolidated with CJ-2006-6673
JUDGE:	The Honorable Patricia G. Parrish
NATURE OF CASE:	Controversy as to escrow obligations pursuant to 37 O.S. §§600.21-600.23

NAMES OF PARTY OR PARTIES FILING THIS PETITION IN ERROR:

Grand River Enterprises Six Nations, Ltd. and Tobaccoville, USA, Inc.
--

* * *

EXHIBIT "C"

Issues To Be Raised On Appeal

1. The trial court erred in finding that the evidence presented by the AG established that 170,366,380 "units sold" of Grand River manufactured cigarettes occurred in the State of Oklahoma in 2005 and therefore Grand River's escrow obligations for 2005, adjusted for inflation, is \$3,546.619.15 [sic].
2. The trial court erred in finding that the evidence presented by the AG established that 84,125,040 "units sold" of Grand River manufactured cigarettes occurred in the State of Oklahoma in 2006 and

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therefore Grand River's escrow obligations for 2006, adjusted for inflation, is \$1,804.396.46 [sic].

3. The trial court erred in including cigarettes sold, and excise stamps purchased for those cigarettes in 2004 in its calculation of escrow amounts due and owing in 2005 and 2006.

4. The trial court erred in ruling that cigarettes sold on tribal lands are to be included as "units sold" for purposes of calculating escrow obligations.

5. The trial court erred in imposing a civil penalty on Grand River.

6. The trial court erred in finding in favor of the State of Oklahoma in including cigarettes which the excise tax was paid in 2004.

7. The trial court erred in utilizing the NPM Reports to determine the number of "units sold", since it was undisputed that the NPM Reports did not contain the reporting information required by Oklahoma statutes to compute the "units sold" in a given year for purposes of the escrow computation.

8. The trial court erred in its interpretation of the definition of "units sold" under the escrow statute.

9. The trial court erred in including in "units sold" for 2005 and 2006 cigarettes which the excise tax stamps were purchased in 2004 and cigarettes sold on tribal lands.

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10. The trial court erred in failing to rule upon Appellants' claim of due process violation because of the State arbitrarily declaring Seneca cigarettes contraband subject to seizure.

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APPENDIX B

August 1, 2006

**VIA CERTIFIED MAIL,
RETURN RECEIPT REQUESTED**

Mr. Steve Williams, President
Grand River Enterprises Six Nations Ltd.
PO Box 750
2176 Chiefswood Road
Ohsweken, Ontario NOA 1MO

**Re: Denial of Grand River Enterprises Six
Nations Ltd.'s Application To Be Placed
in Oklahoma's 2006 Directory of Tobacco
Product Manufacturers**

Dear Mr. Williams:

My office has made numerous requests for Grand River Enterprises Six Nations Ltd. ("GRE") to provide its records of sales in Oklahoma in 2005. Specifically, my office requested such records of sales by letters dated October 31, 2005, December 30, 2005, February 3, 2006, March 7, 2006 and March 22, 2006.

On May 5, 2006, my office sent yet another request for GRE to send the records of sales in Oklahoma in 2005. GRE was informed that the records were needed to complete the processing of the company's 2006 Directory Application.

While my office did receive some information on May 23, 2006, in a letter from Mr. Marc Edwards, Attorney for Tobaccoville USA, Inc., an importer who

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receives cigarettes from your company, the information consisted of only a single sheet of paper with a list of the names of six companies with a corresponding stick count (sales total) for each and a total stick amount of 7,204,400. Of the six companies listed by Mr. Edwards, only 2 were listed in GRE's 2006 Directory application as Stampers of its product, and none of the sales totals reconciled with the actual amount of sales that any of those companies reported to the Oklahoma Tax Commission for 2005. No attempt was made by Mr. Edwards to explain the discrepancies or to provide supporting documents, or information other than the scant summaries of some of the sales of your product contained in his letter.

Grand River Enterprises Six Nations Ltd., itself, has not provided any records of its sales in 2005 to this office.

The 2006 Oklahoma Directory of Certified Tobacco Product Manufacturers and their brands was placed on the website of the Office of the Oklahoma Attorney General on August 1, 2006. Because of Grand River Enterprises Six Nations Ltd.'s failure to provide its records of sales in 2005, which my office repeatedly notified GRE were necessary for my office to process its 2006 application, GRE's application to have GRE and the "Seneca" brand cigarettes that it manufactures placed in the current Directory is denied.

Sincerely,

W. A. Drew Edmondson
Attorney General

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cc: File
OAG Tobacco Team
OTC

APPENDIX C
IN THE DISTRICT COURT
OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

GRAND RIVER ENTERPRISES)
SIX NATIONS, LTD., a)
Canadian corporation, and)
TOBACCOVILLE, USA, INC.)
South Carolina corporation,)

Plaintiffs,)

vs.)

STATE OF OKLAHOMA)
ex rel. OKLAHOMA)
TAX COMMISSION)

and)

STATE OF OKLAHOMA)
ex rel. THE ATTORNEY)
GENERAL OF OKLAHOMA,)

Defendants.)

Case No.
CJ-2006-6673

AMENDED PETITION

(Filed Aug. 22, 2006)

* * *

10. 68 O.S. § 302 levies a tax upon the sale, use, gift, possession or consumption of cigarettes within the jurisdiction of the State of Oklahoma. The tax is evidenced by stamps which are furnished by and purchased from the OTC. Hence, the tax is commonly known as the "stamp tax." The stamp tax is generally

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paid by wholesalers, not manufacturers. Wholesalers purchase the stamps from the OTC and affix the stamps to each pack of cigarettes that are sold, used, received, possessed or consumed in Oklahoma. Prior to 2005, the stamp tax on a pack of cigarettes was twenty-three cents (\$0.23) (the “pre-2005 price”).

11. On November 2, 2004, the Oklahoma Legislature enacted 68 O.S. § 302-5, which increased the stamp tax on a pack of cigarettes and other tobacco products from twenty-three cents (\$0.23) to one dollar and three cents (\$1.03) (the “post-2005 price”). This additional stamp tax upon cigarettes is only imposed upon the inventory of cigarettes acquired on or after January 1, 2005. Therefore, wholesalers purchased stamps at the pre-2005 price for the cigarettes that the wholesaler acquired in inventory prior to January 1, 2005.

12. No stamp excise tax is required on cigarettes sold on tribal land. Instead, the tribe makes a “payment in lieu” of cigarettes sales and excise taxes pursuant to the terms of tax compacts between the tribes and the Governor on behalf of the state. 68 O.S. § 346-350.

13. Cigarettes of a NPM determined to be non-compliant with 37 O.S. §§ 600.21-600.23 shall be banned from sale in Oklahoma for a period not to exceed two (2) years and may also be deemed contraband and Subject to seizure and forfeiture. 37 O.S. §600.23(E); 68 O.S. § 360.7. If cigarettes are seized

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and forfeited under 68 O.S. § 360.7, they "shall be destroyed . . . and not resold." 68 O.S. § 360.7(B).

APPENDIX D
IN THE DISTRICT COURT
OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

GRAND RIVER ENTERPRISES))	
SIX NATIONS, LTD., a))	
Canadian corporation, and))	
TOBACCOVILLE, USA, INC.,))	
a South Carolina corporation,))	
Plaintiffs,))	
vs.))	Case No.
STATE OF OKLAHOMA))	CJ-2006-6341
<i>ex rel.</i> OKLAHOMA))	Consolidated With
TAX COMMISSION))	CJ-2006-6673
and))	
STATE OF OKLAHOMA))	
<i>ex rel.</i> OFFICE OF THE))	
ATTORNEY GENERAL))	
OF OKLAHOMA,))	
Defendants.))	

RESPONSE AND OBJECTION TO ATTORNEY
GENERAL'S MOTION FOR SUMMARY
JUDGMENT. AND BRIEF IN SUPPORT

(Filed Jul. 3, 2008)

* * *

D. The Escrow Statute violates the Due Process Clause of the Fourteenth Amendment because it fails to provide procedural safeguards against unlawful tax exactions.

- 1. The Escrow Statute provides for a statutory scheme wherein the amount of the escrow payment is determined by informational reports prepared by unrelated third parties which are not disclosed to the NPM to verify.**

A state must provide procedural safeguards against unlawful tax exactions in order to satisfy the commands of the Due Process Clause of the Fourteenth Amendment, U.S.C.A. Const. Amend. 14. *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, Dept. of Business Regulation of Florida*, 496 U.S. 18, 110 S. Ct. 2238, 110 L. Ed. 2d 17 (1990). The process set forth in the Escrow Statute as to how the Attorney General determines the assessment against the NPM (i.e. the amount to be placed in escrow by the NPM) does not provide for sufficient procedural safeguards to satisfy the requirements of the Due Process Clause.

The Escrow Statute sets forth a statutory scheme wherein the OTC collects informational reports from wholesalers regarding the number of cigarettes sold by a particular NPM during a certain time period. The OTC then sends these informational reports to the Attorney General. The Attorney General reviews

the informational reports and uses the figures set forth in the reports to calculate the NPM's escrow payment (i.e. assessment).

As such, pursuant to the Escrow Statute, the Attorney General makes an assessment against the NPM based on informational reports that are provided to the OTC by third parties that are unrelated to the NPM. Moreover, the OTC and the Attorney General refuse to disclose or provide the informational reports to the NPM based upon their interpretation of the confidentiality requirements in 68 O.S. § 205. As a result, the NPM, whose assessment is determined by the information reports, is not given the opportunity to review the informational reports filed with the OTC to verify their accuracy and validity. Therefore, the NPM is assessed on information that is not provided by the NPM or subject to their review. Such a statutory scheme clearly does not have the procedural safeguards to satisfy the commands of the Due Process Clause of the Fourteenth Amendment. As such, the Escrow Statute should be held unconstitutional.

2. The Escrow Statute fails to provide the Plaintiffs a meaningful opportunity to contest the amount of the escrow payment assessed against them by the Attorney General.

A state must provide procedural safeguards against unlawful tax exactions in order to satisfy the

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commands of the Due Process Clause, U.S.C.A. Const. Amend. 14. *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, Dept. of Business Regulation of Florida*, 496 U.S. 18, 110 S. Ct. 2238, 110 L.Ed. 2d 17 (1990). Due process obligates a state to afford a meaningful remedy for improperly exacted taxes. *Williams v. State*, 156 Vt. 42, 589 A.2d 840 (1990). A meaningful opportunity for taxpayers to withhold contested tax assessments and to challenge their validity in a predeprivation hearing constitutes a procedural safeguard sufficient, by itself, to satisfy the Due Process Clause of the Fourteenth Amendment. *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 113 S. Ct. 2510, 125 L. Ed. 2d 74 (1993). However, when the states places the taxpayer under duress to pay a tax promptly when due and relegates the taxpayer to a post payment refund action in which to challenge the tax's legality, the Due Process Clause obligates a state to provide meaningful backward-looking relief to rectify any unconstitutional deprivation that occurs. *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, Dept. of Business Regulation of Florida*, 496 U.S. 18, 110 S. Ct. 2238, 110 L.Ed. 2d 17 (1990). That is, if no predeprivation remedy exists, the Due Process Clause obligates a state to provide meaningful backward-looking relief to rectify any unconstitutional deprivation. *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 113 S. Ct. 2510, 125 L. Ed. 2d 74 (1993).

In this case, the Escrow Statute does not afford the NPMs a meaningful remedy for an improperly

exacted (or calculated) escrow payment. In fact, the Escrow Statute does not provide the NPMs with any effective means for challenging the amount of the escrow payment assessed against them by the Attorney General. The Escrow Statute sets forth no process wherein the NPMs may contest or appeal the amount of the escrow payment assessed by the Attorney General. The Escrow Statute only provides meaningful remedies for the Attorney General. The Escrow Statute allows the Attorney General to bring a civil action on behalf of the state against any NPM that fails to place in escrow the funds assessed by the Attorney General. 37 O.S. § 600.23(E). It further enables the Attorney General to assess a civil penalty against any NPM that has not placed in escrow the amount specified by the Attorney General, even if the NPM is simply seeking clarification of the amount assessed by the Attorney General. 37 O.S. § 600.23(E)(1), (2).

The Escrow Statute's failure to provide the NPMs with (i) a meaningful opportunity to challenge the amount of the escrow payment assessed against them, and (ii) a meaningful remedy for an improperly calculated escrow payment, violates the Due Process Clause of the Fourteenth Amendment. As such, the Escrow Statute should be held to be unconstitutional.

IV. CONCLUSION

For the foregoing reasons, Tobaccoville respectfully requests that the Motion for Summary Judgment of the Attorney General be denied, and judgment be granted in favor of Tobaccoville [sic], declaring no further escrow obligation is due and owing.

Respectfully submitted,

/s/ MARC EDWARDS

Marc Edwards, OBA # 10281

Robert N. Sheets, OBA # 8152

Phillips McFall McCaffrey McVay
& Murrah, P.C.

Thirteenth Floor, Corporate Tower
101 N. Robinson

Oklahoma City, Oklahoma 73102

Telephone: (405) 235-4100

Facsimile: (405) 235-4133

ATTORNEYS FOR PLAINTIFFS
