APL-2017-00029
Appellate Division Docket No. CA 15-01764
Cattaraugus County Clerk's Index No. 82670

Court of Appeals

of the

State of New York

ERIC WHITE and NATIVE OUTLET,

Plaintiffs-Appellants,

– against –

ERIC T. SCHNEIDERMAN, NEW YORK STATE ATTORNEY GENERAL, in his official capacity; and THOMAS H. MATTOX, COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, in his official capacity,

Defendants-Respondents.

RECORD ON APPEAL

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STATEMENT PURSUANT TO CPLR §5531 [1-2]

STATE OF NEW YORK : SUPREME COURT
APPELLATE DIVISION : FOURTH DEPARTMENT

ERIC WHITE and NATIVE OUTLET,

Plaintiffs/Appellants,

against

ERIC T. SCHNEIDERMAN, NEW YORK STATE ATTORNEY GENERAL, in his official capacity; and THOMAS H. MATTOX, COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, in his official capacity,

Defendant/Respondents.

STATEMENT PURSUANT TO CPLR §5531

Docket: _____

Plaintiffs/Appellants, Eric White and Native Outlet, by its attorneys, Lipsitz Green Scime Cambria LLP, states as follows:

1. The index number of the case in the court below is 82670.

2. The full names of the original parties are Eric White and Native Outlet, Plaintiffs, and Eric T. Schneiderman, New York State Attorney General, in his official capacity, and Thomas H. Mattox, Commissioner of the New York State Department of Taxation and Finance, in his official capacity, Defendants.

3. The action was commenced in Supreme Court, County of Cattaraugus.

4. The action was commenced by the filing of Plaintiffs' Summons and Verified Complaint filed on June 23, 2014. The Summons and Verified Complaint was served upon Defendant Eric T. Schneiderman, New York Attorney General, in his official capacity on June 26, 2014 and Defendant Thomas H. Mattox, Commissioner of the New York State Department of Taxation and Finance, in his official capacity on June 25, 2014.

5. On August 11, 2014, Plaintiffs filed Notice of Motion for a Preliminary Injunction, Affirmation of Paul J. Cambria, Jr., Affidavit of Eric White and Memorandum of law in Support of Plaintiffs' Motion for Preliminary Injunction enjoining the Defendants from enforcing Tax Law Section 471 as against the Plaintiffs for transactions occurring on reservation land.

6. On December 26, 2014, Defendants filed a Notice of Cross-Motion to Dismiss and Memorandum of Law in Opposition to Plaintiffs' Motion for Preliminary Injunction seeking dismissal of Plaintiffs' Verified Complaint pursuant to CPLR 3211(a)(7).

7. Plaintiffs are appealing all aspects of the Order of the Hon. Jeremiah J. Moriarty, J.S.C., granted on March 9, 2015 and filed in the Office of the Clerk of the County of Cattaraugus on March 12, 2015, which denied Plaintiffs' Motion for Preliminary Injunction as moot and granted Defendants' Cross-Motion dismissing Plaintiffs' Verified Complaint.

8. Plaintiffs are appealing on a full reproduced record.

DATED: July 1, 2015
Buffalo, New York

LIPSITZ GREEN SCIME CAMBRIA LLP

By: _____

Paul J. Cambria, Jr., Esq.
42 Delaware Avenue, Suite 120
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(716) 849-1333
Attorneys for Plaintiffs/Appellants

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NOTICE OF APPEAL, DATED MARCH 24, 2015 AND FILED MARCH 24, 2015 WITH AFFIDAVIT OF SERVICE [3-5]

STATE OF NEW YORK
SUPREME COURT : COUNTY OF CATTARAUGUS

ERIC WHITE and NATIVE OUTLET,

Plaintiffs,

against

ERIC T. SCHNEIDERMAN, NEW YORK STATE ATTORNEY GENERAL, in his official capacity; and THOMAS H. MATTOX, COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, in his official capacity,

Defendants.

Index No. 82670

NOTICE OF APPEAL

CATTARAUGUS COUNTY CLERK
2015 MAR 24 P 12: 1

PLEASE TAKE NOTICE, that Plaintiffs Eric White and Native Outlet, by and through their attorneys, Lipsitz Green Scime Cambria LLP, hereby appeal to the Appellate Division, Fourth Department from the Order dated and granted by the Hon. Jeremiah J. Moriarty, J.S.C. in the above-captioned matter on March 9, 2015 and entered and filed in the Office of the Cattaraugus County Clerk on March 12, 2015, a copy of which is attached hereto as **Exhibit A**, granting defendants' cross motion to dismiss Plaintiffs' Complaint pursuant to CPLR 3211(a)(7) and denying as moot Plaintiffs' motion for a preliminary injunction, and this appeal is taken from each and every part of said Order as well as from the whole thereof

DATED: March 24, 2015
Buffalo, New York

LIPSITZ GREEN SCIME CAMBRIA LLP

By: _____
Jeffrey F. Reina, Esq.
42 Delaware Avenue, Suite 120
Buffalo, New York 14202
(716) 849-1333

TO: David Sleight, Assistant Attorney General
Office of the Attorney General
350 Main Street, Suite 300A
Buffalo, NY 14202
(716) 853-8400
Attorneys for Defendants

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AFFIDAVIT OF SERVICE

I, Jane Hauser, being first duly sworn under oath, depose and state that I caused this **NOTICE OF APPEAL with Exhibit** to be served upon the following:

David Sleight, Assistant Attorney General
Office of the Attorney General
350 Main Street, Suite 300A
Buffalo, NY 14202

by mailing copies to it in properly addressed envelopes, with postage prepaid, and depositing said envelopes in the U.S. Mail on the 24th day of March, 2015, before the hour of 5:00 p.m.

Jane Hauser
Jane Hauser

Sworn to before me this
24th day of March, 2015

Gloria R Bogdan
Notary Public

GLORIA R. BOGDAN
Notary Public, State of New York
Qualified in Erie County
My Commission Expires Dec. 9, 2018

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ORDER OF THE HONORABLE JEREMIAH J. MORIARTY, J.S.C., GRANTED ON MARCH 9, 2015 AND FILED ON MARCH 12, 2015, APPEALED FROM [6- 8]

At a Special Term of the Supreme Court, held in and for the County of Cattaraugus, at the Cattaraugus County Courthouse, 303 Court Street, Little Valley, New York, on the 19th day of February, 2015.

PRESENT: **HON. JEREMIAH J. MORIARTY, J.S.C.**
Justice Presiding

STATE OF NEW YORK : COUNTY OF CATTARAUGUS
SUPREME COURT

ERIC WHITE and NATIVE OUTLET,

Plaintiffs,

against

ERIC T. SCHNEIDERMAN, NEW YORK STATE ATTORNEY GENERAL, in his official capacity; and

THOMAS H. MATTOX, COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, in his official capacity,

Defendants.

ORDER

Index No. 82670

2015 MAR 12 A 10:04
CATTARAUGUS COUNTY CLERK

This matter having come before the Court on the August 11, 2014 Motion of Plaintiffs ERIC WHITE and NATIVE OUTLET seeking an Order pursuant to CPLR Article 63 preliminarily enjoining the Defendants ERIC T. SCHNEIDERMAN, in his official capacity as New York State Attorney General, and THOMAS H. MATTOX, in his official capacity as Commissioner of the New York State Department of Taxation and Finance, from enforcement of New York State Tax Law §471 during the pendency of this action, and the December 26, 2014 Cross-Motion of

Defendants seeking an Order dismissing Plaintiffs' Verified Complaint pursuant to CPLR 3211(a)(7).

NOW upon reading and filing Plaintiffs' Verified Complaint dated June 13, 2014 and filed on June 23, 2014; Notice of Motion for a Preliminary Injunction dated August 11, 2014, Affirmation of Paul J. Cambria, Jr., Esq. dated August 11, 2014; Affidavit of Eric White, sworn to June 13, 2014, Memorandum of Law in Support of Motion for Preliminary Injunction dated August 11, 2014 submitted in support of Plaintiffs' motion; Defendants' December 26, 2014 Notice of Cross-Motion to Dismiss and Memorandum of Law in Opposition to Plaintiffs' Motion for Preliminary Injunction and in support of Defendants' Cross-Motion to Dismiss dated December 26, 2014, submitted in support of said cross-motion and in opposition to Plaintiffs' motion; and Plaintiffs' Reply Memorandum of Law in Further Support of Plaintiffs' Motion for Preliminary Injunction and In Opposition to Defendants' Cross-Motion to Dismiss dated February 12, 2015, submitted in further support of Plaintiffs' motion for preliminary injunction and in opposition to Defendants' cross-motion to dismiss; and

After hearing Paul J. Cambria, Jr., Esq. on behalf of Plaintiffs and Assistant Attorney General, David J. Sleight, on behalf of Defendants; and after due deliberation being had thereon, it is hereby

ORDERED, that for the reasons set forth on the record at the hearing of said motions (a transcript of which is attached hereto and made a part hereof), Defendants' Cross-Motion is granted for the reasons set forth in Defendants' papers; and the application to dismiss the Verified Complaint of Plaintiffs pursuant to 3211(a)(7), in that said pleading fails to state a cause of action under existing and controlling New York law, is granted; and it is further

ORDERED, that based upon the foregoing, Plaintiffs' motion for a preliminary injunction is moot.

HON. JEREMIAH J. MORIARTY, J.S.C

ENTERED: March 9 2015

Vera Dry
Clerk of Court

TRANSCRIPT OF COURT PROCEEDINGS HELD ON FEBRUARY 19, 2015 [9-37]

STATE OF NEW YORK

SUPREME COURT : COUNTY OF CATTARAUGUS

ERIC WHITE and NATIVE OUTLET,

Plaintiffs

-vs- INDEX NO. 82670

ERIC SCHNEIDERMAN, NEW YORK STATE ATTORNEY GENERAL, and THOMAS H. MATTOX, COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF TAX FINANCE,

Defendants

---

303 Court Street
Little Valley, NY 14755
February 19, 2015
ARTICLE 78 MOTION

B E F O R E:

HONORABLE JEREMIAH J. MORIARTY
Supreme Court Justice

A P P E A R A N C E S:

PAUL CAMBRIA, ESQ., and
JEFFREY F. REINA, ESQ.
Appearing on behalf of the Plaintiffs

DAVID SLEIGHT, ESQ.
Assistant Attorney General
Appearing on behalf of the Defendants

Kathleen M. Trost,
Official Court Reporter

THE COURT: This is the matter of Eric White and Native Outlet against Eric T. Schneiderman, New York State Attorney General, in his official capacity, and Thomas H. Mattox, M-A-T-T-O-X, Commissioner of the New York State Department of Tax Finance, in his official capacity, Index No. 82670. Representing the plaintiff -- would you note your appearances for the record?

MR. CAMBRIA: Paul Cambria and Jeffrey Reina on behalf of the plaintiffs.

MR. SLEIGHT: Assistant Attorney General David Sleight for the defendants.

THE COURT: Okay. So, this is your application.

MR. CAMBRIA: It is.

THE COURT: Mr. Cambria, so you may proceed.

MR. CAMBRIA: Thank you. Your Honor, it's our position that the Tax Law which is represented by Section 471 has an exception, if you will, and that exception is embodied in Section 6 of Indian Law.

If we start off with Section 471, first of all, as we've indicated in our complaint, the facts here are as follows: The business model for my client is a situation where the entire transaction occurs on a recognized Indian reservation. So, this isn't a case

where it's a website and we're soliciting business off the reservation or it's not a matter of delivering something off the reservation or mailing something off the reservation. This is a circumstance, as pled in our complaint, of the entire transaction occurring there. Someone comes on the reservation, a Native American sells them a product, and it is our contention that that's not a taxable event under 471.

Now, 471 deals with the imposition of tax on cigarettes, but there is an exception in that -- and what I did was I just blew up, if you will, just the language. This is just the section -- just the language here that is pertinent to my argument, basically saying that taxes imposed -- "except that no tax shall be imposed on cigarettes sold under such circumstances that this state is without the power to impose the tax." So, 471 itself recognizes that there may be exceptions to its application.

Our position is that that exception is set forth in Indian Law Section 6. It's important because historically we see a number of different scenarios dealing with Native Americans around the country. In some places the federal government has allocated lands, and they've basically dispossessed the Natives from their land to a designated land and that's their

reservation.

The Cattaraugus and Allegany reservations here are not like that. Here they've always been in possession of these lands. These are aboriginal lands. What's happened is there came a time when Indian Law Section 6 was passed, and if you look at the history -- and I'm not gonna repeat a number of the things that we've said in our pleadings, but there was a reason why tax exemptions were given to the Indians.

In the dealings between the state and the Indians, a number of treaties were entered into with the federal government because federal government is the only government that has the ability to enter into treaties. New York State had to recognize those treaties and, for the most part, we think has ignored a number of them and what they mean. But it is clear and we've cited a number of treaties in our pleadings and the government -- and I'll call the Attorney General's Office the government.

Basically, with regard to the 1831 treaty, they're making an argument, well, maybe that just applies to Ohio Senecas and so on. I don't think there's any definitive proof that that's the fact. The Senecas from here stretched the whole way into Ohio, but it doesn't matter because we've cited all the other

treaties, the '38, the '42, and all of them say the same thing, that the Nation has never been a part of a state. It is a Nation unto itself, and there is some historical recognition of that. One of them is taxation because, clearly, if you're going to recognize a Nation as such, that means that the Nation has some autonomy, it has some self-control, self-government, if you will.

We've cited the Patterson case from the Court of Appeal which basically talks about the fact that New York State recognized the Senecas own constitution. Well, only countries have constitutions and states and nations. Obviously, our federal nation has a constitution, the state has one, the Senecas have one, and the State of New York has recognized that in two separate occasions.

So, that means there's an autonomy there. That means that historically, if we look at the treaties where it makes it clear that the Nations are not part of a state and then we look at the fact that New York has recognized the constitution, if you will, of the Nation, historically that shows a recognition of an independent society, of an independent country, if you will. My position is that Indian Law Section 6 is part and parcel of that recognition.

Now, let's look at what it says and my position is that this section, Indian Law 6, is the very exception that 471 speaks of because 6, Section 6 says and it's -- we'll look at the title first because some people have made arguments that the title means something. But it simply says "Exemption of Reservation Lands" -- with an "s" and that's important, "lands" -- "from Taxation."

The reason I say it's important is because there's going to be a claim and there has been a claim that this section really only dealt with land and it only dealt with real estate taxes if you will. If this title said "land," that would make more sense, it says Exemption of Reservation Land from Taxation -- it doesn't say that. It says "lands." And why? Because all it's doing in that title is defining the geography that is embraced by the exemption.

So, lands means this is where the exemption occurs, on the various lands, as there's obviously more than one reservation. If it said "land," they could make an argument. It's pretty clear land is land. Here's what it says: "No taxes shall be assessed for any purpose whatever, upon any Indian reservation in this state, so long as the land of such reservation shall remain the property of the nation, tribe or band

occupying same."

Well, clearly, we know that it's still their property. It's been recognized as such many times. But let's look at this language because, as I say, they're going to refer to the Snyder case from the Third Department and try to persuade you that that is binding authority. And they will make an argument that if we look at this law, that we should be able to figure out that it really only means property tax.

What I'm doing is giving it some indicia here as to why it's patently and not obviously limited to property tax. First of all, it says "No taxes shall be assessed for any purpose whatever." Why would you have to say "any purpose whatever" if you're only talking about one tax? "Any purpose whatever." Their claim is it's land. Why say "any"? It's obvious that their law was contemplating other taxes.

In addition to that, if we think about the history of this, if there was only a land tax at the time that this section was enacted, they'd have an argument to say, well, it had to be land tax, that's all there was, but there wasn't. As we pointed out in our papers, there were several taxes, including excise taxes which is what a sales tax is, at the time. So, to make an argument that it only meant land when there was several

other taxes involved, when they use the term "any."

So, now the claim is going to be and it has been and it historically has been that, well, this has already been decided in Snyder in the Third Department and in Bramhall in the Fourth Department, and to that, I point out the following. The Court of Appeals has made it clear that the Snyder case, at best, was dictum, at best, because the Court of Appeals, when they were asked to review the Snyder case, said the following: To the extent the plaintiff contends that the state tax statutes at issue violate either the Supremacy Clause or New York law, which is 6, his arguments are unpreserved, cannot be considered on this appeal.

Plaintiff's complaint asserted only violations of the Commerce Clause and the laws of the United States. I have the complaint here that was filed -- I give a copy to the government, if I might hand one up to you. What we see is that Section 6 was never before the Court in the Third Department, ever. They never alleged anything but federal law.

So, when they got to the Court of appeals, somebody, probably in one of the amici's briefs say, oh, what about this Section 6, which is clearly a prohibition of taxes for any purpose; and the Court of

Appeal said sorry, that's not in this lawsuit because nobody ever alleged any New York law in this lawsuit, ever. And so, what happens is the Snyder case, at best, is dicta, at best, because that was -- that issue of Section 6 was never ever raised in the case, ever.

So, now we move to Bramhall from the Fourth Department. Well, it never reasoned anything. It just cited the Snyder case and said oh, well, this issue's been decided, without delving into the fact that it was never before the court in the Third Department. It wasn't before the trial court. You've got the pleadings. It wasn't before the Third Department. There was never any request that Section 6 be interpreted.

So, it turns out to be no precedent whatsoever. In fact, we -- I was thinking about it yesterday, and Jeffrey and I were talking about what is the effect of dicta in New York State? And we found this old case from 1897 that's still good law called Colonial City Traction Company versus Kingston and it's 154 N.Y. 493. Basically, it says that if the statements of the Court are broader than the issues brought before that Court, you can only consider those words to be the opinion of the writer but not the Court, and it's dicta.

It says, "A judicial opinion, like evidence, is

only binding so far as it's relevant, and when it wanders from the appointed issue, it no longer has force as official utterance." And so, what's happened here is time after time when anybody brought up Section 6, the state would say oh, well, you need to read the Snyder case. Well, we read the Court of Appeals pronouncement on the Snyder case and found out, low and behold, that they never raised Section 6. So, there is no binding authority with regard to the meaning of Section 6 and whether or not it is, in fact, an exemption.

So, I submit that you now have no binding authority with regard to Section 6. So, now it's a question of what does it say and what does it mean and is it an exception to 471? I submit it is for the following reasons: First of all, and we've cited all these cases, the Supreme Court and our Court of Appeal have all said that when you are analyzing either statutes or treaties or any other sort of pronouncements that deal with Native Americans, you are to exercise all ambiguities in their favor. You are to view these laws in the eyes of how they would be read and understood by the Natives. That's what those cases say.

And so, I don't have to be a Native American to

read the plain language of Section 6 which says no taxes shall be assessed. There was even an attempt to make the argument, oh, assess is what you do to land. Well, if we look at the definition of assess in any dictionary you want to, it simply says the computation of, and it gives a number of examples and it says as in property tax, excise tax, etcetera. So, they're all covered.

So, to say because we call a local person an assessor, gee, that must mean it's only property, that's nonsense. So, if I'm a Native American and I read this law that was passed umpteen decades ago and it says "no taxes shall be assessed for any purpose whatever," what am I supposed to think that means? What would any of us looking at that think that means? It means what it says, "for any purpose whatever." What else do you need to know but that?

For the Third Department to try to stretch out and say oh, this must be land only -- now, I can see how they tried to do that at one point and the government has tried to do the same thing. There was a law that was passed in 1837, and that law had to do with the fact that some properties of Native Americans had been acquired at a, quote/unquote, tax sale, and what happened was the legislature recognized that this

happened, basically nullified it and passed this law and said that there are no taxes that shall apply for any purpose whatever. The land reverted back to the Natives the way it was supposed to and so on.

Well, that's fine, but many years later this section was enacted and it wasn't tied to any specific land transaction or anything else. I might say -- you know, I also had made mention of Section 71 of the Indian Law -- let me find it here, Section 71. Now, Section 71 was passed after Section 6, and what it does, I think, is reemphasizes and solidifies, if you will, the fact that the intention was to exclude reservations from taxation because 71 -- what happened was this, when this village and Salamanca and some of the others were culled out of the reservation, if you will, the state said, well, wait a minute, now we can tax them because they're not, quote/unquote, the reservation. So, we can tax them.

But they wanted to make sure that they made it clear that by doing that, they weren't suggesting that the rest of the reservation could be taxed. And so, Section 71 says exclusion of villages from reservations, lease of lands therein, certification of copies of leases granted by the Seneca Nation of Indians and recording thereof; and the language that I

cite says "except that this section shall not authorize the taxation of any Indian or the property of any Indian not a citizen of the United States."

When the legislature wants to specifically talk about property, they do. When they are saying any tax whatever, they say it. What 71 does is make it clear that by taking some of that reservation land and letting it be villages or some of the properties here that are leased from the Senecas and allowing them to be taxed, the legislature made it clear, but we're not changing history, we're not changing the fact that this action of allowing some taxation is not going to allow taxation on the reservation, and they say "shall not authorize taxation of any Indian or the property of any Indian," making it clear that it's more than just property. It is a tax in whatever form.

So now, what else do I anticipate is going to be argued by the state? Well, they're gonna say, well, wait a minute, Section 471, itself passed after Section 6, specifically talks about sales to non-Natives and that the tax includes sales to non-Natives. It does. And the only way you can square that language with Section 6 is to interpret it to mean sales by non-Natives to non-Natives. That's the only way that can square with Section 6, and there are sales

by non-Natives, who have stores and so on on the reservations, to non-Natives.

471 could apply to them but the only way you could interpret Section 6 to make any sense whatsoever is to say that the new 471, which still has the phrase if we don't have power and we can't tax, that that only applies from non-Native to non-Native because if you take 6 and you take 71 and you take the plain language and you take the rules for interpreting statutes and treaties and so on, the deal with Natives, and you give them the benefit of all the doubts, if you interpret it the way they would interpret it and you look at what these plain laws say, no tax for any purpose whatever can be assessed to the Natives on their reservation.

Now, I'm not talking about somebody comes on and buys something and they go off the reservation or somebody sells something off the reservation or they deliver it someplace in New Jersey or whatever. That's a different situation. I'm not talking about that. We're talking about our set of facts where the entire transaction and the title passes on the reservation. I think that Section 6 is as plain as plain can be as to what it means.

And so, now we move on to kind of the second part of the argument that we've made. All the cases cited

by the state, aside from the Snyder case, they're all federal cases, and every one of them was based on federal law, basically the dormant commerce clause and the due process clause to a degree. None of them are based on Section 6, not one of the cases in any way talked about Section 6. The only two cases we've found, as I said, is Snyder and Bramhall.

So, all of the federal precedent has no application to this case, all of them, no application whatsoever because it's one thing for the federal courts to interpret dormant commerce clause and the due process clause, and they have. The leading case on due process is Quill which is basically a situation where the Supreme Court said if there's enough significant contacts between you and state X, let's say, they can impose the tax. You need to have this nexus, if you will, of contact.

Well, one of the things that we point out is that there's no question that the reservation is not the State of New York. Indeed, it's interesting. If you look at the contraband commerce -- Contraband Cigarette Trafficking Act, CCTA, which is 18 USC 2341(4), it's interesting. The federal government has this statute that they use to enforce state tax laws. Basically, they say if you are transporting cigarettes which

should be taxed by any state in the union and they're not taxed, we can prosecute you for it as a federal offense.

But interestingly enough, they define terms in that statute, and realize that the federal government is the government, the overall umbrella, if you will, of dealings with the Indians, and they define in that section what constitutes a state because that's the only tax that the CCTA can enforce and does enforce. And they say quite clearly in Section 4 that a state is either one of the United States, the District of Columbia, Puerto Rico or the Virgin Islands.

They clearly define what the states are. That perfectly dovetails with the treaties that say New York -- I'm sorry, that say the reservation has never been a part of the state -- of any state, and a reservation is not part of New York State in the sense that it is a separate freehold with its own constitution.

So, now the question becomes, if the transaction occurs totally on the reservation -- and we're not talking about soliciting some guy from New Jersey or mail order somebody from Connecticut, we're talking about a total transaction on the reservation -- does the state have the requisite nexus under due process

to impose a tax? Now, this is in addition to our Section 6 argument. Section 6 argument I think stands on its own. It says what it says.

This is a different one. If we want to move to the federal side, because they've cited so many federal cases, we start with the definition and we see that nowhere, Indian lands, in the definition of the CCTA. They're not defined as part of a state, and we look at the treaties and it makes it clear that the reservations are not part of the state.

We look at the Patterson case and we see the Court of Appeal has recognized the Senecas constitution, and we also see that the Patterson case and others say that the only laws that can be imposed, if you will, on the reservations are those which protect or advance the reservation; and clearly, there is no Native American or anyone else who believes that taxation law would fall into those categories because they would not. Taxation laws are a way of controlling. That's what they are.

So, basically, we have two separate arguments here, the first under Section 6, it is what it is, it says what it is; and the other is due process from the standpoint of historically and by treaty, and the state has no ability to make the reservation part of New York

State. They don't have that power. Only the federal government can deal by treaty with the Natives. So, New York can't, by trying to impose its taxes if you will, make the reservation part of the state.

So, in essence and in conclusion, Section 6 says what it says. I submit, you know -- and each time I look at this, I'm like, what part of this am I not understanding when you say "for no purpose whatever"? What else could that mean? Why -- if the legislature said the lands, they would have said the land or they would have said land taxes or something that indicated that it was only restricted to that.

As I say, historically there were all sorts of taxes in those days. And so, why would the legislature pick out one tax to relieve the Natives of but leave the rest of them in place? None of that makes sense. The Snyder case made no sense when it was decided. Clearly, they didn't apply the construction rules that the Supreme Court says you have to apply because they certainly did not in any way resolve any ambiguities in favor of the Indians or they would have said otherwise; and as it turns out, it wasn't even before it.

So, I submit that that's how this should be interpreted. Section 6 should say, for our facts, where the transaction wholly occurs on the reservation,

that Natives are not and cannot be taxed; that that law recognizes Native sovereignty to that degree, and other scenarios are other scenarios, but that's the one we have alleged here and that's our position. Thank you.

THE COURT: Thank you, Mr. Cambria.

Mr. Sleight.

MR. SLEIGHT: Good morning, Your Honor. If it please the Court, that was some nice tapdancing by Mr. Cambria, but I have two Latin words, stare decisis. The arguments that they have raised here in each of their three causes of action have already been made and rejected, as counsel notes, by the Third Department and by the Fourth Department. In those cases, Snyder and Wetzler or Bramhall are binding precedent on this Court.

So, they may not like what those decisions say and they might want to try to have the Appellate Division revisit those decisions by bringing this case, but I don't think it can be seriously argued that the decisions don't say what they say or that they're not dispositive of our motion to dismiss. As I said, those are binding precedent, those decisions of the Appellate Division and the Court of Appeals which this Court's duty bound to follow.

Plaintiff's first cause of action has to do with

Section 6, and Mr. Cambria's made a lot of arguments about what Section 6 means. Again, those arguments have been rejected in Bramhall and Wetzler by two Appellate Division courts. I think that if you look at those cases, the historical origins of Section 6 are discussed, and that when you look at the historical origins, it's clear that Section 6 was meant to apply to real property and not to personal property. So, I don't think there's really any wiggle room on that issue.

The second cause of action in the plaintiff's complaint argues that the tax law violates rights guaranteed by various treaties between the Seneca Nation and the U.S. Again, same argument has been considered and rejected by both the Fourth Department in Bramhall and the Third Department in Wetzler and by the Second Circuit in U.S. versus Cade. All of these cases are cited in our memo of law.

Also, even if this weren't the case, and we lay this law out in our memo of law, treaties do not generally create individual rights of action that can be enforced in domestic proceedings, and that's the Second Circuit case, Moore versus New York. Whether they do is a matter of treaty interpretation by the Court.

First, the plaintiff doesn't point to any particular portion of the treaties at issue as creating a private right to action. Second, the Appellate Division and the Second Circuit have already ruled that these treaties do not prohibit the state from taxing the sale of cigarettes to non-Indians on reservation land.

The third cause of action challenges the Tax Law 471 on the grounds that it violates the Commerce Clause and due process clause. This cause of action is premised on the erroneous contention that the Seneca Nation of Indians reservation lands are not part of the State of New York. Again, this contention has been considered and rejected by numerous courts, just recently in a case that my esteemed counsel is representing the defendant in the Western District of Missouri, William -- U.S. v. Perry, a copy of the decision I'd like to hand up to the Court. These same arguments were made and rejected.

And in that case the Court said, with respect to plaintiff's argument regarding the CCTA -- the core of defendant's argument is that the Cattaraugus Indian reservation, where defendant lives and runs his business, is not part of the State of New York pursuant to Indian treaties; and therefore, state statutes, in

particular the state cigarette taxing scheme, are inapplicable to him. Defendant has provided no case law to compel this conclusion, and the Court has found none in its search -- in its research.

Instead, the Court's research would suggest the opposite result was recognized long ago, and it goes on to cite several cases and history in which courts have concluded that, for the purposes of the application of state law, the Seneca Nation of Indian reservation is part of the State of New York.

In sum, Judge, and I rely on my papers. Unless the Court has some other questions, these issues have all been raised and decided by higher courts, appellate courts, Appellate Division, Fourth and Third Department, Court of Appeal, the Second Circuit. And they may not like what they say and they may want to challenge them at the appellate level, but this Court is bound by those decisions.

THE COURT: Thank you, Mr. Sleight. Mr. Cambria.

MR. CAMBRIA: If I may respond briefly, let me start with Perry. Mr. Perry is here. The Court totally and a hundred percent relied on the Snyder case and Bramhall in the Eighth Circuit, the reason being they're a federal court. So, they have taken the

position, well, that's what that case says and we're going to use it, and the flaw is that they have not considered what the Court of Appeals said about that case, and that's the flaw.

Clearly, I think we all acknowledge the Court of Appeals is the highest court in our state, and when the Court of Appeal says you never had that issue before you, what does that say? That says that that decision is not anything but a dicta at all. That's all it can be. Otherwise, the Court of Appeals would have reached the issue. They never did reach the issue. So, it wasn't there. So, if nobody alleged it -- and you have the complaint and it's not before you, and the highest court in the state says it wasn't before you and so we're not gonna talk about it, it has no presidential value.

Interestingly enough, the Perry case, we have reserved -- and the federal system is so different, but we have reserved the right there to take that issue to the Eighth Circuit. What we've been -- what we attempted to persuade the Court there was to follow the Pullman and abstention doctrine which basically allows the state courts to interpret their laws before the federal court gets involved, and that's obviously what we've reserved, plus the merits, for the Eighth

Circuit.

But again, if you read the decision -- he's handed it up to you -- it just cites Snyder and Bramhall and that's all they ever cite. What I'm saying is look, let's not be -- we're not robots here. We're thinking people who have experience in the law. So, we have to look at all the facets of it, and when you -- and you know, when they cite Snyder, they never cite the Court of Appeals pronouncement on Snyder or they simply say affirmed, very misleading to say affirmed because the Court of Appeals never affirmed the holding that Section 6 only dealt with land.

And it's interesting, at the time that Section 6 was enacted, there was one tax that had covered a number of things including land and personals and so on. There were other taxes boiling about the nation, if you will, and in our state, excise type taxes. So, it's clear that there was some meaning to that language about "any purpose," but we have to go back to this -- it wasn't a matter of predicting this, it's obvious.

Their whole argument rests on Snyder, nothing else, Snyder, because the language doesn't support them. I mean, you try to say that the words "any purpose whatever" mean just one purpose, it just doesn't fly. It can't. It's just an oxymoron. It

doesn't make sense. So, they have to keep saying it's Snyder, it's Snyder, it's Snyder. All I said is let's look at the highest court in this state, and I think it's legitimate to say the highest court makes it clear that, at best, that was dicta.

Dicta isn't binding precedent and there is no binding precedent. And now we're going to apply all of the interpretation rules that the Supreme Court tells us in McClanahan and other cases that we have to employ. When we do that and when we look at the plain language and look at the history of what taxes existed and we look at Section 71 and so on, it all makes sense, and then we just read plain words the way they are meant to be interpreted. Any means any, whatever means whatever, more than one. It all means more than one.

Now, as to the second part, you know, it's funny. He says oh, well, they can't invoke the treaties because individuals can't invoke treaties. Well, that's not true. The cases they cite we've distinguished because every one of the cases they cite, it's one person trying to invoke the rights of a tribe.

For example, one of them was the tribe, said well, this land is ours and an individual was trying to invoke those rights on behalf of the tribe. This isn't

that case. This is an individual who is saying this statute applies to me as an individual; this is a real case in controversy as to me. And so, to say that they don't have the protection of the treaties, they can't invoke the treaties. We're invoking New York State law. We're saying New York law says that you can't impose this tax on us.

The treaty comes into play when we talk about the reservation is not the State of New York. Well, that applies to -- that is the law, that the reservation is not the State of New York. Let me read Article 4 of the treaty of 1838, and it's just an excerpt in the middle of the paragraph. It says, "The land secured to them by patent under this treaty shall never be included in any state or territory of this union." What else could it mean except what it says, "shall never be included in any state or territory"?

Treaty, force of the federal government. The state has no control over treaties. They can't modify them, they can't change them in any way, and that's what the treaty says. They are not part of the state, period. And you don't -- any individual can invoke that. That is the law. That tells us the difference between states and reservations, and we're not part of New York State.

We may have interaction with New York State, and as I've said, Patterson and some of these other cases we cite talk about protection and benefit and so on, obviously. But that, in a nutshell, is our argument. We submit that the way this goes, you can interpret Section 6 for the plain words that it has, and you can square it with the fact that Snyder and Bramhall decided things not before them.

You now have the complaint. The Court of Appeals had the complaint, and that's what they used to make their statement, that that issue wasn't before those courts. So, how could they decide it with authority? They can't. And it's interesting, when you look at the complaint that was filed on behalf of Mr. Snyder all those years ago, all it talks about is the dormant Commerce Clause and it talks about due process. There is not one citation to a state statute in there. So, those cases do not speak authoritatively as to that interpretation. Thank you so much, Your Honor.

THE COURT: Thank you.

MR. SLEIGHT: We'll rely on our papers, Judge.

THE COURT: Thank you, gentlemen. The Court has reviewed the submissions --

MR. CAMBRIA: I'm sorry --

THE COURT: Yes?

MR. CAMBRIA: One other thing I forgot to say, from a preliminary injunction standpoint and this idea of irreparable injury and so on, these tax laws, for the first time, even though they were enacted many moons ago, the regulations that were in force weren't passed until 2010; and so, for all these years those taxes were not imposed. So, who has the greater punishment here, if you will, from a preliminary injunction standpoint in balancing the equities? Years and years of no application of the tax compared to 2010 when they started imposing the tax? So, I think the equities balance in favor of the Natives, Your Honor.

THE COURT: Anything, Mr. Sleight?

MR. SLEIGHT: No, Your Honor.

THE COURT: As I said, the Court has reviewed the submissions which were excellent, and we very much appreciate the hard work that went into that and, of course, the arguments of counsel.

It is the decision of the Court that the cross motion of the defendants is granted for the reasons set forth in their papers; and the application to dismiss the complaint pursuant to 3211(a)(7), in that the pleading fails to state a cause of action under existing and controlling New York law, is granted.

Based upon the foregoing, the plaintiff's motion for a preliminary injunction is moot. Thank you, gentlemen, very much, and good luck.

MR. SLEIGHT: Judge, would you like me to submit an order?

THE COURT: Yes. I would ask you to please submit a order on notice to counsel.

MR. SLEIGHT: Yes, Your Honor.

(Whereupon, proceedings concluded.)

* * * * *

CERTIFIED TO BE A TRUE AND ACCURATE TRANSCRIPT OF THE ABOVE-ENTITLED ACTION.

Kathleen M. Trost

Kathleen M. Trost,
Court Reporter

Dated: February 27, 2015

PLAINTIFFS VERIFIED COMPLAINT, DATED JUNE 13, 2014 AND FILED ON JUNE 23, 2014 [38-47]

NEW YORK STATE SUPREME COURT : COUNTY OF CATTARAUGUS

ERIC WHITE and NATIVE OUTLET,

Plaintiffs,

VERIFIED COMPLAINT

against Index No. 82670

ERIC T. SCHNEIDERMAN, NEW YORK STATE ATTORNEY GENERAL, in his official capacity; and

THOMAS H. MATTOX, COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, in his official capacity.

Defendants.

Plaintiffs ERIC WHITE and NATIVE OUTLET, by and through their attorneys, Lipsitz Green Scime Cambria LLP, for his Verified Complaint against the Defendants herein, allege as follows:

IDENTIFICATION OF PARTIES AND FACTUAL BACKGROUND

A. The Parties

1. Plaintiff Eric White is a Native American, who resides within the Seneca Nation of Indians ("SNI"). Mr. White is an enrolled member of the SNI, and operates a convenience store on the territory (in what is otherwise known as the City of

Salamanca) named Native Outlet, where he sells a number of products, including cigarettes.

2. Defendant Eric T. Schneiderman is the Attorney General of the State of New York, charged with enforcing the laws of the State of New York.

3. Defendant Thomas H. Mattox is the Commissioner of the New York State Department of Taxation and Finance, charged with implementing the tax laws of the State of New York.

B. Pertinent Facts and Description of the Statutes

4. Defendants are charged with enforcement of New York State Indian Law, Article 2, Section 6 (entitled, "Exemption of reservation lands from taxation"), which indicates that "[n]o taxes shall be assessed, for any purpose whatever, upon any Indian reservation in this state, so long as the land of such reservation shall remain the property of the nation, tribe or band occupying the same."

5. Defendants are also charged with enforcement of New York State Tax Law, Article 20, Section 471, New York State's taxing scheme regarding cigarettes, which mandates "[t]here is hereby imposed and shall be paid a tax on all cigarettes possessed in the state by any person for sale, except that no tax shall be imposed on cigarettes sold under such circumstances that this state is without power to impose such tax..."

6. The Senecas are not residing on land given or earmarked for them by New York or the United States. The Senecas' land has always been theirs, and is separate and apart from New York State.

7. As Plaintiff's convenience store is on sovereign Indian land which is not part of the State of New York, 471 does not authorize the imposition of a State tax on Plaintiff's goods.

8. Plaintiff does not introduce goods into commerce within the State of New York nor are any contacts established within the State because title to those goods passes upon tender of payment for the goods which takes place within the territory.

9. The contradictory and unclear language within New York State Tax Law Section 471, New York State's taxing scheme regarding cigarettes, has led to an erroneous interpretation by Defendants, and an illegal and injurious imposition of tax upon Eric White as a member of the Seneca Nation of Indians, and Native Outlet, on the sale and possession of cigarettes upon sovereign land, despite language in Indian Law §6, which indicates otherwise. Directly connected to the implementation of Tax Law §471 in terms of regulation, monitoring and licensing of Plaintiffs' activities regarding their Indian commerce, is the remainder of New York's taxing scheme under Tax Law §§ 471-a, 471-b, 471-c and 471-e, the state licensed stamping agent requirements under Public Health Law §1399-ll, the Escrow Statute (Public Health Law §§ 1399-nn, 1399-oo and 1399-pp), the Directory Statute (Tax Law §480, et seq.), the Fire Safety Statute (Exec. Law §156-c) and the price-fixing scheme under the Cigarette Marketing Statutes (Tax Law §483, et seq.). All of this legislation must be struck as unconstitutional and unenforceable as a consequence.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELEIEF

AS AND FOR A FIRST CAUSE OF ACTION

THE ENACTMENT AND ENFORCEMENT OF SECTION 471 DIRECTLY CONFLICTS WITH AND IS VIOLATIVE OF PLAINTIFF'S FUNDAMENTAL RIGHTS AS GRANTED IN INDIAN LAW SECTION 6

10. Paragraphs 1 through 9 are hereby incorporated, as if re-asserted herein.

11. As argued in the Plaintiffs' Memorandum of Law in Support, New York State Indian Law Section 6 dictates that no taxes shall be assessed upon Indian land, for any purpose.

12. As Tax Law Section 471 violates Plaintiffs' fundamental rights as set forth in Indian Law Section 6 by the state imposing a tax on goods it has no legal authority to impose, the Plaintiffs herein seeks a judgment pursuant to C.P.L.R. §3001 declaring that Section 471 is unconstitutional and invalid as enforced against Plaintiffs; and permanently enjoining Defendants from unlawfully implementing Section 471 against Plaintiff.

13. As also violative of Plaintiffs' fundamental rights as set forth in Indian Law Section 6 by the state imposing a tax on goods it has no legal authority to impose, the Plaintiffs herein further seeks a judgment pursuant to C.P.L.R. §3001 declaring the remainder of New York's taxing scheme under Tax Law §§ 471-a, 471-b, 471-c and 471-e, the state licensed stamping agent requirements under Public Health Law §1399-ll, the Escrow Statute (Public Health Law §§ 1399-nn, 1399-oo and 1399-pp), the Directory Statute (Tax Law §480, et seq.), the Fire Safety Statute (Exec. Law §156-c) and

the price-fixing scheme under the Cigarette Marketing Statutes (Tax Law §483, et seq.), unconstitutional and invalid as enforced against Plaintiffs; and permanently enjoining Defendants from unlawfully implementing these statutes against Plaintiffs.

AS AND FOR A SECOND CAUSE OF ACTION

THE ENACTMENT AND ENFORCEMENT OF SECTION 471 DIRECTLY CONFLICTS WITH AND IS VIOLATIVE OF PLAINTIFF'S FUNDAMENTAL RIGHTS AS GRANTED IN THE SENECA TREATIES OF 1831, 1838 AND 1842

14. Paragraphs 1 through 9 are hereby incorporated, as if re-asserted herein.

15. As argued in the Plaintiffs' Memorandum of Law in Support, the federal government has always had the sole and exclusive right to enter into treaties with, and regulate trade with, Indian territories. Further, Indian treaties are deemed the legal equivalent of federal statutes. Through ratification of a series of treaties pertaining to sovereign Seneca land, New York is estopped from claiming the Allegany and Cattaraugus reservations are part of New York State. Specifically, pursuant to Article 11 of the Treaty with the Senecas (July 20, 1831; 7 Stat. 351):

> [t]he United States guarantee that said lands shall never be within the bounds of any State or Territory, nor subject to the laws thereof; and further that the President of the United States will cause said tribe to be protected at their new residence against all interruption or disturbance from any other tribe or nation of Indians, or from any other person or persons whatever; and he shall have the same care and superintendence over them in the country to which they design to remove, that he has heretofore had over them at their present place of residence.

16. This is further developed in the Treaty with the New York Indians (January 15, 1838; 7 Stat. 550):

> The lands secured to them by patent under this treaty shall never be included in any State or Territory...

17. This language was ultimately ratified by the final Treaty with the Seneca (May 20, 1842; 7 Stat. 586):

> [T]hey the said nation (the said indenture not withstanding) shall and may continue in the occupation and enjoyment of the whole of the said two several tracts of land, called the Cattaraugus Reservation, and the Allegany Reservation with the same right and title in all things, as they had and possessed therein immediately before the date of the said indenture...

18. As Tax Law Section 471 violates Plaintiffs' fundamental rights as set forth in the Seneca treaties of 1831, 1838 and 1842 by the state imposing a tax on goods it has no legal authority to impose, the Plaintiffs herein seeks a judgment pursuant to C.P.L.R. §3001 declaring that Section 471 is unconstitutional and invalid as enforced against Plaintiffs; and permanently enjoining Defendants from unlawfully implementing Section 471 against Plaintiffs.

19. As also violative of Plaintiffs' fundamental rights as set forth in the Seneca treaties of 1831, 1838 and 1842 by the state imposing a tax on goods it has no legal authority to impose, the Plaintiffs herein further seeks a judgment pursuant to C.P.L.R. §3001 declaring the remainder of New York's taxing scheme under Tax Law §§ 471-a, 471-b, 471-c and 471-e, the state licensed stamping agent requirements under Public Health Law §1399-ll, the Escrow Statute (Public Health Law §§ 1399-nn, 1399-oo and 1399-pp), the Directory Statute (Tax Law §480, et seq.), the Fire Safety Statute (Exec. Law §156-c) and the price-fixing scheme under the Cigarette Marketing Statutes

(Tax Law §483, et seq.), unconstitutional and invalid as enforced against Plaintiffs; and permanently enjoining Defendants from unlawfully implementing these statutes against Plaintiffs.

AS AND FOR A THIRD CAUSE OF ACTION

THE ENACTMENT AND ENFORCEMENT OF SECTION 471 AGAINST THE PLAINTIFF VIOLATES THE COMMERCE CLAUSE AND THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION

20. Paragraphs 1 through 9 are hereby incorporated, as if re-asserted herein.

21. As argued in the Memorandum of Law in Support, Tax Law Section 471 as enforced against the Plaintiffs, violates the Commerce Clause and Due Process Clause of the United States Constitution, by imposing and enforcing an illegal tax against an out-of-state retailer without physical presence or minimum contacts with the state.

22. Mr. White is a member of a sovereign entity that lacks any physical presence within New York State.

23. Plaintiff does not introduce goods into commerce within the State of New York.

24. Plaintiff's goods are sold to the buyer on sovereign Indian land, not part of the State of New York.

25. Accordingly, title to those goods passes upon tender of payment for the goods which takes place within the territory.

26. This sale establishes no contacts with the State, as it is not the plaintiff that causes goods to flow into state commerce, but the purchaser when they transport the goods off of the territory.

27. The Senecas are not residing on land given or earmarked for them by New York or the United States. The Senecas' land has always been theirs, and is separate and apart from New York State.

28. The Plaintiff's status as sovereign Indian land separate and apart from New York State invokes the protections of both the Commerce Clause and the Due Process clause, and enforcement of Section 471 against the Plaintiff without the proper analysis is a violation of Mr. White's fundamental rights.

29. As Tax Law Section 471 violates Plaintiffs' fundamental rights as set forth in the United States Constitution by the state imposing a tax on goods it has no legal authority to impose, the Plaintiffs herein seek a judgment pursuant to C.P.L.R. §3001 declaring that Section 471 is unconstitutional and invalid as enforced against Plaintiff; and permanently enjoining Defendants from unlawfully implementing Section 471 against Plaintiff.

30. As also violative of Plaintiffs' fundamental rights as set forth in the United States Constitution by the state imposing a tax on goods it has no legal authority to impose, the Plaintiffs herein further seeks a judgment pursuant to C.P.L.R. §3001 declaring the remainder of New York's taxing scheme under Tax Law §§ 471-a, 471-b, 471-c and 471-e, the state licensed stamping agent requirements under Public Health Law §1399-ll, the Escrow Statute (Public Health Law §§ 1399-nn, 1399-oo and 1399-pp), the Directory Statute (Tax Law §480, et seq.), the Fire Safety Statute (Exec. Law §156-c) and

the price-fixing scheme under the Cigarette Marketing Statutes (Tax Law §483, et seq.), unconstitutional and invalid as enforced against Plaintiffs; and permanently enjoining Defendants from unlawfully implementing these statutes against Plaintiffs.

WHEREFORE, Plaintiffs demand judgment against the Defendants as follows:

(1) Preliminarily and permanently enjoining Defendants from enforcing and implementing against Plaintiffs Tax Law §471, as well as the remainder of New York's taxing scheme under Tax Law §§ 471-a, 471-b, 471-c and 471-e, the state licensed stamping agent requirements under Public Health Law §1399-ll, the Escrow Statute (Public Health Law §§ 1399-nn, 1399-oo and 1399-pp), the Directory Statute (Tax Law §480, et seq.), the Fire Safety Statute (Exec. Law §156-c) and the price-fixing scheme under the Cigarette Marketing Statutes (Tax Law §483, et seq.);

(2) A judgment pursuant to C.P.L.R. §3001 declaring that the enactment and enforcement against Plaintiffs of Tax Law §471, as well as the remainder of New York's taxing scheme under Tax Law §§ 471-a, 471-b, 471-c and 471-e, the state licensed stamping agent requirements under Public Health Law §1399-ll, the Escrow Statute (Public Health Law §§ 1399-nn, 1399-oo and 1399-pp), the Directory Statute (Tax Law §480, et seq.), the Fire Safety Statute (Exec. Law §156-c) and the price-fixing scheme under the Cigarette Marketing Statutes (Tax Law §483, et seq.); by Defendants as against Plaintiffs is violative of New York State Indian Law, Section 6, the Seneca treaties of 1831, 1838 and

1842, and the Due Process and Commerce Clause, and therefore unconstitutional;

(3) Awarding Plaintiffs their costs and disbursements of this action, together with such other and further relief as the Court deems just and proper.

Dated: Buffalo, New York
June 13th, 2014

PAUL J. CAMBRIA, JR., ESQ.

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Attorneys for Plaintiffs

VERIFICATION

I, Eric White, being duly sworn, deposes and says: I am one of the Plaintiffs in this matter; and am the owner of Native Outlet, which is the other Plaintiff in this action. I have read the foregoing Verified Complaint and know the contents thereof. The same is true to my knowledge, except as to matters therein stated to be alleged on information and belief, and as to those matters I believe them to be true.

ERIC WHITE

Sworn to before me this
13th day of June, 2014.

Notary Public

ELIZABETH A. HOLMES
Notary Public, State of New York
Qualified in Erie County
My Commission Expires Oct. 11, 2015

PLAINTIFFS ERIC WHITE AND NATIVE OUTLET'S NOTICE OF MOTION FOR A PRELIMINARY INJUNCTION, DATED AUGUST 11, 2014 [48-49]

NEW YORK STATE SUPREME COURT : **COUNTY OF CATTARAUGUS**

PAID
45- 8/12/14

COPY

ERIC WHITE and NATIVE OUTLET,

Plaintiffs,

against

NOTICE OF MOTION FOR A PRELIMINARY INJUNCTION

C.P.L.R. Article 63

Index No. 82670

ERIC T. SCHNEIDERMAN, NEW YORK STATE ATTORNEY GENERAL, in his official capacity; and

THOMAS H. MATTOX, COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, in his official capacity.

Defendants.

CATTARAUGUS COUNTY CLERK

2014 AUG 12 A 9:05

PLEASE TAKE NOTICE that upon the annexed affirmation of Paul J. Cambria, Jr., Esq., sworn to on August 11, 2014, the Affidavit of Eric White in Support and Memorandum of Law in Support, and upon all attached documents and all prior proceedings regarding this action, the undersigned will move this Court on _____ , the _____ day of August 2014, at a special term thereof to be held in New York State Supreme Court before the Hon. _____ , J.S.C., located at 303 Court Street, Little Valley, New York 14755, Part _____ , at _____ , or as soon thereafter as counsel can be heard, for an Order pursuant to C.P.L.R. Article 63 for a preliminary injunction regarding New York State Tax Law §471, and for such other relief as this Court deems just and proper.

Dated: August 11, 2014
Buffalo, New York

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Hon. Thomas H. Mattox
Commissioner
Department of Taxation and Finance
Office of Counsel
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Albany, New York 12227

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AFFIRMATION OF PAUL J. CAMBRIA, JR., ESQ., DATED AUGUST 11, 2014
IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION [50-61]

NEW YORK STATE SUPREME COURT : **COUNTY OF CATTARAUGUS**

ERIC WHITE and NATIVE OUTLET,

Plaintiffs,

AFFIRMATION IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

against

C.P.L.R. Article 63

Index No. 82670

ERIC T. SCHNEIDERMAN, NEW YORK STATE ATTORNEY GENERAL, in his official capacity; and

THOMAS H. MATTOX, COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, in his official capacity.

Defendants.

STATE OF NEW YORK :
COUNTY OF ERIE : ss
CITY OF BUFFALO :

PAUL J. CAMBRIA, JR., ESQ., pursuant to CPLR §2106 and subject to the penalties for perjury, duly affirms the following to be true and accurate to the best of my knowledge:

1. I am an attorney at law, duly licensed to practice my profession in this state. I am a senior partner with Lipsitz Green Scime Cambria LLP in Buffalo. We represent the Plaintiffs ERIC WHITE and NATIVE OUTLET in this action.

2. Unless otherwise stated, this affirmation is made upon information and belief, the source of which is your deponent's examination of our confidential office file, as well as conversations between members of my office and pertinent witnesses herein.

3. This affirmation is being submitted in support of Plaintiffs' motion for a preliminary injunction pursuant to C.P.L.R. Article 63.

4. Your deponent hereby incorporates all allegations of law and fact set out in the Verified Complaint; affidavit of Eric White; Motion for Preliminary Injunction; and Memorandum of Law in Support of the Motion for Preliminary Injunction.

5. As set out below, as well as in the Memorandum of Law in support, the Plaintiffs have been unlawfully subjected to an impermissible statutory taxing scheme that New York State is without jurisdiction to implement and enforce as against sovereign members of the Seneca Nation of Indians ("SNI"). The instant motion for a preliminary injunction pursuant to C.P.L.R. Article 63 is appropriate and necessary, as the Plaintiffs have "demanded and would be entitled to a judgment restraining the [Respondents] from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the [Plaintiffs]." *See* C.P.L.R. §6312(a).

6. Further, as also set out in the Verified Complaint and Memorandum of Law in Support, (1) there is a likelihood of Plaintiffs' ultimate success on the merits, (2) Plaintiffs will suffer irreparable injury absent the granting of the preliminary injunction, and (3) a balancing of equities favors the Plaintiffs' position.

I.

IDENTIFICATION OF PARTIES AND FACTUAL BACKGROUND

A. The Parties

7. The above captioned Plaintiff (Eric White) is an enrolled member of the SNI, a federally recognized Indian tribe which is part of the Six Nation Iroquois

Confederacy. He resides in the SNI. Mr. White owns and operates a retail and convenience store by the name of Native Outlet, located in the Allegany territory of the SNI. Apart from other goods and services, Mr. White sells cigarettes in bulk as a retailer and out of his convenience store.

8. Defendant Eric T. Schneiderman, is the Attorney General of the State of New York, charged with enforcing the laws of the State of New York.

9. Defendant Thomas H. Mattox is the Commissioner of the New York State Department of Taxation and Finance, charged with implementing the tax laws of the State of New York.

B. Background and History of the New York State Cigarette Taxing Scheme

10. As more fully addressed in Plaintiffs' Memorandum of Law, New York collects cigarette taxes through licensed agents who purchase stamps and affix them to cigarette packs in advance of the first sale within the state. In other words, the wholesalers are "stamping agents" that pre-pay cigarette taxes. Therefore, purportedly the "ultimate incidence of and liability for the tax [is] upon the consumer." NY Tax Law §471(2).

11. With certain exceptions, cigarettes possessed in New York (as opposed to sovereign Indian territory), by someone other than a licensed state stamping agent or wholesaler, must have a New York stamp. NY Tax Law §471, *et seq.*

12. But while no person other than a duly licensed state agent may possess or transport, for the purpose of sale, any unstamped cigarette packages (*see* NY Tax Law §1814), cigarettes possessed in New York are not to be taxed where the state is "without power" to tax. *See again* NY Tax Law § 471(1).

13. New York State enacted Tax Law §471 in 1939, and has imposed taxes on cigarettes ever since. It was not until 1988, however, that New York first enacted regulations creating a scheme to calculate and collect sales taxes due from sales to non-Indians on Indian lands. However, these regulations were never implemented[1], and were repealed by Governor Pataki in 1998.

14. In 2003, Tax Law §471-e was passed, which directed the Department of Taxation to issue regulations necessary to collect cigarette taxes on reservation sales to non-Indians. The Department adopted these new regulations on October 22, 2010, which were codified at 20 NYCRR 74.6.

15. Since these new regulations were adopted, the State has been aggressively enforcing Section 471 against enrolled tribal members of the SNI on sovereign Indian lands, such as Mr. White.

16. Section 471 provides the basis for both civil and criminal prosecution in State and Federal courts, and subjects the Plaintiffs to civil and criminal fines, penalties and damages if convicted, not to mention incarceration.

C. Indian Law Sections 6 and 71 and New York State Authority to Regulate Indian affairs

17. Over 100 years ago New York State enacted legislation prohibiting the taxation on Indian "reservations, or on any part thereof, for any purposes whatever," as codified in New York State Indian Law Section 6. (emphasis added).

18. As more fully addressed in Plaintiffs' Memorandum of Law, the pertinent Act which paved the way for this legislation in 1857 distinctly holds that "the Senecas do

[1] Though the United States Supreme Court ruled in Department of Taxation and Finance v. Milhelm Attea and Bros., Inc., 512 U.S. 61, 73 [1994], that "States may impose on reservation retailers minimal burdens reasonably tailored to the collection of valid taxes from non-Indians," this case dealt specifically with non-Indian wholesalers.

not hold the title to the Cattaraugus and Allegany Reservations under the State of New York, but their title to the same is original, absolute and exclusive."

19. The legislative intent is clear: the Senecas are a sovereign entity that New York State is without power to tax for commerce on Indian lands.

20. The principal is further codified in Indian Law Section 71, which stems from the 1875 Act and further preserves the tax prohibition set out in the 1857 Act cited above. Section 71 indicates that "this section shall not authorize the taxation of any Indian or the property of any Indian, not a citizen of the United States."

21. Accordingly, Section 471 is in direct conflict with Indian Law Sections 6 and 71, and as a result of its enforcement, the very rights and assurances bestowed upon Seneca tribal members such as Mr. White pursuant to the New York State Constitution are being violated on a daily basis.

22. In that regard, it is well settled that the federal government, as opposed to the state, has always had the sole and exclusive right to enter into treaties with, and under limited circumstances, to regulate trade with Indian territories (including the SNI).

23. New York State agreed to those terms, memorialized in Article I, §8, ¶3, which provides that "[t]he Congress shall have power [t]o regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

24. Furthermore, several treaties between the Six Nations and the United States were ratified in subsequent years, including the 1794 Canandaigua Treaty (7 Stat. 44), which granted the Nations under Articles 2, 3 and 4, the "free use and enjoyment" of their lands; a concept eventually embraced in the SNI Constitution of 1848, which was ratified by New York's legislature in 1849.

25. Even the New York State Court of Appeals has acknowledged the supremacy of SNI law over New York law regarding SNI jurisdiction. In Patterson v. Council of Seneca Nation, 245 N.Y. 433, 441 (1927), our state's highest court clarified that by the state's "approval of the Indian constitution in its original and amended form, the State of New York acknowledged the Seneca Indians to be a separate nation, a self-governing people, having a central government with appropriate departments to make laws, to administer and to interpret them."

26. Although the United States Supreme Court has held that states may impose on reservation retailers minimal burdens reasonably tailored to the collection of valid taxes from non-Indians, in New York's case, Section 471 is not a valid tax.

27. Section 471 was enacted in direct contravention of century-old legislation which vowed to relieve the Seneca Nation of Indians from taxes and to protect them in the enjoyment of their property.

D. Section 471 only applies to commercial activities within the State of New York

28. Article 11 of the Treaty with the Senecas (July 20, 1831; 7 Stat. 351) makes it clear that Seneca lands are separate from the State of New York:

> [t]he United States guarantee that said lands [of the Senecas] shall never be within the bounds of any State or Territory, nor subject to the laws thereof; and further that the President of the United States will cause said tribe to be protected at their new residence against all interruption or disturbance from any other tribe or nation of Indians, or from any other person or persons whatever; and he shall have the same care and superintendence over them in the country to which they design to remove, that he has heretofore had over them at their present place of residence.

29. Further, the Treaty with the New York Indians (January 15, 1838; 7 Stat. 550) provides that:

> And whereas this subject was agitated in a general council of the Six nations as early as 1810, and resulted in sending a memorial to the President of the United States, inquiring whether the Government would consent to their leaving their habitations and their removing into the neighborhood of their western brethren, and if they could procure a home there, by gift of purchase, whether the Government would acknowledge their title to the lands so obtained in the same manner it had acknowledged it in those from whom they might receive it; and further, whether the existing treaties would, in such a case remain in full force...

30. Finally, the 1842 treaty with the Seneca ratifies:

> [T]hey the said nation (the said indenture not withstanding) shall and may continue in the occupation and enjoyment of the whole of the said two several tracts of land, called the Cattaraugus Reservation, and the Allegany Reservation with the same right and title in all things, as they had and possessed therein immediately before the date of the said indenture, saving and reserving to the said Thomas Ludlow Ogden, and Joseph Fellows the right of pre-emption, and all other the right and title which they then had or held in or to the said tracts of land. (Article 1, 7 Stat 586, 1842).

31. Accordingly, the lands of the Senecas comprising their reservations are not part of the State of New York and further are protected by New York State Indian Law from taxes "for any purposes whatever" since commerce wholly therein is not commerce within the State of New York as it must be to be subject to the provisions of section 471.

E. Section 471 Violates The Due Process Clause and the Commerce Clause of the United States Constitution, as well as Indian Law §6

32. Finally, because Mr. White is a member of a sovereign entity that lacks any physical presence within New York State, Section 471's requirement that he pay state taxes in a jurisdiction where he is not physically present based upon a transaction wholly conducted on non-New York State land, violates both the Commerce Clause and the Due Process Clause of the United States Constitution as well as Indian Law §6.

33. Prior to enforcing Section 471 against the Plaintiff, the Defendant would have to establish a physical presence *within* the State of New York in order to comport with the requirements of the Commerce Clause.

34. Further, in order to avoid running afoul of Mr. White's Due Process protections, Defendants must be able to first establish that Mr. White introduced untaxed cigarettes into commerce within the State of New York.

35. Unlike other Indian Tribes, the Senecas are not residing on land given or earmarked for them by New York or the United States. The Senecas' land has always been theirs, and is separate and apart from New York State.

36. Furthermore, as indicated a contract of sale for goods [including cigarettes] on the reservation, establishes that title to those goods passes upon tender of payment for the goods. Accordingly, title to the cigarettes sold passes to the buyer within the territory. This sale establishes no contacts with the State, as it is not the plaintiff that causes goods to flow into state commerce. All commercial transactions therefore result in title to the goods passing ownership on sovereign land and not within the State of New York.

37. The Plaintiff's status as sovereign Indian land separate and apart from New York State invokes the protections of both the Commerce Clause and the Due Process clause, and enforcement of Section 471 against the Plaintiff without the proper minimum contacts analysis is a violation of Mr. White's fundamental rights.

II.

LIKELIHOOD OF SUCCESS ON THE MERITS

38. As set out in the Verified Complaint and Memorandum of Law in Support, there is a likelihood of success on the merits of this action.

39. The actions of Defendants in enforcing New York State Tax Law 471 are in direct contravention of Plaintiffs' sovereign rights as a member of the SNI, codified and recognized by the State of New York in Indian Law Sections 6 and 71, and consistent with the 1831 Treaty with the Senecas; the 1838 Treaty with the New York Indians and the 1842 Treaty with the Senecas—each such treaty recognizing separate Seneca lands. The applicable statute (entitled, "Exemption of reservation lands from taxation"), prohibits the very enforcement of Section 471 as "[n]o taxes shall be assessed, for any purpose whatever, upon any Indian reservation in this state, so long as the land of such reservation shall remain the property of the nation, tribe or band occupying the same." These rights were bestowed upon and granted to Plaintiffs through the ratification of the New York State Constitution. The language is clear, as long as the activity is occurring on Indian lands, it is subject to no tax "for any purpose whatever."

III.

IRREPARABLE HARM TO PLAINTIFFS

40. As set out in Plaintiffs' Memorandum of Law, it is clear that continued enforcement of Section 471 has and will continue to cause irreparable injury to the Plaintiffs, as they are subject to both State and Federal, civil and even criminal sanctions on the basis that he has purportedly violated Section 471, resulting in potentially millions of dollars of fines, penalties and damages, and even jail time if convicted. Mr. White is kept from maintaining a profitable business, and risks prosecution for a violation of the contradictory and muddled tax laws implemented by a State that years ago vowed to protect him from this very harm. There is no question of the drastic economic impact that Section 471 has imposed on the Plaintiffs' livelihood and ability to make a living. This is in addition to the blatant encroachment on the sovereignty that the SNI has fought long and hard to be recognized for. Native Americans have been operating pursuant to their own constitution, free from the jurisdiction of the state for decades past. A violation of this very right, bestowed upon them by the State Constitution alone establishes that the injury is both immediate and irreparable.

IV.

BALANCING OF THE EQUITIES FAVOR PLAINTIFFS

41. As also set out in the Plaintiffs' Memorandum of Law in Support, the balancing of the respective equities in this case favors a preliminary injunction and temporary restraining order. Pursuant to its own laws, the state has no legal authority to impose its taxing scheme on Plaintiffs in the first place. Accordingly, enjoining the Defendants from imposing a taxing scheme that is illegal from the outset poses no harm

to the Defendants. The only stake the Defendants have in this battle is financial, which pales in comparison to the constitutional and sovereign injustices that the Plaintiffs are experiencing every day Section 471 is enforced. As such, the balance of equities clearly favor the Plaintiffs, who has suffered a number of legal injustices while being subject to this statute which remains void of any legally permissible justifications.

WHEREFORE, your deponent respectfully requests, based on the annexed Verified Complaint, affidavit of Eric White and Memorandum of Law in Support and exhibits, that this Court grant Plaintiffs' application herein in its entirety; that is, (1) issuing a preliminary injunction; (2) enjoining the Defendants from enforcing Tax Law Section 471 against the Plaintiffs for transactions occurring on reservation land; (3) declaring Section 471 unconstitutional on its face, and as applied, as violative of Plaintiffs' state constitutional rights; (4) declaring as unconstitutional on its face, and as applied, as violative of Plaintiffs' state constitutional rights, the remainder of New York's taxing scheme under Tax Law §§ 471-a, 471-b, 471-c and 471-e, the state licensed stamping agent requirements under Public Health Law §1399-ll, the Escrow Statute (Public Health Law §§ 1399-nn, 1399-oo and 1399-pp), the Directory Statute (Tax Law §480, et seq.), the Fire Safety Statute (Exec. Law §156-c) and the price-fixing scheme under the Cigarette Marketing Statutes (Tax Law §483, et seq.); and (5) granting such other relief as this Court deems just and proper.

Dated: Buffalo, New York
August 11, 2014

PAUL J. CAMBRIA, JR., ESQ.

LIPSITZ GREEN SCIME CAMBRIA LLP

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AFFIDAVIT OF ERIC WHITE, SWORN TO ON JUNE 13, 2014 [62- 65]

NEW YORK STATE SUPREME COURT : COUNTY OF CATTARAUGUS

ERIC WHITE and NATIVE OUTLET,

Plaintiffs,

against

AFFIDAVIT IN SUPPORT

C.P.L.R. Article 63

Index No. 82670

ERIC T. SCHNEIDERMAN, NEW YORK STATE ATTORNEY GENERAL, in his official capacity; and

THOMAS H. MATTOX, COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, in his official capacity.

Defendants.

SENECA NATION OF INDIANS:
ALLEGANY TERRITORY:

Affiant Eric White, herein alleges, being duly sworn, deposes and says:

1. This affidavit is in support of Plaintiffs' Motion for a Preliminary Injunction and Temporary Restraining Order. I herein incorporate by reference the Verified Complaint; affirmation of Paul J. Cambria, Jr., Esq. and Memorandum of Law in support of my Motion for a Preliminary Injunction and Temporary Restraining Order.

2. I am an enrolled member of the SNI, a federally recognized Indian tribe which is part of the Six Nation Iroquois Confederacy.

3. I reside in the SNI. I own and operate a retail and convenience store by the name of Native Outlet, located within the Allegany territory of the SNI (in the locality also known as the City of Salamanca).

4. Apart from other goods and services, I sell cigarettes in bulk as a retailer and out of my store.

5. Pursuant to New York State Tax Law §471, the state is requiring enrolled tribal members of the SNI on sovereign Indian lands to pre-pay the state cigarette taxes on cigarettes that tribal members purchase for both individual consumption and resale. Directly connected to the implementation of Tax Law §471, in terms of regulation, monitoring and licensing of Indian commerce, is the remainder of New York's taxing scheme under Tax Law §§ 471-a, 471-b, 471-c and 471-e, the state licensed stamping agent requirements under Public Health Law §1399-ll, the Escrow Statute (Public Health Law §§ 1399-nn, 1399-oo and 1399-pp), the Directory Statute (Tax Law §480, et seq.), the Fire Safety Statute (Exec. Law §156-c) and the price-fixing scheme under the Cigarette Marketing Statutes (Tax Law §483, et seq.). All of this legislation must be struck as unconstitutional and unenforceable as a consequence.

6. As more fully addressed in the accompanying Memorandum of Law in support, the state's enforcement of this provision is in direct contravention of the rights and assurances bestowed upon Seneca tribal members such as myself pursuant to the Seneca Nation's Constitution, ratified by New York State, and codified in Indian Law Section 6.

7. Section 6 prohibits the taxation on Indian "reservations, or on any part thereof, for any purposes whatever." Accordingly, the Senecas are a sovereign entity that New York State is without power to tax.

8. Further, the defendant cannot establish minimum contacts with the State in order to lawfully impose a tax because I do not introduce product into commerce within the State. The terms of any contract of sale for goods [including cigarettes] on my reservation establishes that title to those goods passes upon tender of payment for the goods. Accordingly, title to the cigarettes sold passes to the buyer within my territory. Therefore the sale establishes no contacts with the State, as it is not the seller that causes goods to flow into state commerce, but the purchaser when they transport the goods off of the territory.

9. Despite our state and federally recognized sovereignty, if I ignore the statutes enacted by the State of New York, I could be the subject of a criminal prosecution for purported violations of the New York State Tax Law, which potentially subjects me to fines, penalties and damages in the millions, not to mention incarceration.

10. As a result of this potential prosecution, I have been forced not to fully pursue my cigarette business, which is a significant part of my livelihood, and which has supported not only my family and me, but all twenty-five of my employees and their families, native and non-native, for decades.

11. The drastic economic impact that continued enforcement of Tax Law Section 471 and the other statutory provisions set out above have had on my business has been immediate and irreparable. Continued enforcement will be fatal to my livelihood.

12. Through this affidavit and the supporting legal memorandum, your affiant has demonstrated the requirements needed for a preliminary injunction and temporary restraining order.

13. As such, your affiant respectfully requests that this Court grant Plaintiffs' Motion for a Preliminary Injunction, and enjoin the Attorney General and the Commissioner of Taxation and Finance from enforcing Section 471, as well as the other statutory provisions addressed above, immediately.

WHEREFORE, your affiant prays that this Court rule accordingly.

ERIC WHITE

Sworn to before me this
13th day of June, 2014

Notary Public

ELIZABETH A. HOLMES
Notary Public, State of New York
Qualified in Erie County
My Commission Expires Oct. 11, 2015

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION, DATED AUGUST 11, 2014 [66-95]

NEW YORK STATE SUPREME COURT : **COUNTY OF CATTARAUGUS**

ERIC WHITE and NATIVE OUTLET,

Plaintiffs,

MEMORANDUM OF LAW

against

Index No. 82670

ERIC T. SCHNEIDERMAN, NEW YORK STATE ATTORNEY GENERAL, in his official capacity; and

THOMAS H. MATTOX, COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, in his official capacity.

Defendants.

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

This Memorandum of Law is in support of Plaintiffs' request for relief by way of Motion for a Preliminary Injunction. It further incorporates all pleadings and affidavits submitted in support of the Motion for a Preliminary Injunction.

(A) MOTION FOR PRELIMINARY INJUNCTION

Section §6301 of the New York Civil Prac. Law and Rules governs the issuance of a preliminary injunction:

> A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of

> an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff.

N.Y. C.P.L.R. 6301 (McKinney). A preliminary injunction may be granted where the moving party establishes: (1) a likelihood of ultimate success on the merits, (2) that irreparable injury will occur absent a preliminary injunction, and (3) a balancing of the equities favors the movant. Digestive Liver Disease, P.C. v. Patel, 18 A.D.3d 423, 793 N.Y.S.2d 773 (2nd Dept. 2005), *citing* W.T. Grant Co. v. Srogi, 52 N.Y.2d 496, 438 N.Y.S.2d 761 (1981) and CPLR 6301.

As the Fourth Department has noted, "[a] party moving for a preliminary injunction need not establish a certainty of success on the merits..." Holdsworth v. Doherty, 231 A.D.2d 930, 647 N.Y.S.2d 633 (4th Dept. 1996)(*see also,* Parkmed Co. v. Pro-Life Counseling, 91 A.D.2d 551, 553, 457 N.Y.S.2d 27; Tucker v. Toia, 54 A.D.2d 322, 326, 388 N.Y.S.2d 475). Further, "'it is not for this court to determine finally the merits of an action upon a motion for preliminary injunction; rather, the purpose of the interlocutory relief is to preserve the status quo until a decision is reached on the merits.'" Gambar Enterprises, Inc. v. Kelly Services, Inc., 69 A.D.2d 297, 306, 418 N.Y.S.2d 818 (4th Dept. 1979)(internal citations omitted). As to likelihood of success, "(i)t is enough if the moving party makes a prima facie showing of his right to relief; the actual proving of his case should be left to the full hearing on the merits." Tucker v. Toia, 54 A.D.2d 322, 326, 388 N.Y.S.2d 475 (4th Dept. 1976)(internal citations omitted).

(1) Likelihood of success:

As established predominantly in the memorandum to follow, the Plaintiffs have pled a prima facie case for likely success on the merits on the following grounds:

The actions of Defendants in enforcing New York State Tax Law 471, is in direct contravention of Plaintiffs' sovereign rights as a member of the Seneca Nation of Indians (hereinafter "SNI" or "Seneca Nation") codified and recognized by the State of New York in Indian Law Sections 6 and 71. Section 6 (entitled, "Exemption of reservation lands from taxation"), prohibits the very enforcement of Section 471 as "[n]o taxes shall be assessed, *for any purpose whatever*, upon any Indian reservation in this state, so long as the land of such reservation shall remain the property of the nation, tribe or band occupying the same." (emphasis added) Section 71 reinforces the language in 6 and extends it to Indian property as well as land. As set out below, the Plaintiffs' fundamental rights are enshrined in the 1831 Treaty with the Senecas, the 1838 Treaty with the New York Indians and the 1842 Treaty with the Seneca. These rights were bestowed upon and granted to Plaintiffs through the ratification SNI Constitution, which was ratified by the state legislature and recognized by the Court of Appeals as the law of the state.

As such, Plaintiffs have established grounds for success on the merits in the present case.

(2) Irreparable injury absent a preliminary injunction:

As argued below, continued enforcement of Section 471 has and will continue to cause irreparable injury to the Plaintiffs, in that he will be subject to both State and Federal civil, and even criminal, sanctions on the basis of violating Section 471, including millions of dollars in fines, penalties and damages, and even incarceration.

The economic impact on Plaintiffs has been drastic. Businesses in the Seneca Nation of Indians ("SNI") operate pursuant to the Nation's own laws and Constitution.

Plaintiff Eric White owns and operates a retail convenience store (Native Outlet) pursuant to the laws of the SNI in the Allegany Territory. The items Plaintiffs sell—including cigarettes—are not legally subject to tax pursuant to New York State Indian Law Section 6. Their injury by the enforcement of Section 471 is both immediate and irreparable, in that New York State tax is being levied against their products without proper legal authority.

(3) A balancing of the equities favors the movant:

With respect to the competing equities, a court must conclude that the harm to the Plaintiffs without the injunction will be greater than the harm to the Defendants if the injunction is granted. Nassau Roofing & Sheet Metal Co. v. Facilities Development Corp., 70 A.D.2d 1021, 1022, 418 N.Y.S.2d 216, 218 (3d Dep't 1979), appeal dismissed 48 N.Y.2d 654. Pursuant to its own laws, the state has no legal right to impose its taxing scheme on plaintiff in the first place. Accordingly, enjoining Defendants from imposing a taxing scheme that is illegal from the outset poses no harm to the Defendants. The only stake the Defendants have in this battle is financial, which pales in comparison to the constitutional and sovereign injustices that the Plaintiffs are experiencing every day that Section 471 continues to be enforced. As such, the balance of equities clearly favor the Plaintiffs, who have suffered a number of legal injustices while being subjected to this statute, which remains void of any legally permissible justifications.

As such, Plaintiffs meet all elements required for the issuance of a preliminary injunction and temporary restraining order pursuant to C.P.L.R. Article 63.

(B) ANALYSIS OF SECTION 471 AND LEGAL ARGUMENT

The present matter directly relates to our State's attempt to illegally impose and collect cigarette taxes from an enrolled member of the Seneca Nation of Indians. As set out below, Section 471 of the New York State Tax Law is the State's taxing mechanism for cigarettes that are possessed, sold or transferred within New York State and §1814 is the mechanism for criminal enforcement. However, Section 471 explicitly recognizes its limited ability to only collect taxes on cigarettes the State has the power to tax. Section 6 of the New York State Indian Law prohibits taxation upon Indian Land ***for any purpose.*** The concept of Indian sovereignty has been recognized not only by our State Constitution through years of legislative history, but by the highest Courts of both this state and country. In light of the case law, statutes and legislative history, continued enforcement of Section 471 upon the Seneca's sovereign land constitutes an impermissible constitutional violation.

1. The NYS Cigarette Tax System in General

New York collects cigarette taxes through licensed agents who purchase stamps and affix them to cigarette packs in advance of the first sale within the state. In other words, the wholesalers are "stamping agents" that pre-pay cigarette taxes. "The full amount of the tax is part of the price of stamped cigarettes at all subsequent stops in the distribution stream." Dep't of Taxation v. Milhelm Attea & Bros., 512 U.S. 61, 64

(1994). Therefore, purportedly the "ultimate incidence of and liability for the tax [is] upon the consumer." NY Tax Law §471(2).[1]

With certain exceptions, cigarettes possessed in New York (as opposed to sovereign Indian territory), by someone other than a licensed state stamping agent or wholesaler, must have a New York stamp. NY Tax Law §471, *et seq*. In New York, "cigarettes are presumed taxable" until the contrary is proven by those "in possession thereof." City of New York v. Milhelm Attea & Bros., Inc., supra at 337. *See also* 20 N.Y.C.R.R. 74.1(a)(1).

But while no person other than a duly licensed state agent may possess or transport, for the purpose of sale, any unstamped cigarette packages (*see* NY Tax Law §1814), cigarettes possessed in our state are not to be taxed where New York is "without power" to tax. *See again* NY Tax Law §471(1). Indeed, "New York State lacks authority to tax cigarettes sold to tribal members for their own consumption..." Milhelm Attea, et al., 512 U.S. at 64, citing Moe v. Confederated Salish and Kootenai Tribes, et al., 425 U.S. 463, 475-481 (1976).[2] Accordingly, "cigarettes to be consumed on the reservation by enrolled tribal members are tax exempt and need not be stamped." Milhelm Attea, et al., 512 U.S. at 64.[3] In order to control the amount of cigarettes consumed by non-Indians (whether on or off of Indian Land), New York has

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[1] Put another way, "[t]axes [in NYS] are largely collected through a system of pre-payments, and then passed along the distribution chain to the consumer." City of New York v. Milhelm Attea & Bros., Inc., 550 F. Supp. 2d 332, 337 (E.D.N.Y. 2008) (internal citations omitted).

[2] *See also* City of New York, 550 F. Supp. 2d at 337.

[3] "On-reservation cigarette sales to persons other than reservation Indians, however, are legitimately subject to taxation." Milhelm Attea, et al., 512 U.S. at 64 (internal citation omitted); Moe, 425 U.S. at 483 (approving for first time the taxing of non-tribal members on reservation); *see also* United States v. Kaid, 241 Fed. Appx. 747, 750 (2d Cir. 2007).

implemented regulations under Section 471 which require Indian retailers to participate in a coupon system, which would permit them to receive their allotment of tax-exempt cigarettes (20 NYCRR 74.6[a][4]); or participate in a "prior approval" system. *See* 20 NYCRR 74.6(a)(5); Tax Law §471(5). Regardless of which method they choose, it requires the purchase of New York State tax stamps (with payment of the applicable taxes) for products possessed on Indian Land.[4]

Directly connected to the implementation of Tax Law §471, in terms of regulation, monitoring and licensing of Indian commerce, is the remainder of New York's taxing scheme under Tax Law §§ 471-a, 471-b, 471-c and 471-e, the state licensed stamping agent requirements under Public Health Law §1399-ll, the Escrow Statute (Public Health Law §§ 1399-nn, 1399-oo and 1399-pp), the Directory Statute (Tax Law §480, et seq.), the Fire Safety Statute (Exec. Law §156-c) and the price-fixing scheme under the Cigarette Marketing Statutes (Tax Law §483, et seq.). All of this legislation must be struck as unconstitutional and unenforceable as a consequence.

2. The Seneca Nation is Not a "State" and Therefore not Subject to New York Tax Law

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[4] With regards to cigarettes purchased off of the tribe's so-called reservation, Tax Law §471-e(1)(a) indicates that:

> Notwithstanding any provision of this article to the contrary qualified Indians may purchase cigarettes for such qualified Indians' own use or consumption exempt from cigarette tax on their nations' or tribes' qualified reservations. However, *such qualified Indians purchasing cigarettes off their reservations* or on another nation's or tribe's reservation, and non-Indians making cigarette purchases on an Indian reservation shall not be exempt from paying the cigarette tax when purchasing cigarettes within this state. Accordingly, all cigarettes sold on an Indian reservation to non-members of the nation or tribe or to non-Indians shall be taxed, and evidence of such tax will be by means of an affixed cigarette tax stamp. (emphasis added)

Contraband Cigarette Trafficking Act ("CCTA"), 18 U.S.C. §2341(4), defines the term, "State," to mean "a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or the Virgin Islands." Aside from the fact that Congress elected to exclude Indian territories from this definition, as further observed below, in the commentary related to the Act of 1857, the SNI territory has never been deemed part of New York State.

3. Interpretation and Applicability of Indian Law § 6

The constitutional interpretation and enforcement of Tax Law Section 471 that requires the taxation of cigarettes on reservation land must be seen in light of Indian Law Section 6 (entitled, "Exemption of reservation lands from taxation"). This provision indicates that "[n]o taxes shall be assessed, ***for any purpose whatever***, upon any Indian reservation in this state, so long as the land of such reservation shall remain the property of the nation, tribe or band occupying the same (emphasis added)." This provision was derived from state legislation enacted in 1857. The law, found in Chapter 45 of the Laws of New York; 80th Session, read, in pertinent part: "AN ACT to relieve the Seneca Nation of Indians from certain taxes on the Allegany and Cattaraugus reservations. Passed February 19, 1857...

> Section 1. The title of every such lot or parcel of the Allegany reservation, and of every such lot or parcel of the Cattaraugus reservation, as has been heretofore sold by the comptroller for taxes, and bid in by him for the States, is hereby released by the State to the Seneca nation of Indians residing on said reservation...
>
> Section 4. No tax shall hereafter be assessed or imposed on either of said reservations, or on any part thereof, ***for any purposes whatever***, [5] so long as said reservations remain

[5] Note that this provision still remains in the present version of Indian Law §6 (see above).

> the property of the Seneca nation; and all acts of the legislature of this State conflicting with the provisions of this section, are hereby replaced." (emphasis added)

Commentary, believed to be part of a legislative judiciary committee report, released contemporaneously with the Act, observed that "[a]ny authority in th[e] State, to tax those Indians, is disclaimed, and it is acknowledged, that the land owned by them never belonged to the State of New York." *See* Documents and Official Reports ("illustrating the causes which led to the revolution in government of the Seneca Indians, in the year 1848, and the recognition of their representative republican constitution, by the authorities of the United States and of the State of New York," printed by Wm. Moody & Son, 1857), pg. 91. The above commentary further noted that "the Senecas do not hold the title to the Cattaraugus and Allegany Reservations under the State of New York, but **their title to the same is original, absolute and exclusive.**" *See* Documents and Official Reports, et al., pg. 89, 92 (emphasis added).[6] Governor Dewitt Clinton's promise to the Senecas, also noted in the commentary above, should be considered: "You may retain your lands as long as you please - no man can deprive you of them without your consent. The State will protect you in the *enjoyment* of your property." Id. at 92 (emphasis added).

The treaty rights and privileges, as analyzed below; i.e., in 1831, 1838 and 1842, were, in effect, codified in the legislative history of the 1857 Act (now Indian Law §6). No Tax law legislation (i.e., Article 471) may supersede Indian Law §6, which, again, prohibits the assessment of taxes "***for any purpose whatever***, upon any Indian reservation

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[6] The Senecas "are not citizens of this State, and have no representative in our Legislature, we can claim no right to tax them..." Id. at 89. They are "to be regarded as a distinct and independent nation, having a constitution and representative government of their own." Id.

in this state..." (emphasis added). Superseding Indian Law §6 would be akin to our state superseding Indian treaty rights. And again, as observed by our legislature, Tax Law §471(1) does not apply where the state is with "without power" to impose the taxes in question.

In sum, New York's statutory scheme must be viewed in light of Indian Law §6 and its legislative history, as set out in the 1857 Act,[7] which recognizes Indian sovereignty. Without jurisdiction within the Seneca lands, New York State has no authority to impose a tax (or enforce via criminal sanctions) on any product possessed or sold by the Senecas on sovereign territory, without regard to whom the product is ultimately sold to or consumed by. As set out below, the Seneca's sovereignty is further recognized in both Federal and New York State case law.

4. Further Support from Indian Law § 71

New York State Indian Law Section 71, entitled (in pertinent part) "Exclusion of villages from reservations" also stems from the 1875 Act and further preserves the tax prohibition set out in the 1857 Act cited above:

> Those parts of the Allegany reservation included in the villages of Vandalia, Carrollton, Great Valley, Salamanca,

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[7] In 1978, Indian Law §200 repealed the 1857 Act as part of an administrative purging of laws enacted from 1779 through 1908. No reason is articulated for the Act being repealed. However, the above commentary and the Act itself are still important in explaining the legislative history of Indian Law §6, which has been unchanged in content since 1892. Further, while there is case law indicating that Indian Law §6 only applies to the taxing of real property (*see* Snyder v. Wetzler, 193 A.D.2d 329, 331-332 [3d Dep't 1993], *aff'ed* 84 N.Y.2d 941, 942 [1994] [but noted the court, "**[t]o the extent plaintiff contends that the State tax statutes at issue violate** either the Supremacy Clause or **New York law, his arguments** are unpreserved and **cannot be considered on this appeal**. Plaintiff's complaint asserted only violations of the Commerce Clause and "the Laws of the United States enacted pursuant thereto."] [emphasis added]), the content of §6 is informed by the 1857 Act and its commentary, as they were in place when the state legislature first articulated the §6 phrase, "[n]o taxes shall be assessed, for any purpose whatever, upon any Indian reservation in this state, so long as the land of such reservation shall remain the property of the nation, tribe or band occupying the same."

> West Salamanca and Red House, as surveyed, located and established pursuant to an act of congress approved February nineteenth, eighteen hundred and seventy-five, have been constituted parts of the several towns within which they are located, and all the general laws of the state are extended over and apply to the same; ***except that this section shall not authorize the taxation of any Indian or the property of any Indian, not a citizen of the United States.*** [8]

(emphasis added). This language derives from the Session Laws of 1881, Chapter 188, entitled "An Act extended the general laws of the State of New York over lands included in the villages surveyed..." Passed, May 2, 1881:

> SECTION 1. All those parts of the Allegany Indian Reservation included in the villages of Vandalia, Carrollton, Great Valley, Salamanca, West Salamanca and Red House, as surveyed...are constituted parts of the several towns within which they are located, and all the general laws of this state are extended over and shall apply to the same. ***Provided always, that nothing in this section shall be construed to authorize the taxation of any Indian, or the property of any Indian not a citizen of the United States.***[9]

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[8] While the Act of 1875 provided that all municipal laws and regulations of the state may extend over and be in force with certain Indian villages, it has been further reinforced that only the leaseholds held by non-indians may be subject to taxation. See, City of Salamanca v. County of Cattaraugus, 245 A.D.2d 1058, 1059 (4th Dep't 1997)("[i]n 1881, the New York Legislature enacted chapter 188 of the Laws of 1881 (now Indian Law § 71), which extended the general laws of the State over the six villages mentioned in the Act of 1875 and provided that '[l]and situate in said villages, held by or under lease from the Seneca Nation of Indians and which the holders are entitled to have renewed at the expiration thereof by virtue of said act of congress are and shall be for all purposes considered a freehold estate' thereby allowing for taxation of those leaseholds"); United States v. Salamanca, 31 F. Supp. 60 (W.D.N.Y. 1939)('[i]n United States v. County of Erie, D.C., 31 F.Supp. 57, decided November 21, 1939, this court held that such a leasehold is taxable when held by a white person...[t]he act of 1875 specifically exempts the Indian and Indian property from taxation. When such a leasehold is in the hands of an Indian, it is Indian property just as is a title descendible under tribal custom.").

[9] In 1892 New York State codifies Indian Law wherein Section 71 first appears. It combines sections 1 and 3 of L. 1881, c.188 as referenced above. It remains unchanged today with regard to the taxation of Indians and Indian property.

Accordingly, it was always the legislature's intent to exclude the sovereign Senecas from taxation of any kind.

5. Historically, New York State Has Had No Authority to Regulate Indian Commerce

As previously noted, Mr. White is an enrolled member of the SNI, a federally recognized Indian tribe which is part of the Six Nation Iroquois Confederacy. The federal government has always had the sole and exclusive right to enter into treaties with, and regulate trade with, Indian territories (including the SNI). In fact, Articles IX and XI of the 1781 Articles of Confederation, the latter known as the "Indian Commerce Clause," provided Congress with the "exclusive right" to regulate trade with the Indians. Indian treaties are deemed the legal equivalent of federal statutes (Solis v. Matheson, 563 F.3d 425, 430 [9th Cir. 2009]).[10] The 1784 Fort Stanwix Treaty between the United States and the Six Nations (7 U.S. Stat. 15), ratified in what is now known as Rome, New York, recognized the Nations' possession of their aboriginal territory in New York State, in that the Indians "shall be secure in the peaceful possession of the lands they inhabit." Though New York State refused to participate in the agreement, an Indian Tribe's treaty rights must be respected none the less.[11]

In July of 1788, New York State ratified the United States Constitution. Article I, §10, ¶1, therein provides that "no state shall enter into any treaty..." Further, Article II, §2, ¶2, grants treaty making power with the President, conditioned upon the advice and

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[10] And if silent as to their applicability to Indian tribes, statutes will not be interpreted to violate rights guaranteed by Indian treaties. U.S. v. Fiander, 547 F.3d 1036, 1039 (9th Cir. 2008).

[11] *See again* Milhem Attea, 512 U.S. at 73 (requiring "a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law").

consent of the Senate. Moreover, Article I, §8, ¶3, provides that "[t]hc Congress shall have power [t]o regulate commerce with foreign nations, and among the several states, and with the Indian tribes." New York agreed to these terms, which are, of course, the law of the land. *See also* Seminole Tribe v. Florida, 517 U.S. 44, 62 (1996) (in a decision authored subsequent to the Milhem Attea ruling, discussed below; the court noted that "[t]he Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause. This is clear enough from the fact that the States still exercise some authority over interstate trade but have been divested of virtually all authority over Indian commerce and Indian tribes.").[12]

Several treaties between the Six Nations and the United States were ratified in subsequent years, including the 1794 Canandaigua Treaty (7 Stat. 44), which granted the Nations under Articles 2, 3 and 4, the "free use and enjoyment" of their lands; a concept eventually embraced in the Tribe's own constitution. [13] The dictate that the Seneca

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[12] Seminole Tribe was criticized for other reasons in Cent. Va. Cmty. College v. Katz, 546 U.S. 356, 363-389 (2006).

[13] Moreover, it can no longer be disputed that treaties involving Indian tribes must be interpreted in favor of the Indians. As observed by the Supreme Court:

> The treaty nowhere explicitly states that the Navajos were to be free from state law or exempt from state taxes. But **the document is not to be read as an ordinary contract agreed upon by parties dealing at arm's length with equal bargaining positions**. We have had occasion in the past to describe the circumstances under which the agreement was reached. "At the time this document was signed the Navajos were an exiled people, forced by the United States to live crowded together on a small piece of land on the Pecos River in eastern New Mexico, some 300 miles east of the area they had occupied before the coming of the white man. In return for their promises to keep peace, this treaty 'set apart' for 'their permanent home' a portion of what had been their native country."
>
> It is circumstances such as these which have led this Court in

Reservations are not part of the State of New York is further developed in the Treaty with the Senecas (July 20, 1831; 7 Stat. 351); where in Article 11 thereof, it provides:

> **[t]he United States guarantee that said lands shall never be within the bounds of any State or Territory, nor subject to the laws thereof**; and further that the President of the United States will cause said tribe to be protected at their new residence against all interruption or disturbance from any other tribe or nation of Indians, or from any other person or persons whatever; and he shall have the same care and superintendence over them in the country to which they design to remove, that he has heretofore had over them at their present place of residence (*emphasis added*).

This is confirmed in the Treaty with the New York Indians (January 15, 1838; 7 Stat. 550) when the Senecas, and other New York Indians were being asked to move west of the Mississippi. While the treaties made it clear that the Seneca's homeland was not part of the State of New York, the Senecas wanted to be sure that the land to which they would be moving could never become a part of any state or territory of the United States:

> And whereas this subject was agitated in a general council of the Six nations as early as 1810, and resulted in sending a memorial to the President of the United States, inquiring whether the Government would consent to their leaving their habitations and their removing into the neighborhood of their western brethren, and if they could procure a home there, by gift of purchase, whether the Government would acknowledge their title to the lands so obtained in the same manner it had acknowledged it in those from whom they

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> interpreting Indian treaties, to adopt the general rule that **"doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith."**

McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 174 (1973) (emphasis added and internal citations omitted). Further, it should be pointed out that the High Court in the often cited Attea decision specifically elected not to address any treaty arguments. *See* Attea, 512 U.S. at 77, fn 11.

> might receive it; and further, whether the existing treaties would, in such a case remain in full force...

Thus, and to satisfy the Senecas who were being asked to move to the land west of the Mississippi that their ownership of this land would be the same as their homeland (the Allegany and Cattaraugus "Reservations"), the following language was inserted into the treaty:

> The lands secured to them by patent under this treaty shall never be included in any State or Territory...
> (Article 4, 7 Stat 550, 1838).

Some Senecas actually moved to that land while the others stayed on their homeland, which is now, in part, the Cattaraugus and Allegany "Reservations," and the subject of this lawsuit.

This language was ultimately ratified by the final Treaty with the Seneca (May 20, 1842; 7 Stat. 586):

> [T]hey the said nation (the said indenture not withstanding) shall and may continue in the occupation and enjoyment of the whole of the said two several tracts of land, called the Cattaraugus Reservation, and the Allegany Reservation with the same right and title in all things, as they had and possessed therein immediately before the date of the said indenture, saving and reserving to the said Thomas Ludlow Ogden, and Joseph Fellows the right of pre-emption, and all other the right and title which they then had or held in or to the said tracts of land. (Article 1, 7 Stat 586, 1842).

Accordingly, the treaties expressly provide that the new Seneca land established west of the Mississippi would enjoy the same sovereign status as the Seneca's homeland in New York and therefore, "***shall never be included in any State or Territory***." This specific treaty language is an explicit acknowledgement of the retained sovereign status of the

Seneca land (the Allegany and Cattaraugus "Reservations") and New York is estopped from legislating to the contrary.

Again, it is clear that New York State has historically recognized that the Seneca Nation land is not a part of the State and is the original ancestral homeland of the Senecas. As further developed above, the state enacted legislation in 1857, now codified in Indian Law §6, which indicated that "[n]o taxes shall be assessed, ***for any purpose whatever***, upon any Indian reservation in this state, so long as the land of such reservation shall remain the property of the nation, tribe or band occupying the same (emphasis added)." This legislation is a direct product of the principles of sovereignty set forth in the treaties of 1831, 1838 and 1842. This is further supported by the legislative history and enactment of Indian Law §71,

Accordingly, as the Seneca Reservations are not and never have been a part of the State of New York, the state's attempts to impose taxes upon goods that transfer title from the Senecas ***on Seneca land*** impermissibly impedes upon the sovereignty explicitly granted and historically recognized by both the Federal and the State government.

Further, the Seneca Nation of Indians Constitution of 1848 was ratified by New York's legislature in 1849. In 1927, the New York Court of Appeals summarized the relationship between New York State and the SNI Constitution this way:

> Section 19 provides: "The laws passed by the Legislature of the State of New York *for the protection and improvement of the Seneca Nation of Indians*, [14] and also all laws and regulations heretofore adopted by the Chiefs in legal Council assembled shall continue in full force and effect as

[14] *See also* Buffalo Creek Treaty of 1842, Art. 9, between New York, Massachusetts, the United States and the SNI, wherein it was agreed that the US would protect the Senecas' land from "all taxes, and assessments for roads, highways and other purposes..." This treaty is also cited in the commentary to the Act of 1857.

> heretofore *except so far as they are inconsistent with the provisions of this Constitution or Charter.*" The words which we have italicized are significant. Laws enacted by the State of New York must be "for the protection and improvement of the Seneca Nation of Indians." **They must not be "inconsistent with the provisions of this Constitution or Charter."**

Patterson v. Council of Seneca Nation, 245 N.Y. 433, 441 (1927) (bold emphasis added; italicized emphasis in original). Our state's highest court is acknowledging here the supremacy of SNI law over New York law in Indian affairs and that New York law must be for the protection and improvement of the SNI.

The Patterson court continued in its analysis of the SNI Constitution:

> Section 1 provides: "Our government shall have Legislative, Executive and Judiciary departments." The legislative power is to be vested in a council to be called the "Councillors [sic] of the Seneca Nation." The executive power is to be vested in a president. Section 4 provides: "The Judiciary power shall be vested in three peace makers on each reservation; any two of whom have power to hold courts, subject to an appeal to the Council, and to such courts of the State of New York as the Legislature thereof shall permit." Section 5 provides: "All causes of which the peace makers have not jurisdiction, may be heard before the Council or such courts of the State of New York as the Legislature thereof shall permit." Section 6 provides that the "power of making treaties shall be vested in the Council." Section 16 provides: "The rights of any members of the ancient confederacy of the Iroquois to the occupancy of our lands and other privileges shall be respected as heretofore."

Patterson, 245 N.Y. at 441-442. Here the court is recognizing the legitimacy of the SNI structure of government. Most importantly, the court then recognized:

> **In March, 1849, the Legislature of the State of New York passed a resolution approving the new constitution of the Senecas and directed the officers of the State to respect the new "Constitutional Government."** The constitution of the Senecas was

amended in the year 1898. The amended constitution was "ratified and confirmed" by the Legislature of the State of New York by the enactment of chapter 252 of the Laws of 1900. The amended constitution provides: "The legislative power shall be vested in a council of sixteen members, who shall be called the Councillors [sic] of the Seneca Nation of Indians, of whom eight shall be elected every two years for the Cattaraugus and eight for the Allegany Reservation."

* * *

Thus did the Seneca Nation, far from abdicating its sovereign powers, set up a strong central government, distribute all governmental powers among three departments, empower a legislative body to be called the "Councillors [sic] of the Seneca Nation" to make necessary laws, create a president to execute them, and establish a peacemakers court and a surrogate's court to interpret the laws of the nation and decide causes. **Thus did the Legislature of the State of New York twice approve of the constitution adopted and the government set up.** It was not accurate to say, therefore, that the State of New York in the year 1849 "assumed governmental control" of the Indians. On the contrary, in that year and subsequently, **by its approval of the Indian constitution in its original and amended form, the State of New York acknowledged the Seneca Indians to be a separate nation, a self-governing people, having a central government with appropriate departments to make laws, to administer and to interpret them.** It is true that the constitution gave consent of the nation that laws might be passed "by the Legislature of the State of New York for the protection and improvement of the Seneca Nation of Indians," but only in so far as such laws might not be "inconsistent with the provisions of this Constitution or Charter." **It gave no consent that the common law of the State of New York should obtain on the Indian reservations. It did not abrogate the customary laws of the nation.** The ancient usages and customs of the Seneca Nation, therefore, except as modified by the constitution, or as they might be modified by appropriate legislation of the nation or State, continued as the law of the Indian land.

Patterson, 245 N.Y. 433, 442-443 (emphasis added). As such, the state's highest court in Patterson proclaims the law of our state:[15] New York law is subordinate to SNI law

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[15] Patterson is still the law of our state. *See* Ransom v. St. Regis Mohawk Educ. & Community Fund, 86 N.Y.2d 553 (1995), wherein our state's highest court noted:

> We initially note that petitioners' argument that the doctrine of sovereign immunity is not applicable to the St. Regis Mohawk Tribal Council, nor to the derivative Fund because the former body is a creature of and governed by New York Statute, is similar to the claim rejected by this Court in Matter of Patterson v. Council of Seneca Nation (245 N.Y. 433, supra). In Patterson, we stated that, notwithstanding the enactment of provisions by this State's legislature to assist the Seneca Indians in administering the affairs of government (*see,* Indian Law art. 4), the relevant portions of the New York Indian Law did "not otherwise make applicable to Indians either the common law or statute law of the State," and did "not abrogate Indian customs or usages" (Patterson, *supra* at 445). Thus, the Court reached the "inescapable" conclusion "that the Seneca tribe remains a separate nation; that its powers of self government are retained with the sanction of the State; that the ancient customs and usages of the nation, except in a few particulars, remain, unabolished, the law of the Indian land; that **in its capacity of a sovereign nation the Seneca Nation is not subservient to the orders and directions of the courts of New York State**" (id.)...

Id. at 560, fn2 (bold emphasis added). Moreover, as the Court of Appeals noted in 2008 (the last time it addressed Patterson):

> Since at least 1843, New York has acknowledged the customs and laws of many tribal governments, including the Poospatuck, in its statutes (*see* Indian Law §§ 20-153; People ex rel. La Forte v Rubin, 98 NYS 787, 788-789 [Sup Ct, Onondaga County 1905]). In Matter of Patterson v. Seneca Nation, 25 N.Y. 433, 157 N.E. 734 [1927]), we held that the question of tribal membership "must be determined by the self-governing Seneca Nation, through its council, according to Seneca laws, usages and customs" (id. at 446). "[U]nless the last vestige of separate national life has been withdrawn from the Indian tribes by encroaching State legislation; then, surely, it must follow that the Seneca Nation of Indians has retained for itself that prerequisite to their self-preservation and integrity as a nation, the right to determine by whom its membership shall be constituted" (id. at 438).

Matter of Spota v. Jackson, 10 N.Y.3d 46, 53 (2008).

regarding Indian affairs and must not be inconsistent therewith. Indeed, Section 471 clearly dictates "that no tax shall be imposed on cigarettes sold under such circumstances that this state is without power to impose such tax." According to our State's highest court (Patterson, supra), the SNI, not New York State, has the authority to regulate the tribal members and businesses within the SNI territory.

6. Until 1988, New York State Did Not Even Attempt to Collect Cigarette Taxes from Indians

New York State enacted Tax Law §471 in 1939,[16] and has imposed taxes on cigarettes ever since. It was not until 1988, however, that New York first enacted regulations creating a scheme to calculate and collect sales taxes due from sales to non-Indians on Indian lands. Though the propriety of New York's 1988 regulations implementing the state's policy of keeping *non*-tribal members from obtaining tax-free cigarettes from Indian lands was upheld by the Supreme Court (*see* Department of Taxation and Finance v. Milhelm Attea and Bros., Inc., 512 U.S. 61, 76 [1994]), these regulations were never implemented.[17] In fact, Governor Pataki repealed them in 1998.

In Milhelm Attea, 512 U.S. at 76, the Court concluded that "States may impose on reservation retailers minimal burdens reasonably tailored to the collection of valid taxes from non-Indians." Id. at 73. Thus, the regulatory scheme must not be "unduly burdensome." Id. at 76. However, the Attea decision dealt with *non*-Indian wholesalers. Thus, not addressed by the high court is the scenario of tribal members licensed to sell tobacco by the SNI free from oversight or jurisdiction of the state, as articulated in Indian

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[16] *See* Cayuga Indian Nation v. Gould, 14 N.Y.3d 614, 622 (2010) (explaining state's tax history).

[17] As explained in Gould, 14 N.Y3d at 623-624.

Law Section 6. Within §471 itself, as this Court will recall, the legislature inexplicably recognizes that there would be circumstances where the state would be "without power to impose [a cigarette] tax." (The scenario at bar is such a scenario.)

The State, the Indian tribes and non-Indian convenience store owners battled for several years post-Milhelm Attea as to what the next step should be. In 2003, Tax Law §471-e was passed, which directed the Department of Taxation to issue regulations necessary to collect cigarette taxes on reservation sales to non-Indians. The Department adopted these new regulations on October 22, 2010, which were codified at 20 NYCRR 74.6, and approved in Seneca Nation of Indians v. State of New York, 89 A.D.3d 1536 (4th Dept. 2011), *lv denied* 18 N.Y.3d 808 (2012). But again, still not addressed therein is the scenario of tribal members licensed to sell tobacco by the SNI, with their sovereignty further sanctioned by New York State's own applicable Indian laws. So while New York began its attempt at collecting cigarette taxes from the Indians in the late 1980's, evaluation of the applicability of the new tax laws in light of Indian Law Section 6 has never been addressed by this state's highest court.

7. The Supreme Court Recognizes Only the Federal Government's Plenary Role in Regulating Indian Affairs

It is the federal government, not the states, that may potentially under certain limited circumstances regulate Indian tribes, their enrolled members and their licensed businesses. Said the Supreme Court:

> Indian tribes are "distinct, independent political communities, retaining their original natural rights" in matters of local self-government. Although no longer "possessed of the full attributes of sovereignty," they remain a "separate people, with the power of regulating their internal and social relations." They have power to

> make their own substantive law in internal matters.
>
> As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority.
> * * *
> As the Court in Talton recognized, **however, Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess.**

Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55-57 (1978) (emphasis added and extensive citations omitted); McClanahan, 411 U.S. at 170-171 (recognizing that "[s]tate laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply. It follows that Indians and Indian property on an Indian reservation are not subject to State taxation except by virtue of express authority conferred upon the State by act of Congress" (citation omitted). [18]

Thus, the state court generally lacks jurisdiction over Indian tribes where the exercise of such jurisdiction would infringe on the right of Indians to govern themselves. Williams v. Lee, 358 U.S. 217, 223 (1959).[19] When New York State attempts to impose

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[18] *See also* Id. at 71 ("we have also recognized that the tribes remain quasi-sovereign nations which, by government structure, culture, and source of sovereignty are in many ways foreign to the constitutional institutions of the Federal and State Governments. *See* Elk v. Wilkins, 112 US 94 [1884]"); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 148, n14 (1982) (in upholding a Tribe's sovereign authority to impose of a severance tax on natural resources removed by nonmembers from tribal land; the court noted that "[b]ecause the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence [in the Tribe's constitution] on this point is that the sovereign power to tax remains in tact"); United States v. Forness, 125 F.2d 928, 932 (2d Cir. 1942) (recognizing that "state law does not apply to Indians except so far as the United States has given its consent"). "As long as these Indians remain a distinct people, with an existing tribal organization, recognized by the political department of the government, Congress has the power to say with whom, and on what terms, they shall deal, and what articles shall be contraband." United States v. Forty-Three Gallons of Whiskey, 93 U.S. 188, 195 (1876).

[19] In Hoffman v. Wood, 1994 U.S. Dist. LEXIS 21858 (E.D. Wash. 1994), the District Court Judge wrongly concluded that Williams had been overruled, as purportedly observed in

and enforce a tax upon sovereign Indian land, it is directly infringing upon SNI's sovereignty. Congress has further recognized the limited role left to state governments with regards to Indian lands. For example, 25 U.S.C. §233 provides that New York courts have jurisdiction over certain civil suits involving Indians; however, as noted therein, nothing in that provision "shall be construed as subjecting the lands within any Indian reservation in the State of New York to taxation for State or local purposes." *See also* Wash. v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 154 (1980) ("[e]ven if the State's interests were implicated by the tribal taxes, a question we need not decide, it must be remembered that tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States"); *see also* 25 U.S.C. §4301(4) ("consistent with the principles of inherent tribal sovereignty and the special relationship between Indian tribes and the United States, Indian tribes retain the right to enter into contracts and agreements to trade freely, and seek enforcement of treaty and trade rights"). [20]

Sheppard v. Sheppard, 104 Idaho 1, 655 P.2d 895 (1982). This was not the case. *See* Sheppard, 104 Idaho at 17-18; 655 P.2d at 911-912. *See also* Warren Trading Post Co. v. Arizona Tax Comm 'n, 380 U.S. 685, 692, fn18 (1965) ("...Congress in the exercise of its power granted in Art. I, § 8, has undertaken to regulate reservation trading in such a comprehensive way that there is no room for the States to legislate on the subject"); *see also* 25 U.S. §233 (in granting the states limited civil jurisdiction in certain Indian-related claims; Congress explicitly noted that "nothing herein contained shall be construed as subjecting the lands within any Indian reservation in the State of New York to taxation for State or local purposes,...").

[20] McClanahan, 411 U.S. at 172 (recognizing that "[t]he Indian sovereignty doctrine is relevant... not because it provides a definitive resolution of the issues in this suit, but because it provides a backdrop against which the applicable treaties and federal statutes must be read. It must always be remembered that the various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty long predates that of our own Government". *See also* County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Confederated Tribes, et al., 502 U.S. 251, 258 (1992) (observing that "[i]n the area of state taxation... Chief Justice Marshall's observation that "the power to tax involves the power to destroy," has counseled a more categorical approach: "Absent cession of jurisdiction or other federal statutes permitting it,"

In discussing its "unique Indian tax immunity jurisprudence," the U.S. Supreme Court has recognized:

> "the doctrine of tribal sovereignty . . . [ ] historically gave state law 'no role to play' within a tribe's territorial boundaries." We have further explained that the doctrine of tribal sovereignty, which has a "significant geographical component," ..., requires us to "revers[e]" the "'general rule'" that "'exemptions from tax laws should . . . be clearly expressed.'" **And we have determined that the geographical component of tribal sovereignty "'provide[s] a backdrop against which the applicable treaties and federal statutes must be read.'"**

Wagnon v. Prairie Band Potawatomi Nation, 546 U.S. 95, 112 (2005) (emphasis added and internal citations omitted). In sum, it is the federal government, not the state, that has at least some legal authority to regulate, over see and perhaps tax SNI licensed businesses and its enrolled members, such as Plaintiffs.

7. **Because the Cattaraugus Territory is not within New York State, enforcement of §471 and §1814 against the Plaintiff violates the Commerce Clause and the Due Process Clause of the United State Constitution**

a. Commerce Clause

Pursuant to Article 1, § 8 of the Constitution, Congress has exclusive authority to "regulate Commerce with foreign Nations, and among the several States." The Commerce Clause contains both an affirmative grant of authority and a negative sweep (referred to as the "dormant" commerce clause). Red Earth LLC v. United States, 728 F. Supp. 2d 238, 245 (W.D.N.Y. 2010) aff'd, 657 F.3d 138 (2d Cir. 2011). The negative or

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we have held, a State is without power to tax reservation lands and reservation Indians. And our cases reveal a consistent practice of declining to find that Congress has authorized state taxation unless it has "made its intention to do so unmistakably clear.").

dormant implication of the Commerce Clause "prohibits state taxation or regulation that discriminates against or unduly burdens interstate commerce, [thereby impeding] the free private trade in the national marketplace." Id. (*quoting* General Motors Corp. v. Tracy, 519 U.S. 278, 287, 117 S.Ct. 811, 136 L.Ed.2d 761 [1997]).

The United States Supreme Court decision, Quill Corp. v. North Dakota, 504 U.S. 298, 112 S.Ct. 1904, 119 L.Ed.2d 91 (1992), remains the leading authority on point with regard to the prohibitions contained within the Commerce Clause:

> In Quill, the Supreme Court was asked to determine whether a mail-order catalog business that did not have any physical presence in the State of North Dakota could be required to collect and pay an excise tax on goods purchased by North Dakota residents for use in that State.
> * * *
> [T]he Supreme Court held that North Dakota's attempt to tax an out-of-state entity that lacked any physical presence in that State violated the dormant Commerce Clause. The Court explained that a "bright-line" rule requiring physical presence in a taxing jurisdiction before an out-of-state retailer can be subject to a tax was beneficial because it "firmly establishes the boundaries of legitimate state taxing authority to impose a duty to collect sales or use taxes and reduces litigation concerning those taxes."

Red Earth, 728 F.Supp. 2d at 245, quoting Quill, 504 U.S. at 315–16, 112 S.Ct. 1904. Because the Plaintiffs in this case are members of a sovereign entity that lacks any physical presence within New York State, Section 471's requirement that he pay state taxes in jurisdictions where he is not physically present violates the Commerce Clause. The Commerce Clause distinctly prohibits state and local jurisdictions from imposing taxes on entities located outside of their jurisdiction. Prior to enforcing Section 471 against the Plaintiffs, the Defendants would have to establish a physical presence *within* the State of New York, which the Defendants cannot do.

b. Due Process Clause

"In addition to the Commerce Clause, state taxing schemes must also satisfy the requirements of the Due Process Clause." Id. at 247. "The Commerce Clause and the Due Process Clause impose distinct but parallel limitations on a State's power to tax out-of-state activities." MeadWestvaco Corp. v. Ill. Dep't of Revenue, 553 U.S. 16, 24, 128 S.Ct. 1498, 170 L.Ed.2d 404 (2008) (citing Quill, 504 U.S. at 305–06, 112 S.Ct. 1904). "The Due Process Clause 'requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.'" Quill, 504 U.S. at 306, 112 S.Ct. 1909, *quoting* Miller Brothers Co. v. Maryland, 347 U.S. 340, 344-345, 74 S.Ct. 535, 539, 98 L.Ed. 744 (1954).

In Quill, the Court reasoned that a state tax will satisfy due process as long as the out-of-state seller has "minimum contacts with the jurisdiction 'such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.' " Quill, 504 U.S. at 307, 112 S.Ct. 1904 (*quoting* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945)). "In light of Quill, it is clear that a state tax imposing a duty to collect excise taxes upon an out-of-state seller will survive due process scrutiny when out-of-state seller engages in regular or systematic solicitation of business within that taxing jurisdiction." Red Earth, 728 F.Supp. 2d at 248. (quotations omitted).

In Red Earth, fellow Native Americans located on the Cattaraugus territory of the Seneca Nation of Indians sought to enjoin enforcement of the Pact Act[21] on the ground

[21] The PACT Act, signed into law on March 31, 2010, imposes strict restrictions on the delivery sale of cigarettes and smokeless tobacco. Pub.L. No. 111-154, §2(a), 124 Stat. 1087, 1088 (2010). A delivery sale occurs when the buyer and seller are not in each other's physical presence at the

that specific provisions of the act violated "the Due Process Clause by subjecting them to the taxing jurisdiction of state and local governments without regard to whether they have sufficient minimum contacts with those taxing jurisdictions." Red Earth, 728 F. Supp. 2d at 247 (W.D.N.Y. 2010) aff'd, 657 F.3d 138 (2d Cir. 2011).

In granting the injunction, the Court recognized that the Pact Act required "remote sellers who are not physically present in a taxing jurisdiction to collect state and local excise taxes on cigarettes and smokeless tobacco *regardless of whether their existing contacts with that taxing jurisdiction rise to the level of minimum contacts necessary to satisfy due process considerations.*" Id. at 248. The Court further held,

> [b]y failing to require any minimum contacts before subjecting the out-of-state retailer to "all state, local, tribal, and other laws generally applicable to sales of cigarettes or smokeless tobacco," Congress is broadening the jurisdictional reach of each state and locality without regard to the constraints imposed by the Due Process Clause. That it cannot do. It would appear that the PACT Act seeks to legislate the due process requirement out of the equation.

Id. at 251-52.

As already established, the Senecas do not hold the title to the Cattaraugus and Allegany Reservations under the State of New York, but their title to the same is original, absolute and exclusive. Further, the lands secured to the Senecas by treaty were to "never be included in any State or Territory..." Treaty with the New York Indians, Article 4 (January 15, 1838; 7 Stat. 550). Accordingly, as the Cattaraugus Territory is a

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time the buyer requests or receives the cigarettes, as when cigarettes are ordered over the Internet and delivered by mail. 15 U.S.C. § 375(5). In order to prevent tobacco smuggling and ensure the collection of all tobacco taxes, the statute demands that delivery sellers comply with the same laws that apply to law-abiding tobacco retailers. 124 Stat. at 1087-88. To that end, the PACT Act requires delivery sellers to pay excise taxes, obey licensing and tax-stamping requirements, and otherwise comply with state and local tobacco laws as if the delivery sales occurred entirely within the specific State and place where the tobacco product is delivered. 15 U.S.C. §376a(a)(3). Red Earth LLC v. United States, 657 F.3d 138, 141 (2d Cir. 2011)

separate and distinct entity from New York State, the Due Process analysis and constraints recognized in Quill and Red Earth must be applied to the matter at bar.

Section 471 purports to subject Plaintiff Eric White and his company to the taxing scheme it imposes on the basis that he possesses "cigarettes within the state." N.Y. Tax Law § 471 (McKinney). In fact, it mandates prepayment of New York State cigarette taxes on all cigarettes possessed for sale, and presumes that "all cigarettes within the state are subject to tax until the contrary is established, and the burden of proof that any cigarettes are not taxable hereunder shall be upon the person in possession thereof." Id.

As Mr. White resides on a territory not within New York State, the State is without jurisdiction to enforce Section 471 against him. Furthermore, should Mr. White cause cigarettes to enter into commerce within New York State, a due process analysis must be undertaken prior to assessing any sort of tax against him. Without minimum contacts with New York State, Mr. White cannot be required to comport with that jurisdiction's laws that mandate pre-payment of sales and excise taxes for sale of cigarettes into that taxing jurisdiction. It is only after cigarettes enter commerce within New York State that it has jurisdiction to enforce Section 471, and only after a due process analysis can Mr. White be subject to civil and criminal penalties available for violations of Sections 471 and 1814 of the New York State Tax Law.

As set forth in the accompanying declarations, the structure of Mr. White's business provides that title to the goods passes upon tender of payment for the goods. Accordingly, title to the goods he sells passes to the buyer upon the territory. N.Y. U.C.C. Law § 2-401 (1)(McKinney). This sale establishes no contacts with the State, as it is not Mr. White and his company who causes goods to flow into state commerce but the

purchaser of the goods when and if they transport the goods off of the territory and into the State.

Accordingly, the Defendants must be enjoined from enforcing Sections 471 and 1814 against the Plaintiffs, as he is not located within New York State and therefore not subject to the taxing jurisdiction of the State.

(C) CONCLUSION

As fully set forth above, the legislative history of New York State's Indian Law evinces an intention to exempt sovereign Indian land (particularly land belonging to the Seneca Nation of Indians) from taxation of any kind by the state. This principle is codified in Indian Law Section 6, reinforced in Section 71 and reflected in the jurisprudence of the state's highest court. Accordingly, section 471 of the New York State Tax Law as it attempts to levy a tax on any goods within tribal land is unconstitutional. Also unconstitutional, invalid and unenforceable, for the reasons described above, are the remainder of New York's taxing scheme under Tax Law §§ 471-a, 471-b, 471-c and 471-e, as well as the state licensed stamping agent requirements under Public Health Law §1399-ll, the Escrow Statute (Public Health Law §§ 1399-nn, 1399-oo and 1399-pp), the Directory Statute (Tax Law §480, et seq.), the Fire Safety Statute (Exec. Law §156-c), and the price-fixing scheme under the Cigarette Marketing Statutes (Tax Law §483, et seq.). Based on the foregoing, the plaintiffs respectfully request that this Court grant petitioners Motion for a Preliminary Injunction.

Dated: Buffalo, New York
August 11, 2014

PAUL J. CAMBRIA, JR., ESQ.
LIPSITZ GREEN SCIME CAMBRIA LLP

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DEFENDANTS ERIC T. SCHNEIDERMAN, NEW YORK STATE ATTORNEY GENERAL, THOMAS MATTOX, COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE'S NOTICE OF CROSS-MOTION TO DISMISS, DECEMBER 26, 2014 [96- 98]

STATE OF NEW YORK
SUPREME COURT: COUNTY OF CATTARAUUGUS

ERIC WHITE and NATIVE OUTLET,

Plaintiffs,

NOTICE OF CROSS MOTION

Index No.: 82670

-against-

ERIC T. SCHNEIDERMAN, NEW YORK STATE ATTORNEY GENERAL, in his official capacity; and

THOMAS MATTOX, COMMISIONER OF THE NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, in his official capacity,

Defendants.

SIRS:

PLEASE TAKE NOTICE of the within cross motion:

MOTION ON BEHALF OF:	Defendants
DATE, TIME AND PLACE OF HEARING ON MOTION:	January 8, 2015 at 9:30 a.m., or as soon thereafter as counsel can be heard, at the Cattaraugus County Courthouse, 303 Court Street, Little Valley, New York
SUPPORTING PAPERS:	Memorandum of Law dated December 26, 2014 and all prior pleadings and proceedings.
RELIEF DEMANDED:	Dismissal of Complaint
GROUNDS FOR RELIEF DEMANDED:	CPLR 3211(a) (7)

Dated: Buffalo, New York
December 26, 2014

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STATE OF NEW YORK
SUPREME COURT: COUNTY OF CATTARAUUGUS

ERIC WHITE and NATIVE OUTLET,

Plaintiffs,

-against-

ERIC T. SCHNEIDERMAN, NEW YORK STATE ATTORNEY GENERAL, in his official capacity; and

THOMAS MATTOX, COMMISIONER OF THE NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, in his official capacity,

Defendants.

NOTICE OF CROSS-MOTION

Index No. 82670
Hon. Jeremiah J. Moriarty III

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MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND IN SUPPORT OF DEFENDANTS' CROSS-MOTION, DATED DECEMBER 26, 2014 [99- 111]

STATE OF NEW YORK
SUPREME COURT: COUNTY OF CATTARAUGUS

ERIC WHITE and NATIVE OUTLET,

Plaintiffs,

Index No.: 82670

-against-

ERIC T. SCHNEIDERMAN, NEW YORK STATE ATTORNEY GENERAL, in his official capacity; and

THOMAS MATTOX, COMMISIONER OF THE NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, in his official capacity,

Defendants.

MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION AND IN SUPPORT OF DEFENDANTS' CROSS-MOTION TO DISMISS

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PRELIMINARY STATEMENT

This action arises out of the State of New York's effort to collect taxes on cigarettes sold by Native Americans to non-Native Americans. Plaintiff, Eric White, is the owner and operator of a convenience store, Plaintiff Native Outlet, located on the Seneca Nation of Indian ("SNI") lands within the City of Salamanca, New York. Mr. White is an enrolled member of the SNI who sells cigarettes to both Native Americans and to non-Native Americans through Native Outlet.

Plaintiffs commenced this action with the filing and service of a summons and verified complaint on June 23, 2014. Plaintiff's verified complaint seeks a judgment pursuant to CPLR §3001 declaring that New York's statutory and regulatory provisions for collecting taxes on the sale of cigarettes by Native Americans to non-Native Americans violates N.Y. Indian Law §6 and various Indian treaties, and is unconstitutional. The verified complaint also seeks preliminary and permanent injunctive relief enjoining Defendants from enforcing and implementing New York's statutory and regulatory provisions for collecting taxes on the sale of cigarettes by Native Americans to non-Native Americans.

Plaintiffs' verified complaint asserts three causes of action as grounds for the relief they request. The first cause of action alleges that the enactment and enforcement of N.Y. Tax Law §471 directly conflicts with, and violates, Plaintiff fundamental rights as granted by Indian Law §6. The second cause of action alleges that the enactment and enforcement of N.Y. Tax Law §471 conflicts with, and violates, Plaintiff fundamental rights as granted by the Seneca Treaties of 1831, 1838 and 1842. The third cause of action alleges that the enactment and enforcement of N.Y. Tax Law §471 violates Plaintiffs' constitutional rights under the Commerce Clause and Due Process Clause of the United States Constitution.

On or about August 12, 2014, Plaintiffs filed and served a motion for preliminary injunction. Plaintiffs' motion for a preliminary injunction seeks the issuance of a preliminary

injunction: 1) enjoining Defendants from enforcing Tax Law §471 against Plaintiffs for transactions occurring on reservation lands; 2) declaring Tax Law §471 unconstitutional on its face and as applied to Plaintiff; and, 3) declaring the rest of New York's statutory and regulatory provisions for collecting taxes on the sale of cigarettes by Native Americans to non-Native Americans unconstitutional on its face and as applied to Plaintiff.

Defendants Eric T. Schneiderman, New York State Attorney General, and Thomas Mattox, Commissioner of the New York State Department of Tax and Finance ("DTF"), submit this memorandum of law in opposition to Plaintiff's motion pursuant to CPLR §6301 seeking issuance of preliminary injunction and in support of Defendants' motion to dismiss the Complaint pursuant to CPLR 3211(a) (7). This Court should deny Plaintiffs' motion for a preliminary injunction and grant Defendants' cross-motion to dismiss because it is now well settled under United States Supreme Court precedent that Indians engaging in commerce beyond reservation boundaries are generally subject to state laws otherwise applicable to all citizens and that, specifically, a state may validly enforce its cigarette tax laws when Indians sell to non-members of their own tribe.

STATEMENT OF FACTS

A. Statutory & Regulatory Background

New York's Tax Law imposes an excise tax "on all cigarettes possessed in the state by any person for sale." Tax Law § 471(1). Moreover, "[i]t shall be presumed that all cigarettes within the state are subject to tax until the contrary is established, and the burden of proof that any cigarettes are not taxable hereunder shall be upon the person in possession thereof." Tax Law § 471(1); see also Tax Law §§ 481(2)(a), 1814(d) (providing that possession of more than four hundred unstamped cigarettes in New York is "presumptive evidence" that the cigarettes are subject to tax); Tax Law § 471-a (imposing tax on use of non-exempt untaxed cigarettes, with

exception for "the use of four hundred or less cigarettes, brought into the state on, or in the possession, of any person").

While "the ultimate incidence of and liability for the tax shall be upon the consumer" (Tax Law § 471(2)), the statute envisions that ordinarily the tax will be paid in advance by an agent licensed by the Commissioner of the Department of Taxation and Finance ("DTF") who purchases and affixes tax stamps on packages of cigarettes (Tax Law §§ 470(11), 471(2)). The tax is then added to the sale price of the cigarettes and eventually collected from the consumer. Tax Law § 471(2), (3). Only licensed cigarette stamping agents may possess or sell unstamped cigarettes, other than in a few limited circumstances not present here. 20 N.Y.C.R.R. §§ 74.3(a), 76.1(b)(2).

With regard to Indian nations or tribes and cigarette sales, the Tax Law acknowledges that "no tax shall be imposed on cigarettes sold under such circumstances that this state is without power to impose such tax, including sales to qualified Indians for their own use and consumption on their nations' or tribes' qualified reservation." Tax Law § 471(1). However, tax may be imposed, pursuant to U.S. Supreme Court precedent, "on all cigarettes sold on an Indian reservation to non-members of the Indian nation or tribe and to non-Indians." DeptTax Law § 471(1); Washington v. Confederated Tribes of Colville Reservation, 447 U.S. 134, 160 (1980).

Therefore, the statute provides two systems for Indian nations or tribes to purchase tax-free cigarettes for *on-reservation sale to their members*, a coupon system and a prior approval system. Tax Law §§ 471(1), (5); 471-e; 20 NYCRR §74.6. Under both systems, all cigarettes must bear a tax stamp even if they are tax-free to the purchaser. Tax Law §§ 471(2), (5)(b), § 471-e(b); see generally Oneida Nation of New York v. Cuomo, 645 F.3d 154 (2d Cir. 2011) (denying preliminary injunction against overall scheme because plaintiffs, including SNI , had not established a likelihood of success on merits); Seneca Nation of Indians v. State of New York, 89 A.D.3d 1536 (4th Dept. 2011) (declaring implementing regulations governing the sale

of tax-exempt cigarettes on qualified reservations to members of an Indian nation or tribe, as well as the collection of the excise tax on cigarette sales to non-members of the nation or tribe, to be valid and enforceable).

With regards to sales other than on-reservation sale to their members, the law provides (Tax Law §471(1)) that: "[t]he tax imposed by this section is imposed on all cigarettes sold on an Indian reservation to nonmembers of the Indian reservation or tribe and to non-Indians and evidence of such tax shall be made by means of an affixed cigarette stamp." See also, 20 NYCRR §74.6(a)(1) (which provides that "qualified Indians purchasing cigarettes off their reservations or on another nation's or tribe's reservation...are not exempt from paying the cigarette tax when purchasing cigarettes within the state"); §74.6(a)(2) ("all cigarettes sold on an Indian reservation to non-members of the Indian nation or tribe and to non-Indians will be taxed, and evidence of such tax will be by means of an affixed cigarette tax stamp").

The Tax Law provides for civil and criminal sanctions for the failure to pay cigarette tax. Tax Law §§ 481, 1814. Possession or transport of five thousand or more unstamped cigarettes by any person other than an agent "shall be presumptive evidence that such cigarettes are possessed or transported for the purpose of sale and are subject to the tax imposed by" Tax Law § 471; Tax Law § 1814(d).

Finally, the Tax Law provides for seizure by the State Police and other law enforcement of cigarettes upon which the tax has not been paid or the stamps not affixed as required by Article 20 and directs that the seized product be turned over to the DTF Commissioner and forfeited to the State. See, Tax Law §1846(a). Tax Law §481(1)(b)(i) allows the Commissioner of DTF to impose a penalty of not more than $150 for each two hundred cigarettes, or fraction thereof, in excess of one thousand cigarettes in unstamped or unlawfully stamped packages in possession or under the control of any person.

ARGUMENT

POINT I

PLAINTIFFS HAVE NOT ESTABLISHED THAT THEY ARE ENTITLED TO A PRELIMINARY INJUNCTION

A. Preliminary Injunction Standard

The purpose of a preliminary injunction is to preserve the *status quo* pending a trial. The remedy is considered a drastic one, which should be used sparingly. See Trump on the Ocean, LLC v Ash, 81 AD3d 713, 715 (2nd Dept. 2011). Generally, the decision to grant or deny a preliminary injunction lies within the sound discretion of the Supreme Court, which, in exercising its discretion, must determine if the moving party has established: 1) a likelihood of success on the merits; 2) irreparable harm in the absence of an injunction; and 3) a balance of the equities in favor of the injunction. Doe v Axelrod, 73 NY2d 748, 750 (N.Y.1988); Trump on the Ocean, 81 AD3d at 715. Moreover, injunctive relief is inappropriate where, as here, the party seeking that relief has an adequate remedy at law. See City of New York v State of New York, 94 NY2d 577, 599 (N.Y. 2000); Roushia v Harvey, 260 AD2d 687, 688 (3rd Dept. 1999).

B. Plaintiffs' Have Not Established a Likelihood of Success on the Merits

The arguments Plaintiffs assert in support of their claims have already been made and rejected by the Appellate Division, Fourth Department, the New York Court of Appeals, the Second Circuit Court of Appeals and the U.S. Supreme Court in cases brought by various New York State Indian tribes, including the SNI, and by other parties involved in the Indian cigarette trade in New York. See generally; Dept. of Tax and Finance v. Milhelm Attea & Bros, 512 U.S. 61 (1994) (upholding New York's prior statutory and regulatory provisions for collecting taxes on the sale of cigarettes by Native Americans to non-Native Americans); Colville, 447 U.S. at 134; Oneida Nation of New York, 645 F.3d at 154; Seneca Nation of Indians, 89 A.D.3d at 1536. Moreover, "parties challenging a duly enacted statute face the initial burden of demonstrating the

statute's invalidity beyond a reasonable doubt." Dalton v Pataki, 5 N.Y.3d 243, 255, (2005) (internal quotation marks and citations omitted). In fact, in order to prevail, a challenger has to "prove beyond a reasonable doubt that in any degree and in every conceivable application the [legislative enactment] suffers wholesale constitutional impairment" Local Govt. Assistance Corp. v Sales Tax Asset Receivable Corp., 2 N.Y.3d 524, 535 (2004) (internal quotation marks and citations omitted); see also Cohen v State of New York, 94 N.Y.2d 1, 8 (1999); Matter of Moran Towing Corp. v Urbach, 99 N.Y.2d 443, 448 (2003).

1. Plaintiffs' First Cause of Action Lacks Merit

Plaintiff's first cause of action alleges that the enactment and enforcement of N.Y. Tax Law §471 directly conflicts with, and violates, Plaintiff fundamental rights as granted by Indian Law §6. The fatal flaw in this cause of action is that it assumes that Indian Law §6 applies to retail transactions that take place on Indian land, when, by its clear language and according to the case law interpreting it, it does not. Indian Law §6 applies only to taxes on real property. See In re New York State Department of Taxation and Finance v. Bramhall, 235 A.D.2d 75 (4th Dept. 1997); Snyder d/b/a Senaca Hawk v. Wetzler, 193 A.D.2d 329 (3rd Dept. 1993).

The statute provides that: "[n]o taxes shall be assessed, for any purpose whatever, upon any Indian reservation in this state, so long as the land of such reservation shall remain the property of the nation, tribe or band occupying the same." N.Y. Indian Law §6 (Consol. 2014). In Bramhall, 235 A.D.2d at 75, a case involving seizure by the State of motor fuel being transported to reservation land for sale by Indian retailers, the Defendants there, like the Plaintiffs here, argued that Indian Law §6 prohibited the State from taxing retail transactions occurring on reservation lands. In rejecting that argument, the Fourth Department first pointed out that the statute applied only to tax on reservation land, and went on to state:

> [T]he sovereign rights of the Seneca Nation do not prohibit application of the State's tax laws to sales on the Seneca Nation's reservations to non-Indians. Even on reservations, state laws may be applied unless such application would interfere with reservation self-government or would impair a right granted or reserved by

> federal law. State taxation of sales of cigarettes and other products to non-Indians on reservations and other taxes directed toward the activity of non-Indians on reservations have been sustained notwithstanding Indian claims of sovereignty

Id. at 85 (internal quotations and citations omitted).

2. Plaintiffs Second Cause of Action Lacks Merit

Plaintiffs' second cause of action alleges that the enactment and enforcement of N.Y. Tax Law §471 conflicts with, and violates, Plaintiff fundamental rights as granted by the Seneca Treaties of 1831, 1838 and 1842. This cause of action lacks merit for several reasons.

First, the 1831 Treaty that Plaintiffs cite (a/k/a the Treaty of Little Sandusky) was made with the Seneca of Ohio, not Plaintiff White's tribe, the SNI of New York. The other two treaties, those of 1838 and 1842 (known collectively as the "Buffalo Creek Treaty") were made with Plaintiff White's tribe; however, whatever rights may be secured to the SNI under the Buffalo Creek Treaty, such rights have no application to the circumstances presented by this case. In rejecting identical arguments by other SNI based entities involving the Buffalo Creek Treaty, the Fourth Department held and explained that:

> The immunity from taxation that respondents claim here is not conferred by Federal treaties (*see*, 7 US Stat 15, 33, 44, 586) or by case law interpreting those treaties. The 1784, 1789 and 1794 Treaties (7 US Stat 15, 33, 44) do not confer any immunity from taxation, and the 1842 Treaty (7 US Stat 586), although it prohibits the State from taxing reservation land, does not bar the imposition of excise and sales taxes on cigarettes and motor fuel sold to non-Indians on the Seneca Nation's reservations.

Bramhall, 235 A.D.2d at 85 (internal case citations omitted, emphasis added). See also Snyder v. Wetzler, 193 A.D.2d 329, 331 (3d Dept. 1993) (the Ninth Article of the Treaty of Buffalo Creek cited by petitioners "clearly refers only to taxes levied upon real property or land."), aff'd, 84 N.Y.2d 941 (1994); United States v. Kaid, 241 Fed. Appx 747, 750-51 (2d. Cir. 2007) (Treaty of Buffalo Creek "prohibit[s] only the taxation of real property, not chattels like cigarettes.").

In any event, even if the treaties at issue could possibly be construed as providing something more than real property rights *to a tribe*, Plaintiffs lack standing to assert any claim under the referenced treaties.

Generally speaking, treaties do not create privately enforceable rights even when the treaty may benefit individuals. Mora v. New York, 524 S.3d 183, 201 (2d Cir. 2008); United States v. Rommy, 506 F.3d 108, 129 (2d Cir. 2007). In the specific context of Indian law, individual tribal members lack standing to assert rights allegedly guaranteed to a tribe under a treaty. See, e.g., Canadian St. Regis Band of Mohawk Indians v. New York, 573 F.Supp. 1530, 1537-38 (N.D.N.Y. 1983) ("though the court takes no position at this time on whether a tribe has standing to assert a claim under the Treaty of Ghent, it is quite clear that individual members of the tribe may not do so...Since such property rights belonged to the tribe, if there is standing on the part of any third party to enforce the treaty, it would be on the part of the tribe.") (internal citations omitted); Bess v. Spitzer, 459 F.Supp. 191 (E.D.N.Y. 2006); (noting State Supreme Court's holding that "individual Indians lack standing to sue under the Treaty of Fort Albany of 1664 because that Treaty secures rights for 'tribes and bands of Indians' rather than individuals" and observing that "[p]rinciples of tribal immunity do not apply to individual Indians in the same way that they apply to Indian Tribes"); New York v. Smith, 2013 U.S. Dist. LEXIS 92082, 10-11 (E.D.N.Y. 2013) (same). Therefore, Plaintiffs lacks standing to assert the alleged treaty rights even if such treaties could be construed in the manner they suggest.

3. Plaintiff's Third Cause of Action Lacks Merit

Plaintiffs' third cause of action alleges that the enactment and enforcement of N.Y. Tax Law §471 violates Plaintiffs' constitutional rights under the Commerce Clause and Due Process Clause of the United States Constitution. Plaintiffs allege that they do not introduce goods into the State of New York, because the title of those goods passes to the consumer on reservation land, which is sovereign and not part of the State of New York. Therefore, they argue, the

cigarettes they sell to Non-Native Americans who transport them off reservation constitute interstate commerce, which the State is prohibited from regulating absent a physical presence in the State or minimum contacts with the State.

The fatal flaw in this cause of action is that it proceeds from the erroneous contention that the SNI's reservation lands are not part of the State of New York. This contention 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) ("The suggestion that the St. Regis reservation is not 'within the state', and concomitantly that the transportation of liquor thereto is akin to shipment through, but not into, New York, is patently sophistic."). See also In re HCI Distribution, Inc. v. New York State Police, 110 A.D.3d 1297, 1300 (3rd Dept. 2013); Bramhall, 235 A.D.2d at 86; Matter of 1750 Cases of Liquor, 231 A.D.2d 947, 85-86 (3d Dept. 1996) aff'g. 166 Misc.2d 739. Thus, it is now beyond dispute that the State has authority to tax and regulate "[o]n-reservation cigarette sales to persons other than reservation Indians." Milhelm Attea & Bros., 512 U.S. at 64. 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, 645 F.3d at 154 (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).

The case of Red Earth, LLC v. United States, 657 F.3d 138 (2d Cir. 2011), relied on by Plaintiffs to support their argument that Tax Law §471 violates the Commerce and Due Process Clauses, and which addressed the Due Process Clause's limitations on "a state's ability to tax

out-of-state vendors," does not have any application here because Plaintiffs are in-state vendors engaged in intrastate commerce.

Thus, not only can Plaintiffs not show a likelihood of success on the merits entitling them to a preliminary injunction, but their complaint is devoid of merit, as a matter of law, and should be dismissed in its entirety.

C. Plaintiffs Have Not Established Irreparable Harm

Plaintiffs have submitted the affidavit of Eric White in support of their motion for a preliminary injunction. In his affidavit, Mr. White asserts in a wholly conclusory fashion that, because of the threat of criminal prosecution if he does not comply with Tax Law §471, he has been forced to not fully pursue his cigarette business. However, conclusory allegations are not sufficient to establish irreparable harm. See Technology for Measurement v. Briggs, 291 A.D.2d 902, 903 (4th Dept. 2003). In addition, the prospect of irreparable harm must be "imminent, not remote or speculative" Golden v Steam Heat, 216 AD2d 440, 442, 628 NYS2d 375 (2nd Dept. 1995). Here, Mr. White's bald conclusory assertion that he has not pursued his cigarette business to the fullest because of Tax Law §471 is insufficient, as a matter of law, to establish irreparable harm warranting the issuance of a preliminary motion.

D. Plaintiffs Have Failed To Establish A Balance Of Equities In Their Favor

The States interest in regulating the use of tobacco is well established. As the Supreme Court has observed, "tobacco use, particularly among children and adolescents, poses perhaps the single most significant threat to public health in the United States." FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 161 (2000). For this and a host of other reasons, "New York State has a powerful interest in regulating the sale of cigarettes" Ward v. New York, 291 F.Supp.2d 188, 205 (W.D.N.Y. 2003); see also, Milhelm Attea & Bros, 512 U.S. at 75 ("We are persuaded ... that [the State's] decision to stanch the illicit flow of tax-free cigarettes early in the distribution stream is a 'reasonably necessary' method of 'preventing fraudulent

transactions,' one that 'policies against wholesale evasions of [the State's] own valid taxes without unnecessarily intruding on core tribal interests") (quoting Colville, 447 U.S. at 162)); St. Regis Group, 217 A.D.2d at 219-20 (approving of off-reservation seizures of non-compliant liquor shipments as necessary "to prevent fraudulent transactions").

Conversely, Plaintiffs' interest in selling untaxed cigarettes to non-Native Americans has been held to be definitively weak. *See e.g.*, Oneida Nation of New York, 645 F.3d at 165 ("the revenue tribes and retailers gain from cigarette sales to non-members derives from the marketing of a tax exemption, not from value 'generated on the reservations by activities in which the [t]ribes have a significant interest.'") (quoting Colville, 447 U.S. at 155).

CONCLUSION

For all of the foregoing reasons, it is respectfully requested that the Court deny Plaintiffs' motion for a preliminary injunction and instead grant Defendants cross-motion and dismiss the complaint in its entirety.

Dated: Buffalo, New York
December 26, 2014

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STATE OF NEW YORK
SUPREME COURT: COUNTY OF CATTARAUUGUS

ERIC WHITE and NATIVE OUTLET,

Plaintiffs,

-against-

ERIC T. SCHNEIDERMAN, NEW YORK STATE ATTORNEY GENERAL, in his official capacity; and

THOMAS MATTOX, COMMISIONER OF THE NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, in his official capacity,

Defendants.

MEMORANDUM OF LAW

Index No. 82670
Hon. Jeremiah J. Moriarty III

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PLAINTIFFS ERIC WHITE AND NATIVE OUTLET'S REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND IN OPPOSITION TO DEFENDANTS' CROSS-MOTION TO DISMISS [112- 125]

STATE OF NEW YORK : COUNTY OF CATTARAUGUS
SUPREME COURT

ERIC WHITE and NATIVE OUTLET,

Plaintiffs,

against Index No. 82670

ERIC T. SCHNEIDERMAN, NEW YORK STATE ATTORNEY GENERAL, in his official capacity; and

THOMAS H. MATTOX, COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, in his official capacity,

Defendants.

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND IN OPPOSITION TO DEFENDANTS' CROSS- MOTION TO DISMISS

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PRELIMINARY STATEMENT

This Memorandum of Law is submitted in further support of the instant motion for preliminary injunction of Plaintiffs Eric White ("White") and Native Outlet (collectively "Plaintiffs") seeking to enjoin Defendants Eric T Schneiderman, in his official capacity as New York State Attorney General and Thomas H. Mattox, in his official capacity as Commissioner of the New York State Department of Taxation and Finance (collectively the "State Defendants") from enforcement of New York State Tax Law §471 during the pendency of this proceeding. This Memorandum of Law is also submitted in opposition to the State Defendants' cross motion seeking dismissal of Plaintiffs' Verified Complaint pursuant to CPLR 3211(a)(7).

The facts and circumstances underlying this action are set forth in Plaintiffs' Verified Complaint, Affidavit of Paul J. Cambria, Jr., Esq., sworn to on August 11, 2014, and Affidavit of Eric White, sworn to June 13, 2014, and will not be repeated herein at length. For the reasons set forth below, the instant motion of Plaintiffs should be granted in its entirety and the State Defendants' cross-motion to dismiss should be denied.

ARGUMENT

The State Defendants contend that each of the causes of action set forth in Plaintiffs' Verified Complaint lack merit and, therefore, Plaintiffs have failed to demonstrate a likelihood of success on the merits. Specifically, the State Defendants assert that: (i) Plaintiffs' First Cause of Action lacks merit because N.Y. Tax Law §471 does not conflict with N.Y. Indian Law §6 because "Indian Law §6 applies only to taxes on real property";[1] (ii) Plaintiffs Second Cause of Action lacks merit because the Seneca Treaties of 1831, 1838 and 1842 are inapplicable to this dispute and Plaintiffs lack standing to assert treaty rights granted to the Seneca Nation of Indians

[1] State Defendants' December 26, 2014 *Memorandum of Law in Opposition to Plaintiffs' Motion for a Preliminary Injunction and in Support of Defendants' Cross-Motion to Dismiss* ("Opp. MOL.") at p. 6.

("SNI");[2] and (iii) Plaintiffs' Third Cause of Action alleging that Tax Law §471 violates Plaintiffs' rights under the commerce clause lacks merits because "plaintiffs are in-state vendors engaged in intrastate commerce."[3]

As an initial matter, the basis of the State Defendants' argument is the misguided belief that the SNI and its members are subservient to and therefore subject to the regulatory yoke of New York State, and that New York knows what is best for not only its citizens, but citizens of the SNI. Unfortunately, such misplaced paternalism has negatively impacted the historical dealings between New York and Native Americans, whose presence in the "New World" pre-dates the arrival of European colonists and the founding of New York and later the United States. Such allegiance to the myth of superiority of New York blinds the State Defendants to the inherent flaw in their argument – Plaintiffs' rights and the rights granted to them as members of the SNI are not fungible with New York State's exercise of power over businesses and citizens of the State of New York, nor are they fungible with rights granted to members of other Native American tribes. Instead, the rights of Plaintiffs as members of the SNI – a sovereign tribal nation that continues to occupy and actively govern its aboriginal territory since before the founding of the United States – must be determined by reason of the unique circumstances of history and treaties that directly apply to the SNI and its people.

A. The State Defendants' Restrictive Reading of New York Indian Law §6 and the Inapplicability of Relevant Indian Treaties is Without Historical Support

In support of their contention that Plaintiffs' First and Second Causes of Action lack merit the State Defendants cite extensively to *Snyder d/b/a Seneca Hawk v. Wetzler*, 193 A.D.2d 329 (3d Dep't 1993) and *In re New York State Dep't of Taxation and Finance v. Bramhill*, 235

[2] *Id.* at p. 7.
[3] *Id.* at p. 10.

A.D.2d 75 (4th Dep't 1997) for the proposition that Indian Law §6 only applies to taxes on real property and not to retail transactions taking place on SNI territory.[4]

A close examination of the *Wetzler* case demonstrates that the plaintiff therein never advanced the argument being made by Plaintiffs in this action, to wit, challenging the constitutionality of New York's Tax Laws as they conflict with Indian Law Section 6 [and treaties it is derived from]. Accordingly, while the Third Department briefly addressed it, the New York Court of Appeals never ruled on the appellate court's interpretation, noting that "[t]o **the extent plaintiff contends that the State tax statutes at issue violate** either the Supremacy Clause or **New York law, his arguments** are unpreserved and **cannot be considered on this appeal.** Plaintiffs complaint asserted only violations of the Commerce Clause and the Laws of the United States enacted pursuant thereto." *Wetzler*, 193 A.D.2d at 331-32 (3d Dep't 1993), *aff'ed* 84 N.Y.2d at 942 [1994] [emphasis added]. Accordingly, the issue of whether Indian Law §6 precludes the imposition of taxes under Tax Law §471 remains ripe for presentation before the Court of Appeals, which is the goal of the instant proceeding, with the plaintiffs appearing therein as Respondents.

Moreover, in advancing a narrow and constrictive reading of Indian Law §6, the State Defendants want the Court to ignore the proper rules of construction that must be utilized when interpreting Indian Treaties and applicable statutes. Such rules dictate that "[t]he language used in treaties with the Indians should never be construed to their prejudice" *Worcester v. State of Ga.*, 31 U.S. 515, 582, 8 L. Ed. 483 (1832), *abrogated on other grounds* in *Nevada V. Hicks,* 533 U.S. 353, 121 S.Ct. 2304, 150 L.Ed.2d 398 (2001), and that ambiguous expressions are to be resolved in favor of the Indian parties concerned. *See, McClanahan v. State Tax Comm'n of*

[4] *Id.* at p. 6.

Arizona, 411 U.S. 164, 174, 93 S. Ct. 1257, 1263, 36 L. Ed. 2d 129 (1973); *citing Carpenter v. Shaw*, 280 U.S. 363, 367, 50 S.Ct. 121, 122, 74 L.Ed. 478 (1930). Further, "they must be construed, not according to their technical meaning, but in the sense in which they would naturally be understood by the Indians." *Carpenter, supra*; *citing Jones v. Meehan,* 175 U. S. 1, 11 20 S. Ct. 1, 44 L. Ed. 49 (1989).

Importantly, these rules apply equally to statutes concerning Indian tribes, such as Indian Law §6. *See Alaska Pac. Fisheries Co. v. U.S.*, 248 U.S. 78, 89, 39 S. Ct. 40, 42, 63 L. Ed. 138 (1918)(holding "statutes passed for the benefit of dependent Indian tribes or communities are to be liberally construed, doubtful expressions being resolved in favor of the Indians."); *Choate v. Trapp*, 224 U. S. 665, 675, 32 Sup. Ct. 565, 56 L. Ed. 941(1912)(holding "[t]his rule of construction has been recognized, without exception, for more than a hundred years, and has been applied in tax cases."); *accord Squire v. Capoeman*, 351 U.S. 1, 7, 76 S. Ct. 611, 615, 100 L. Ed. 883 (1956); *Cnty. of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 269, 112 S. Ct. 683, 693, 116 L. Ed. 2d 687 (1992).

Accordingly, these principles of interpretation must be applied in determining the legal meanings of the language set forth in the applicable treaties and state statutes dealing with the Seneca Indians. In *Carpenter*, the Supreme Court, in addressing the subject of agreements and statutes containing tax exemptions, applied these canons, directing that "tax exemptions secured to the Indians by agreement between them and the national government are to be liberally construed in favor of the Indians." *Carpenter v. Shaw*, 280 U.S. at 366-367, *supra*. The Third Department in *Wetzler* failed to follow these mandatory rules of construction when attempting to interpret Section 6 of the Indian Law, as well as the Treaty of 1842.[5] Further,

[5] The court in *Wetzler* also addressed 25 U.S.C. §233, which provides that New York courts have jurisdiction over certain civil suits involving Indians; however, as noted therein, nothing in that provision

Wetzler only analyzes the statute and treaty specific to the imposition of taxes, it does not engage in an analysis of the treaties at all with respect to the sovereignty argument advanced by Plaintiffs herein.

As discussed in detail in Plaintiffs' initial moving papers, the pertinent sections of the New York State Indian Law were codified from hundreds of years of legislative history and numerous Indian treaties specific to the Seneca Indians. Section 6 of the Indian Law, which states as follows: "[n]o taxes shall be assessed, **for any purpose whatever,** upon any Indian reservation in this state, so long as the land of such reservation shall remain the property of the nation, tribe or band occupying the same", preserves - ***to this day*** - the language derived directly from the state legislation enacted in 1857:

> Section 1. The title of every such lot or parcel of the Allegany reservation, and of every such lot or parcel of the Cattaraugus reservation, as has been heretofore sold by the comptroller for taxes, and bid in by him for the States, is hereby released by the State to the Seneca nation of Indians residing on said reservation...
>
> Section 4. No tax shall hereafter be assessed or imposed on either of said reservations, or on any part thereof, **for any purposes whatever**, so long as said reservations remain the property of the Seneca nation; and all acts of the legislature of this State conflicting with the provisions of this section, are hereby replaced."

(emphasis added). Accordingly, while the 1857 Act itself was repealed, the treaties still remain law, as they are deemed the legal equivalent of federal statutes. *Solis v. Matheson*, 563 F.3d 425,

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"shall be construed as subjecting the lands within any Indian reservation in the State of New York to taxation for State or local purposes." Again, the court found that this provision was land-specific without the proper construction analysis that is required with respect to Indian statutes. Further, *see also Wash. v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 154 (1980) ("[e]ven if the State's interests were implicated by the tribal taxes, a question we need not decide, it must be remembered that tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States"); *see also* 25 U.S.C. §4301(4) ("consistent with the principles of inherent tribal sovereignty and the special relationship between Indian tribes and the United States, Indian tribes retain the right to enter into contracts and agreements to trade freely, and seek enforcement of treaty and trade rights").

430 (9th Cir. 2009),[6] as does Section 6. Further, the language specific to the Cattaraugus and Allegany Reservation's status as a *sovereign nation* remained, as did the prohibition against the assessment or imposition of taxes *for any purposes whatever*. In interpreting the meaning of Indian Law Section 6, a Court must take into consideration the legislation it was derived from, as well as the treaties upon which it is based. Additionally, as emphasized above, it must be interpreted and construed in favor of the Native Americans, with an understanding of how the language in the treaties establishing the Seneca's rights vis-à-vis the federal government and State of New York would have been understood by them at the time the treaties were entered. For "any purpose whatever" could not be more clear; indeed, if this law was only meant to apply to one taxing purpose (i.e. land) it would say so. By instead employing the phrase "any purpose whatever" the statute is thus not limited to real property taxes only.

This point is underscored by noting that at the time these treaties were adopted, New York, as well as other states, employed several methods of taxation in addition to simply taxes on land, including consumption taxes, license taxes, and levies on intangible property. Howe, E.T. & Reeb, D.J., *The Historical Evolution of State and Local Tax Systems*, 78 Social Science Quarterly 109, 111-112 (March 1997). More importantly, beginning in 1823 through at least 1859, New York levied a general property tax that taxed not only all lands (i.e. real property), but personal property including furniture, monies, goods, chattels, public stocks and stocks in moneyed corporations. *Laws N.Y.*, 1823, Ch. 262, p. 390; Scwab, J.C., *History of the New York Property Tax*, Publications of the American Economic Association, Vol. 5, No. 5, 17, 72-73 (September 1890).[7] Thus, at the time the relevant treaties were being negotiated, and the 1857 Act was being adopted, New York did not solely tax land, instead it imposed a single taxing scheme on real and personal property. Placed within historical context, the use of the phrase "for

[6] And if silent as to their applicability to Indian tribes, statutes will not be interpreted to violate rights guaranteed by Indian treaties. *U.S. v. Fiander*, 547 F.3d 1036, 1039 (9th Cir. 2008).
[7] Copies of *The Historical Evolution of State and Local Tax Systems* and *History of the New York Property Tax* are attached hereto as **Exhibits A** and **B**, respectively.

any purposes whatever" in the 1857 Act, which again was thereafter included in Indian Law §6, must therefore be interpreted to mean more than merely taxes on real property. There is simply no historical support for the narrower interpretation advanced by the State Defendants.

Put differently, the language of Indian Law §6 and the treaties underlying it must be construed liberally, and in conformity with how the Senecas would have understood the language, and should not be influenced by interpretations that seek to impose modern concepts and distinctions between taxes on real property from other forms of taxation such as income taxes, excise taxes and sales taxes. Commentary believed to be part of a legislative judiciary committee report released contemporaneously with the 1857 Act, further highlights that the nuanced modern distinction between forms of taxation was not contemplated in the 1800s, and that the right secured by the SNI in its treaties, and as codified in the laws of New York, was that they were a sovereign and distinct people, not part of New York, and therefore entitled to be free from the yoke of regulation by the State of New York:

> **[a]ny authority in th[e] State, to tax those Indians, is disclaimed,** and it is acknowledged, that the land owned by them never belonged to the State of New York...the Senecas do not hold the title to the Cattaraugus and Allegany Reservations under the State of New York, but **their title to the same is original, absolute and exclusive."**

See Documents and Official Reports ("illustrating the causes which led to the revolution in government of the Seneca Indians, in the year 1848, and the recognition of their representative republican constitution, by the authorities of the United States and of the State of New York," printed by Wm. Moody & Son, 1857), pg. 89-92 (emphasis added). Moreover, the Senecas "are not citizens of this State, and have no representative in our Legislature, we can claim no right to them...." *Id.* at 89. They are "**to be regarded as a distinct and independent nation, having a constitution and representative government of their own.**" *Id.* (Emphasis added).

The rights and privileges retained by the Senecas in the treaties of 1831, 1838 and 1842, were, in effect, codified in the legislative history of the 1857 Act (now Indian Law §6) and accordingly must be looked to in order to correctly interpret New York State Indian Law Section 6.[8] The broad scope of the treaty language, and the historical context in which that language was adopted, was not addressed in *Wetzler*, as the Third Department merely looked at "Article Ninth" of the Buffalo Creek Treaty in their analysis because it was the "only reference made to taxes." *Wetzler* at 331.[9] However, in a jurisdictional analysis, the entire treaty and the historical context under which it was entered, must be taken into consideration and construed in favor of the Senecas. There is no doubt that the treaty language cited extensively in Plaintiffs' moving papers constitutes an explicit acknowledgement of the retained sovereignty of the Seneca land (the Allegany and Cattaraugus "Reservations") and construction in favor of the Senecas clearly supports Plaintiffs' argument that the reservations at issue remain separate and distinct from New York State and accordingly, not within its jurisdiction.

As *Bramhall* is premised upon *Wetzler* it is therefore distinguished on the same basis:

> The immunity from taxation that respondents claim here is not conferred by Federal treaties *(see,* 7 U.S. Stat. 15, 33, 44, 586) or by case law interpreting those treaties *(see, New York Indians,* 5 Wall [72 U.S.] 761, 18 L.Ed. 708; *Snyder v. Wetzler,* **193 A.D.2d 329, 603 N.Y.S.2d 910,** *affd.* **84 N.Y.2d 941, 620 N.Y.S.2d 813, 644 N.E.2d 1369;** *Fellows v. Denniston,* 23 N.Y. 420). The 1784, 1789 and 1794 Treaties (7 US Stat. 15, 33, 34) do not confer any immunity from taxation, and the 1842 Treaty (7 U.S. Stat. 586), although it prohibits the State from taxing reservation land, does not bar the imposition of excise and sales taxes on cigarettes and motor fuel sold to non-Indians on the Seneca Nation's reservations *(see, Snyder v.*

[8] While the State Defendants question whether the 1831 Treaty is applicable herein, they have not cited, nor have Plaintiffs been able to find any definitive historical evidence that the Senecas that were party to the 1831 Treaty were not, in fact, part of the tribe presently known as the SNI. Seneca territory is acknowledged to have extended into Ohio at certain points in their history; regardless, the other treaties cited herein, which the State Defendants do not dispute involve treaty rights granted to the SNI stand equally for the proposition for which the 1831 Treaty is cited in support – to wit that the SNI is sovereign and distinct from the State of New York.

[9] As indicated, the Court of Appeals found that the constitutionality argument was not preserved for their review.

> *Wetzler, supra,* **193 A.D.2d, at 331, 603 N.Y.S.2d 910).** Indian Law § 6 and 25 U.S.C. § 233 similarly bar only the imposition of a tax on reservation land *(Snyder v. Wetzler, supra,* **193 A.D.2d, at 332-333, 603 N.Y.S.2d 910).**

235 A.D.2d 75, 85, 667 N.Y.S.2d 141, 147-48 (4th Dept. 1997) (emphasis added). *Bramhall* thus cites *Wetzler* at every turn, and in nearly identical manner concludes that Indian Law Section 6 and the Buffalo Creek Treaty only prohibit taxes upon land. Accordingly, *Bramhall* is equally unavailing as it also failed to apply the rules of construction for Indian treaties and statutes required by the Supreme Court. Both cases therefore beg for higher court review, and for the correct application of construction principals for statutory interruption.

B. Plaintiffs' Have Standing to Assert Rights Afforded under the Relevant Treaties

The State Defendants' assertion that Plaintiffs lack standing to assert rights guaranteed to them by both treaty and the law of New York is wholly without merit, and the cases cited by them in support of this contention are inapposite and easily distinguished.

In *Canadian St. Regis Band of Mohawk Indians v. State of N.Y.*, 573 F.Supp. 1530, 1532 - 1533 (N.D.N.Y. 1983), the individual tribal members brought an ejectment action in the form of a putative class action seeking to recover possession of land in northern New York State. In that action, the plaintiffs "specified that 'the lands in question are tribal lands ....'" *Id.* at 1533. In ruling that the plaintiffs lacked standing, the court noted that in an ejectment action "a plaintiff suing in ejectment must establish his *own* title to the land; he may not rely on the weakness of the defendant's title or the superiority of a third person's title ... This rule, preventing the assertion of a *jus tertii* —the better title of a third party—is in essence a rule of *standing* ... To the extent that the individual plaintiffs purport to maintain an ejectment action under federal common law ... the individual plaintiffs lack standing because they lack title." *Id.* at 1534. The court further held that to the extent the plaintiffs' claims were brought under the federal

Nonintercourse Act they also lacked standing because said Act provides no private cause of action. *Id.*

The dicta in *Canadian St. Regis Band of Mohawk Indians* cited by the State Defendants for the proposition that tribal members lack standing to enforce rights granted under treaties was likewise related to specific claims of the plaintiffs seeking to recover possession of real property in which they had held no title as title belonged to the tribe under the Treaty of Ghent. Here, Plaintiffs are not seeking recovery of real property of the tribe. Instead, they are seeking the protection afforded to not only SNI, but its members under the applicable treaties and the laws of New York, to be free from the regulatory yoke of New York State.

Similarly, the other two cases cited by the State Defendants, *Bess v. Spitzer*, 459 F.Supp.2d 191 (E.D.N.Y. 2013) and *New York v. Smith*, 952 F.Supp.2d 426 (E.D.N.Y. 2013) are inapposite because the purported holding that individual Indians lacked standing were limited to an interpretation of the rights and obligations granted under the 1664 Treaty of Fort Albany, which is not one of the treaties cited herein by Plaintiffs.

Under New York law "[t]he two-part test for the threshold legal requirement of standing to challenge governmental action requires, first, an injury-in-fact and, second, that the injury 'fall[s] within the zone of interests or concerns sought to be promoted or protected by the statutory provision.'" *Gym Door Repairs, Inc. v. New York City Dept. of Educ.*, 112 A.D.3d 1198, 1199 (3d Dep't 2013). Here, the Affidavit of Eric White, sworn to June 13, 2014, establishes that Plaintiff have sustained injuries-in-fact, that being the deprivation of their rights to be free from New York State's tax regulation per the treaties and laws of the State of New York. Likewise, said injury falls squarely within the zone of interest/concern protected by the treaties and statutes cited herein in support of the sovereignty of the SNI and its constituent tribal

members. Accordingly, there is no merit to the State Defendants' contention that Plaintiffs lack standing to assert rights granted to the SNI and its people.

C. The Lands of the Seneca Nation are Not Part of New York State

The State Defendants assert that Plaintiffs' Third Cause of Action lacks merit because "it proceeds from the erroneous contention that the SNI's reservation lands are not part of the State of New York." The State Defendants cite *New York State Dept. of Taxation and Finance v. Tyler Distribution Centers*, 225 A.D.2d 936 (3d Dep't 1996), *In Re HCI Distribution, Inc. v. New York State Police*, 110 A.D.3d 1297 (3d Dep't 2013); *Bramhall, supra*, and *Matter of 1750 Cases of Liquor*, 231 A.D.2d 947 (3d Dep't 1996) in support of this contention.

As discussed at length above, and in Plaintiffs' initial moving papers, the existence of the SNI as a separate and distinct political entity imbued with aspects of sovereignty not even conferred upon a state cannot be disputed. New York has long recognized that the Senecas "are not citizens of this State, and have no representative in our Legislature, we can claim no right to them...." *See* Documents and Official Reports (printed by Wm. Moody & Son, 1857) at pg. 89. They are instead "**to be regarded as a distinct and independent nation, having a constitution and representative government of their own.**" *Id.* (Emphasis added). *See also, Ransom v. St. Regis Mohawk Educ. & Community Fund*, 86 N.Y.2d 553, 553 (1995) ("in its capacity of a sovereign nation the Seneca Nation is not subservient to the orders and directions of the courts of New York State"). The above cases cited by the State Defendants fail to address the unique position afforded the SNI and its people. Thus, while the State Defendants contend that they have the right to tax transactions between Senecas and residents of New York State, those cases place the cart before the horse because it presupposes that New York is not otherwise precluded from seeking to interfere with the sovereign rights it has

recognized are possessed by the Senecas. Without belaboring the point, New York enacted legislation in 1857, now codified in Indian Law §6, which indicated that "[n]o taxes shall be assessed, ***for any purpose whatever,*** upon any Indian reservation in this state, so long as the land of such reservation shall remain the property of the nation, tribe or band occupying the same." (Emphasis added). This legislation is a direct product of the principles of sovereignty set forth in the treaties of 1831, 1838 and 1842, and is further supported by the legislative history and enactment of Indian Law §6.

Accordingly, as the SNI is not and never has been a part of the State of New York, the state's attempts to impose taxes upon goods that transfer title from the Senecas *on Seneca land* impermissibly impedes upon the sovereignty explicitly granted and historically recognized by both the Federal and the State government. In short, "for any purpose whatever" means what it says no matter what purpose of the tax, land or otherwise.

CONCLUSION

The State Defendants predicate their opposition to Plaintiffs' motion for a preliminary injunction and their respective cross motion to dismiss on the erroneous supposition that the Seneca Nation, and concomitantly its people, does not constitute a sovereign independent political body, and that the State is within its authority to unilaterally define such sovereignty to service its own ends. As set forth herein and in Plaintiffs' initial moving papers, in attempting to undercut the Plaintiffs' position, the State Defendants must ignore the historical context in which the sovereignty maintained by the Seneca Nation has been repeatedly reaffirmed both in treaty and under the laws of New York. The Court should therefore look past the latest attempt of the State to usurp and trample such sovereignty, and instead reaffirm the long held right of the SNI and its people to be free from the yoke of New York State regulation. Accordingly the Court

should grant the instant motion of Plaintiffs for a preliminary injunction enjoining enforcement of Tax Law § 471, and deny the State Defendants' cross-motion to dismiss.

Dated: February 12, 2015
Buffalo, New York

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EXHIBIT A - THE HISTORICAL EVOLUTION OF STATE AND LOCAL TAX SYSTEMS [126- 138]

The Historical Evolution of State and Local Tax Systems*

Edward T. Howe, *Siena College*

Donald J. Reeb, *State University of New York at Albany*

State and local government officials will struggle with increasingly difficult expenditure choices—particularly for education, corrections, welfare, and health programs—as federal support for domestic activities declines, discontent with burdensome taxes rises, frustration with mandated expenditures increases, and relatively slow economic growth unfolds. Thus, major state (i.e., income and sales) and local (i.e., property) tax bases will face intensified pressure. Federal adoption of a flat-rate income tax could possibly further undermine the efficacy of these tax bases if state and local income and property tax deductibility is eliminated.

Scholarly literature has afforded surprisingly little attention in recent decades to the origins of state and local tax systems—particularly those that were set up before this century. An appreciation of the historical forces governing tax-base evolution not only can assist in understanding the emergence of the present structure, but also can illuminate consideration of any proposed tax policy changes intended to augment future revenue requirements.

This article will explore the economic, political, and administrative determinants that have historically affected tax-base adoptions by the states—the major innovators. The main economic and political determinants have included (1) changes in economic activity, (2) economic crises, (3) increased revenue needs to meet existing and expanding public service demands, (4) political opportunities for tax-base adoptions, and (5) possibilities for "tax exporting." Many of these considerations will likely influence future evolutionary changes in state and local tax systems.

Table 1 shows the year that pioneering states adopted notable taxation measures enacted since 1805. Property, poll, license, and excise taxation began in the colonial era.

* Direct all correspondence to Edward T. Howe, Economics Department, Siena College, Loudonville, NY 12211. The authors wish to thank the editor and anonymous reviewers for their support and critically helpful comments. Editor's note: Reviewers were David Morgan, Ronald Fisher, and John Due.

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TABLE 1

Important Tax Adoptions by States

Tax	Year	State(s)
Specialized corporate		
On banks	1805	Georgia
On foreign insurance	1824	New York
Inheritance	1826	Pennsylvania
Income (modern)	1911	Wisconsin
Severance	1915	California
Selective sales		
On motor fuel	1919	Colorado, New Mexico, North Dakota, Oregon
On cigarettes	1921	Iowa
On distilled spirits	1933	Arizona, Colorado, Delaware, Indiana, Maryland, Massachusetts, New Jersey, New York, Rhode Island
General sales	1932	Mississippi

Sources: ACIR, 1994; Kendrick, 1951.

The Colonial Era

Colonial life principally revolved around agricultural activity, with increasing attention to commercial and artisan pursuits. Colonial governmental needs were very limited—mainly general administration, roads, and jails. The colonists generally disdained taxes and preferred fees, fines, and unremunerated labor services. When tax revenue needs were urgent, regional attitudes helped govern the mix of sources. The New England colonies primarily relied on property and poll taxes; the southern colonies, on customs duties and poll taxes (given that large landholders disliked property taxes); and the middle colonies, on property taxes, customs duties, and excises (Dewey, 1968:10).

Virginia, the earliest settlement (1607) levied the first known colonial tax—a poll (head) tax in 1619 (Sydenstricker, 1915:5). The ubiquitous poll tax, New York being the only exception, applied to free men regardless of occupation or the amount of property. Poll taxes on slaves, however, formed part of the personal property tax. Although the poll tax was simply stated and easily administered, it could be burdensome for those with relatively low incomes.

Virginia quickly recognized the possibility of taxing property by levying a tax on the estate of deceased persons still liable for unpaid poll taxes (Kendrick, 1951:99). The Massachusetts Bay Colony went further by imposing a tax directly on "estate" property in 1634. As forms of property

ownership widened, through expanded economic activity, the property tax moved beyond land to include buildings, livestock, and other enumerated tangible personal property items. Local administrators arbitrarily assessed all of the components to which differentiated tax rates applied for generating colonial and local government revenues (Jensen, 1931:27).

The Plymouth colonists supplemented the property tax with a "faculty" tax in 1643, which was later adopted by most of the other colonies (Kinsman, 1903:2). Generally, a fixed rate applied to the estimated earnings (i.e., wages, profits, and other income) of all members of a particular profession (Kinsman, 1903:16). Connecticut, Massachusetts, and South Carolina, especially, derived significant revenues from its use. Although the faculty tax was crudely applied, it recognized that compensations received outside of property holdings also represented tax-paying ability.

Customs duties were imposed on enumerated exports and imports that included tobacco, wheat, wood products, and spirits. Massachusetts, New York, South Carolina, and Virginia became more heavily dependent on these revenues as the colonial period progressed (Myers, 1970:18–20). License taxation began with levies on the beaver (1632) and fur trades (1641) in Massachusetts, but all of the colonies eventually extended them to occupational groups (e.g., tavernkeepers and peddlers). Finally, excise or consumption taxes were levied on both widely consumed (e.g., wine and spirits) and certain luxury goods (e.g., carriages and fruits).

Colonial tax payments were made in various forms—commodities, specie, land grants, and paper money—to local administrators, who often contended with tax evasion (Kendrick, 1951:108).

As the colonial period ended, the colonists had succeeded in developing several different tax bases, with provisions and enforcement procedures that were uneven within and among the colonies—characteristic features of future tax systems. The faculty tax, a harbinger of the income tax, was the most important innovation in tax-base development.

Reliance on the General Property Tax

Aside from the loss of revenues from customs duties brought on by the ratification of the U.S. Constitution in 1789, regional state tax systems remained much as they were in the colonial era. Oliver Wolcott surveyed the tax systems of the sixteen states in 1796, especially property tax usage, and observed that real property components (i.e., land and buildings) constituted most of the property tax base, supplemented by enumerated tangible (e.g., household possessions) and intangible (e.g., interest on loans) items. Arbitrary assessment procedures, different tax rates, and various exemptions still plagued local property tax administration. Four states (Delaware, Maryland, New York, and Rhode Island) nevertheless attempted to tax the "mass of property" (Wolcott, 1832:437).

Three of these states used the property tax only sporadically. Maryland (1756 and 1777–1785) levied it mainly to finance the Revolutionary War (Hanna, 1907:11–13). Pennsylvania (1785–1789), Delaware (1798–1804), and New York (1799–1802) used it either because other tax and nontax revenues were insufficient to cover expenses or to finance debt (Newcomer, 1917:31, 37, 54). Otherwise, license taxes, public land sales, and income from state investments generally provided needed revenue.

Poll tax usage tended to decline, except in North Carolina, during the early decades of nationhood because of equity considerations. Faculty tax experiments in New York (1778–?), New Hampshire (1719–1794), Maryland (1777–1780), Virginia (1777–1790), Delaware (1796–1800), Vermont (1778–1840), and Pennsylvania (1782–?) generated little revenue (Kinsman, 1903:9–14).

State expenditures, mainly for the same purposes as in the colonial era, were easily financed from these long-standing tax and nontax sources from 1789 to about 1820, when the era of "internal improvements" began. As agricultural and commercial markets expanded westward in this period, banks and insurance companies emerged to facilitate economic relations. These early corporate entities, considered legal persons, were subject to real property taxes in all states. Some states, inaugurating specialized corporate taxation, imposed taxes on various forms of intangible personalty. Bank capital stock taxes were levied in Georgia (1805), New Jersey (1810), and Massachusetts (1812), while Pennsylvania (1814) and Ohio (1815) enacted bank dividend taxes (Seligman, 1921:151). New York (1824) and New Jersey (1826) commenced insurance company taxation by taxing foreign (i.e., out-of-state) insurance premiums (Seligman, 1921:161).

Recognizing that the federal government had only limited interest in fostering "internal improvements" and that state tax revenues would be insufficient, many states borrowed heavily from about 1820 until the Panic of 1837 to finance large-scale, risky investments in canals, railroads, and banks in an effort to link scattered markets and boost prosperity. Unable to meet interest and principal payments on bonds as a result of the Panic of 1837, many states reluctantly raised property taxes, expanded special corporate and license taxes, and even experimented with inheritance and income taxes to avoid default (Taylor, 1951:376).

Virginia initiated taxation of transportation companies in 1842 with a tax on "dividends of profit" (Sydenstricker, 1915:32). Connecticut followed with a tax on nonresident owners of railroad stock in 1849 (State of Connecticut, 1913:23). Inheritance taxation began in Pennsylvania (1826) and Louisiana (1828) and later spread to Virginia (1844), Maryland (1845), North Carolina (1847), and Alabama (1848) (Kendrick, 1951:117). Restricted income taxation commenced in Pennsylvania (1840), Maryland (1842), Virginia (1843), Alabama (1843), and Florida (1845), but difficul-

ties with local administration of the tax (e.g., it was viewed as akin to intangible property taxation) constrained collections (Penniman and Heller, 1959:3–4).

Meanwhile, around 1820, several states initiated a significant reform in property taxation through a "general property" tax. The "general property" tax attempted to impose a uniform tax rate on all forms of property subject to taxation (uniformity and universality provisions) through constitutional or statutory means—reflecting the Jacksonian belief that the actual value of property best represented tax-paying ability (Benson et al., 1965:32–35). Unlike land, however, tangible and intangible personal property was mobile and became harder to locate for tax purposes (Fisher, 1987:108).

As the process of industrialization unfolded around mid-century, general property tax complaints became more widespread as critics argued that increasing amounts of household and business property (e.g., diverse forms of business intangible personalty such as stocks and bonds) were exempt from taxation, underreported, or underassessed. The results were inequitable tax burdens within and among property classes (i.e., residential, commercial, and industrial). One notable response was the initiation of state assessment of railroad, express, and telegraph property in the two decades after the Civil War, which often resulted in modified general property and other special taxes (Lutz, 1918:34).

Moving beyond state taxation of railroad dividends and stock, Wisconsin levied a gross receipts tax on railroads in 1854 (Kendrick, 1951:116). Special taxation of express and telegraph companies began when Virginia imposed gross receipts taxes on express companies in 1856 and Georgia levied a gross annual profits tax in 1858 (Report of the Commissioner of Corporations, 1915:58, 130). Ohio taxed the net receipts of express and telegraph companies in 1862 (Corporations Commissioner, 1911:32). Gross receipts and other specialized corporate taxes were extended to telephone, gas, and electric utilities in the last quarter of the nineteenth century.

The 1870 federal census first confirmed the preeminence of the state general property tax in state tax structures. Six states (Connecticut, Delaware, Maryland, Massachusetts, New Jersey, and Pennsylvania), however, obtained more than half of their total tax revenues from specialized corporate or license taxes (U.S. Bureau of the Census, 1872).

Following a period of restrictive state spending in the middle decades, associated with heavy debt burdens, state expenditures accelerated in the last two decades of the nineteenth century. These expenditures were mainly for health, corrections, social welfare, and educational activities as population expanded and concentrated in urban areas to meet the demands of a burgeoning industrial economy.

Permanent state tax commissions appeared after 1890 and were variously charged with collecting nonproperty taxes, equalizing the burden of the state property tax, assessing public utilities, and supervising local assessors (Kendrick, 1951:121).

Approximately one third of the states derived more than 50 percent of their total tax revenues from nongeneral property taxes by 1902. Most of these states had gradually embraced a "separation of revenue sources" movement that relegated the general property tax to local usage. A portion of these state-administered special taxes was often returned to localities through state aid or tax-sharing payments (Hutchinson, 1931:14).

New York, which illustrates the extended reach of specialized taxation in the late nineteenth century, levied a franchise capital stock tax on certain corporations and joint-stock companies and taxes on insurance premiums in 1880. Additional taxes were placed on collateral heirs (1885), business organizations (1886), liquor (1896), and gross earnings and excess dividends of certain public utilities in 1899 (Newcomer, 1917:59–64).

State Income and Sales Taxes

The continued failure to locate intangibles for taxation purposes near the turn of the twentieth century led many states to adopt classified property taxes (i.e., lower rates on intangibles than on real property). Other states attempted to reach intangibles through income taxation. The 1911 Wisconsin income tax law, the first modern statute, levied state-administered rates on individuals and corporations. Corporations were required to file "information returns" that detailed wage payments for individual workers (Penniman, 1980:9). Income taxes were quickly adopted in Mississippi (1912), Connecticut (1915), Virginia (1915), Massachusetts (1916), Delaware (1917), Missouri (1917), Montana (1917), North Carolina (1919), North Dakota (1919), and New York (1919). Rising property tax rates in the 1920s, significant property tax delinquency in the 1930s, and further efforts to locate intangibles for taxation prompted more adoptions; by 1940 thirty-three states had an individual and/or corporate income tax (Blakey and Johnson, 1941:131). In 1991, Connecticut became the forty-first state to tax wage and salary income.

State income taxes accelerated the movement toward less dependence on the real general property tax. A majority of states received more than 50 percent of their total tax revenue from specialized corporate, special property, mortgage, inheritance, poll, business license, and income taxes for the first time in 1924 (U.S. Bureau of the Census, 1926:72–75).

The state income tax became a major tax source in succeeding decades by generating substantial amounts of revenue in periods of inflation and economic growth (i.e., it was a relatively elastic revenue source), with either modestly flat or progressive rates. The adoption of withholding payments

(after World War II) and conformity with federal income tax provisions greatly aided state administration.

Excise taxes, traceable to the colonial era, were further applied to motor fuels, cigarettes, and liquor in the early decades of the twentieth century. Motor fuel taxation began in 1919 (in Colorado, New Mexico, North Dakota, and Oregon) and spread to all states within ten years. Motor fuel taxes dominated total state tax revenues from 1927 to 1944, before they were superseded by the general retail sales tax. Iowa pioneered the cigarette tax in 1921, which forty-three states had adopted by 1950. Thirty states enacted distilled spirits taxes from 1933 to 1940 after the end of Prohibition (Advisory Commission on Intergovernmental Relations [ACIR], 1994).

Although revenue from motor fuel taxes increased, corporate income and property tax receipts significantly declined in the early years of the Great Depression. Consequently, state governments desperately needed a new tax source to finance their expenditures, provide aid to localities (especially for social welfare), and participate in federal aid programs. The general retail sales tax, with its broad base and relatively low yield, proved a successful experiment. Mississippi pioneered this tax in 1932, and twenty-one states were using it by 1938. Additional enactments after World War II financed mainly educational programs, as states became reluctant to raise income tax rates (Due and Mikesell, 1994:2). Critics have argued that its regressiveness (i.e., it claims a disproportionate share of the spending of lower-income groups), relatively inelastic nature (i.e., its revenue yield lags behind economic growth), and applicability mainly to goods has tended to offset its revenue-raising capability.

Changing economic conditions and improved administrative capability may create possibilities for new state tax bases, but favorable political opportunities are also necessary for tax adoptions. A recent empirical study (Berry and Berry, 1992:715) contends that twentieth-century state tax adoptions have generally resulted from a fiscal crisis, a political willingness to enact a tax in the year immediately after an election, or an inclination to "copycat" other states. They find little empirical support for the hypotheses that tax adoptions are more likely to occur in states with a high level of economic development (i.e., greater wealth or urbanization) or with a government unified politically (i.e., the same political party controls the governorship and the legislature).

Recent empirical evidence shows that "tax exporting" (i.e., shifting part of a state's tax burden to nonresidents) may also influence state tax structure choices. States tend to shift the burden of state income and business property taxes when large corporate tax bases are owned by nonresidents (Morgan and Mutti, 1985:195–199). Further, states with significant tourism and natural resource industries tend to rely more on license and severance taxes, respectively, than on income and general sales taxes (Gade and Adkins, 1990:44–45). Severance taxes—exactions based on the value

or quantity of natural resources removed from land or water—are relatively important in only a few states. Alaska, Louisiana, Montana, New Mexico, North Dakota, and Wyoming received at least 10 percent of their total tax revenue from these taxes in 1992 (U.S. Bureau of the Census, 1994).

Local Tax Revenue Diversification

The property tax historically has been the main source of local government tax revenue. Most of the relative decline since the 1930s in the property tax share of total local government tax revenue nationally has resulted from greater reliance on local general sales and income taxes, especially for counties and large cities.

Local general sales taxes, first adopted in New York City in 1934 and New Orleans in 1936, resulted from rising discontent over property tax increases accentuated by foreclosures. By 1994, thirty-three states had authorized local sales tax options, which were state-administered in twenty-six states, locally administered in three states, and both state and locally administered in four states (Due and Mikesell, 1994:279).

Local income taxation first emerged in Philadelphia (1938), St. Louis (1948), Cincinnati (1954), Pittsburgh (1954), and Detroit (1962). Income taxes were being used by 3,853 local jurisdictions in 1992, particularly in Pennsylvania and Ohio (ACIR, 1994:77).

Other General Revenues

State and local governments have also derived revenues from "charges and miscellaneous general revenues," according to federal government statisticians. Since 1790, state financial support has included revenue from public land sales, investment income, bank dividends, premiums from bank charters, loan payments, war claims, earnings from prison-made goods, tolls, sales of public documents, fees, fines, forfeitures, lottery sales, and numerous smaller receipts. New York and Pennsylvania, especially averse to taxation, received one half or more of their general revenue from such sources in the first decades of nationhood. In more recent decades, education and hospital charges and interest earnings have become increasingly important in many states.

Intergovernmental assistance payments—federal aid to states and localities and state aid to local units—rose significantly in the 1930s and again in the 1960s and the 1970s, but inflation-adjusted growth in overall federal aid payments has tended to fall since 1978. Most federal assistance is currently geared toward health (especially Medicaid), income security, education, and highways and often requires further state contributions (Raimondo, 1992:234).

Some Lessons from the Past

State government tax-base innovations, and subsequent court decisions and statutory changes, have traditionally reflected the political willingness and administrative capability to exploit market-induced economic activity. As the dominant nature of market activity has changed from agricultural to industrial to service pursuits, the states have had to rely mainly on regressive tax sources (except for modestly progressive state income taxes), which have often limited their ability to meet increased expenditure demands.

Significant changes in economic activity have historically generated potentially taxable components for major tax bases (e.g., tangible and intangible personal property and services that could be located under the general sales tax). Political willingness and state administrative capability consequently determined the extent to which these components were to be exploited. For example, the general property tax attempted, but failed, to embrace numerous forms of personalty. Enhanced state administrative capability eventually made possible the development of specialized corporate, income, and general sales taxation as relatively effective alternatives to personal property taxation—perhaps the most important general property tax reforms (Reeb and Tomson, 1985:476). Major tax bases, however, have never embraced all existing possibilities either because some sources have been legislatively excluded. The property tax has historically excluded religious, governmental, and not-for-profit organizations. The general sales tax has not reached all existing service activities in most states.

The existence of a major tax base, however, has not guaranteed its usage. The state property tax was not universally employed in the early decades of nationhood. Currently, seven states (Alaska, Florida, Nevada, South Dakota, Texas, Washington, and Wyoming) do not use an individual income tax. Five states (Alaska, Delaware, Montana, New Hampshire, and Oregon) do not employ a general retail sales tax (ACIR, 1994:34).

General property, income, motor fuel, and general retail sales taxes have been the only major broad-based exactions since 1789. The general retail sales tax, enacted over sixty years ago, was the last major innovation. The failure to develop a major tax source since the Great Depression is an unheralded constraint.

The federal government, adhering to a principle of neutrality, has generally avoided efforts to assist states in bolstering their revenues from existing tax sources. State inheritance taxation, however, was strengthened by allowing a partial tax credit against the federal estate tax in the 1920s (Shannon, 1969:107). Itemized deductions under the federal individual income tax for allowable state and local income and property taxes have long encouraged reliance on those tax sources. More recently, state

enforcement of a 1978 federal law prohibiting cigarette "bootlegging" has greatly reduced revenue losses from illegal cigarette sales (Fisher, 1996: 401–402). Barring a voluntary agreement among the states, future state sales tax revenue would greatly benefit from federal legislation permitting state-use taxation of national sales by mail-order firms.

State and local tax revenues over the last half century have generally expanded incrementally through a variety of initiatives that are indicative of future changes. These past actions have mainly included limited base-broadening activity, raising existing tax rates, and some tax diversification efforts.

Future Tax Policy Developments

State and local tax systems have never fully adapted to an economy dominated by services, so broadening the base of sales and income taxes offers considerable potential for future revenue-raising efforts.

Base-broadening activity can forestall tax rate increases, ease compliance problems, simplify tax administration, improve fairness to taxpayers, and enhance the elasticity of the tax system to take advantage of economic growth (Gold, 1990:111–112). The greatest potential gains in sales tax revenue appear to be in health, professional, and business-related services that are currently precluded by political considerations (Due and Mikesell, 1994:92). Broadened sales taxation of public utility, repair, and personal services, plus further taxation of admissions and amusements, appears more politically feasible (National Conference of State Legislatures and National Governors' Association [NCSL-NGA], 1993:74). Increased attention is also expected to focus on sports betting, automatic teller machines, security and maintenance services, and wireless communications. Hawaii, New Mexico, and South Dakota already have extensive general sales taxation of consumer and business services.

Increased sales taxation of interstate business services will depend on further state cooperative efforts. For example, a particular need for cooperation exists where a service, such as accounting or on-line computer services, originating in one state is provided in several states and tax apportionment becomes difficult (NCSL-NGA, 1993:73).

Future state personal income tax reforms geared toward revenue growth will likely include repealing or modifying allowed deductions. States that have already repealed various deductions include Kansas (1992) and Kentucky (1990)—federal income taxes; Colorado (1992) and Mississippi (1992)—state income taxes; and New Jersey (1990)—property taxes (Gold and McCormick, 1994:11).

Income tax revenues from multistate corporations could be increased in several ways: adoption of a "combined reporting" basis (i.e., inclusion of

all corporate subsidiaries of a firm) for apportionment of corporate income tax payments; revision of the components used in an apportionment formula (e.g., to include a "market-based" factor to allow states that provide services to out-of-state firms to tax part of their net income); and better coordination by states of their corporate tax policies (NCSL-NGA, 1993: 37, 43).

States will continue to allow local option sales taxes that often specify how the proceeds are to be used. The intent is to alleviate pressure on the property tax, keep overall tax rates lower, and create a somewhat more elastic revenue structure. Kansas (1992) now allows counties and cities to impose a sales tax for health programs; Missouri (1993) permits counties to use the proceeds for emergency 911 numbers; and Washington (1993) allows counties to use the revenue for criminal justice programs. Chicago and Philadelphia enacted a sales tax in 1991 (Gold and Ritchie, 1994:19).

States could also augment local revenues by changing their shared-tax formulas. In 1993, Missouri and Montana provided localities with a greater amount of shared revenue from a motor fuel tax (Gold and Ritchie, 1994: 33–34).

A value-added business tax (VAT) has long been suggested as a new state tax base, but states have shown limited interest. A relatively low tax rate would be applicable to all businesses at each stage in the production and distribution of goods and services. Advocates say this could generate substantial revenue, resolve several corporate taxation apportionment problems, replace many existing business taxes, and reach most service activity. Critics argue that interstate administrative complications could be very serious because of any differences in coverage, exemptions, and rates among the states. Michigan, the only state with a variation of VAT, has had its "single business tax" since 1975. Alabama, Florida, Tennessee, and Texas have recently debated, but not enacted, some form of VAT (Brown, 1991:1).

Finally, state and local charges and miscellaneous general revenues will continue to expand and supplement tax sources. At the state level, there has been widespread application of environmental fees affecting solid and hazardous wastes and containers. At the local level, "impact fees" have been imposed on developers to help defray infrastructure expenditures. In some localities, charges have been levied for fire protection and ambulance usage (Downing, 1992: 523–525).

One of the fastest growing components of miscellaneous general revenue in recent years has been legalization of various types of gambling—lottery sales, parimutuel offtrack betting, casinos, bingo, and video machines (Katz, 1991). Nevertheless, gambling revenues will remain a minor revenue source for most states. SSQ

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HISTORY OF THE NEW YORK PROPERTY TAX.

I.

1623-1664.

It is in vain that we look for a pronounced fiscal policy in New Netherland. A glance at the economic condition of the Hudson valley during the half century ending with the English invasion in 1664, is the best explanation of this absence of a well regulated tax system. The country open to settlement by the Dutch could offer little to an emigrant, however attractively the pamphlets of the day described its fruitful soil, on which sugar, indigo, cotton, cinnamon and other southern products could be raised in abundance, ("overvloedigh"), its beautiful rivers and navigable waters, its trade and fisheries.[1] Like their successors in our Western Territories, the colonial enthusiasts of those days drew on their imagination as well as their pocket book, in order to induce settlers to emigrate to the New World. The Dutch West India Company, or the city Amsterdam,[2] or some wealthy Dutchman, as the case might be, paid the passage money of the emigrants, provided them with homes in some suitable district along the Hudson, fortified the settlements and offered

[1]Cf. Beschrijvinge von Nieuw Nederlant, etc. Vertoogh van Nieu-Neder-Land, etc., Sommer Verhael van Amerikansche Voyagie, etc.

[2]Conditien der Stadt Amsterdam, etc.

the settlers farming utensils, seed and clothing for one year at Dutch prices, and beside all this liberality offered them immunity from every form of taxation, direct and indirect, during a term of ten years.[1]

Similar exemptions were offered by the city of Amsterdam in 1656 to any would-be settlers on the Delaware River.[2]

The character of the Dutch settlements was largely influenced by the institution of patroonship.[3] Many rich Dutch merchants availed themselves of the chance of establishing themselves as patroons or feudal lords in this new country, and founded an American land aristocracy which became a leading factor in the history of New York.[4] The right of preëmption, the monopoly of mills, quarter sales, license to fish and hunt, the power of the patroon to administer civil and criminal justice, the appointment by him of local officers and magistrates, indeed a modified system of feudal land tenure was established, only gradually to disappear. The exaction of quit rents (or ground rents) dating from this time led to the troubles of 1836-46.[5]

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[1] *Loketkas, W. I. Co., No.* 30; *Vreyheden By de Vergaderinghe van de negenthiene van de Geoctroyeerde West Indische Compagnie*, 1630. The Company promised "de Coloniers van de Patroonen inden tijdt van thien Jaren niet te beswaren met Convoy, Pol, Accijs, Imposten, ofte eenighe andere contributien: ende nae d'expiratie van de selve thien jaren, ten hooghsten met sulcken Convoy als de goederen hier te Lande tegenvoordigh beswaert sijn."

[2] *Laws and Ordinances* N. Nethd, p. 243.

[3] Brodhead, *History N. Y.*, I. p. 144 ff. *W. Ind. Saecken*, folio 44, 488, 550.

[4] Doc's *Col. History N. Y.* I p. 4; Elting, Dutch Village Communities.

[5] Cheyney, *Anti-Rent Agitation in the State of N. Y.* 1836-46. Brodhead, *History N. Y.* I. p. 194-200.

This system of quit rents, which was characteristic of the lands leased directly by the government to settlers, as well as of lands in the possession of the patroons, may be considered the beginning of a land tax. Its relation to the later property tax will be touched upon below.

The colonial revenues of New Netherland were almost exclusively derived from two sources, from duties and from excise.

The favorable situation of New Amsterdam was soon recognized by the Dutch.[1] Immediately upon its settlement it became an important trading centre. From the Island of Manhattan, goods imported from Holland were distributed along the Hudson and through the interior. This was especially the case with so-called "Indian goods." Furthermore, the town lay in the direct line of commerce between New England and the settlements in Virginia, the Colonial navigators preferring the quiet waters of Long Island Sound to the open sea route to the south of that Island. New Amsterdam became the centre of export trade, the chief articles of export remaining for a long time tobacco and furs, especially beaver skins. The importance of the latter article of export is suggested by the beavers in the seal of New Amsterdam, which are retained in the municipal coat of arms of New York to this day, and by the fact that in the terms of capitulation, dated March 12th, 1664, the yearly payment of forty beaver skins to the Duke of York was stipulated.[2]

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[1] Van der Donck, Beschrijvinge van Nieuw Nederlant, p. 9.

[2] Doc'y *History N. Y.* II, p. 396; Laws and Ordinances of the city of N. Y., (Wm. Bradford) 1707, Charter of 1686. Brodhead, *History N. Y.* 11, Appendix.

During the seven years, 1624-1630, 42,987 beaver skins and 4,890 other skins, to the value of $140,000 (355,692 guilders) were exported from New Netherland.[1]

The favorable situation of New Amsterdam, the key to the Dutch possessions in North America, naturally led to the introduction of import, export and transit duties, which the West India Company, thanks to its exclusive right of transportation, found comparatively little difficulty in collecting. The duties never seem to have risen above 15 per cent. *ad valorem.*[2]

Occasionally we hear of complaints, as in 1658, against the heavy export duty on tobacco.[3] Reference to defrauding importers is made in 1649,[4] and in 1661 a schepen of New Amsterdam is convicted of smuggling. The export duty was frequently evaded by transporting goods to Virginia or New England, and exporting them thence to England.[5] The transit duties on goods going up the Hudson were also at times evaded.[6]

The loss of revenue on this account may have been one of the causes which led to the introduction of an indirect tax on the consumption of beer, wine and liquor.

This second tax which naturally suggested itself to the Dutch authorities was intended to reach the

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[1] Valentine's *Manual for* 1851, p. 368.

[2] Brodhead, *History N. Y.* I, pp. 288, 312, 394; Doc's *Col. History N. Y.* I, p. 429; Dutch Records, City Hall, July 23, 1647.

[3] Dutch Records, City Hall, Sept. 19, 1658.

[4] Dutch Records, City Hall.

[5] Brodhead, *History N. Y.* I, p. 466 (1647).

[6] Records Common Council, City Hall, Oct. 16, 1669.

producer, and was comparatively easy to collect, as distilleries, breweries and winepressers existed in great numbers.[1]

In 1650 the revenue of the Colony, it is stated by Secretary Van Tienhoven,[2] was derived from an 8 per cent. export duty on beaver skins, an excise on beer of $1.20 (3 guilders) per tun, first imposed in 1644, and an excise on wine of 2 cents (1 stiver) per can, first imposed in 1647.

Frequent complaints are made about the heavy taxes, and about Governor Stuyvesant's being "so much given to confiscating."[3] His wine excise, "beside still other intolerable burdens," are mentioned. A letter to the Earl of Clarendon in 1661[4] speaks of "unheard of excise, not only on all goods brought to them or caryed from them, but also on what they eate and drinke."

One gains the impression, in looking through the numerous remonstrances regarding the wretched Home government (*de quade regering*),[5] that the Colonists were justified in complaining about heavy taxes, and in demanding "exemption from duties, tenths and taxes, which at the first beginning are disadvantageous and oppressive until the country becomes populous and somewhat firmly established.[6]

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[1] Brodhead, *Hist'y N. Y.*, I, pp. 394, 467. Kort Verhael van *Nieuw Nederlant*, etc., p. 3. Vertoogh van *Nieuw-Nederland*, etc., pp. 5, 60.

[2] Doc's *Col. Hist. N. Y.*, I, 429. Nov. 29, 1650.

[3] Vertoogh van *Nieuw-Neder-Land*, etc., pp. 38, 60.

[4] Collections N. Y. Hist. Society for 1869. Clarendon Papers—Maverick to the Earl of Clarendon. Cf. Loketkas, *W. Ind. Co.* No. 30.

[5] Vertoogh van *Nieuw Neder-Land*, p. 38. Loketkas, *W. Ind. Co.* No. 30.

[6] Loketkas, *W. Ind. Co.* No. 30. Petition dated July 26, 1649. Doc's *Col. Hist. N. Y.*, I, 259. Petition dated Oct. 13, 1649.

As early as 1653 the city finances of New Amsterdam were in a shocking condition.[1] There were no means of paying a debt of $360 (900 guilders); even the Turnkey was asked to wait for his salary a little, "till something should come into the treasury."[2]

In a letter to the Home governmment of 1656 the city authorities of New Amsterdam call attention to the low condition of the municipal finances.[3] "An official remonstrance from the Home government" had failed to relieve matters.[4] The citizens were evidently unwilling if not unable to pay taxes.

With envious eyes the Dutch settlers looked toward New England. There, they said, was a populous, rich, prosperous and flourishing district carrying on trade with the whole world, while New Netherland, though much more favorably situated, was desolate, ("woest"), impoverished, endangered, yes, ruined by a wretched government.[5]

The adoption of the New England tax system was desired by many. There, according to Secretary Von Tienhoven's report in 1650,[6] "all the property and means of the people, as well of the highest as the lowest, were appraised by the magistrates and taxed according to each man's ability for the payment of the governor, deputy governor, magistrates,

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[1] Dutch Records, City Hall, Dec. 8, 1653.

[2] *Ib.*, Dec. 12, 1659.

[3] *Ib.*, Sept. 11, 1656.

[4] *Ib.*. June 12, 1654. Proposition gadaen door den Dr. Genl. en Hooge Rad.

[5] Loketkas, *W. Ind. Co.* No. 25. "Aen de Hoogh Moogende Heeren de Heeren Staten Generael der Vereenigde Neederlanden. (De Gecommitteerde uijt Nieuw Nederlant. Feb. 7, 1650.")

[6] Doc's *Col. Hist'y N. Y.*, I, p. 364. Cf. Peters, T. McC., *Town Government in Mass.*, Bay Colony, middle of seventeenth century. N. Y., 1890.

secretaries, marshals, constables, military officers, ministers and schoolmasters, for the erection of churches, schoolhouses and town edifices, for the repairs of bridges, for the erection of ordinaries for travellers of the University in Boston, for the support of the General Assembly and of the Court."

The low financial condition of the Colony during the governorship of Pieter Stuyvesant led to the extension of the tax system in this direction, that is to the addition of direct taxes to the indirect taxes already existing. In 1654 the officials in New Amsterdam are advised by the Home government to find ways and means to raise money. They act accordingly, and decide to raise a tax on real estate ("taxatie van vaste goederen.")[1] Pieter Stuyvesant seems to have been the moving spirit in this new development. Early in 1654 he and his Council adopt a resolution,[2] which sets forth that they "have not been able to find a better expedient or measure aside from the duties on merchandise, than to impose an honest and fair tax upon real property, as land, houses or lots, and milch cows or draught oxen." Then follow the proposed rates. The Home government gladly approves of the plan, increases the proposed rates and calls the tax a special war tax.[3] The imposition of this tax must have been effective, for a year later the Burgermeester and Schepen of New Amsterdam receive a letter, dated May 26, 1655, from the Home government,[4] which after addressing them as "Honorable, Pious, Dear, Trusty Subjects,"

[1] Dutch Records, City Hall, August 2 and 10, 1654; Oct. 1, 1655. Doc's *Col. Hist'y N. Y.*, XIV, p. 283.

[2] Doc's *Col. Hist'y N. Y.*, XIV, p. 270.

[3] Brodhead, *Hist'y N. Y.*, I, pp. 589-90.

[4] Duch Records, City Hall, August 17, 1655.

announces the establishment of a yearly municipal tax of twenty cents (ten stivers) on each morgen of land, (about twenty-seven cents an acre,) thirty-nine cents (twenty stivers) apiece on horned cattle, and five per cent. on the rent of all houses. Three years later it was decided to assess and tax vacant lots in New Amsterdam the fifteenth penny (six-and-a-half per cent.) until built upon. Payment in kind was as usual allowed.[1] In 1661 the authorities of Esopus are empowered to raise one Rix dollar (presumably equal to three guilders or $1.20) from every morgen (three-quarters of an acre) of land, or about $1.60 from every acre.[2]

This increase of taxes aroused great indignation.[3] Indeed the wording of the laws plainly shows that the introduction of direct taxes was intended as an extraordinary measure to supplement the revenue from indirect taxes during the financial distress of the '50's and '60's of the seventeenth century,[4] which made the English invasion of 1664 and consequent change of government a blessing to the Colony.

In announcing the surrender of the Colony to the English, the Colonial authorities give a parting shot at the Home government. They write:[5] "We, your Honors loyal, sorrowful and desolate subjects, can-

[1]Laws and Ordinances of New Netherland, p. 325 (Jan'y 15, 1658), N. Y. Col. MSS., VIII, 645; XVI, 126.

[2]Laws and Ordinances of New Netherland, p. 413 (Nov. 12, 1661), N. Y. Col. MSS., IX, 883.

[3]Doc's *Col. Hist'y N. Y.*, II, p. 151 (1653.)

[4]Laws and Ordinances New Netherland, page 197 (Oct. 11, 1655), p. 184 (Sept. 2, 1654). N. Y. Col. MSS., VI, 97; V, 361.

[5]Dutch Records, City Hall, Sept. 16, 1664. Letter addressed to "Groot, Achtbr and voorsienige Heeren, de Heeren Bewintheberen van de E. Westindische Compagnie ter Camere Amsterdam."

not neglect nor keep from relating the event, which through God's pleasure thus unexpectedly happened to us *in consequence of your Honors neglect and forgetfulness of your promise.*" Two months later they address a respectful letter to the Duke of York,[1] but do not fail to refer to the Colony's having been impoverished for many years by heavy taxes.

The Dutch West India Company had proved a failure, at least in its attempt to found a strong commonwealth in America. Its primary object had been to develop trade between Holland and America. In this it had been much harassed by the Spanish wars, and aside from New Netherland, its colonies in America amounted to very little. The trade between New Netherland and the quasi-Dutch possessions in South America, particularly in Brazil, of which so much had been expected,[2] never reached any importance, and Pieter Stuyvesant's high-sounding title of "Director General of New Netherland, Curaçao, etc."[3] was little more than a name.

The West India Company displayed too mercenary and selfish a spirit, which did not favor the development of a healthy commonwealth. "The provincial agents generally displayed more devotion to the interests of the directors in Holland than to those of the community over which they were placed."[4] The administrative policy of England

[1] Dutch Records, City Hall, Nov. 22, 1664. Letter addressed to "Groot, Achtbr and voorsienige Heeren, de Heeren Bewintheberen van de E. Westindische Compagnie ter Camere Amsterdam."

[2] *W. Ind. Saecken*, folio 324, 334, 343.

[3] Dutch Records, City Hall, March 10, 1648.

[4] Brodhead, *History N. Y.* I, p. 746. Cf. Jameson, Willem Usselinx, also Adam Smith's criticism in his *Wealth of Nations*, Book IV. chap. VII.

was better suited to the needs of the Colony, as experience proved.

It was stated above that the ordinary revenue of New Netherland was derived from indirect taxes and that direct taxes were only resorted to as an unusual measure in time of distress. This conclusion seems to be disproved by numerous references to a property tax as existing on Long Island.

As early as 1654 the "Director General and Supreme Council authorize the schepen and magistrate of the town of Midwout, at their request, to levy six guilders ($2.40) on each lot situate within the district of said town,"[1] and three years later a tax of 300 guilders ($120) was levied on the town of Breuckelen. The officials write:[2] "We, to raise said sum in the easiest manner, assessed and taxed each person as is hereunder more fully set forth, all according to our conscience and opinion in easy circumstances and well off." The Court messenger was authorized to notify each taxpayer of his assessment and to collect the tax, payable in two instalments in country produce. At the same time twelve inhabitants of Walebocht were taxed 88 guilders ($35), and seven inhabitants of Gouwanus 60 guilders ($24).

Complete assessment lists of many Long Island towns, dated 1675-83 and signed by the proper officials, are in existence,[3] which force us to believe that a well developed property tax was in force on Long Island before the English invasion of 1664.

[1] Laws and Ordinances New Netherland, p. 184, (Sept. 2, 1654), N. Y. Col. MSS. V, 361.

[2] Laws and Ordinances New Netherland, p. 304, (Feb. 13, 1657), N. Y. Col. MSS. VIII, 463.

[3] Doc's *Col. History N. Y.*, II, p. 700; XIV, p. 736; Doc. *History N. Y.* II, p. 91ff, p. 441 ff.

These towns are East Hampton, Huntington, Southold, Flushing, Newtowne, Brookhaven, Breuckelen, Boswyck, New Utrecht, Amsfortt, Middelwout, Bushwyck, Gravesend, Jamaica, Hampsted, Oyster Baye, Smith's Towne, Southampton and New Orange.

As an individual assessment we cite that of Richard Browne, of Southold, dated Sept. 16, 1675.[1] He was assessed at 4 heads, £72; 50 acres of land, £50; 8 oxen, £48; 10 cows, £50; 6 three-year-olds, £24; 7 two-year-olds, £17.10; 5 yearlings, £7.10; 6 horses, £72; 24 shepe, £8; 10 swine, £10; 1 year old 1 yearling, £11; total £370=$1,790.80.

The introduction of a property tax on Long Island at a time when this tax was almost unknown to the Dutch settlers on the continent is easily explained when we remember that Long Island had never been more than nominally under Dutch jurisdiction.[2] The eastern end of the island was almost entirely settled by the English from New England, Southampton from Lynn, Mass. in 1640, Newtown and Gravesend from Massachusetts, Easthampton in 1653. New Haven, Conn., had been a colonizing centre, whence agricultural settlers had been sent across Long Island Sound.[3] The influence of the English had always predominated on the island; indeed, they had claimed the island and were practically in possession of it as early as 1656, as is evidenced by Von der Donck's expression:[4] "Long Island has almost

[1] Brodhead, *History N. Y.* II, p. 257; Doc's *History N. Y.* II, p. 448. The currency of New York was at this time about seven-tenths the value of English money.

[2] Johnston, Connecticut, pp. 137-8; Roberts, New York, I, p. 89; Hildreth, *History U. S.* I, pp. 146, 416-17, 434, 438, 440, 443.

[3] Brodhead, *History N. Y.* I, p. 670.

[4] Von der Donck, Beschrijvinge van Nieuw Nederlant, p. 7, "het (Lange) Eylandt is meest alle by verscheyde middelen van d'Engelsche gheincorporiert." An anonymous pamphlet of 1662 contains

entirely, by one means or another, been incorporated by the English."

While the mutual boundaries of their possessions were in dispute, the English and Dutch encroached very largely on each other's dominions. On the one hand we hear of "encroaching neighbors," of the invasion of the English and of the English villages on Long Island; on the other hand of Dutch claims to the whole of Connecticut and of Dutch intruders in that colony.[1]

The Puritan colonists on Long Island naturally retained the form of taxation to which they had been accustomed in New England, and introduced the customary general property tax.

That the Dutch should not have hit upon the same form of taxation finds a partial explanation in the history of taxation in Holland.[2]

If the Dutch settlers looked to their mother country for models of tax forms to introduce into their American possessions, as they naturally would, they found numerous types of indirect taxes to choose from, but no tax that bore any resemblance to a general property tax. The Dutch developed every form of indirect taxes to raise the revenue necessary to carry on their war of independence. The importation and consumption of wine, beer and liquor was heavily taxed after about 1580. In the same way many articles of luxury as well as necessity were

a similar expression: "dat hebben de Engelzen ook al op weenigh na in't bezit." Kort Verhael van Nieuw Nederlant, p. 18. Cf. Vertoogh von Nieuw-Neder-Land, p. 20, ss.

[1] Dutch Records, City Hall, 1653-4, Oct. 22, 1663, Feb. 11, 1664. Vertoogh van Nieuw-Neder-Land, pp. 21, 29; Bancroft, *History U. S.* I, p. 494; Brodhead, *History N. Y.*, I, p. 519.

[2] Cf. Laspeyres, *Volkswirthschaftliche Anschauungen d. Niederländer;* Engels, *De Belastingen der Republiek;* and Rogers, *Economic Interpretation of History.*

taxed either by an import or an excise duty. Direct taxes played an unimportant role in Holland during this period.

In the establishment of their tax system, the New England settlers followed the entirely different practice of direct taxation in their mother country, and adopted as their chief tax one which in principle had existed in England since the Norman conquest.[1]

The danengeld of the eleventh century, the scutage of the twelfth and the subsidies of later centuries were essentially taxes on real property, while the fifteenths, instituted by Henry II in 1165 to cover the expenses of his crusades, bear the character of taxes on personal property. This system of taxing the aggregate property of all citizens, personal as well as real, existed till far into the seventeenth century, the subsidies under the name of "monthly assessments" at the time of Cromwell, the last one being raised by Charles II in 1673. The introduction of the land tax gave the development of English taxation a new direction.

The whole development is thus summed up by Vocke:[2]

"English taxes under the feudal *régime* were proportionate to the lands held in fee simple, that is, were real property taxes. Personal property taxes came into vogue as soon as the industrial and commercial classes reached importance, while land taxes were introduced with the decline of the feudal system and consequent changes in land tenure and land values. Income taxes could only be introduced after the complete downfall of feudalism, and when the modern ideas about duties toward the state demanded a contribution from all citizens for a common purpose."

[1] Dowell, *History Taxation* III, pp. 67-71: I, pp. 38-162, 227, 238; Sinclair, *History Pub. Rev.* I, p. 43, ff. 87; Vocke, *Steuern d. brit. Reichs*, ss. 479 ss.; Wagner *Finanzw.* III, § § 70-75, ss. 162-172; § § 81-82, ss. 182-4.

[2] p. 505.

It is interesting to observe how closely some of the early English assessment laws resemble those of New York of a few centuries later. As early as 1188, at the time of the celebrated Saladin tythe, the method of collecting this general property tax is minutely prescribed. We see in its provisions the prototype of the New York assessment laws. The distinction between real and personal property, the exemption of armor, of clerical paraphernalia and of precious stones, presumably because of the difficulty of reaching the latter, are the peculiar features of the law. "And if any one shall have given less than he ought to in the opinion of the officials, four or six loyal men of the parish shall be chosen; being put under oath, these shall say how much more the delinquent should have paid, and he shall be obliged to pay this sum."[1] This is an excellent example of the transition stage from a voluntary to an enforced contribution or tax, of which more below.

The assessment laws of the fourteenth century are more explicit.[2] The election of assessors in every city,

[1]Dowell, *History Taxation* I, Appendix I, p. 227; "Uniusquisque decimam reddituum et mobilium suorum in eleemosynam dabit hoc anno, exceptis armis et equis et vestibus militum, exceptis similiter equis et libris et vestibus et vestimentis et omnimoda capella clericorum, et lapidibus pretiosis tam clericorum quam laiorum."

"Et si aliquis juxta conscientiam illorum minus dederit quam debuerit, eligenter de parochia quatuor vel sex viri legitimi, qui jurati dicant quantitatem illam quam ille debuisset dixisse; et tunc oportebit illum superaddere quod minus dedit."

[2]Dowell, *History Taxation* I, p. 238.

"Les chiefs Taxours sanz delai facent venir devant eux de chescune cite, burgh et autre vile du counte, deinz franchise et dehors, les plus loials hommes et mielz vanez de meismes les lux a tiele noumbre dount les chiefs Taxours puissent suffiseament es tire qatre au sis de chescune ville, ou plus si mester feit, a lour discre-

burgh and town is authorized. The oath of office they are to take, and the method of assessing property they are to adopt, are minutely prescribed.

The appointment of assessors has become well established, the exemption of church property and of necessary household goods, or of what corresponded to them in the middle ages, of horses and arms, is provided for. The assessor's oath, the penalty for concealment, and the assessment of property at its "vereie value" reappeared in their American garb.

We shall see how the system of assessing and collecting taxes in New York had a similar origin, and has always remained true to the principle of measuring a man's ability to pay taxes by the amount of his real and personal property. How deeply rooted this principle is in the Anglo-Saxon race, is shown by the fact that the present British local taxes are still based on a similar principle of taxing land and householders, according to the rental value of their real property.

Municipal Finances of New Amsterdam.

A few words regarding the financial history of New Amsterdam before we take up the English period. In accordance with the custom in Holland,[1]

cion, par lesqueux la dite taxacion et ce qe a ce appent a faire mielz purra estre faite et accomplie."

"Et quant il averont tieux eslutz, adonques les facent jurer sur Seintes Evangeles, seit a saver ceux de chescune ville par eux, qe ceux issi juretz loialment et pleinement enquerront queux beins chescun de meismes les villes avoit le jour de Seint Andren avant dit, en meson et dehors, ou q'il fuissent, saunz nul desporter, sur greve forfeture. Et tous ceux biens, ou q'il seient devenuz depuys en cea par vente on en autre manere, loialment taxerount solonc lour vereie value. . . ."

[1] Larpeyres, *Volksw. Auschauungen d. Niederländer*, p. 232.

indeed in accordance with the custom in vogue in all medieval communities, the revenues were farmed out. Thus the Burgher and Tapper Excise was farmed out to the highest bidder at public auction.[1] The farmer was required to make quarterly payments to the city treasury, offer two bondsmen and keep an office open for the transaction of business. The farming of the excise must have been a remunerative business, at least judging from the account of the spirited auctions.[2] The excise duties which the farmer was authorized to collect were established. Curiously enough the tax discriminated in favor of French wines. This source of revenue, the city excise, brought in $1,700 (4220 Carolus guilders) in 1656, and $1,400 (3510 guilders) in 1659.

Innkeepers' licenses were early introduced, and on the other hand the price at which the innkeepers were to retail their refreshments was fixed.[3] They naturally suffered under this double fire and complained in 1657 that they could only afford to pay the license fee, if the authorities did not prescribe the price at which they were to sell at retail.

Another source of revenue was the city slaughterhouse. This was farmed out in 1656, for instance, for $280 (710 Carolus guilders), the farmer in return receiving five per cent. of the value of all slaughtered cattle.[4] The same arrangement is made

[1] Cf. Conditien en Vorwarden volgens de Costume en ordre onses Vaderlants aende meestbietende te verpachten de Borger Excijs van Wijnen en Bieren binnen deser Stede Amsterdam. Dutch Records, City Hall, Oct. 30, 1656.

[2] *Ibidem*, Oct. 29, 1659.

[3] Dutch Records, City Hall, Jan. 9, 1657.

[4] Conditien en vorwarden · · aen de meestbietende te verpachten den excijs vant geslacht Bestiaeu binnen de Stede Amsterdaems Jurisdictie, *Ibidem*, Oct. 30, 1656.

in 1659 and the sum offered rises to $460 (1135 guilders).[1] All persons slaughtering oxen, cows, calves and sheep for private consumption, are to give notice to the slaughter-house farmer, procure a permit from him and pay him his legal fee.[2]

These forms of indirect taxation bear as much the character of police regulations as of fiscal measures.

Some revenue was also derived from farming out the ferry to Long Island.

The fees of secretaries, notaries, clerks and similar officials, were fixed by law in 1658,[3] and Court fines were to be divided one-third to the city, one-third to the officer, one-sixth to the church and one-sixth to the poor.[4] Among the fines was one for tardiness and absence from a meeting of the Schout, Burgomeesters and Schepen;[5] another of $10.00 (25 guilders) for neglect to sweep a chimney in case it caught fire,[6] which fine is still in force and collectible, but amounts now to only $5.00.

Finally, a considerable sum of money annually flowed into the city treasury from the sale of the "groote borgerrecht" and "klijne" or "poorter recht," the "freedoms" of the English period. The origin of these rights of citizenship remind one forcibly of the exclusiveness of a medieval city. It seems the resident merchants of New Amsterdam were much harassed by the competition of itinerant merchants, coming especially from New England

[1] Conditien en vorwarden . . aen de meestbietende te verpachten den excijs vant geslacht Bestiaeu binnen de Stede Amsterdaems Jurisdictie, Dutch Records, City Hall, Sept. 26, 1659.

[2] *Ibidem*, Feb. 25, 1659.

[3] Dutch Records, City Hall, Jan. 25, 1658.

[4] *Ibidem*, Feb. 25, 1658.

[5] *Ibidem*, April 16, 1653, Feb. 27, 1663.

[6] *Ibidem*, Jan. 23, 1648.

and settling only for a short time in the town. Complaints are made as early as 1648.[1] To put a stop, to this sort of competition, foreign traders, especially the "Scotch pedlars", were compelled, by virtue of the city's staple right, to set up and maintain an open store in New Amsterdam, and to procure from the authorities the lesser right of citizenship ("Klijne" or "Poorterrecht", cost $8.00 or twenty guilders) to enable them to trade.[2] The greater right of citizenship, "Groote borgerrecht", cost $20.00 or fifty guilders) qualified the holder for any city office and gave him among other privileges freedom from arrest by a subaltern officer.[3] Within two months after the publication of this law, 209 persons had bought the lesser right of citizenship and twenty the greater.[4]

Complaints are nevertheless often heard of non-citizens carrying on trade in New Amsterdam,[5] and in 1661 it is provided that the right of citizenship should be lost after an absence of four months from the city; and beside obtaining the burgher right, a person must have resided six consecutive weeks in the city or have paid the city $8.00 (twenty guilders) in beavers (or the value thereof), over and above the cost of his right of citizenship.[6]

The finances of New Amsterdam were from the earliest date poorly regulated. There was constant friction between the city and Home government,

[1] Dutch Records, City Hall, Sept. 18, 1648.
[2] Repeated, Minutes Common Council, April 24, 1691.
[3] Dutch Records, City Hall, March 29, 1657; June 18, 1660.
[4] *Ibidem*, April 9, 1657.
[5] *Ibidem* 1659 passim.
[6] *Ibidem*, Jan. 18, Feb. 25, 1661. Minutes Common Council, March 15, 1683.

regarding the former's right to enjoy the excise and ferry revenues.[1] At times the revenue from one of these sources had to be pledged to the payment of some debt. At other times as in 1658,[2] "there were several who had bought the burgher right and not paid for it," while the farmers of the public revenues were constantly in arrears in their payment to the city treasury.

II.

1664–1683.

The Change of Government.

We pass on to the period which begins with the English invasion in 1664. As was suggested above, the change of government proved beneficial to the colony. The domestic affairs remained almost unchanged. By the articles of surrender it was provided[3] "that all officials and magistrates shall continue in office." The payment of the city's debt incurred before the English invasion was provided for. "'Planters were to enjoy their Ffarms, Houses, Lands, Goods and Chattels . . . upon ye same terms which they do now possess them, only that they change their masters.'"[4] The English population in New Netherland and the close relation between Great Britain and the Netherlands during the seventeenth century made such a change of sovereignty an easy matter.

[1] Dutch Records, City Hall, Jan., May 18, Sept. 22, Nov. 23, 1654.
[2] *Ibidem*, March 25, 1658.
[3] Dutch Records, City Hall, June 14, 1665. Brodhead, *Hist'y N. Y.*, I, p. 762.
[4] Brodhead, *History N. Y.*, I, pp. 744–5. O'Callaghan, *History New Netherland*, II, pp. 587, 593.

The Duke of York's government of the province was in marked contrast with the Dutch *régime*. The governor general, the duke's representative, soon introduced businesslike management into the colonial finances. A collector of imports was appointed. His oath of office read:[1]

"That you will faithfully and truely discharge the trust reposed in iou and that you will not directly or indirectly act or contrive any waij to the prejudice of the revenue but shall on all occasions discover any fraud intended and that you will keep exact accompt of all moneys you Recive and be accomptable to the Maijor and Aldermen so offten as you shall be thereunto reqiared and not to pay any money to any person whatsoever without a warrant from the Major or his deputy and that signed by M. Nevins as entered."

This shows at least the good intentions of the Government to put the Colonial finances in order. Export and import duties were firmly established, the former as usual laid upon the exportation of "furr, Peltry or hides, tobacco, sugar and Brazilian dyewoods."[2] The weigh-house and slaughter-house charges were fixed.[3] On all sides we see confusion giving away to order. This is particularly evident in the publication of the "Duke's Laws,"[4] a code copied directly from the existing laws in New England.

In these laws definite provision is made for the assessment of taxes.

"All assessments shall be made by the Constable and the Eight Overseers of the Parish Proportionably to the Inhabitants in the Towne or Parish where such Assessment is to be made and Every Inhabitant who shall not contribute to all Charge both Civill and Ecclesiasticall pportionably to the rate soo assessed shall be compelled thereunto by attachment or distresse of goods to be Levyed

[1] Dutch Records, City Hall, June 19, 1665.

[2] *Ibidem*, March 5, 1671-2. Ordinance, July 2, 1667.

[3] *Ibidem*, June 27, Oct. 31, 1665.

[4] State Library, Albany, Brodhead, *History N. Y.*, II, p. 70ff. *N. Y. Hist Coll.*, 1st series, vol. 1; Heading; "Assessments, Charges Publique, Fees, etc."

by the Constable, Provided noe man shall be Assessed for Estate reall or psonall which Lyeth not within the Same Towne or Parish where he is assessed . . That the Justice of the Peace only shall be exempt from Paying any Publique Assessmt in the Parish where he Inhabitt During the time of their bearing Office, Paymts to the Church only eccepted . . . . The Towne of Assessmts shall be certified in writing into the Sessions and the Justices are Empowered to rate in any inhabitant by Abatement who shall make itt Appeare that he is overcharged . . . ."

"Charges publique" are to be regulated as follows:

"That the high Sherriffe for the time being shall from yeare to yeare send forth his warrants to the High Constable of every Towne within their Rideing who shall send warrants to the Constables of each Rideing requireing each Constable to call together the overseers of their town who shall within four months . . . . make a list of all the male Persons in the same towne from 16 yeares and upwds and a true Istimacon of all Psonall and reall Estates being or reputed to be the Estate of all and every the Persons in the same towne or otherwise under their Custidy or management according to just valluation . . . ."

The kinds of property to be taxed are enumerated, the value of cattle is established. Infirm and sick persons are to be exempt from all taxation. Correction of errors in the assessment list is made possible. Payment in kind, imprisonment in case of refusal to pay, and levy by distress are provided for. The same code of laws fixed the Sheriff, Constable, and Court fees.

It was only on Long Island where, as was shown, the English influence predominated, that the "Duke's Laws" were carried into effect,[1] while the Hudson valley, especially the cities New York, Albany, Esopus and Schenectady did not come within their jurisdiction. This may be taken as further evidence that the property tax was an unusual form of taxation on the continent during the Dutch period. On Long Island

[1] Howard, *Local Const. History U. S.*, p. 105.

on the other hand the "Duke's Laws" fell in with the habits of the people and the regulations concerning taxation were consistently carried out.[1] Property was assessed and taxed, appearing in the rolls under the heads of land, houses and cattle.

On the continent this form of taxation was slower of adoption. In the Delaware valley to be sure we have evidence of a regularly assessed property tax in 1676.[2] But in this district the English influence had always been strong just as on Long Island.

In 1680 the Duke of York ordered Governor Lewen to inform himself—

"With all diligence and exactnesse wt rent or tax every house at N. Yorke, Esopus, Albany, Long Island and all other N. Y. territoryes doth or ought to pay by ye year . . . ye total of all Quittrents and other rents, proffitts, services and advantages due and payable to me or any other."[3]

He was evidently dissatisfied with the absence of any regularly established direct taxes in his American possessions. In New York and Albany the houses had been taxed—

"But att uncertaine rates, some more, some less, as they judge requisite and is or ought to be employed to the use of said towns. . . . But those of New York say they have never had any perfect accot. either of the tax of houses wch amounts to 170£ ($600) per ann., nor of the dockage, wharfage or anchorage wch. is conceived amounts to a great sume annually. . . . They likewise say a considerable sume of money was raised upon their stocks both Inhabitants and Merchant strangers for making the Docke att first, but never any accot. made to them of it, though they conceive there may be considerable surplusage. The severall Taxes sett or raised by the 200th penny at Albany, ffines, Amerciaments, etc. are set forth in abstract from severall Records as much as could be found. But there was a tax of the 300th penny at

[1] Doc's *Col. History N. Y.*, XIV, p. 602 (Nov. 3, 1667); p. 626 (Oct. 12, 1669); III, p. 304 (1681).

[2] Doc's *Col. History N. Y.*, XII, p. 566 (Nov. 23, 1676).

[3] Doc's *Col. History N. Y.*, III, p. 280, (May 24, 1680.).

Albany and 200th penny at Schenectedie of wch. I could have no acct."[1]

During the revival of the Dutch sovereignty in 1674, Governor Colve had found "no means . . . more reasonable than to raise the moneys by form of a tax on the wealthiest and most affluent inhabitants." . . . He ordered "that an assessed tax be levied on the estates and means, without any exception, of all the inhabitants . . of New Orange, those alone being exempted whose capital shall be estimated not to exceed the sum of 1,000 guilders ($400) . . . the assessment to be made by six indifferent persons."[2] The exemption of property under 1,000 guilders seems to have been an afterthought, for such estates were included in the first two assessments and were afterwards omitted. A Board of Assessors had been appointed on February 1st, 1674, representing in equal parts the Government, the community and the magistrates, and assessed 134 estates.[3]

A month later Governor Colve raised a forced loan of 1 per cent. of the property of the well-to-do.[4] It is called "a tax advanced in the form of a loan,"[5] and naturally met with considerable opposition, "some persons forgetting or refusing to pay," though the loan was to be repaid out of the revenue from

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[1]Doc's *Col. History N. Y.* III, p. 303. Governor Lewen's Report, 1681.

[2]*Ibidem* II, p. 685; (Feb. 14, 1674).

[3]Valentine's *Manual* for 1866, p. 805; N. Y. Col. MSS. 23, 206; Moulton & Yates, *History N. Y.* p. 19.

[4]N. Y. Col. MSS. 23, 225; *Laws and Ordinances New Netherland*, p. 522, (March 17, 1674); Doc's *Col. History N. Y.* II, p. 697.

[5]Records Common Council, June 12, 1674. "Taxatie . . . by fforme van Leeninge vorstreckt."

import and export duties, a promise which probably was never fulfilled.[1]

Voluntary and Enforced Contributions.

The attempt to levy a tax on the property of the well-to-do suggests a subject of great interest to the student of the history of taxation, namely the system of voluntary contributions, which we find were in all early communities the first step toward the establishment of a fixed tax. Such a primitive form of taxation is described in *Tacitus' Germania* (Chap.XV) "A gift is offered by every subject for the support of his chief."

The evolution of a tax from a voluntary contribution is illustrated in the financial history of New York. At first an informal contribution for some common purpose is raised. Gradually the size of the contribution is proportioned by custom to the contributor's possessions. As time goes on, pressure is brought to bear on the contributor and he is forced, by some indirect means, to maintain this proportion. Finally the voluntary character of the contribution has disappeared and it becomes a forced contribution or a tax proportionate to the taxpayer's possessions.

At first for some common purpose, as in 1648, for the erection of a church, or in 1667, for the maintenance of a minister,[2] voluntary offerings were solicited. Or else, as in 1653, a list of forty-two persons was made out, who were *provisionally* to contribute $2,000 (5050 guilders), for the purpose of putting the city in a state of defense, the contributions

[1] N. Y. Col. MSS. 23, 225; Doc's *Col. History N. Y.* II, p. 697.

[2] Doc's *Col. History N. Y.* I, p. 424 (Nov. 29, 1650); Dutch Records City Hall, Feb. 7, 1666-7.

ranging from Hendrick Kip's $20.00 (50 guilders) to Cornelis von Steenwyck's $80.00 (200 guilders).[1] The element of compulsion is already apparent, as well as the indefinite promise of refunding the contribution contained in the word "provisionally." The element of compulsion becomes more apparent in an ordinance of 1655, which reads:—[2]

"The Director-General and Council of New Netherland . . . consent that the Burgomasters (of New Amsterdam) shall . . . first and foremost solicit both from the trading shippers, merchants, factors and passengers, and from the citizens in general, a voluntary subscription and contribution, each according to his condition, state and circumstances, and in case of opposition or refusal either from any disaffected or ill-disposed persons, which the Director-General and Council do not anticipate, . . . the Burgomasters, with the President of the Schepens are authorized . . . to assess such according to their circumstances, and condition them to constrain to a reasonable contribution and promptly to enforce it by execution."

But the voluntary character of the contribution has not quite disappeared, for Pieter Stuyvesant heads the list and "*offers* as his share $20.00 (50 guilders) more than any one else, namely $60.00 (150 guilders)." Cornelis von Tienhoven "*offers* $40.00 (100 guilders)." Johannes De Peyster "is *assessed*" (getaxeert) at $20.00 (50 guilders). Domine Megalopensis gives $20.00 (50 guilders) "*of his own free will* (vrijwillg)." Six men ask to be assessed and are taxed amounts varying from $24.00 to $40.00 (60 to 100 guilders). Of the twenty-six persons who attend the first meeting of the Court all but four offer voluntary contributions. At the following meetings the more reluctant appear. Many *offer* contributions but are *assessed* at a higher sum ("pre-

[1] Dutch Records, City Hall, March 13, 1653.

[2] *Ibidem*, Oct. 11, 1655; N. Y. Col. MSS. 6, 97; *Laws and Ordinances New Netherland*, p. 197.

senteert doch getaxeert''), others offer or are assessed a beaver, still others work at the city work or send their slaves in lieu of a contribution. Some are assessed for their houses, their contributions being avowedly made proportionate to their property.[1] Many of the so-called contributors evidently did not act in good faith, for in 1657, two years later, the Court Messenger had to be empowered to collect the amount due from the reluctant contributors "according to the *assessment* made by the Honorable Director General, etc., in October, 1655."[2]

Similar quasi-contributions are recorded on Long Island in 1657 and 1661.[3] Some "voluntarily promise to give and contribute," others are assessed. In one case a citizen "continues at two beavers and offers two beavers more, for those that are unable to pay what they have promised."[4]

An excellent example of the transition stage, from a contribution to a tax, is furnished by a case in New Castle in 1677.[5] The inhabitants were asked to contribute to the expense of repairing a broken dam. But in order that pressure might be brought to bear on them, the Court ordered "that the Burgers in generall be called together and yt those whoe will pay pro Rata towards it, To have their parts, but those who Refuse, to Loose their commondage."

Similar examples of the evolution of a tax from a voluntary contribution are to be found in the history

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[1] Dutch Records, City Hall, Oct. 11-15, 1655.

[2] *Ibidem*, March 9, 1657.

[3] Laws and Ordinances New Netherland, pp. 305, 414-15 (Nov. 12, 1661); Col. MSS. 8 : 463 (Feb. 13, 1657).

[4] Dutch Records, City Hall, Feb. 7, 1666-7.

[5] *Doc's Col. History N. Y.* XII, p. 576.

of New England.[1] Contributions led to fixed taxes in support of Harvard College. It was suggested to the Connecticut authorities when the subject of supporting Harvard College was under discussion, that "if it were *commanded* by you, and left to the *freedom* of every family which is able and willing to give throughout the plantations, to give but a fourth part of a bushel of corn, or something equivalent thereto, and for this end, if every minister were desired to stir up the hearts of the people once in in the fittest season of the year, to be freely enlarged therein, and one or two faithful men be appointed in every town to receive and seasonably send in what shall be thus given to them, it is conceded that no man could feel any aggrievance hereby." At this suggestion the Connecticut Assembly passed a law, orde/ing two men to be appointed in each town, "who shall *demand* what every family *will* give."

In New York "voluntary contributions" for specific purposes are mentioned, in 1664 and 1671 for the support of the minister, and in 1689 and 1692 for the defense against enemies.[2] Even the above-mentioned forced loan of 1674, is called a "tax and contribution list."[3]

Long after the contribution had ceased to be in any way voluntary, and had become a tax, the name "contribution" is retained, quite in keeping with the

[1] Blackmar, *History Federal and State Aid to Higher Education*, p. 87, 103.

[2] Dutch Records, City Hall, Feb. 22, 1664; Records Common Council, July 16, 1671; Doc'y *History N. Y.* II, p. 59 (Sept. 23, 1689); Doc's *Col. History N. Y.* III, p. 822, (March 7, 1692.)

[3] Valentine, *History N. Y.*, p. 315.

custom of calling the Governor's salary a "free and voluntary gift."[1]

A singularly parellel development, is to be found in the history of the English poor rate—

"At first they only claimed voluntary gifts, collections in churches, made at first in midsummer, afterwards more prudently postponed to Christmas. Very soon the appeal for voluntary aid was followed by exhortations to the richer folk, to give of their abundance. Soon the caitiff who would not give, was to be delated to the bishop, who was to exhort him . . . Very soon compulsion followed. The rich but covetous man, who remained obdurate, was to be sent to gaol and an assessment levied on his goods. Finally, a general assessment was ordered."[2]

Review of Period 1623–1683.

The property tax gained a firm foot-hold with the establishment of the Colonial Assembly in 1683. In the Charter of Liberties of that year,[3] it was provided

"That noe Aid, Tax, Tallage, Assessment, Custome, Loane, Benevolence, or Imposition whatsoever shall be layed, assessed, imposed or levyed on any of his Majesties Subjects within this Province or their Estates upon any manner of colour or pretence, except by the act and consent of the Governor, Council and Representatives of the people in general assembly, mett and assembled."

The regulation of the provincial finances was thus put into the hands of the Colonial representatives, and a study of Colonial laws from that time down to the Revolution, is the best source of information regarding the development of the property tax.

Before we examine these laws, it will be well to review the results we have so far reached, covering

[1] Records Common Council, Nov. 7, Dec. 10, 1683. Dongan's Laws, 1683-84, p. 56.

[2] Rogers, *Economic Interpr. History*, p. 242, Cf. Gneist, *Englische Kommunalverfassung*, (1863) I S. 275-81; Sinclair, *History Pub. Rev.* I, p. 101.

[3] State Library, Albany, Doc's *Col. History, N. Y.* III, pp. 357 ff.; Brodhead, *History N. Y.* II, p. 659.

as they do the first sixty years of the colony's history.

We called attention to the disordered finances and prevailing system of indirect taxes under the Dutch, the gradual development of a direct tax on property beginning as a voluntary contribution or as an unusual method of raising a revenue for a special purpose, and becoming a full-fledged tax under the English rule.

The reasons were given for our belief that the introduction of this form of direct taxation is to be ascribed to the English, in whose history this tax-form has always played a prominent part. Of course one must not lay too much stress on this supposed connection between the tax systems of England and of New York. England had outgrown the cruder form of a general property tax, and besides it was not a question of introducing a new fiscal system into a well-ordered community like an annexed province. Still it was the Duke of York and his government who gave the development of the New York tax system an entirely new direction, and whatever theoretical principles the English authorities had in mind in framing tax laws for the Colony they were moulded, perhaps unconsciously, by the centuries' experience of English direct taxation.

Aside from the English influence, the economic conditions of the Dutch possessions, and a comparison of them with those of New England, largely explain the development of their taxes.

The English settlements in New England were primarily agricultural colonies, the Dutch settlements trade colonies. However highly the trade of New England was spoken of, that section of the

country was chiefly devoted to agriculture. The fruitful Connecticut valley and eastern Long Island were early settled by a farming population.

On the other hand, the Dutch in New Netherland were primarily traders, the best evidence of which was the character of the West India Company.[1] Although the first emigrants in 1623 were sent out as agricultural settlers, they soon desert their fields and hasten to make treaties with the Indians and engage in the profitable fur trade.[2] While the New Englanders were protecting themselves against the Indians, the Dutchmen were extending their trade up the Hudson and into the interior.

This difference in the character of the settlers of both districts, New England and New Netherland, goes a great way to explain the difference in the tax systems they adopted in the early years of their existence. In New England there was no extensive trade which made indirect taxation expedient. The settlers lived in separate communities, each adult owning and working his own farm. Naturally enough the authorities turned to the possessions of the farming population as a proper object of taxation. Every farmer's real and visible property, his house, farm and cattle, were taken as a measure of his ability to contribute to the common expenses, and he was taxed accordingly. Under the then existing circumstances such a general property tax was both just and expedient.

In New Netherland on the other hand a class of farmers came into existence much later than in New

[1] Brodhead, *History N. Y.*, I, p. 747; Bancroft, *History U. S.*, I, pp. 496 ff.

[2] Brodhead, *History N. Y.*, I, pp. 150–2; Doc'y *History N. Y.*, III, pp. 35–36, 44–45.

England. About the middle of the century, after the curtailment in 1638 and 1640 of the privileges of the West India Company and of the Patroons, agricultural village communities sprang up. The Hudson valley filled up with agricultural settlers, Walloons from Belgium, Huguenots from France, Waldensians from Piedmont and Puritans from New England.[1]

As long as the Colonists were traders at New Amsterdam and Beverwyck, or were scattered along the river, their possessions consisting almost entirely of moveable goods, a property tax was difficult to introduce. Even in the agricultural districts of Long Island and the Delaware valley, the property tax when introduced was only collected with difficulty.[2] In the words of the Court at New Castle:[3]

"The people live distant and their Estates (are) for the most part very Inconsiderable; that we can find no proper way to discover the vallue of their sed estate, and if discovered to bring it in a Valluable shape to Receive. But if your Honor will be pleased to allow of a Levy to be Laid by the Pole, as they of Virginia and Maryland doe and have continued itt for so many years, not finding out a more easier and better way, then ye Levy can be easier made and Received."

The difficulty of collecting a property tax had been obviated by introducing a pole tax on Long Island in imitation of the similar tax in New England.[4]

Commondage and Quit Rents.

In all early communities we are accustomed to find extensive tracts of land held in common possession. As a source of revenue commondage in New

[1] Elting, *Dutch Village Communities*, pp. 18, 22; Doc's *Col. History N. Y.*, XIV, pp. 332-3; Brodhead, *History N. Y.*, I, pp. 407, 734.

[2] *Col. History N. Y.*, XIV, p. 602.

[3] *Ibidem*, XII, p. 590 (Feb. 8, 1677).

[4] *Ibidem*, III, p. 304.

Netherland and New York never was of great importance. We find it mentioned on the island of Manhattan in 1669,[1] while many of the village communities along the Hudson held considerable pasture and wood land in common until a late date,[2] quite like the Teutonic "Markgenossenschaften," the Commons of the town of Hurley being divided by an act of the State Legislature, April 4th, 1806.

The system of quit rents was never developed into a distinct land tax. In the time of the Dutch, public lands had been leased to settlers for the yearly payment of a small quit rent. This system was adopted by the English, who derived some revenue from this source. At first it had some significance. In 1678 public lands were leased at \$0.40 to \$1.50 (30*d* to 100*d*) per 100 acres.[3] These low rates were, it seems, never raised. There was great laxity in collecting the rents,[4] and the proposal of Governor Hunter to derive a large revenue from this source went unheeded. He writes in 1710 to the Lords of Trade:[5]

"There is one thing I would propose to your Lordships. . . . In the infancy of the English government here Lands were granted without any reservation of Quit Rents. . . . . Others were granted with a reservation of such Quit Rents as then were or should thereafter be established by the Laws of this country, others, . . . are under a very inconsiderable Quit Rent; Those granted . . . are with Reservation of 40 cents (2s. 6d.) each 100 acres, but the quantity is so small and there is so little in her Maj'.

[1] Records Common Council, August 31, 1669.

[2] Elting, *Dutch Village Communities; Laws of N. Y.*, 1710. An act for the easier Partition of Lands in Joynt Tenancy or in common (1708).

[3] Doc'y *History N. Y.*, I, p. 59.

[4] N. Y. Col. MSS., 33 (May 20, 1684); Minutes Common Council, April 2, 1756, Feb. 13, 1764; Laws, Oct. 18, 1701; Jan. 8, 1762.

[5] Doc's *Col. History N. Y.*, IV, p. 179 (Nov. 14, 1710).

gift, that if all were patented, the Quit Rent would amount to a very inconsiderable sum, so that if your Lordships thought fit to advise the passing of an Act of Parliament at home that all lands within this province granted or to be granted should pay to her Majesty a Quit Rent of 60 cents (2s. 6d.) I believe it would goe a great way in raising a Fund sufficient for the government here."

In 1686 and the following years the provincial quit rents amounted to[1]—

	Quit Rents		Duties.		Excise.	
1686	£291.-.¼	$1,000.00	£.....	$.....	£.....	$.....
1691	21.12.6	75.00	2521.2.11¾	8,500.00	203.12	670.00
1693	38.11—	130.00	1916.8.¼	650.00	665.16.6	2,250.00
1694	149 —½	500.00	3055.11.3	10,300.00	862.4.10	500.00
1695	36.17.6	125.00	23.13.17.10¼	7,850.00	919.18.2½	3.100.00
1698	165.4.9	550.00	.....	.....	.....	.....
1699	— 10.19	2.00	.....	.....	.....	.....

Their irregular character and small amount is apparent when compared with the amount raised by duties and excise. In 1692 no revenue from quit rents is mentioned, and throughout the eighteenth century quit-rent revenue is only referred to here and there.[2] No pains were taken to collect the revenues—the best proof of which are the numerous laws "for the more easy collecting His Majesty's Quit-

[1]Doc'y *Hist'y N. Y.*, I, pp. 477, 702; N. Y. Col. MSS. 33.
[2]Doc's *Col. Hist'y N. Y.*, I, p. 519.

rents,"[1] and the attempt on the part of the English authorities during the Revolutionary war to induce the lease-holders to commute their annual quit rent by the payment of a round sum.

Quit rents were continued under the State government.[2] Municipal quit rents in New York City will be discussed below. The system was allowed to dwindle, and in its present form remains only as a faint reminder of early Colonial conditions.

The quit rents raised by the Patroons have a similar history, and were brought into prominence by the celebrated Anti-Rent-Agitation of 1836–46.[3]

III.

1683–1777.

The real history of the New York property tax begins with the establishment of the Colonial Assembly in 1683. From that time on, this tax form was developed in a uniform way, the fundamental principle of taxing every person in proportion to his aggregate property always remaining unchanged. Monotonous uniformity has characterized the development of the property tax, but in this uniformity lies its historically interesting feature.

Colonial Duties and Excise.

The Colonial revenues from duties and excise we may dismiss with a few words.

[1] Acts Jan'y 8, 1762, Oct. 18, 1701; Doc's *Col. Hist'y N. Y.*, VII, p. 901. Minutes Common Council, April 2, 1756, Feb. 13, 1764.

[2] Cf. *Laws N. Y.*, 1806, ch. 171, p. 599; 1816, 1817, 1818, ch. 281, p. 302; 1819, ch. 222, p. 291.

[3] Cheyney, Anti-Rent-Agitation in N. Y., 1836–46.

The "Continued Bill for defraying the Requisite charges of the Government," and an "Explanation" of that bill of 1683[1], had put the import and export duties on a firm footing. The revenue from this source, though nominally "*settled* upon His Majesty, then His Royal Highness and his heirs, by Act of Assembly,"[2] at the request of the Duke of York, who wished and expected some certain revenues to be provided him,[3] was "*continued*" from year to year. Such laws, "granting to His Majesty the several Duties and Impositions on Goods, Wares and Merchandizes imported into this colony," were those of 1691, 1692, 1740 and 1753.[4] It is to be remembered that inasmuch as the revenue from duties flowed into the Royal treasury the colonists cared little about the regulation and collection of duties. The revenue from this source was beyond their reach, and only indirectly played a part in the provincial finances.

The collection of excise duties was regulated by "An Act for laying an excise on all Strong Liquors retailed in this colony," of October 13, 1713, and by an additional law of March, 8, 1773.

During the '90's of the seventeenth century the annual revenue from duties and excise averaged $8,500 and $2,700 (£2,500 and £800), respectively,[5] while in the '20's of the eighteenth century the revenue from duties averaged $11,000 (£3,360) annually, and in the '50's and '60's $20,000 (£5,800).[6]

[1]Dongan's Laws, State Library, Albany.

[2]Docy, *Hist. N. Y.*, I, p. 103.

[3]Doc's *Col. Hist'y N. Y.*, III, pp. 317-18; Brodhead, *Hist'y N. Y.*, II, p. 358.

[4]*Laws N. Y.*, 1694, p. 21, 58; Doc's *Col. History N. Y.*, VII, p. 907; *Laws N. Y.*, 1752 (Nov. 3, 1740); *Laws N. Y.*, 1774 (Dec. 12, 1753.)

[5]N. Y. Col. MSS. 33; Doc'y *History N. Y.*, I, p. 477.

[6]Doc'y *History N. Y.*, I, p. 703.

During the ten years preceding the Revolution the duties and excise had netted $13,500 and $2,500 (£5,000 and £900) on an average.[4] The Colonial revenue from goods sold at auction, and from hawkers' and pedlars' licenses averaged £1,000 annually during this last period.

Tax Laws of the Colonial Assembly.

We can now return to the property tax and trace its development at the hands of the Colonial Assemblymen. After organizing and accepting the royal Charter of Liberties in October, 1683, they passed on November 1st, 1683, a general Tax and Assessment Law which deserves especial attention as the first of its kind. It is entitled "An Act for the defraying of the publique and necessary charge of each respective City, Towne and County throughout This Province and for maintaining the poor and preventing Vagabonds,"[1] and reads:

"Bee It Enacted by the Governour Councell and Representatives in Generall Assembly and by the Authority thereof, That annually and once every yeare there shall be Elected a certaine number out of Each respective Citty, towne and County, throughout this province, To be Elected and Chosen by the Major part of all the ffreeholders and ffreemen, which certain number Soe duely Elected, shall have full power and authority to make an Assessement or certaine Rate within their respective Cittyes, Townes and Countyes, annually and once every yeare, which assessment and certaine rate soe Established as aforesaid shall be paid in to a certaine Treasurer, who shall be Chosen by the Major part of all the ffreeholders and ffreemen of Each respective Citty, Towne and County; which Treasurer soe duly Chosen shall make such payment for the Defraying of all the publique and necessary Charges of Each respective place above mentioned, as shall be appointed by the Comiconers or their President, That shall bee appointed in Each

[1] *Journal General Assembly N. Y.*, 1766–76; Valentine's *Manual* for 1851, p. 391.

[2] Dongan's Laws, State Library, Albany, p. 26.

respective Citty, Towne and County, within this province for the Superviseing the publique affairs and Charge of Each respective Citty, Towne and County aforesaid. And bee It further provided by the authority aforesaid, That the Treasurer for Each respective Citty, Towne and County shall keep a distinct booke of accounts Containing a perticuler account of all the moneys, rates and Assessments aforesaid, And alsoe of all disbursements and payments of money by warrants aforesaid, and once in Every yeare he shall bring his accounts to such persons as shall be appointed for the Audit of the same under the penalty of one hundred pounds, Except prevented by death or Sicknesse. And farther, whereas it is the Custome and practice of his Maties Realme of England, and all the adjacent Collonyes in America, That Every respective County, Citty, Towne, parish and precinct doth take care and provide for the poor who doe inhabit in their respective precincts aforesaid, Therefore it is Enacted by the authority aforesaid, That for the Time to come the respective Comiconers of Every County, Citty, towne, Parish, Precienct aforesaid, shall make provision for the maintenance and Support of their poor respectively.

"And for the Prevention and discouraging of vagabonds and idle persons to come into the province from other parts, and alsoe from one part of the Province to another, Bee it Enacted by the authority aforesaid That all persons That shall come to inhabit within this Province or any part or place thereof and hath not a vissible Estate, or hath not a manual Craft or occupacon, shall before he be admitted an Inhabitant give Sufficient Surety That he shall not be a burthen or Charge to the respective places he shall come to inhabit in, which Security shall continue for two yeares, Provided Alwayes That all those that have manual crafts or occupacon may at all times come and inhabitt in any part within this province, and be alwayes admitted, Provided he maketh Applicacon Eight dayes after his arrivall into any Citty, Towne or County aforesaid unto such person or persons as are appointed for the Governing the respective parts aforesaid And alsoe all vessells That shall bring any passengers into this Province, the Master of any such Vessells shall within four and twenty houres after arrivall bring a list of all such Passengers he brings into this province with their quality and Condicons unto the Cheife Magistrate of Each respective Citty, County, towne aforesaid, under the penalty of tenne pounds Currant money of this Province, Alwayes provided That if any Vessell bring in any person not qualified as aforesaid, nor able to give Surety for their well demeanour, That then and in such case the Master of said Vessell or vessells shall be oblidged to transport all such persons to the place from whence they came, or at least out of

this Province and dependencies, And alsoe if any Vagabonds beggars or others remove from one County to another and cannot give Security as aforesaid, It shall be lawfull for the constable to return such persons to the County from whence they came."

The close relation existing between local taxation and the maintenance of the poor is noteworthy as a parallel to the development of English local taxation.[1] A great deal of attention is given to the mode of collecting the tax and to the treasurer in the law, a faint reminder of the voluntary contributions.

The collectors and treasurers were at first not very trustworthy officials, and numerous acts were intended to force those "who have been empowered to receive any . . . moneys, who shall not make due payments of the sum . . . to make satisfaction . . . out of . . . their owne proper estate, and alsoe to pay tenne pounds damage for every hundred pounds which they shall be found in arrears . . . "[2]

Later laws brought home the loss incurred by dishonest officials to the taxpayers, who had elected them. In the case of New York City "the inhabitants of such Ward, as have chosen such collector or constable so offending shall make good the Loss and Damage in that Behalf, by a fresh levy upon themselves, and not upon the inhabitants of the whole city, as has been formerly."[3]

Similar laws were passed for other counties.[4] This difficulty of obtaining trustworthy officials was partly

[1] Cf. Roger *Economic Intepr. History*, p. 479 ff. Wagner *Finanzw.* III, § 76, s. 173; § 159, s. 351.

[2] Act Oct. 27, 1684, Dongan's Laws, p. 56.

[3] Act July 21, 1715.

[4] Richmond, July 24, 1724; Westchester, April 11, 1769; Dutchess and Ulster, April 3, 1775.

overcome in time, perhaps by requiring bonds on entering upon office. The New York City sheriff's and chamberlain's bonds run back to 1740 and 1748 and amounted then to £1000 ($4,800), forty years later to £2000 ($9,600).[1] However as late as 1772 the Colonial treasurer misappropriated the funds entrusted to him, and speculated in imported goods which were late in arriving and thus led to his exposure. He excused himself by saying, "I thought it would be a public benefit to circulate the surplus in a commercial way." Great consternation followed in the Assembly. Resolutions condemning such practices were passed, but the treasurer it seems was left unmolested.[2]

A second and much more serious difficulty very soon appeared. An impartial and correct assessment proved to be an impossibility. In 1692 the Assembly addressed a petition to the Govenor which reads :[3]

". . . that there may be a certain method for the equal and proportionable assessing of subsidies, We doe pray that his Excell. would appoint Commissioners in each respective County for the making an Estimate of their Estates, that for the future there may not be such uncertaintyes."

This attempt to do away with a difficulty which is inherent in the character of the property-tax, by interference and regulation on the part of the higher authorities, appears again and again in New York history and is at present embodied in the institution of State and County Boards of Equalization.

Another attempt, but of a different kind, to do away with the difficulty of a correct assessment, is that of establishing fixed values at which all kinds of property are to be assessed, which appears in vary-

[1] Record Room, Finance Department, New York City.
[2] Journal N. Y. Assmbly 1766-76. Feb. 19, 1772.
[3] Journal Legisl. Council, p. 23, Sept. 9, 1692.

ing form in the tax laws of the eighteenth century. Thus it was proposed in 1693[1] to assess arable and pasture land according to its annual yield, and other property, such as slaves, horses, cattle, sheep and goats, at varying sums. A similar law was passed on September 29, 1709 and renewed in 1710 and in 1711.

But such a cast-iron assessment law did not suit the easy-going methods of the people, and the law soon fell into disuse. In 1775 complaint is made that "the method heretofore practiced for the taxation of Estates in the County of Orange hath not been as equal and just as it is conceived it might be,"[2] and an elaborate schedule is drawn up of the values at which each kind of property should be assessed. The tax-payer was to give an account of his land and other property, and a penalty was provided as usual for cases of concealment.

The general assessment laws of 1691, 1701 and later years are modelled after the law of 1693 discussed above.[3] The election of two or more freeholders to "assess and establish a certain rate upon each of the Freeholders and Inhabitants within their respective towns," the election of a supervisor, treasurer and collector, and provision for levy by distress in case of refusal to pay are the salient features of these laws. The general law of June 19, 1713, regulating the election of assessors remained practically unchanged and in force till Revolutionary times.

By the end of the seventeenth century the property tax had become well established in the Colony, as is proved by the wording of the large number of tax

[1] Journal N. Y. Assembly, March 9, 1693.
[2] Act April 3, 1775.
[3] Acts, May 13, 1691; Oct. 15, 1701; June 19, 1703.

laws of that period.[1] The county authorities were authorized to raise certain sums from the real and personal estate of all inhabitants of the county, either to cover the county expenses or as its contribution to the provincial expenses.

In New York City the assessment books of this period are still preserved.[2] In 1688 the assessment list of the city's seven wards amounted to £78,231 ($265,000).[3] A good example of an assessment list of this period is one of 1699 entitled:

"Assessments of the Estates, Real and Personal of ye Inhabitants, Freeholders and Sojourners of the Citty of New Yorke for the Raising of the sum of 400 lbs. ($1350) by authority of an Act of Genll Assembly of this Province—entitled An Act for the enabling the Citty of New Yorke to pay their Debts and to Erect and Repair their publick buildings, the same being to be imployed for the building a new Citty Hall within the said Citty and the house att the Ferry Pursuant to the Directions of the Mayor, Recorder, Aldermen and Assistants of the said Citty and Poorhouse of ye Publick Works and buildings made the 29th day of November 1699 at the Rate of Seaven farthings and four White Wampum in the pound (approximately 2½*d* in the £ or not quite 1%)."

The list is signed by two assessors for each ward and is audited by the Mayor and three Aldermen. The amount raised was £370.11s. ($1,250).

Simi ar assessment lists of 1700 and later years are in existence. The taxpayer's "house," "lott," "ground" or "estate" were assessed, and evidently no attempt was made to reach his personal property. In the assessment made December 25, 1702, the

[1] Acts, May 31, 1687; Aug. 20, 1687; Sept. 2, 1689; April 19, 1692; Aug. 14, 1692; March 24, 1694-5; May 16, 1699; Minutes Common Council, Aug. 24, 1685; Sept. 15, 1685; Nov. 2, 1688; Jan. 25, 1693-4.

[2] Assessment Books 1699-1709; Tax Books 1709-34, N. Y. Comptroller's office.

[3] Minutes Common Council, Nov. 2, 1688.

valuations range from £5 to £600 ($17.00 to $2,000), the latter sum occurring but once. The number of persons assessed in 1703 was 1,450, and in 1735 was 2,325. The valuation of taxable property in 1699 amounted to £46,250 ($150,000), in 1704 to £38,900 ($130,000) and £37,240 ($125,000) by two different valuations, in 1715 to $33,925 ($110,000) and in 1722 to £40,107 ($135,000.)

The provincial property taxes were raised by distributing them among the various counties. A glance at the quota thus raised in each county at different times gives one an interesting view of the somewhat arbitrary distribution. The quota in each county, in per cent. of the whole sum raised, amounted to: (See table on opposite page.)

Allowing for the difference of time, New York evidently increasing much faster in wealth than the other counties, it is apparent that the legislators were at times very arbitrary in dividing the sum to be raised for the province among the different counties. Only in part is this irregularity explained by the fact, that in the case of raising money for the protection of some one county, as of Albany in 1692, that county is exempted, or at least its burden is lightened, at the expense of the others. This motive is distinctly avowed in the laws of 1747: "In consideration of the present distressed circumstances of the Inhabitants of Albany, by the Ravages of the Enemy, it (the quota) being one-third less in Proportion to the last Tax of that County; the said Deduction being now laid on the other counties in proportion."

There is no need of reviewing the great mass of tax laws, general and special, passed by the

Colonial Assembly during the eighteenth century. No material progress is made in the wording and carrying out of the laws.

Complaints are often heard. The frequent regulations of levies by distress, as in 1691, 1701, 1744 and 1769, as well as the arrears in taxes mentioned in 1674, 1703, 1710 and 1711[1], indicate the great difficulty of collecting the tax.

Counties.	1688	1691	1691	1692	1702	1709	1709	1709	1709	1746	1746	1747
New York...	17	23	20	23	21.1	20	22.1	22	21.8	33	33	35
Albany.....	9.4	10	9		6	10	4.3	8.5	7.6	14	14	10
Kings.....	11.1	15	13	14	14.8	12	18.2	14	14	6	5.8	6.1
Queens.....	11.1		13	15	18.5	19	16.1	15	17.6	11	11	11.7
Suffolk.....	17	20.2	17.5	20	18.5	17.2	17	15	17	10	10	10.4
Westchester.	7.2	8	7	8.5	6.2	6	6	8	7	5	5.2	5.8
Richmond...	7.2	6.9	6	4.5	4.5	4	5.6	5	5	3	3	3.2
Orange.....	.3	.85	.75	1	2.2	1.6	1.5	2.4	1.6	3	3	3.5
Ulster.....	16	13.9	12.5	14	7.2	8	7.8	8	9	8	9	9	9.5
Duchess.....					.9	2.2	1.1	1	1.6	4	4	4.3
Dukes.....	1.5	1.4	1.25									
Notes.....	1	2	3	4	5	6	7	8	9	10	11	12

[1] Act, May 3, 1688.
[2] *Laws N. Y.*, 1694, p. 27.
[3] *Ibidem*, p. 40.
[4] *Ibidem*, p. 46 (April, 1692).
[5] Act, Nov. 13, 1702.
[6] *Laws N. Y.*, 1710, p. 83 (May 24, 1709).
[7] *Ibidem*, p. 97 (Nov., 1709).
[8] Act, Nov. 2, 1709.
[9] *Laws N. Y.*, 1710, p. 103 (Nov. 12, 1709).
[10] Act, May 3, 1746.
[11] Act, July 15, 1746.
[12] Act, Nov. 25, 1747.

The tax legislation of the last century was characterized on the one hand by a desire to make the existing tax system more effective, and on the other hand by the anxiety it displayed not to hurt the feelings of the taxpayer. Thus the above-mentioned measure of fixing certain values at which different kinds of property were to be assessed was again and again adopted, always to be repealed or to fall into disuse soon afterwards, owing to the severe pressure it brought to bear upon the unfortunate taxpayer. Either the ignorance or the good will of the assessor has always stood in the way of assessing property at its full market value. These shortcomings are of course encouraged by the method of electing assessors, and are therefore as much due to the laxity of conscience in the community as to the assessors themselves.

The Assembly repeatedly sought to spur on the assessors to the fulfillment of their duty by changes in the wording of their oath of office. In 1691 they were bound by oath: "Well, truly, equally and according to their best understanding to assess and rate the Inhabitants, Residents and Freeholds of the respective places for which they shall be chosen Assessors."[2] The tax law of May, 1691, "which . . . . hath been by experience found to be very inconvenient and burdensome to the inhabitants of

[1] *Laws N. Y.*, 1694, p. 29; Acts, Oct, 18, 1701; May 19, 1744; May 20, 1769; Records Common Council, Feb. 24, 1674; Governor's Message, Oct. 14, 1703; *Laws N. Y.*, 1726; Minutes Common Council, Jan. 19, 1710.

[2] *Laws N. Y.*, 1694, p. 99; Cf. *Laws N. Y.*, 1710, p. 103 (Nov. 12, 1709.)

this Province, and hath occasioned many Heats, Animosities, Strifes, and Debates and other differences . . . "[1] was amended in May, 1703, "forasmuch as many Disputes, Cavils, controversies and Mistakes have happened and been occasioned as well by the generality of the words . . . . as many other omissions and defects experience has found and observed in the same," and the assessors were required "Equally, Duly and Impartially to assess and make a rate for their respective Proportions, being first Sworn Equally, Duly and Impartially to make such assessment."

In a similar law of 1721,[2] this warning is addressed to the assessors: "You shall spare no person for favor or affection, or grieve any person for Hatred or Ill-will." This well-meant advice bears a close resemblance to the Pennsylvania assessor's oath of the same period:[3] "Thou shalt well and truly . . . cause the rates and sums of money . . . . to be duly and equally assessed and levied according to the best of thy skill and knowledge; and herein thou shalt spare no person for favor or affection, nor grieve any for hatred or ill-will."

But the legislators were not always satisfied with such vague and well-meant admonition, and in 1764 the following assessor's oath was framed:[4] "I, A. B., do swear upon the Holy Evangelists of Almighty God, that I will well and truly, equally and impartially, and in due proportion, according to the best of

[1] Act October 18, 1701.

[2] Act July 27, 1721: "An Act for the more Equal and impartial assessing the Minister and poor tax to be raised in New York, Queens, Westchester and Richmond counties."

[3] Worthington, *Finances of Pennsylvania*, p. 78.

[4] Act October 20, 1764.

my understanding, assess all the whole Estates, real and personal, of all the Freehold's, etc., within the city of Albany. So help me God."

The provisions regarding the manner of obtaining the value of assessable property always remained indefinite. The law of March 19, 1774, goes as far as any in prescribing that "Assessors . . . shall . . . make an assessment in the manner following, to wit: they shall proceed from house to house, throughout the said county, till they have gone thro' the whole, and shall make out a true and exact List of all the names of the Freeholders and Inhabitants of the said county, and against the names of every such person shall set down the value of all his or her estate, real and personal, as nigh as they can discover the same to be within the same county."[1]

The democratic spirit of our country has always been opposed to a strict enforcement of the assessment laws. Every attempt to make their provisions more stringent has been half-hearted. A self-valuation under oath by the taxpayers has never been attempted in New York. The constitution of California contains a provision (Art. XIII, Sec. 8) requiring "each taxpayer . . . to make and deliver to the county assessor, annually, a statement, under oath, setting forth specifically all the real and personal property owned by such taxpayer, or in his possession." . . . The Political Code of the State (Part III, Title IX, § 3629-3633) enlarges this provision. Such treatment of the taxpayers was and is unknown in New York. In 1770 it was thought sufficient to provide[2] that "every person, subject to

[1] Cf. Act Dec. 17, 1743.

[2] Act Jan. 27, 1770.

such tax or charge shall at all times, when required by the assessors of the precinct wherein he resides, or either of them, give him or them a view of all the improved land in his occupation and a just account of all the horses, cattle and chattels, which are his property and ought to be subject to such tax or charge." But the saving clause was added: "Provided always that nothing herein contained shall be construed to oblige any person to give in any account of any sums of money due to him, or of his household furniture, jewels, plate or wearing apparel."

Concealment of property was always subject to a heavy penalty,[1] but was probably never enforced any more than the demand for the account of his property from the taxpayer.

The utter impossibility of reaching the great mass of personal property which has become so painfully evident in the tax history of this century, was early recognized in colonial legislation. As long as taxable property was almost entirely included under the categories, land, houses, cattle and agricultural implements, it was a matter of no great difficulty to reach it and assess it at nearly its true value. But as soon as movable property began to increase under the stimulus of trade and industry, the difficulty became greater and greater of forcing non-landowners to bear their just share of the public burdens.

The earliest attempt to obviate this difficulty is to be found in the legislative measures directed against itinerant merchants. In addition to those cited above, we may mention the law of 1741, (renewed in 1745

[1] Cf. Act Jan. 27, 1770.

and 1755),[1] which obliged "all persons that shall come to inhabit in the city of New York, in order to expose any goods, wares or merchandise to sale at any time after the annual assessment made for the tax for the maintenance of the minister and poor of the said city, to pay their due proportion to the same."

In Albany (and similarly in Schenectady) the assessors[2] were "to inquire whether anybody moves into Albany after the date of assessment to do business. . . . they must demand a true account on oath or affirmation of the value of their goods which they bring into the ward, and shall rate them like other inhabitants."

On the one hand, there must have existed a class of poor as early as 1683, as is indicated by the general assessment law of that year; on the other hand there must have been a well-to-do class, whose property was largely personal, that is, movable. At first freeholders were the only taxpayers.[3] As soon as the class of property owners was no longer co-extensive with the class of freeholders, the laws recognize as taxpayers the four classes of freeholders, inhabitants, residents and sojourners. Residents apparently included subjects that were possessed of personal and not real property, while sojourners, of course, included only temporary residents of the province. Similar divisions of property owners, *i. e.* of taxpayers, are noted in many tax laws of the seventeenth century.[4]

[1] Acts Nov. 27, 1741; May 14, 1745; Sept. 11, 1755; Cf. *Laws N. Y.*, relating to N. Y. City, 1833, pp. 4-5.

[2] Act, Feb. 19, 1756.

[3] Cf. Act, May 24, 1709.

[4] Acts, Nov. 12, 1709; July 24, 1724: July 5, 1755; Oct. 20, 1764; January 31, 1775; Minutes Common Council, Jan. 10, 1769.

The form of the eighteenth century tax laws remained almost unchanged. The county officers superintended the finances of the county as well as of the subordinate corporations. They decided on the county rate, and arranged for the election of town assessors. Of the aggregate property as assessed by the latter, a certain percentage was raised to cover the town and county expenses, or, as the county's quota to a provincial tax as fixed by the Colonial Assembly.

Oliver Wolcott's report on Direct Taxes (Dec. 14, 1796,)[1] though covering only State taxes, applies as well to the lesser corporations and furnishes us with a review of the condition of local taxation in the United States toward the end of the last century. The tax system of New York is described as follows:

"No objects of taxation are defined in the laws nor any principles of valuation prescribed. The amount of a tax upon the State being declared, the Legislature determines the quotas to be paid by the counties, the supervisors of counties determine the quotas of towns, which last are apportioned to individuals by assessors; no provision has been made for requiring a disclosure of the property owned by individuals; of course, all assessments by the Legislature, by supervisors and assessors are determined by a discretionary estimate of the collective and relative wealth of corporations and individuals."

In Rhode Island, Delaware and Maryland the property tax had been developed on similar lines. In the other States certain objects of taxation were defined and their valuation regulated by law. In some States land was divided into various classes, according to quality and mode of cultivation, each class being taxed at a fixed rate. In other States horses and cattle were specially taxed. In New

[1] American State Papers, vol. 7. (Finance, vol. 1), No. 100, p. 414 ff.

England and in some of the Southern States a pole or capitation tax was raised. However the tax systems of the various States differed, the principle at the foundation of all of them was the same, namely the principle of finding the measure of an individual's ability to pay taxes in the aggregate amount of property in his possession. In New York this principle seems to have been most strictly adhered to.

IV.

1777–1890.

The Revolution and the establishment of the Confederation brought about little or no change in the New York tax system. The Federal Constitution of 1789, however, introduced a factor which was of lasting influence on the development of State and local taxation. By constitutional provision the States once for all lost their right to derive revenue from export, import and tonnage duties. Aside from these direct provisions the State and local taxes were left to compete with the Federal taxes.[1] In this competition the Federal government has always proved itself the stronger party. By adopting a system of indirect taxes (duties and internal revenue taxes), the Union took possession of the most copious and easily managed sources of revenue and drove New York, like the other States, involuntarily to the extension of its property tax. The framers of the Constitution did not fully realize that its tendency would be to develop federal and local taxation on such different lines. Still the *Federalist* acknowledges that[2] "the Laws

[1] Von Holst, *Staatsrecht*, d. v. St. A. ss. 66, 160.

[2] The *Federalist*, No. 34 (Jan. 8, 1788.)

cannot . . . in a legal sense interfere with each other, even in the policy of their different systems. An effectual expedient for this purpose will be mutually to abstain from those objects which either side may have first had recourse to. . . . A small land-tax will answer the purpose of the States, and will be their most simple and fitting resource." The future extent of local direct taxes was certainly not appreciated by the statesmen of 1787.

In the city of New York the revenues from other sources than the property tax had been developed during the Eighteenth century. Ferry rent had steadily increased from £145 ($480) in 1701 to £1,362 10s. ($3,700.00) in 1799; dock rent from £25 ($85) in 1703 to £4,155 5s. 9½d. ($1,100) in 1799; market rent from £72 10s. ($240.00) in 1736 to £790 10s. ($2,100); house and land rent from an insignificant sum to close upon £1,000 ($2,300); water-lot rent from £33 1s. 2½d. ($100) in 1735 to £927 13s. 1d. ($2,500) in 1800; tavern licenses from £51 10s. 3d. ($170) in 1702 to ten times that amount toward the end of the century. The slaughter-house, the rope-walk, the powder magazine, the poor-house, the brick-yard and the public crane were all at times sources of revenue. But all these sources of revenue were insufficient to cover the expenses of a city of growing importance.[1] A wiser policy would have improved them and made them more abundant, but as it was, the property tax, which at first was merely supplementary to these "Sundry Branches of City Revenue," as they are called in the New York City Ledger, came gradually to overshadow them in importance. But more of this below.

[1] N. Y. City Journals and Ledgers, Minutes Common Council, Dutch Records, City Hall.

Another factor which has been of influence on the development of the New York property tax is the former close relation between full citizenship and ownership of land. The right of suffrage was based on the possession of land before the arrival of the English.[1] By the Charter of Liberties (1683)[2] "every ffreeholder within this province, and ffreeman in any corporacon shall have the free choice and vote in the electing of the representatives, . . . and by freeholders is understood every one who is so understood according to the laws of England." "Ffreeman of any corporacon" applies to those who had purchased the freedom of the city of New York, merchants invariably paying twice or three times as much as others.[3]

By Act of the Assembly, April, 1698, the right of suffrage was limited in a similar way to resident freeholders of £40 ($194)[4], "Always provided That the Free men in the corporations of the cities and counties of New York and Albany have liberty to vote in their respective corporations, provided that they have been freemen of the said corporations, and have actually dwelt there three moneths before the Test of any such Writ of Election . . . ."

The first New York State Constitution (1777), like the constitutions of the other States, established property qualification for voters, which though

[1]Elting, *Dutch Village Communities*, p. 35.

[2]State Library, Albany; Brodhead, *History N. Y.*, II, p. 659, Act April, 1691: "And by Freeholders is to be understood every one who shall have 40s. per annum from freehold."

[3]N. Y. City Journal No. 2, 1696–1736; N. Y. City Ledger, 1700–1760; Minutes Common Council, II, 1691–1702.

[4]Cf. Contested Election Cases, involving voters' freehold, Nov. 18, 1768; May 18, 1769; (Journal N. Y. Assembly) and Sept. 29, 1701; (Minutes Common Council.)

amended in 1822, remained in force till 1826, as it did in many other States till a later date.[1]

During two centuries full rights of citizenship were enjoyed only by owners of land, which is synonymous with the well-to-do classes, for until the nineteenth century all property was primarily connected with the possession of land. It was natural then that the citizen should pay his share of the public charges according to the size of his property. The democratic tendency of this century has done away with property qualifications to the rights of citizenship (barring the still existing poll-taxes); and although the property tax still remains, it no longer reaches the whole body of citizens. The taxpayers as a class are not coextensive with the voting population. A curious reaction is seen in the attempt to put city suffrage on a property basis.[2]

State Tax Legislation Since 1777.

The various State Constitutions which were framed at the suggestion of the Continental Congress, during the '70's and '80's of the last century, contain with one exception no reference to any principles of taxation. Our Revolutionary heroes were too much occupied with framing Declarations of Natural Rights to give much thought to matters of taxation. However, the Massachusetts Constitution of 1780 lays down the general principle, that[3] "each individual of the society has a right to be protected by

[1] Dougherty, N. Y. Constitutions; Bernheim, *Ballot in N. Y.*, p. 132. Bryce, *Am. Commonwealth*, II, p. 53; Hitchcock, *State Constitutions*, p. 27; Stimson, *American Statute Law*, §244, 252.

[2] Adams, *Public Debts*, p. 359. Ford, W., *American Citizen's Manual*, p. 77.

[3] Part I, Declaration of Rights, X, Part II, ch. 1, § 1.

it, in the enjoyment of his life, liberty and property, according to standing laws. He is obliged consequently to contribute his share to the expenses of this protection." It further provides for a valuation of estates for purposes of taxation every ten years at least.

The Vermont Constitution (Chap. I, Art. 9) curiously enough provided, and still provides, that previous to any law for a tax, the purpose for which the tax is levied ought to appear of more importance to the community than the money would be if not collected.[1]

The New York Constitution of 1777 provided that municipal and county officials should continue to be eligible. Aside from this indirect provision no reference is made to taxation. It was left to the State Legislature in its first dozen sessions to give the old established property tax a new lease of life. Thus "An act for defraying the public and necessary charge in the respective counties of this State," passed March 7, 1788, shows no advance on former laws. It enacts:

"That the assessors of each respective city, town and place in every county of this State, shall yearly and every year, as soon as conveniently may be after they are chosen and qualified, proceed to inquire into the value of the real and personal estate of every freeholder and inhabitant within the city town or place, whereof they are assessors; and shall make out a true and exact list of the names of the freeholders and inhabitants of the respective cities, towns and places, for which they shall be chosen assessors; and of such who have estates therein, and do not reside there; and opposite to the names of every such person shall set down the real value of all his or her whole estate, real and personal in the same city town or place, as near as they can discover the same and shall set down the value of the real estate of each person, as aforesaid, in one column and the value of the personal estate of each person, as

[1] Ely, *Taxation in Am. States and Cities*, p. 397, quoting Stimson, *American Statute Law*, 1886, §330 B.

aforesaid, in another column of the same list or assessment, leaving room sufficient opposite thereto to insert the sum each person is to pay."

No material advance has been made in the form of the tax laws during the first century of State government. In the case of State taxes as well as in the taxes of the subordinate corporations the proper officials are authorized by the Legislature to raise a certain sum on, or a certain percentage of the estates of all the inhabitants within their respective districts.

A tax of March 28, 1778, made a distinction between real and personal property and taxed the former more heavily than the latter. This proceeding was however exceptional.

In 1799 one more attempt was made to reach the true value of property in the assessment list. The law of April 1st, of that year, provided "that the valuation of houses and lands within this State lately made under the authority of the United States shall as soon as the same be compleated, be deemed to be the value of all such houses and lands for the purposes" of taxation. Real estate, as is seen, was only affected by this law, for the Federal census takers paid particular attention to this class of property. As in former years this law also fixed the value of various kinds of personal property, such as cattle, carriages and slaves, and demanded a list of the same from the owner. But as had always been the case the law proved ineffective, and two years later the assessors were allowed to alter the Federal census valuation of real estate as circumstances required[1], and as regards personal property,

[1] Act, April 8, 1801.

they were, as usual, admonished to ascertain its value according to the best evidence in their power.

We need not go minutely into the tax laws of the present century. The following are some of the general provisions which have a decided bearing on the development of the property tax:

An elaborate law of 1823[1] provides that "all real and personal property shall be valued by the assessors for the purpose of taxation at the value they would appraise such estate in payment of a *bona fide* debt due from a solvent debtor." The method of assessment, which was to be at the place of residence of the taxpayer, is described. Exemptions like those now in force are provided for. They covered Federal and State property, the property of colleges and academies, schools, churches and public libraries, almshouses and similar buildings, and the personal property of clergymen to the amount of $1,500. The reduction of his assessments by the taxpayer, on his taking oath, is made possible. Incorporated companies are to be taxed like individuals, the cashier paying the taxes and deducting them from the dividends. Commutation was made possible by the payment of 10 per cent. of the annual net income of the company. Special provisions were made for New York County.

The general provisions for taxation in force in 1829, as seen in the Revised Statutes of that year, were as follows:

All lands and all personal estate within the State, whether owned by individuals or corporations, was liable to taxation, subject to the same exemptions as in 1823. Land, synonymous with real estate, included

[1] *Laws N. Y.*, 1823, ch. 262, p. 390.

the land itself, buildings, trees, underwood, mines, minerals, quarries and fossils. Personal property included household furniture, monies, goods, chattels, debts due from solvent debtors, public stocks and stocks in moneyed corporations. The taxpayer was to be taxed at his or her residence. Assessors were bound to abide by an affidavit regarding the value of his property made by the taxpayer.[1]

Regarding the taxation of moneyed corporations, their real estate was taxed in the town or ward where it lay; their personal property in the town or ward where the corporation's principal office was situated. Manufacturing and Marine Insurance companies, whose net annual income did not exceed 5 per cent., could commute their taxes by annually paying 5 per cent. of their net income to the County Treasurer. Turnpike, bridge and canal companies, whose annual income was less than 5 per cent., were exempt from all taxes.[2]

All these provisions were renewed in the following editions of the Revised Statutes: 1835, 1846, 1852, 1859 and 1875, with the exception of the commutation clause, which was repealed April 15, 1857. No material additions were made to the general tax laws before 1880.

The Present System.

The present system of assessing and collecting the property tax in New York State can be described as follows: (The unimportant special provisions regarding New York City are disregarded.)[3]

[1] *Rev. Stat.* 1829, Vol. I. ch. III; Title 1, § 1, p. 387; § 3; Title II, § 1, p. 389; § 15, p. 392.

[2] *Ibidem*, Title II, § 6, p. 389; Title IV, § 1; § 6, p. 415.

[3] Davies, *Taxation;* Cooley, *Taxation;* Burroughs, *Taxation; Rev. Statutes N. Y.*, 8th ed. 1889, chap. xiii; Ely, *Taxation in American States and Cities;* Bryce, *American Commonwealth*, II, pp. 127–136, 271–3.

All lands and all personal property within the State, whether owned by an individual or by a corporation, are liable to taxation, with the usual exemptions covering Federal and State property, church and school property, prisons and almshouses, the property of charitable associations, of clergymen up to $1,500, and lastly, all property exempt by law from levy and sale by virtue of an execution. Theoretically, every property-holder pays a tax proportioned to the aggregate amount of his property as far it is situated within the State.

Land or real estate includes:[1]

"The land itself above and under water; all buildings and other articles and structures, substructures and superstructures erected upon, under or above, or affixed to the same; all wharves and piers, including the value of the right to collect wharfage, cranage or dockage thereon; all bridges; all telegraph lines, wires, poles and appurtenances; all surface, underground or elevated railroads, and the iron thereon; branches, switches and other fixtures permitted or authorized to be made, laid or placed in, upon, above, or under any public or private road, street or grounds; all mains, pipes and tanks laid or placed in, upon, above or under any public or private street or place; all trees and underwood growing upon land; and all mines, minerals, quarries and fossils in and under the same, except mines belonging to the State."

An examination of the evolution of this voluminous definition would furnish an excellent review of the difficulties connected with the assessment of various kinds of property.

Personal property includes:[2] "All household furniture; monies; goods; chattels; debts due from solvent debtors, whether on account, contract, note, bond or mortgage; public stocks; and stocks in monied corporations; . . . and such portion of the capital

[1] *Rev. Stat.* 8th ed., Part I, ch. xiii, Title 1, Sect. 2, p. 1082.
[2] *Ibidem*, Sect. 3, p. 1083.

of incorporated companies, liable to taxation on their capital, as shall not be invested in real estate."

These definitions are of great importance in connection with the taxation of corporations, as we shall see.

In each township a board of assessors is elected, which is empowered to draw up the assessment list of its district. On this list is entered the name of the taxpayer, the amount of his real estate, its full value and the full value of his personal estate after deducting all *bona fide* debts owed by him. It is to be noticed that no such deduction is made in the case of real estate. The assessment of taxable property is to be made at its full and true value as it would be appraised by the assessors in payment of a just debt due from a solvent debtor, which principle is embodied in the assessor's oath of office.

In assessing a private corporation a difference is made between its real and personal property as was indicated above. Its real property appears in the assessment list of whatever township (or ward) it is situated in, but its personal property appears in bulk in the assessment list of the township in which the corporation has its principal office. The value of a corporation's personal estate is obtained by deducting from its paid-up capital the amount invested in real estate, the amount invested in stocks of other corporations subject to the same tax, the amount invested in stocks exempt from taxation and that amount of its capital which may be owned by the State or some association not liable to taxation.

By the first of August of each year the township assessment lists are complete and are open to inspection for twenty days. Any taxpayer, if aggrieved,

can appear before the assessors and petition for an abatement, in which case he is put under oath and examined by them.

As long as the assessment lists are in the hands of the assessors the taxpayer can have mistakes in his assessment corrected without going to court. But as soon as the assessment lists have been forwarded to the county officials, a correction of supposed errors is only possible by application to the courts. Two lines of action are open to the aggrieved taxpayer. He can either obtain an injunction to restrain collection, or a writ of *certiorari* to review the action. The former method is condemed as mischievous and tending to embarass the operations of government.[1] "Only in case of great necessity is an injunction to restrain collection of a tax to be granted.[2]

The other means of redress available to the aggrieved taxpayer is to obtain a writ of *certiorari* from the State Supreme Court. This "may be allowed on the petition of a person or corporation assessed and claiming to be aggrieved, to review an assessment of real or personal property for the purpose of taxation made in any town, ward, village or city of this State, when the petition shall set forth that the assessment is illegal, specifying the grounds of the alleged illegality, or is *erroneous by reason of overvaluation*, or is *unequal* in that the assessment has been made at a *higher proportionate valuation than other real or personal property on the same roll* by the same officers, and that the petitioner is or will *be injured* by such alleged illegal, erroneous or unequal assessment."[3] We have italicised portions

[1]Cooley, *Taxation*, pp. 700-4.

[2]Rome, Watertown R. R. Co. vs. Smith, 39 Hun. 332 (1886.)

[3]*Laws N. Y.* 1880, ch. 269, p. 402. *Revised Statute*, 8th ed. p. 1114.

of the law to point out how smooth the path of the aggrieved taxpayer is made. He need not prove that his property was overvalued, but merely that his property was overvalued when compared with his neighbor's assessment.

The township assessors, after completing their task, forward the assessment lists to the County Board of Equalization. This board examines the assessment lists, which together make up the county assessment list, and can add to or deduct from the aggregate valuation of real estate in any township in order to bring about a just relation between the valuations of real estate in the various townships, but in no case can they reduce the aggregate valuation of the county as made by the assessors. It is to be noticed in the first place that the revision of the personal estate valuation does not come within the powers of the County Board of Equalization, and in the second place that any change in a township assessment list made by the Board affects the individual taxpayer only indirectly by raising or lowering the quota of the county and State tax which his township is called on to pay.

A position similar to the County Board of Equalization is occupied by the State Board of Equalization.[1] It consists of three State assessors and six of the State officers, and supervises the distribution of the State taxes among the various counties. This Board revises the county assessment lists and can increase or diminish the aggregate valuation of real estate in any county, in no case, however, reducing the aggregate valuations of all the counties below the figure returned by the county officials. It

[1] Established in 1859. *Laws N. Y.* 1859, ch. 312, p. 702.

is seen, as in the case of the County Board, that the State Board of Equalization can only revise real estate valuations, and that any change made by the Board only affects the amount of an individual county's share of the State tax.

This share is ascertained by multiplying the State tax rate, as fixed by the Legislature, with the revised aggregate county valuation. This amount is added to the county tax levy and is divided among the townships. Each township adds its share of the county and State tax to its own township tax, which is then raised by the collectors. The amount raised is then divided in the proper ratio between Township, County and State.

In reviewing the history of the property tax one is impressed with the uniformity of its development. The principle at the foundation has remained unchanged throughout two centuries, and whatever changes in form and execution of the tax have been made were due to the attempts to adapt the system to changing conditions. The present aspect of the property tax is about the same in all the States. However its development may have differed in the various States, old and new ones, they have now a common system of local taxation.[1]

[1] Cf. Ely, *Taxation in American States and Cities;* Report Revenue Comm. Ill. 1886; Report on Taxation, Conn. 1868, 1887; Worthington, *Finances of Penna.*; Report on Taxation in Mass., 1875; Minot, *Taxation in Mass.*; Cooley, *Taxation;* Report Auditor Dakota, 1886; Report Comptr. Cal., 1882; Report Board Equalization, Cal., 1880; Report Auditor Ala., 1882; Seligman, *Finance Statistics of the American Commonwealths*, Am. Statist. Asso., Boston, 1889.

STATISTICS.[1]

The State tax which is added to the county rate and collected in the townships and wards averaged one mill in the dollar during the half century ending with the Civil war. From then till 1880 the State rate averaged over five mills, and since 1880 it has fallen to an average of two and three-quarter mills on the dollar. The list of State taxes since 1815 is as follows: (in mills)

1815	2	1845	.6	1860	3⅝	1875	6
1816	2	1846	.6	1861	3⅞	1876	3 11/12
1817	2	1847	.5	1862	4.75	1877	3⅛
1818	3	1848	.5	1863	5	1878	2.9
1819	1	1849	.5	1864	5.25	1879	2.863
1820	1	1850	.5	1865	4 8/80	1880	3.5
1821	1	1851	.5	1866	5 9/16	1881	2.25
1822	1	1852	.25	1867	7.6	1882	2.45
1823	.1	1853	.1	1868	5.8	1883	3.25
1824	1	1854	.75	1869	5⅛	1884	2 23/40
1825	.5	1855	1.25	1870	7 41/156	1885	2.96
1826	.5	1856	1.75	1871	5 79/120	1886	2.95
1842	1	1857	3	1872	9⅝	1887	2.7
1843	1	1858	2.5	1873	6.95	1888	2.62
1844	1.1	1859	2.5	1874	7.25	1889	3.52

[1]Compiled from N. Y. State and N. Y. City Comptroller's Reports; Statement Bonded Debt, N. Y. City, Dec. 31, 1886.

The amount raised by the above State tax since 1843, is :

1843	$ 619,694	1865	7,230,977	1878	7,941,298
1844	592,009	1866	8,517,465	1879	7,690,416
1845	655,067	1867	12,647,219	1880	9,232,542
1846	361,310	1868	10,243,317	1881	6,032,830
1847	370,557	1869	10,463,179	1882	6,820,022
1848	302,579	1870	14,285,977	1883	9,334,836
1859	3,512,284	1871	11,613,944	1884	7,762,573
1860	5,440,640	1872	19,580,882	1885	9,160,405
1861	5,586,849	1873	14,800,903	1886	9,512,813
1862	6,884,194	1874	15,727,482	1887	9,075,046
1863	7,272,274	1875	14,206,681	1888	9,089,304
1864	7,880,249	1876	8,529,174	1889	12,557,353
		1877	8,726,511		

The figures for the county and township taxes are less accessible. During the years 1840-1889 the total valuation of the State, the total amount of taxes raised on property by State, county and town taxes, and the average rate in the State of all these taxes, were as follows :

	Valuation.	Rate.	Amount.
1840	$ 641,359,818	.....	.....
1841	655,299,530	.....	.....
1842	620,676,346	.....	$ 4,246,488
1843	592,262,444	.....	3,965,180
1844	599,891,923	7.7 %	4,243,102
1845	605,646,095	.....	4,633,821
1846	616,824,955	7.53	4,647,462
1847	632,699,993	7.65	4,843,626
1848	651,619,595	8.12	5,295,458
1849	665,850,737	8.33	5,548,981
1850	727,494,583	8.67	6,312,787
1851	1,077,831,630	6.27	6,759,638
1852	1,168,335,237	6.00	7,007,688
1853	1,266,666,190	7.37	9,345,222
1854	1,364,154,625	7.06	9,636,091
1855	1,402,849,304	8.32	11,676,172
1856	1,430,334,696	8.90	12,742,845
1857	1,433,309,713	10.57	15,163,138
1858	1,404,907,679	10.98	15,425,539
1859	1,404,913,679	11.64	16,353,287
1860	1,419,297,520	13.35	18,956,024
1861	1,444,767,430	14.15	20,402,276
1862	1,449,303,948	13.42	19,456,024
1863	1,454,455,817	15.84	23,046,801
1864	1,500,999,877	26.56	39,873,943
1865	1,550,879,685	29.63	45,961,441
1866	1,531,229,636	26.49	40,568,245

	Valuation.	Rate.	Amount.
1867	1,664,107,725	27.95 %	46,578,922
1868	1,766,089,140	25.08	44,298,436
1869	1,860,120,770	24.82	46,161,531
1870	1,967,001,185	25.55	50,328,684
1871	2,052,537,898	22.22	45,674,487
1872	2,088,627,445	30.41	63,511,936
1873	2,129,626,386	24.16	51,444,536
1874	2,168,307,873	26.64	57,811,382
1875	2,367,780,102	24.04	50,328,684
1876	2,466,267,273	21.14	52,148,368
1877	2,755,740,318	18.23	50,237,164
1878	2,738,378,600	17.54	48,047,242
1879	2,686,139,133	17.55	47,148,475
1880	2,637,869,238	18.62	49,117,782
1881	2,681,257,606	18.38	49,286,773
1882	2,783,682,567	17.09	47,573,820
1883	2,872,257,325	17.73	50,936,789
1884	3,014,591,372	17.37	52,372,707
1885	3,197,163,785	18.50	57,262,650
1886	3,224,682,343	18.02	58,110,079
1887	3,361,128,177	17.05	57,331,192
1888	3,469,199,945	17.47	60,639,807
1889	3,567,429,757	16.97	60,553,028

In 1850 the average tax on property per individual in the State was $2.03; in 1860, $4.88; and in 1880, $9.66.

The average rate of taxation in the State (third column above) has little meaning, for the rate of county and town taxes varies very much in different parts of the State.

The following is the amount of property tax in some of the counties of the State in 1889 and the aggregate rate of such taxes:

Counties.	Population in 1880.	County Tax.	Town Tax.	State Tax.	Total.	Rate in Mills.
New York.....	1,206,299	25,459,710	.....	5,685,660	31,145,370	19.27
Kings.....	599,495	2,042,074	9,356,095	1,372,270	12,770,439	32.25
Albany.....	154,890	396,462	968,175	315,182	1,679,820	18.76
Hamilton.....	3,923	13,014	11,014	3,646	27,674	26.71
Queens.....	90,574	195,415	139,122	165,353	499,889	10.64
Oneida.....	115,475	249,862	131,180	202,999	584,041	10.12
Rensselaer....	115,328	228,400	180,926	218,750	628,075	10.10
Ontario.....	49,541	68,806	63,198	104,555	236,559	7.96

A table of the revenues of New York City (1805-1889) from the property tax and from other sources is appended. We have placed the municipal revenues from the property tax as well as from other sources in parallel columns in order to emphasize what was said above concerning the enormous increase, relative as well as absolute, of the property tax, when compared with the other sources of revenue. During the years 1840-1887 the revenue from the property tax increased twenty-four fold while rents increased but four fold, dock rent twenty fold and ferry rent seventeen fold. The great increase in the revenue from excise licenses is offset by the provision,[1] which requires the money thus raised to

[1] Laws N. Y., 1874, ch. 642.

be divided among charitable institutions. An analysis of the small increase of revenue from rents shows that while market rents have increased five fold there has been but a small increase in ground rents, while water lots rents and quit rents show a decided falling off since 1840. The municipal authorities have always been backward in developing these secondary sources of revenue, which were originally primary sources. The beggarly sums derived from the sale of railway franchises and from the taxation of transportation companies and other quasi-public corporations such as gas companies are proverbial.)See table on opposite page.)

The following is the list of ordinary revenues of New York City during the year 1888:

From Rents and Sales	$ 2,444,159
Interest on moneys invested	3,029,319
Licenses and Permits	206,028
Fees	366,006
Fines and Penalties	51,581
Franchises	158,637
Croton Water Rent	2,581,724
The State	694,169
Sundries	26,837
Taxes on property	34,754,974
Total ordinary receipts	$44,313,434

The receipts from Local Assessments, from Excise and from the issue of bonds have been omitted for obvious reasons.

During the census years since 1820 the average tax on property per individual in New York City, has been:

1820	$2.90	1860	$12.10
1830	2.40	1870	26.90
1840	4.33	1880	24.00
1850	5.80		

Revenues of New York City, 1805–1889.

	City and County Tax.	State Tax.	Total.	Rate in Mills.		Ferry.	Docks and Slips.	Rents.	Excise Licenses.	Other Licenses.	Fees and Fines.	Croton Water Rent.
1805	$127,095	.....	.....	5	1804	$11,034	$24,657	$23,796	.....	.....	.....	.....
1810	129,727	.....	.....	5.1	....	.....	.....	.....	.....	.....	.....	.....
1815	197,913	$163,372	$361,285	4.4¼	1815	.....	.....	.....	.....	$1,265	.....	.....
1818	255,741	80,254	335,995	4.2	....	.....	.....	.....	.....	.....	.....	.....
1822	303,106	71,289	374,395	5.25	....	.....	.....	.....	.....	.....	.....	.....
1825	336,869	50,580	387,449	3.8¼	...	.....	.....	.....	.....	.....	.....	.....
1830	.....	.....	487,882	.....	1830	11,767	.....	79,072	$30,880	2,885	$12,685	.....
1831	.....	.....	497,884	.....	1831	.....	.....	.....	29,078	.....	.....	.....
1832	.....	.....	523,949	.....	1832	9,363	47 520	.....	.....	.....	13.234	.....
1833	.....	....	640,375	....	....	.....	.....	.....	.....	.....	.....	.....
1834	.....	.....	904,960	.....	....	. . ....	.. . .	.....	.....	.....	.....	.....
1835	.....	.....	858,640	.....	1835	.....	.....	.....	.....	6,114	.....	.....
1836	.....	.....	866,602	.....	1836	11,684	.....	86,093	29,579	.....	22,498	.....
1837	.....	.....	904,419	.....	....	.....	.....	.....	.....	.....	.....	.....
1839	.....	.....	1,352,827	.....	....	.....	.....	.....	.....	.....	.....	.....
1840	1,320,663	34,172	1,354,835	.....	1840	20,418	68,174	81,711	30.780	5,766	13,916	... .
1841	1,404,936	35,415	1.440,351	.....	....	.....	.....	.....	.....	.....	.....	.....
1844	1,693,014	295,805	1,988,819	.....	1845	46,786	68,424	107,491	35,080	17,042	13,267	$157,792
1848	2,546,790	168,720	2,715,510	.....	1850	50,982	108,484	161,175	53,493	18,774	15,415	458,952
1852	3,015,249	313,613	3,328,862	.. ..	....	.....	.....	.....	.....	.....	.....	.....
1854	4,236,962	604,294	4,841,256	.....	1855	105,459	160,602	159,949	12,480	36 457	29,807	708,690
1858	7,293,034	1,328,057	8,621,091	....	....	.....	.....	.....	.....	.....	.....	.....
1860	7.649,873	2,108,635	9.758,508	.....	1860	94,412	169,310	165,423	.....	36,302	30,702	822,761
1863	9,354,825	2,737,080	12,091,905	22.1	....	.....	.....	.....	.....	.....	.....	.....
1865	15,300,008	2,902,849	18,202,857	29.2	1865	152,125	272,416	247,484	.....	35,805	26,527	1,049,556
1866	14,047,919	3,375,238	17,423,157	28.7	1866	181,230	.....	.....	....	.....	.....	.....
1868	17,955,832	4,629,598	22,585,430	28.3	....	.....	.....	.....	.....	.....	.....	.....
1870	18,661,904	6,741,956	25,403,860	27.3	1870	148,347	358,347	417,412	.....	24,612	9,295	1,188,661
1872	26,291 241	9,761,763	36,052,994	35.5	....	.....	.....	.....	.....	.....	.....	.....
1874	24,639,335	8,012,386	32,651,721	29.54	1875	.....	... .	390.842	.....	28,000	.....	1,411,050
1876	23,876,333	7,233,189	31,109,522	28	....	.....	.....	.....	.....	.....	128,431	.....
1878	24,097,561	3,911,327	28,008,888	25.5	....	.....	.....	.....	.....	.....	.....	.....
1880	24,365,950	3,571,323	28,937,273	25.3	1880	66,693	790,753	329,513	419,915	23,882	116,930	1,615,513
1882	23,857,139	2,827,288	27,684,437	22.5	1882	.....	1,147,225	.....	533,655	. .. ..	.....	.....
1886	27,605,786	4,051,487	31,657,273	21.09	1886	240,786	1,231,825	361.619	.....	65,600	151,020	2,501,975
1887	28,112,169	4,258,528	32,370,697	21.6	1887	346,391	1,384,470	377,852	.....	.....	.....	.....
1889	25,459,710	5,685,660	31,145,370	19.27	1888	.....	.....	.....	1,425.390	.....	.....	.....

The following is a table similar to the one above, detailing the receipts of the State Government during the fiscal year ending September 30th, 1889:

From Public Lands	$7,870
Interest on moneys invested in U. S., county and town bonds and in mortgages	539,058
Interest on deposit	44,794
Federal government	77,792
Fees	393,466
Fines	3,136
Sundries	9,700
TAXES.	
State Tax on property	$9,102,611
" " Corporations	1,172,600
" " Organization of corporations	198,982
" " Collateral inheritances	1,075,692
Pool Tax	27,211
Total receipts	$12,652,812

Real and Personal Estate in the Assessment Lists.

We have examined the amount of the property tax throughout the State, and now turn to the question of the relative amount of real and personal property as they appear on the assessment lists. Since 1836 the assessed value of real property in the State has been to that of personal property as 100 is to:

1836	24
1837	24
1840	23
1844	25
1845	24
1850	24
1855	26

1860	29
1864	29
1865	34
1868	33
1870	28
1873	25
1875	20

1876	17
1878	15
1880	14
1885	12
1887	11
1888	11
1889	11

In New York City this ratio can be established for a longer series of years:

1809	15 : 100
1810	15
1811	15
1812	14
1813	17
1816	43
1817	36
1818	35
1819	30
1820	33
1821	35
1822	33
1823	40
1825	73

1826	65 : 100
1828	48
1830	43
1832	39
1834	51
1836	32
1840	35
1845	37
1850	31
1855	44
1859	45
1860	45
1861	43
1862	43
1863	48

1864	54 : 100
1865	42
1867	50
1869	41
1874	31
1876	24
1878	22
1880	22
1882	19
1883	18
1886	18
1887	20
1888	19
1889	16.7

The same ratio in the city of Boston has been:[1]

1799	116 : 100
1804	111
1809	84
1814	85
1816	73
1818	75
1820	76
1822	80
1824	82
1826	73

1828	74 : 100
1830	61
1832	71
1834	73
1836	63
1838	57
1840	56
1842	63
1844	64
1846	75

1848	67 : 100
1850	71
1852	69
1854	77
1856	73
1858	66
1887	35
1888	35

[1] Municipal Charter of the City of Boston, 1859, pp. 232-233.

Curiously the relative decline in the assessed value of personal property begins in the '20's in both cities.

Judging from the valuation of property in the assessment lists, the increase and decrease of both kinds of property in the State must have been:

	Real Property.		Personal Property.	
1859—1865	Increase	5½%	Increase	27%
1865—1870	"	32	"	26
1870—1875	"	27	Decrease	6
1875—1880	"	18	Increase	11
1880—1885	"	19	"	17
1885—1889	"	16	"	3

and in the City of New York:

	Real Property.		Personal Property.	
1809—1813	Increase	9%	Increase	25%
1816—1820	Decrease	10	Decrease	42
1820—1825	Increase	12	Increase	145
1859—1865	"	12	"	6
1865—1886	"	181	"	10
1880—1887	"	36	"	6

This apparently slow growth of personal property within the State, need not be commented upon. It is a well-known fact that the great mass of personal property is barely touched by the tax. As early as 1832 the New York City comptroller complains[1], that "a portion of our business population escapes enrolment on our tax lists." The State Comptroller makes a similar complaint in his report for 1849,[2] and since

[1] Report N. Y. City Comptr. for 1832, p. 10.

[2] Cf. Report N. Y. City Tax Commissioners 1850, pp. 9, 25.

then, numerous comptrollers and tax commissions have called attention to this defect in the tax system. It is generally acknowledged that real estate is assessed at one-half to three-fifths of its market value under the most favorable circumstances, namely in cities, while in country districts the fraction sinks to one-third and one-fifth.[1]

In general low valuations are favored by the practice of adding state and county taxes to township taxes. "Hence arises the double competition between the assessors of counties in the aggregate, and of the towns in each county, for the lowest possible valuation,"[2] in order to escape as much as possible of the county and State taxes.

Independent State Taxation.

This difficulty, as well as the difficulty of properly taxing private corporations, has led to the introduction, since 1880, of a system of direct State taxes, which should be independent of county and township taxation. The State treasury had been made too dependent on county finances. As was the case in New York City, other sources of revenue beside the property tax were never fully developed. Auction duties have declined from $218,514 in 1830 to $17,417 in 1888. Rent of public land never netted the State more than an insignificant sum; the revenue from salt duties netted a surplus as late as 1875, but they now do not cover the cost of collection, while the canals ceased to be a source of rev-

[1] Cf. Report on Local Taxation, N. Y. 1871, p. 20; Report State Comptroller for 1872.

[2] Report Local Taxation N. Y. 1871, p. 20; Cf. N. Y. State Bar Association Report, Vol. IV, Albany, 1881, p. 148.

enue in 1882, the State pledging itself in the constitution to provide for its maintenance out of the revenue from taxation.

The corporation tax of 1880 (since then frequently amended)[1] now taxes every corporation doing business in the State, except savings banks, institutions for saving, life insurance companies, banks and foreign insurance companies, agricultural, horticultural and manufacturing or mining corporations, as follows: If the yearly dividend amounts to more than 6 per cent., the corporation pays a yearly tax to the State of .025 per cent. of its capital for every 1 per cent. dividend declared. If the dividend amounts to less than 6 per cent., the corporation pays a yearly tax of .15 per cent. of its capital, the latter being assessed at its market value. The distinction between dividends of over and under 6 per cent. is directed at preferred and common stock.

In 1887 a tax on the privilege of organization of corporations of $\frac{1}{8}$ of 1 per cent. on their capital was passed.[2]

A third source of revenue was found for the State in 1885 by an act[3] taxing collateral inheritances.

These three sources of State revenue, entirely independent of county and town taxes, netted $1,172,600, $198,982 and $1,075,692 respectively during the fiscal year ending September 30th, 1889.

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[1] *Laws N. Y.*, 1880, ch. 542, p. 763; Declared constitutional, People vs. Nat. Fire Ins. Co. of Harford, 27 Hun. 188 (1882); *Laws N. Y.* 1881, ch. 332, p. 454; 1882, ch. 151, p. 186; 1885, ch. 359, p. 608; 1886, ch. 266, p. 442; 1887, ch. 699, p. 907; 1889, ch. 193, p. 229.

[2] *Laws N. Y.* 1887, ch. 284, p. 355, amending *Laws N. Y.* 1886, ch. 143, p. 302.

[3] *Laws N. Y.* 1885, ch. 483, p. 820, 1887, ch. 713, p. 921; Declared constitutional, Matter of McPherson, 104, N. Y. 306.

New York is not the first State to introduce independent State taxes. Pennsylvania has gone much further in this direction.[1] Since 1867 real estate is exempt from State taxation. Of the $8,465,399 raised by State taxes in 1889, only $747,871 were raised by the personal property tax. Taxes on corporations contributed $3,951,927—that is almost half the State revenue—the tax on collateral inheritances netted $1,378,454, while the rest of the State revenue was derived from fees and licenses of various kinds.[2]

This development of State taxes has met with favor in Pennsylvania. The same tendency is seen in other States and everything seems to point toward a similar development in New York, it being recommended in numerous tax reports.[3]

The Pool tax, introduced in 1887,[4] deserves passing mention. It levies an annual tax of five per cent. upon the gross receipts for the admission to race tracks, and in return provides that the sections of the Penal Code prohibiting pool selling shall not apply during thirty days in the year to the race tracks under the authority of this law. It is to be hoped that this law will be effaced from our statute book, and soon be a thing of the past as much as government lotteries and similar sources of revenue.

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[1] Worthington, *Finances Penna.*

[2] Report Auditor General Penna. for 1889.

[3] Special Report N. Y. State Comptr. on Salaries, Taxation and Revenue, March, 1886, p. 7; Report N. Y. State Assessors, 1879, p. 4; Report Revenue Comm. Ill. 1886, pp. VIII-XV; Report Md. Tax Comm. 1886, pp. 56-62, 162 ff; Report on Taxation, Conn., 1887, p. 31 ff, Report N. Y. Tax Comm. March 1881, pp. 29-32, appendix, pp. 11 ff.

[4] *Laws N. Y.*, 1887, ch. 479, p. 604.

Legal Complications of the Property Tax.

The difficulty of assessing real property at its market value lies in the unwillingness of the assessors to set down that value. There can never be any question as to the *situs* of such property.

In the case of personal property, matters lie quite differently. First the assessor must discover personal property and establish its legal *situs* before he can assess its value. In the present day, what with the mobile character of such property, and the complications affecting its legal *situs* and the taxing powers of the different public corporations, the task of reaching personal estate for purposes of taxation has become quite hopeless.

It is generally conceded that the amount of personal estate in the State equals that of real estate, but that not more than one-fifth of the former finds its way into the assessment lists.[1] A glance at the large number of publications on the subject convinces one that the same condition prevails in the other States.[2]

But even if personal property is discovered by the assessors, the law often steps in the way and prevents its taxation. The constitutional provisions regarding inter-state commerce have greatly complicated the question. We cite some of the leading cases decided in the State and Federal courts.[3]

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[1] Report Local Taxation, N. Y., 1871, p. 26.

[2] Ely, *Taxation in American States and Cities;* Report Board Equaliz. Cal. 1880, pp. 28, 34; 1886, p. 13; Report Ala. State Auditor 1886, p. 5; Report Special Comm. on Taxation, Conn., 1886, pp. 21, 25; Report Rev. Comm., Ill., 1886, p. II; Minot, *Taxation in Mass.*, p. 6.

[3] Davies, *Taxation*, pp. 18-21. Cf. D. A. Wells, Reform of Local Taxation, *North American Rev.* 122, p. 376 (1876).

A statute of a State imposing a tax on the gross receipts of railroad companies is constitutional, though the receipts are made up in part from freights received for transporting goods from one State into another. A distinction is made between a tax on freights carried between States because of their carriage and a tax upon the fruits of such transportation after they have become intermingled with the other property of the carrier.[1] However, the Federal Supreme Court decided in 1886 against the constitutionality of a State statute which levies a tax upon the gross receipts of railroads for the carriage of freights and passengers into, out of or through the State, as being a tax upon commerce between the States.[2]

A general State tax laid alike on all property is constitutional, even if it happens to fall on goods intended for export. Coal mined in Pennsylvania and shipped to Louisiana becomes intermingled with Louisiana property and liable to taxation there, though not landed, but intended for export.[3]

On the other hand imported goods while still in their original packages are exempt from taxation, a welcome provision to all importing merchants in New York, whose personal property appears in consequence on the assessment list as amounting to an insignificant sum. Similarly a tax on auction sales is void when applied to the sale of imported goods in the original packages.[4]

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[1] Reading Railway Co. vs. Penna., 15 Wallace, 284 (1872).

[2] Fargo vs. Mich., 121 U. S., 230; Cf. Phila. & Southern S. S. Co. vs. Penna., 122 U. S., 326.

[3] Brown vs. Houston, 114 U. S., 622 (1885).

[4] Cook vs. Penna., 97 U. S., 566 (1878).

A steamship company incorporated under New York State laws engaging in foreign trade is not exempt from taxation on its capital, because the amount is invested in steamships engaged in foreign commerce.[1]

Aside from the constitutional questions involved, the question of the *situs* of personal property has led to legal complications.[2]

The personal property of non-residents is exempt when actually situated in another State or country, and taxable when situated within the State. This only applies to property which is capable of having an actual *situs*. Debts and choses in action in general follow the domicile of their owner. Lands and chattels have an actual *situs*. The legal fiction "*mobilia personam sequuntur*" is not of universal application.[3] Goods and chattels within a State are equally taxable, whether owned by a citizen of the State or a citizen of another State, even though the latter is taxed in his own State for the value of the same goods as part of his personal estate.[4]

In general personal property is assessed in the township or ward in which the taxpayer resides on the day of assessment.[5] Residence of a person in a town during June, July and August gives the town assessors jurisdiction over his person and property

[1] People, ex rel. U. S. & Brazil S. S. Co. vs. Commissioners of Taxes N. Y., 48 Barbour, 157 (1866). Cf. in general People, ex rel. Haneman vs. Tax Commissioners, 10 Hun., 255; 73 N. Y., 607 (1878).

[2] Report on Local Taxation, N. Y., 1871, pp. 38–52, 64ff.

[3] Hoyt vs. Commissioners of Taxes, 23 N. Y., 224 (1861).

[4] Coe vs. Errol, 116 U. S., 517 (1886).

[5] Davies, *Taxation*, pp. 112–113; *Laws N. Y.*, 1850, ch. 92, p. 142; 1851, ch. 176; Bartlett vs. Mayor, etc. of N. Y., 5 Sandf., 44 (1851); Douglass' vs. Mayor, etc. of N. Y., 2 Duer, 110 (1853); Kirtland vs. Hotchkiss, 100 U. S., 491 (1879).

for the purpose of completing an assessment of his property. A change of residence after July 1st does not affect the assessment roll.[1]

It is often difficult to determine the place of legal residence of a taxpayer, especially in the case of New York City, many of whose inhabitants claim a legal residence, perhaps only a summer home, in some neighboring county or in the State of New Jersey. A simple affidavit exempts such persons from taxation on their personal estate in New York City. In their country residences they pay only small taxes or are discreetly left unmolested by the county and township officials for fear of losing a valuable patron of the district.

Debts due inhabitants of the State from non-residents are taxable "however secured and wherever securities are held."[2] But this clause is practically nullified by the provision that if such debts are capable of an actual *situs* without the State they are exempt from taxation.

Debts owing by residents of the State to foreigners for the purchase of real estate are taxable as personal estate.[3] Other debts owing by the taxpayer are deducted from his personal estate assessment and remain untaxed.[4]

The personal property of non-residents is taxable in so far as it is invested in the State.[5] The agencies of non-resident corporations, such as banks, insur-

[1] Boyd vs. Gray, 34 Howard Practice, 323.

[2] Davies, *Taxation*, pp. 64-5; *Laws N. Y.*, 1883, ch. 392, p. 568.

[3] *Laws N. Y.*, 1851, ch. 371, p. 721.

[4] *Laws N. Y.*, 1851, ch. 176; 1884, ch. 57; 1885, ch. 201, p. 364.

[5] *Laws N. Y.*, 1855, ch. 37, p. 44; Internat. Life Ass. Soc. vs. Commissioners of Taxes, 28 Barb., 318 (1858); Duer vs. Small, 4 Blatchf., 269; 17 Howard Pr., 201 (1859).

ance companies and factories, are directly affected by this provision.[1] However the interpretations of the law have been lenient. The goods of a non-resident owner sent to this State for the purpose of sale without reinvestment of the proceeds are not liable to taxation. The law intends to reach non-residents, employed within the State in a continuous business, and not property sent here only as to a market for sale.[2] Foreign capital sent to New York for investment is exempt, whether invested or uninvested, and whether the securities received therefor are taken away or remain in the State for collection.[3] Where a foreign bank transmits its surplus to its agency, permanently established in New York City, for temporary loans, these funds are exempt.[4]

To prevent so-called double taxation, an individual stockholder in a corporation, liable to taxation on its capital, is not assessed for the value of such stock.[5]

One more general provision must be cited, which bears directly on the assessment of personal property. By act of Congress, February 25th, 1862, all United States stocks are exempt from State and local taxation.[6] However, stockholders in a bank may be

[1] People, ex rel. Bay State, etc. Co. vs. McLean, 80 N. Y., 254 (1880).

[2] People, ex rel., The Parker Mills vs. Commissioners of Taxes, 23 N. Y., 242 (1861).

[3] Williams vs. Board of Supervisors, 78 N. Y., 561 (1879).

[4] People, ex rel., Bank of Montreal vs. Commissioners of Taxes, 59 N. Y., 40 (1874); Cf. Hoyt vs. Commissioners of Taxes, 23 N. Y., 224 (1861); People vs. Trustees of Village of Ogdensburgh, 48 N. Y., 390.

[5] People, ex rel., Lincoln vs. Town of Barton, 44 Barb., 148 (1865).

[6] Davies, *Taxation*, pp. 76-78; People, ex rel., Lincoln vs. Barton, 44 Barb., 148 (1865); People, ex rel., Bank of Commonwealth vs. Commissioners of Taxes of N. Y., 2 Black, 620; Bank vs. Supervisors, 7 Wall., 26 (1868); Bank vs. Mayor, 7 Wall, 16 (1868).

taxed for the value of their stock, although the whole stock is invested in United States bonds and securities.[1]

The Present Tax Question.

In view of the legal complications in State and local taxation, which have been imperfectly sketched above, and in view of the practical difficulty of reaching the great mass of personal property, it is now generally acknowledged that *uniform* taxation of *all* property is an utter impossibility. As we have seen, real estate has always born the brunt of the property tax, and it has been proposed by those New Yorkers best acquainted with the subject, to give up the taxation of personal property,[2] which, as it now stands, is a mere farce and calculated to put a premium on dishonesty. The decrease in revenue due to such a change might be offset by increasing the tax on real estate, by extending the system of corporation taxes, or by introducing some form of personal taxation. Each of these measures has its advocates.

It is granted on all sides, that a reform of the present State and local tax system is necessary, but all are not agreed on the method of accomplishing this end. Any tax reform is so immensely complicated now-a-days by economic conditions. It is no longer simply a question of public finance. Just as the tariff has long ago ceased to be treated as a fiscal question, but as a question of industrial legislation, so state or local taxes no longer involve purely fiscal

[1] People vs. Commissioners of Taxes, 23 N. Y., 426 (1866).

[2] Report on Local Taxation, N. Y., 1871, pp. 52-59, 71-74; Message of Abram S. Hewitt, Mayor, to Board of Aldermen, Jan. 1888, pp. 37-38.

measures, but are fast assuming the character of industrial laws. The history of corporation taxation is an excellent illustration of this—the lenient treatment of manufacturing corporations and their exemption from the direct State corporation tax. The Erie canal which had long been made a source of revenue, was made free by a vote of the people on November 7th, 1882. A similar fate, no doubt, awaits the Brooklyn bridge.

As the tax laws now read[1]—

"The real estate of individuals and corporations and the personal estate of individuals contribute to local taxation, and to the quota of State tax, but the personal estate and capital stock of corporations, contribute only to local taxes. . . . Individuals and corporations, including those liable to direct State taxation, pay taxes on real estate. Individuals and corporations not so liable, pay on personal estate by a rate that includes the State tax, while corporations so liable, and assessed upon the same roll, pay taxes on their capital stock and personal property according to the same rate, diminished by the rate of State taxation."

Practically, all real estate is taxed, though very unequally. Of personal estate, the greater part escapes taxation, while the property of minors and other property which is in the hands of trustees, and cannot therefore escape notice, is heavily taxed.

The results we have reached, can be summed up as follows :

I. A general property tax, aiming at the taxation of the individual in proportion to his aggregate property, cannot be carried out with any degree of justice in New York. In Colonial times, when property was largely visible and tangible, such a tax may have been just as well as expedient, but in the present century it cannot be consistently maintained.

[1] Davies, *Taxation*, p. 8.

II. Even if it were possible to assess all property at approximately its market value, it is not in accordance with just principles of taxation, to allow a tax which measures the individual's ability to pay taxes by the extent of his property, to gain the proportions which this system has gained in New York. The property tax in all the States and Territories, yielded in 1880, $302,200,694,[1] a sum nearly equal to that derived by the Federal government from indirect taxes during the same year.

As an argument in favor of the present direct tax system, it is maintained that the property tax is a proper offset to the Federal taxes which fall particularly on the poorer classes. This argument however fails to establish the justice of the property tax in its present proportions in view of the changing tariff policy of the Union, and in view of the fact that the upper classes, as distinguished from the poorer classes, who bear the brunt of federal taxation, by no means correspond with the property tax-payers.

At the foundation of the property tax lies the principle contained in the "Social Dividend Theory of Taxation," as President Walker calls the doctrine "that the members of the community ought to contribute to the public support in proportion to the benefits they derive from the protection of the State."[2]

Such a give-and-take principle ("Leistung und Gegenleistung") is recognized in the first constitution of Massachusetts and in the Vermont constitution now in force, which provides (chap. I, art. 9) "that every member of society hath a right to be protected in the enjoyment of life, liberty and property, and there-

[1] Compendium U. S. Census 1880, Part II, p. 1509.

[2] Walker, *Political Economy*, p. 440, §424.

fore is bound to contribute his proportion towards the expense of that protection . . . " This principle has also been accepted by the courts:[1] "The person upon whom the demand is made, or whose property is taken, owes to the State a duty to do what shall be his just proportion towards the support of government, and the State is supposed to make adequate and *full compensation,* in the protection which it gives to his life, liberty and property, and in the increase to the value of his possessions, by the use to which the money contributed is applied." This doctrine quite agrees with the popular notion in New York City, that one of the chief objects of municipal government should be to insure the rise in the value of real estate. We are told that "a property tax for the general purposes of the government, either of the State at large or of a county, city or other district, is regarded as a just and equitable tax. The reason is obvious. It apportions the burthen according to the benefit, more nearly than any other inflexible rule of general taxation."[2] And again that "there is nothing poetical about tax laws. Whenever they find property they claim a contribution for its protection, without any special respect to the owner or his occupation."[3]

Judge Dillon says:[4] "Theoretically, the taxpayer is compensated for the taxes he pays, in the protection afforded to him and his property by the government which imposes the tax." The State's sole duty is the protection of property. Granted this premise

[1]Cooley, *Taxation*, pp. 2, 20, 24.

[2]The People, ex rel., Griffen vs. The Mayor, etc. of Brooklyn, 4 N. Y., 428 (1851).

[3]Findley vs. The City of Phila. 32 Penna., 381.

[4]Dillon, *Municipal Corporations*, II, §736, p. 728.

is true, the conclusion is then quite correct. An individual must contribute to the State's support in proportion to the property in his possession.

The Economists have outgrown this position which the law so stoutly maintains. To quote from John Stuart Mill alone[1]—

"There is in this adjustment (the *quid pro quo* principle) a false air of nice adaptation, very acceptable to some minds. But in the first place, it is not admissible that the protection of persons (for which service a pole tax is consistently proposed) and that of property, are the sole purposes of government. The ends of government are as comprehensive as those of the social union. They consist of all the good, and all the immunity from evil, which the existence of government can be made either directly or indirectly to bestow. In the second place, the practice of setting definite values on things essentially indefinite, and making them a ground of practical conclusions, is peculiarly fertile in false views of social questions. . . . Whether the labour and expense of the protection, or the feelings of the protected person, or any other definite thing be made the standard, there is no such proportion as the one supposed, nor any other definable proportion. . . . If there were any justice, therefore, in the theory of justice now under consideration, those who are least capable of helping or defending themselves, being those to whom the protection of government is the most indispensable, ought to pay the greatest share of its price."[2]

The sentence in the opening paragraph of Judge Cooley's treatise on Taxation, is an indirect admission of the insufficiency of this give-and-take theory of taxation: "The justification of the demand is therefore found in the reciprocal duties of protection and support, between the State and those who are subject to its authority, *and* the exclusive sovereignty and

[1]Mill, *Political Economy*, II, Book V, ch. II, §2, pp. 393-4.

[2]Cf. similar lines of reasoning in Leroy-Beaulieu, *Traité de la Science des Finances* I, pp. 113 ss. Livre II, ch. I; Rogers, *Economic Interpr. History*, p. 117; Walker, *Political Economy*, p. 440, §464; Cohn, *Finanzwissenschaft*, Buch 2, Kap. 1, §192, ss. 234 ss.; Wagner, *Finanzwissenschaft*, II, §§329 ss. S., 150 ss.

jurisdiction of the State over all persons and property within its limits for government purposes."

The New York property tax is essentially objective; that is, it is directed at the property as distinct from the possessor. *Property* and its relation to the Commonwealth are emphasized, the tax-paying *citizen* is left out of account. Property, not the citizen, is taxed. This may seem a sophistical distinction. But the fundamental error in the theory of the general property tax is this personification of property. As long as the citizen, his relation and duties to the Commonwealth are overlooked in our tax system, we can expect no advance in our present primitive methods.

The property tax will probably always play an important part in municipal and county finances. The peculiar relation of real estate to local government will tend to cause its taxation to be retained as in England.[1] "In local taxation . . . . the local benefits may in many cases be seen, traced and estimated to a reasonable certainty."[2] This principle is at the foundation of so-called local assessments[3] for building streets, bridges and sewers, the supply of water, etc.

The experience of two centuries shows that an extension of the property tax is undesirable and inexpedient.[4] On whatever lines State and local

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[1]Gneist, *Englische Kommunalverfassung*, 1863, S. 69 ss.; Bödiker, *Kommunal-Besteuerung in England and Wales*, 1873; Probyn, *Local Government in the United Kingdom*, 1882.

[2]The People vs. Mayor, etc. of Brooklyn, 4 N. Y., 428.

[3]Cooley, *Taxation*, pp. 606–77.

[4]Cf. Wells, *Reform of Local Taxation*, 1876, Ely, *Taxation in American States and Cities*, pp. 237, ss; Seligman, *The General Property Tax*, pp. 56, ss.

taxation are to be extended, a new direction for their development must be discovered.

If the personal property tax is given up, which seems inevitable, the arguments against an extension of real estate taxation are the same as those urged against the Henry George single-tax system, while an extension of corporation taxation means an extension of our present impersonal tax system. The introduction of some form of subjective, that is, of personal tax, seems to us advisable, which would be directed at the citizen as an individual taxpayer, not at his property. By building up a tax system on such a foundation the taxpayer would be awakened to a sense of his civic duties which lies dormant under the present system.

The Federal Government can accomplish nothing by direct legislative interference. None of the existing Federal taxes can furnish a foundation for State and local taxes as is the case in Germany and France. The constitutional development of the United States has tended to separate Federal from State and local taxation. The distribution of the surplus revenue of 1837, the greatest attempt to connect their systems of finance, proved a dismal failure.[1]

[1]Bourne, *History Surplus Revenue of* 1837, N. Y., 1885.

STIPULATION WAIVING CERTIFICATION OF RECORD ON APPEAL

STATE OF NEW YORK : SUPREME COURT
APPELLATE DIVISION : FOURTH DEPARTMENT

ERIC WHITE and NATIVE OUTLET,

Plaintiffs/Appellants,

against

ERIC T. SCHNEIDERMAN, NEW YORK STATE ATTORNEY GENERAL, in his official capacity; and THOMAS H. MATTOX, COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, in his official capacity,

Defendant/Respondents.

Index No. 82670

STIPULATION WAIVING CERTIFICATION

IT IS HEREBY STIPULATION AND AGREED, pursuant to CPLR §5532, by and between the undersigned attorneys for the respective parties hereto, that the foregoing constitutes true and correct copies of all parts of the Record on Appeal as are necessary to consider the questions involved in this appeal.

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Dated: 6/1/15

STATE OF NEW YORK OFFICE OF THE ATTORNEY GENERAL

By: _____

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Dated: 6/12/15

Appellate Division Docket No. CA 15-01764
Cattaraugus County Clerk's Index No. 82670

New York Supreme Court

Appellate Division—Fourth Department

ERIC WHITE and NATIVE OUTLET,

Plaintiffs-Appellants,

– against –

ERIC T. SCHNEIDERMAN, NEW YORK STATE ATTORNEY GENERAL, in his official capacity; and THOMAS H. MATTOX, COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, in his official capacity,

Defendants-Respondents.

SUPPLEMENTAL RECORD ON APPEAL

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SUMMONS, COMPLAINT AND AFFIDAVIT OF SERVICE, SNYDER V. WETZLER
[SR-1- SR-9]

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Exhibit "A" Annexed to Affirmation of Toohey.

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ALBANY

BARRY E. SNYDER, SR., d/b/a
SENECA HAWK
ROUTES 5 & 20
IRVING, NEW YORK 14081,

Plaintiff,

vs.

JAMES W. WETZLER,
COMMISSIONER OF TAXATION AND
FINANCE OF THE STATE OF NEW YORK;
DEPARTMENT OF TAXATION AND
FINANCE, STATE OF NEW YORK
NEW YORK STATE TAX APPEAL TRIBUNAL
STATE CAMPUS
ALBANY, NEW YORK 12227,

Defendants.

SUMMONS

The basis of venue is
CPLR §506(b)2

TO THE ABOVE NAMED DEFENDANTS

YOU ARE HEREBY SUMMONED to answer the complaint in this action, and to serve a copy of your answer, on the Plaintiff's attorney(s) within 30 days after the service is completed if this service is not personally delivered to you within the State of New York; and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

DATED: February 1, 1992
Lewiston, New York

TIMOTHY J. TOOHEY
Attorneys for Plaintiff
904 Center Street
P.O. Box 732
Lewiston, New York 14092
(716) 754-4497

Exhibit "A" Annexed to Affirmation of Toohey.

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ALBANY

BARRY E. SNYDER, SR., d/b/a
SENECA HAWK
ROUTES 5 & 20
IRVING, NEW YORK 14081,

Plaintiff,

COMPLAINT

vs.

Index No.

JAMES W. WETZLER,
COMMISSIONER OF TAXATION AND
FINANCE OF THE STATE OF NEW YORK;
DEPARTMENT OF TAXATION AND
FINANCE, STATE OF NEW YORK
NEW YORK STATE TAX APPEAL TRIBUNAL
STATE CAMPUS
ALBANY, NEW YORK 12227,

Defendants.

The Plaintiff, by his attorneys, TIMOTHY J. TOOHEY, PC, for his Complaint herein, alleges as follows:

1. Plaintiff, Barry E. Snyder, Sr., is a duly enrolled member of the Seneca Nation of Indians and resides and has a place of business for the sale of cigarettes and motor fuel on the Seneca Indian Reservation in the State of New York.

2. Upon information and belief, Defendant James. W. Wetzler is the Commissioner of Taxation and Finance of the State of New York, and the head of the Defendant Department of Taxation and Finance.

3. Upon information and belief, Defendant New York Tax Appeals Tribunal is a body consisting of three commissioners responsible for the administration of the Division of Tax Appeals pursuant to Article 40 of the New York Tax Law.

4. At all times hereinafter mentioned Plaintiff was distributing and selling cigarettes and motor fuel on the Seneca Indian Reservation.

Exhibit "A" Annexed to Affirmation of Toohey.

5. Pursuant to New York Tax Law §471, excise taxes are imposed on all cigarettes possessed in the state by any person for sale, subject to certain exceptions, including the exception that "No tax shall be imposed on cigarettes sold under such circumstances that the state is without power to impose such tax..."

6. Pursuant to New York Tax Law §284, excise taxes are imposed on motor fuel imported into the state or manufactured in the state by a distributor, certain subject to certain exceptions, including motor fuel "Imported, manufactured, or sold under circumstances which preclude the collection of such tax by the United States Constitution and of the Laws of the United States enacted pursuant thereto."

7. Similar constitutional restrictions on the collection of sales or use taxes on motor fuel are set forth in Tax Law §1102.

8. The State of New York does not have the power to assess, impose, or levy cigarette, motor fuel, sales or use taxes pursuant to the New York Tax Law against Indians doing business on Indian Reservations, because, inter alia,pursuant to the United States Constitution, Article 1, Section 8, Clause 3, and the Laws of the United States enacted pursuant thereto, Congress has the sole power to regulate commerce with the Indian tribes.

9. Indians on Indian Reservations are immune from the assessment or collection of state taxes unless such state taxation is specifically authorized by the Congress of the United States.

10. Congress has never authorized the assessment of New York State taxes against individual Reservation Indians or Indian tribes.

11. The Defendants have long recognized the state tax immunity of Indians on Indian Reservations.

12. Notwithstanding the foregoing, on or about January 14, 1991, Defendant New York State Department of Taxation and Finance issued tax assessments against Plaintiff for cigarette excise taxes, motor fuel excise taxes, diesel fuel excise taxes, and sales and use taxes as follows:

a. cigarette taxes, penalties and interest pursuant to Article 20 of the tax law in the total amount of ($2,759,475.55) for monthly periods dating from January 1, 1989 through October 31, 1989

b. gasoline/motor fuel taxes pursuant to Article 12-A of the New York Tax Law penalties and interest in the total amount of $573,919.12 for monthly periods dating from January 1, 1989 through December 31, 1989.

c. Gasoline/diesel taxes pursuant to Article 12-A of the New York Tax Law, penalties and interest in the total amount of $976,564.30 for monthly periods dating from January 1, 1989 through December 31, 1989.

d. Sales taxes, penalties and interest in the total amount of $2,017,087.57 for monthly periods dating from January 1, 1989 through December 31, 1989.

13. An actual controversy exists between Plaintiff and Defendants in that Plaintiff contends that the State of New York by and through Defendant New York Department of Taxation and Finance may neither assess state taxes nor attempt to collect state taxes from Plaintiff pursuant to or in furtherance of said assessment based on activities conducted on Indian Reservations.

14. By reason of the foregoing, there is presented for consideration and determination in this action the question of the power and jurisdiction of the Defendants to assess, impose, or levy state cigarette, motor fuel, diesel fuel, and sales taxes against Plaintiff or to collect such taxes from Plaintiff pursuant to or in furtherance of said assessments based on activities carried on by Plaintiff on the Indian Reservations.

15. A declaratory judgment with respect to the issues herein involved will settle the aforesaid controversy directly, expeditiously, and with finality.

16. Plaintiff will suffer irreparable harm and is without an adequate remedy at law and is therefore entitled to a Declaratory Judgment of his rights regarding the application and legal effect of the New York Tax Law upon Plaintiff in

connection with the subject of this action and is entitled to a preliminary and permanent injunction against Defendants in connection therewith, because of the foregoing reasons and for the following additional reasons:

(a) Plaintiff will unnecessarily be subject to various administrative proceedings before Defendant New York Tax Appeals Tribunal in order to contest any determinations hereinafter made by Defendants with respect to tax assessments made by the Defendant New York State Department of Taxation and Finance against Plaintiff for activities on Indian Reservations, which administrative proceedings will involve lengthy and costly hearings which Plaintiff believes will result in a finding by said Defendant confirming any assessments of taxes, interest, and penalties against Plaintiff with respect to any such sales;

(b) As a condition precedent to a court review of any such determinations by the Defendant New York Tax Appeals Tribunal, Plaintiff would be required to either deposit with Defendant Department of Taxation and Finance all taxes, interest, and penalties which are claimed to be due by the Defendant or to post a bond or undertaking for such amounts (totaling over $6.2 million) plus costs, which requirements will effectively preclude court review of this issue, since Plaintiff does not have the financial ability to comply with such requirements.

(c) As a matter involving the applicability and/or constitutionality of the tax law and its application to Plaintiff, Plaintiff is entitled to have the issues raised here and determined by a court of competent jurisdiction.

17. By reason of the foregoing, Plaintiff is entitled to a Declaratory Judgment:

a.) That the State of New York, by and through Defendants, is without power to impose, levy, or assess cigarette, motor fuel, diesel fuel, or sales or use taxes against Plaintiff in that Indians are immune from state taxation with respect to activities conducted on Indian

reservations by reason of the United States Constitution and the Laws of the United States enacted pursuant thereto;

b.) That the State of New York, by and through Defendants, is without power to collect cigarette, motor fuel, diesel fuel, or sales or uses taxes from Plaintiff pursuant to or in furtherance of said assessments with respect to Plaintiff's activities on Indian reservations by reason of the United States Constitution and the Laws of the United States enacted pursuant thereto;

c.) That insofar as the aforesaid limitations on the taxing power of the State of New York are expressly set forth in the relevant provisions of the law, the aforesaid provisions of the Tax Law of the State of New York do not apply by their express terms to Plaintiff's activities on Indian reservations within the territorial boundaries of the State of New York, and insofar as the Tax Law of the State of New York does not expressly so provide and purports to impose such state taxes with respect to such activities, it is unconstitutional and/or pre-empted by federal law; and

d.) That any notices of determination or assessments of cigarettes, motor fuel, diesel fuel, and/or sales and taxes against Plaintiff by Defendants with respect to Plaintiff's activities on Indian reservations are unconstitutional, illegal, null and void and of no effect.

18. By reason of the foregoing, Plaintiff is also entitled to a preliminary and permanent injunction restraining and enjoining the Defendants, or any of their respective agents, employees, or other persons under their control:

a) from assessing, determining, levying, collecting, or attempting to collect state cigarette, motor fuel, diesel fuel, and/or sales and use taxes from Plaintiff with respect to activities carried on by Plaintiff on Indian Reservations, or

b) from commencing or causing to be commenced or maintaining under the tax law of the State of New York or otherwise, administrative, civil,

or criminal proceedings against or involving the Plaintiff by reason of the illegal and unconstitutional assessments of taxes against Plaintiff;

c) From otherwise enforcing or attempting to enforce any other provisions of the Tax Law of the State of New York by reason of, or in connection with, such illegal and unconstitutional assessments.

WHEREFORE, Plaintiff demands judgment against the Defendants:

(a) declaring that the State of New York is without power to impose, levy, or assess cigarette, motor fuel, diesel fuel, and/or sales and uses taxes against Plaintiff with respect to his activities on Indian Reservations within the territorial boundaries of the State of New York;

(b) Declaring that the State of New York is without power to collect cigarette, motor fuel, diesel fuel, and/or sales or use taxes from Plaintiff pursuant to and in furtherance of said assessments;

(c) Declaring that, insofar as the aforesaid limitations on the taxing power of the State of New York are expressly set forth in relevant portions of the law, the aforesaid provisions of the tax law of the State of New York do not apply by their express terms to Plaintiff's activities on Indian reservations within the territorial boundaries of the State of New York, and insofar as the tax law of the State of New York does not expressly so provide and purports to impose such state taxes with respect to such activities, it is unconstitutional and/or pre-empted by federal law; and

(d) Declaring that any Notices of Determinations or assessments of cigarettes, motor fuel, diesel fuel, and/or sales or use taxes against Plaintiff by Defendants with respect to Plaintiff's activities on Indian reservations are unconstitutional, illegal, null and void, and of no effect.

Exhibit "A" Annexed to Affirmation of Toohey.

(e) Permanently enjoining and restraining the Defendant's, and all of their respective agents, employees, and others under their control:

(i) from determining, assessing, levying, collecting. or attempting to collect New York State cigarette, motor fuel, diesel fuel, and/or sales or use taxes from Plaintiff with respect to Plaintiff's activities on Indian Reservations within the territorial boundaries of the State of New York;

(ii) from commencing or maintaining, under the tax law or otherwise, administrative or civil, or criminal proceedings against or involving the Plaintiff by reason of or in connection with the aforesaid legal assessments; and

(iii) from otherwise enforcing or attempting to enforce any other provisions of the tax law of the State of New York by reason of or in connection with such illegal assessments; and

(f) granting the Plaintiff such other and further relief as the Court may deem just and proper together with the costs and disbursements of this action.

DATED: January 7, 1992

Yours,

DENNIS A. CLARY, ESQ. of Counsel
TIMOTHY J. TOOHEY
Attorneys at law
904 Center Street P.O. Box 732
Lewiston, New York 14092
(716) 754-4498

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Exhibit "A" Annexed to Affirmation of Toohey.

VERIFICATION

STATE OF NEW YORK
COUNTY OF ERIE ss.

BARRY E. SNYDER, SR., being duly sworn, deposes and says that he is the PLAINTIFF in this action, he has read the foregoing Summons and Complaint and knows the contents thereof, and that the same is true to the best of his knowledge, except as to those matters therein stated to be alleged upon information and belief, and as to those matters he believes them to be true.

Barry E. Snyder Sr
BARRY E. SNYDER, SR.

Sworn to before me this 21st day of January, 1992

Notary Public

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SR-10

STIPULATION TO SUPPLEMENTAL RECORD

STATE OF NEW YORK	:	**SUPREME COURT**
APPELLATE DIVISION	:	**FOURTH DEPARTMENT**

ERIC WHITE and NATIVE OUTLET,

Plaintiffs-Appellants,

Vs. **Index No. 82670**

ERIC T. SCHNEIDERMAN, NEW YORK STATE ATTORNEY GENERAL, in his official capacity, and THOMAS H. MATTOX, COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, in his official capacity,

Defendants-Respondents.

STIPULATION TO SUPPLEMENT THE RECORD ON APPEAL

It is hereby stipulated that the following document should be added to the Record on Appeal and that with this document, all necessary papers for the determination of this appeal are before the Court:

1. The Summons, Complaint, and Affidavit of Service for the case captioned *Snyder v. Wetzler*, Supreme Court, Albany County.

Dated: 5/11/16

PAUL J. CAMBRIA, JR., ESQ.
LIPSITZ GREEN SCIME CAMBRIA, LLP
42 Delaware Avenue
Buffalo, New York 14202
Attorney for Appellants

Dated: 5/11/16

ROBERT M. GOLDFARB
Office of the Attorney General
The Capitol
Albany, New York 12224
Attorney for Respondents

STATEMENT PURSUANT TO CPLR §5531 [239-240]

STATE OF NEW YORK : COURT OF APPEALS

ERIC WHITE and NATIVE OUTLET,

Appellants,

against

ERIC T. SCHNEIDERMAN, NEW YORK STATE ATTORNEY GENERAL, in his official capacity; and THOMAS H. MATTOX, COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, in his official capacity,

Respondents.

STATEMENT PURSUANT TO CPLR §5531

Docket: APL-2017-00029

Appellants, Eric White and Native Outlet, by its attorneys, Lipsitz Green Scime Cambria LLP, states as follows:

1. The index number of the case in the court below is CA-15-01764.

2. The full names of the original parties are Eric White and Native Outlet, Plaintiffs, and Eric T. Schneiderman, New York State Attorney General, in his official capacity, and Thomas H. Mattox, Commissioner of the New York State Department of Taxation and Finance, in his official capacity, Defendants.

3. The action was commenced in Supreme Court, County of Cattaraugus.

4. The action was commenced by the filing of Plaintiffs' Summons and Verified Complaint filed on June 23, 2014. The Summons and Verified Complaint was served upon Defendant Eric T. Schneiderman, New York Attorney General, in his official capacity on June 26, 2014 and Defendant Thomas H. Mattox, Commissioner of the New York State Department of Taxation and Finance, in his official capacity on June 25, 2014.

5. On August 11, 2014, Plaintiffs filed Notice of Motion for a Preliminary

Injunction, Affirmation of Paul J. Cambria, Jr., Affidavit of Eric White and Memorandum of law in Support of Plaintiffs' Motion for Preliminary Injunction enjoining the Defendants from enforcing Tax Law Section 471 as against the Plaintiffs for transactions occurring on reservation land.

6. On December 26, 2014, Defendants filed a Notice of Cross-Motion to Dismiss and Memorandum of Law in Opposition to Plaintiffs' Motion for Preliminary Injunction seeking dismissal of Plaintiffs' Verified Complaint pursuant to CPLR 3211(a)(7).

7. On March 9, 2015 the Hon. Jeremiah J. Moriarty, J.S.C., issued an Order that denied Plaintiffs' Motion for Preliminary Injunction as moot and granted Defendants' Cross-Motion dismissing Plaintiffs' Verified Complaint.

8. On June 10, 2016, the Appellate Division, Fourth Department issued a Memorandum and Order affirming the lower court's order.

9. Plaintiffs are appealing the Fourth Department's affirmation of the lower court's decision as well as the lower court's order.

DATED: June 19, 2017
Buffalo, New York

LIPSITZ GREEN SCIME CAMBRIA LLP

By: _____

Erin E. McCampbell, Esq.
42 Delaware Avenue, Suite 120
Buffalo, New York 14202
(716) 849-1333
Attorneys for Appellants

State of New York
Court of Appeals

Decided and Entered on the sixteenth day of February, 2017

Present, Hon. Janet DiFiore, *Chief Judge, presiding.*

Mo. No. 2016-1145
Eric White et al.,
Appellants,
v.
Eric T. Schneiderman, &c. et al.,
Respondents.

Appellants having moved for leave to appeal to the Court of Appeals in the above cause;

Upon the papers filed and due deliberation, it is

ORDERED, that the motion, insofar as it seeks leave to appeal from that portion of the Appellate Division order that affirmed the dismissal of plaintiffs' motion for a preliminary injunction, is dismissed upon the ground that such portion of the order does not finally determine the action within the meaning of the Constitution; and it is further

ORDERED, that the motion for leave to appeal otherwise is granted.

Judge Wilson took no part.

John P. Asiello
Clerk of the Court

State of New York
Court of Appeals

John P. Asiello
Chief Clerk and
Legal Counsel to the Court

Clerk's Office
20 Eagle Street
Albany, New York 12207-1095

Decided February 16, 2017

Mo. No. 2016-1145

Eric White et al.,
Appellants,
v.
Eric T. Schneiderman, &c. et al.,
Respondents.

Motion, insofar as it seeks leave to appeal from that portion of the Appellate Division order that affirmed the dismissal of plaintiffs' motion for a preliminary injunction, dismissed upon the ground that such portion of the order does not finally determine the action within the meaning of the Constitution; motion for leave to appeal otherwise granted.
Judge Wilson took no part.

MEMORANDUM AND ORDER OF THE APPELLATE DIVISION, FOURTH DEPARTMENT, ENTERED JUNE 10, 2016 [243-245]

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

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CA 15-01764

PRESENT: WHALEN, P.J., CARNI, NEMOYER, TROUTMAN, AND SCUDDER, JJ.

ERIC WHITE AND NATIVE OUTLET,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

ERIC T. SCHNEIDERMAN, NEW YORK STATE ATTORNEY GENERAL, IN HIS OFFICIAL CAPACITY, AND THOMAS H. MATTOX, COMMISSIONER, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, IN HIS OFFICIAL CAPACITY,
DEFENDANTS-RESPONDENTS.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (PAUL J. CAMBRIA, JR., OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (ROBERT M. GOLDFARB OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Cattaraugus County (Jeremiah J. Moriarty, III, J.), entered March 12, 2015. The judgment granted the cross motion of defendants to dismiss plaintiffs' complaint and dismissed as moot the motion of plaintiffs for a preliminary injunction.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reinstating the complaint to the extent that it seeks a declaration and granting judgment in favor of defendants as follows:

> It is ADJUDGED AND DECLARED that Tax Law § 471 is not inconsistent with Indian Law § 6, the Treaty of 1842 (7 US Stat 586), or the Due Process or Commerce Clauses of the United States Constitution,

and as modified the judgment is affirmed without costs.

Memorandum: Plaintiffs commenced this declaratory judgment action, alleging that the enactment and enforcement of Tax Law § 471, which imposes requirements on plaintiffs to pre-pay the amount of the tax to be assessed on the sale of cigarettes to non-Indians and non-members of the Seneca Nation (collectively, non-Indians), violates Indian Law § 6 and certain treaties between the Seneca Nation and the United States of America, particularly the Treaty of 1842 (7 US Stat 586). Plaintiffs sought a preliminary injunction enjoining enforcement of the Tax Law, and Supreme Court granted defendants'

cross motion pursuant to CPLR 3211 (a) (7) and dismissed the complaint. Because the complaint seeks a declaration, the court erred in dismissing the complaint in its entirety and in failing to declare the rights of the parties (*see Maurizzio v Lumbermens Mut. Cas. Co.*, 73 NY2d 951, 954). We therefore modify the judgment accordingly.

Plaintiffs contend that we erred in determining in *Matter of New York State Dept. of Taxation & Fin. v Bramhall* (235 AD2d 75, *appeal dismissed* 91 NY2d 849) that the Treaty of 1842 and Indian Law § 6 bar the taxation of reservation land, but do not bar the imposition of, inter alia, "sales taxes on cigarettes . . . sold to non-Indians on the Seneca Nation's reservations" (*id.* at 85), and request that we reconsider our determination. We adhere to our determination in *Bramhall.*

The Treaty of 1842, which provided, inter alia, that the Seneca Nation would retain the Allegany and Cattaraugus reservations, stated at article ninth that "[t]he parties to this compact mutually agree to solicit the influence of the Government of the United States to protect *such lands* of the Seneca Indians, within the State of New York, . . . *from all taxes,* and assessments for roads, highways, or any other purpose until such lands shall be sold and conveyed by the said Indians, and the possession thereof shall have been relinquished by them" (7 US Stat 586, 590 [emphasis added]). We conclude that the plain language of that treaty supports our determination that it prohibited the state from imposing taxes on the "lands" (*id.*), i.e., the real property, of the Seneca Nation.

Indian Law § 6, entitled "Exemption of reservation lands from taxation," states that "[n]o taxes shall be assessed, for any purpose whatever, upon any Indian reservation in this state, so long as the land of such reservation shall remain the property of the nation, tribe or band occupying the same." That section has remained unchanged since 1909 (L 1909, ch 31), and it cites to, inter alia, chapter 45 of the Laws of 1857 as the source of the legislation, and to *Fellows v Denniston* (23 NY 420, *revd sub nom. The New York Indians*, 72 US 761). Chapter 45 of the Laws of 1857, entitled "An Act to relieve the Seneca nation of Indians from certain taxes on the Allegany and Cattaraugus reservations" required, inter alia, that, parcels or lots that were sold by the comptroller for taxes were to be released "by the State to the Seneca nation of Indians residing on said reservation" (L 1857, ch 45, § 1), and that "[n]o tax shall hereafter be assessed or imposed on either of said reservations, or any part thereof, for any purposes whatever, so long as said reservations remain the property of the Seneca nation; and all acts of the legislature of this State conflicting with the provisions of this section[] are hereby repealed" (L 1857, ch 45, § 4). The Supreme Court determined in *The New York Indians* (72 US at 770-772) that the State was without authority to impose taxes on real property to defray the costs of building and repairing roads and bridges. Thus, even construing the statute liberally in favor of the Indians, as we must (*see County of Yakima v Confederated Tribes & Bands of Yakima Indian Nation*, 502 US 251, 269), we conclude that the statutory history of

Indian Law § 6 supports our determination in *Bramhall*, and that the limiting language in the title of the section "effectuate[s] the legislative intent" (McKinney's Cons Laws of NY, Book 1, Statutes § 94, Comment at 194), i.e., that Indian Law § 6 was enacted to bar taxes on real property that was part of an Indian nation, tribe or band.

Even assuming, arguendo, that we have interpreted the language of the Treaty of 1842 and Indian Law § 6 too narrowly, we nevertheless conclude that the court properly agreed with defendants that plaintiffs are not entitled to the declaratory relief they seek. It is well established that "the States have a valid interest in ensuring compliance with lawful taxes that might easily be evaded through purchases of tax-exempt cigarettes on reservations . . . States may impose on reservation retailers minimal burdens reasonably tailored to the collection of valid taxes from non-Indians" (*Department of Taxation & Fin. of N.Y. v Milhelm Attea & Bros., Inc.*, 512 US 61, 73). Although plaintiffs are obligated to pay the amount due as tax from non-Indians who have the tax liability, and from whom the amount is collected at the time of the sale, "this burden is not, strictly speaking, a tax at all" (*Moe v Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 US 463, 483).

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

CPLR § 2105 Certification

I, Erin E. McCampbell, Esq., an attorney of the firm of LIPSITZ GREEN SCIME CAMBRIA LLP, attorneys for Plaintiffs-Appellants, Eric White and Native Outlet, hereby certify pursuant to Section 2105 of the CPLR that the foregoing papers constituting the Record on Appeal have been personally compared by me with the originals filed herein and have been found to be true and complete copies of said originals and the whole thereof, all of which are now on file in the office of the Clerk of the County of Cattaraugus.

Dated: June 14, 2017

Erin E. McCampbell, Esq.
Attorney for Plaintiffs-Appellants
Eric White and Native Outlet