No. 09-910 JAN 25 2010

IN THE OFFICE OF THE CLERK

Supreme Court of the United States

ELIAS H. ATTEA, JR.,

Petitioner

v.

DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK, *ET AL.*,

Respondents

On Petition for a Writ of Certiorari to the State of New York Supreme Court, Appellate Division, Third Judicial Department

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A New York State nonresident and Federally Licensed Indian Trader challenges New York State's constitutional authority in imposing income tax and related regulations directly on him as an Indian Trader otherwise governed by Federal congressional authority and, as a nonresident who does not work in New York, challenges the State's reallocation of income to New York based solely on insufficient proof of how much income was allocable outside of the State. This case presents two issues.

1. Whether New York State usurps the United States Congress' plenary power to regulate commerce with the Indian Tribes under Article 1, Section 8, Clause 3 of the US Constitution by imposing a direct tax and onerous record keeping burdens directly on a Federally Licensed Indian Trader.

2. Whether, if Indian Trader income is state taxable, New York State violates a nonresident's Due Process rights and the Commerce Clause by taxing an indiscriminate amount of a nonresident's income solely because there is insufficient proof to show the amount of income allocable to out of State sources.

PARTIES TO THE PROCEEDING

1. Elias H. Attea, Jr., Petitioner

2. Department of Taxation and Finance of the State of New York, Respondent

3. Jamie Woodward, Acting Commissioner of Taxation, Respondent

4. The Tax Appeals Tribunal of the State of New York, Respondent

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioner states that it has no parent companies or nonwholly owned subsidiaries.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutional References

Federal Statutes and Regulations

Federal Cases

New York State Laws

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No _____

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions this Court for a writ of certiorari to review the judgment of the New York State Court of Appeals affirming the decision of New York State Supreme Court, Appellate Division, Third Department in this case.

OPINIONS BELOW

The decision of the Court of Appeals dismissing the appeal is reported at 13 N.Y.3d 830, 918 N.E.2d 955, 890 N.Y.S.2d 441. The opinion of

the State of New York Supreme Court, Appellate Division Third Judicial Department is reported at 64 A.D.3d 909, 883 N.Y.S.2d 610. The decision of the New York Tax Appeals Tribunal is reported at DTA 820371. The decision of the State of New York Division of Tax Appeals is reported at 2006 WL 3391367 (N.Y. Div. Tax App.), DTA No. 820371.

JURISDICTION

The judgment of the State of New York Supreme Court, Appellate Division Third Judicial Department was entered on July 9, 2009. The judgment of the State of New York Court of Appeals dismissing the appeal was entered on October 27, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution
Article 1 - The Legislative Branch
Section 8 - Powers of Congress
Clause 3 - Commerce Clause and Reservation of Trade with Indians
The Congress shall have Power
...
To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;
...

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

United States Constitution
Fourteenth Amendment
Section. 1. Due Process

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

N.Y. Tax. Law § 631 : NY Code - Section 631: New York source income of a nonresident individual

(a) General. The New York source income of a nonresident individual shall be the sum of the following:

(1) The net amount of items of income, gain, loss and deduction entering into his federal adjusted gross income, as defined in the laws of the United States for the taxable year, derived from or connected with New York sources, including:

(A) his distributive share of

partnership income, gain, loss and deduction, determined under section six hundred thirty-two, and

(B) his pro rata share of New York S corporation income, loss and deduction, increased by reductions for taxes described in paragraphs two and three of subsection (f) of section thirteen hundred sixty-six of the internal revenue code, determined under section six hundred thirty-two, and

(C.) his share of estate or trust income, gain, loss and deduction, determined under section six hundred thirty-four and

(2) The portion of the modifications described in subsections (b) and © of section six hundred twelve which relate to income derived from New York sources (including any modifications attributable to him as a partner or shareholder of a New York S corporation).

(b) Income and deductions from New York sources.

(1) Items of income, gain, loss and deduction derived from or connected with New York sources shall be those items attributable to:

(A) the ownership of any interest in real or tangible personal property in this state; or

(1) For purposes of this subparagraph, the term "real property located in this state" includes an interest in a partnership, limited liability corporation, S corporation, or non-publicly traded C corporation with one hundred or fewer shareholders (hereinafter the "entity") that owns real property that is located in New York and has a fair market value

that equals or exceeds fifty percent of all the assets of the entity on the date of sale or exchange of the taxpayer's interest in the entity. Only those assets that the entity owned for at least two years before the date of the sale or exchange of the taxpayer's interest in the entity are to be used in determining the fair market value of all the assets of the entity on the date of sale or exchange. The gain or loss derived from New York sources from the taxpayer's sale or exchange of an interest in an entity that is subject to the provisions of this subparagraph is the total gain or loss for federal income tax purposes from that sale or exchange multiplied by a fraction, the numerator of which is the fair market value of the real property located in New York on the date of sale or exchange and the denominator of which is the fair market value of all the assets of the entity on the date of sale or exchange.

(B) a business, trade, profession or occupation carried on in this state; or

(C.) in the case of a shareholder of an S corporation where the election provided for in subsection (a) of section six hundred sixty of this article is in effect, the ownership of shares issued by such corporation, to the extent determined under section six hundred thirty-two of this article; or...

. . .

STATEMENT OF THE CASE

The relevant facts of this case are largely undisputed. Elias H. Attea, Jr. was a federally licensed Indian trader who lived and worked exclusively in Tennessee. He was the owner and operator of JR Attea Wholesale, which engaged in wholesale distribution of tobacco products to Native Americans living on Indian reservations within the physical boundaries of New York State.

Mr. Attea's business was governed by the Bureau of Indian Affairs and U.S. Customs. Mr. Attea worked from his office and business headquarters in Ashland, Tennessee where he received bills and trade documents. He had no New York license to sell tobacco products or do business in New York State. (Record at 22.)

Mr. Attea timely filed nonresident income tax returns for the years at issue. He was required to file nonresident returns because he received income from the New York Estate of a deceased relative and because he received income as a shareholder of a New York S Corporation. Further, he erroneously paid New York income tax on 1099 income he received from the same New York S Corporation as commission from work performed wholly outside of New York State. There was no allocation to New York State for work performed in the State. (Record at 367.)

As part of his Federal Income Tax Return, Mr.

Attea listed his income under his Indian Trader's license on his Schedule C. After a lengthy residency audit and this Court's decision in Department of Taxation and Finance of New York, et. al. v. Milhelm Attea & Bros., Inc., etc. ("Milhelm Attea"), 512 U.S. 61, 114 S.Ct. 2028 (1994), auditors determined that Attea's income from trade with Indians was taxable to New York State. (Record at 23, 307, 413.)

Auditors requested books and records for J.R. Attea Wholesale which Mr. Attea maintained were kept by the Federal Government employees, not himself.

Mr. Attea maintained that the State was preempted from interfering with his Indian Trade. The State maintained that it could tax Indian Trade income and further, that the State could require Mr. Attea to keep and turn over a specific set of books and records along with his business and personal bank records.

On April 22, 2004, after a series of agreed upon extensions of time, the New York State Department of Taxation and Finance issued a notice of deficiency. The assessment increased Mr. Attea's New York State income by all of his Indian Trade Schedule C income and disallowed all business related Schedule C expenses so that his New York business income exceeded his Federal business income by more and $1 million for the year 1993 and $1.5 million for 1992.

Mr. Attea followed tax procedure on appeal until reaching trial on January 26, 2006 in front of the New York State Tax Appeals Administrative Law

Judge (ALJ). The ALJ issued a decision denying Mr. Attea's appeal and stating that although Mr. Attea was a licensed Indian Trader trading with Indians, ran a multinational multi state business, and had business expenses, since Mr. Attea provided proof other than the books and records the auditor demanded of him, the State was powerless to determine any tax allocation other than 100 percent to New York or to allow him and reasonable business deductions.

Mr. Attea appealed that decision to the New York State Tax Appeals Tribunal. The Tribunal discussed Mr. Attea's use of Foreign Trade Zones which is not at issue here and discussed New York's taxation of Indian Traders. The court concluded that an Indian Trader's income is preempted under Federal law but then called that preemption an 'exemption' and applied stringent rules and burdens for taking advantage of such 'exemption.'

Mr. Attea commenced an Article 78 proceeding effectively appealing the Tribunal Decision to the New York State Supreme Court, Appellate Division, Third Department.

The Third Department entered a decision dated July 9, 2009. The Third Department sustained the 2004 assessment again treating the preemption like an 'exemption,' concluding that Mr. Attea had a 'heavy burden' of proving both that he traded exclusively with Indians and that he had no other business in the State. The court found that based on this Court's decision in Milhelm Attea, Mr. Attea, as

an Indian Trader, was subject to New York State tax laws, regulations and record keeping requirements.

The court further concluded that because Mr. Attea filed a nonresident return, New York had the power to audit the Federal portion of the return and assess tax based solely on Mr. Attea's inability to produce the specific set of documents required by auditors.

After finding Mr. Attea's income taxable as a nonresident, the Lower Court denied Mr. Attea's Due Process and Commerce Clause claims without explanation.

Mr. Attea timely filed an appeal of right to the New York State Court of Appeals based on his Constitutional claims regarding the preemption and improper tax allocation. On October 27, 2009, the Court of Appeals denied Mr. Attea's appeal based on no substantial Constitutional question.

Mr. Attea now appeals to the United States Supreme Court for Certiori to clarify it's decisions with respect to the Federal Preemption and nonresident income tax allocation.

ARGUMENT

This Court's review of the instant case is necessary to prevent New York State from usurping the long standing and exclusive authority of the federal government to regulate trade with Indians. By imposing a direct tax and business income/expense record keeping obligations on the income a federally licensed Indian trader derives

from his trade with Indians on Indian reservations, New York has become intensively involved in an area that has been the near exclusive provenance of the federal government since this country was established. *See* Milhelm Attea 512 U.S. at 70 citing Warren Trading Post, 380 U.S. 685, 687-689, 85 S.Ct. 1242, 1244-1245 (1965).

I. FEDERAL PREEMPTION

A. Taxation and the Indian Trader

The extensive history of federal regulation of Indian trading illustrates the inconsistency of New York's interpretation of recent Supreme Court precedent. Pursuant to its plenary power over the Indian Nations, Congress enacted regulations governing trade with Indians at early as 1790. *See* Warren Trading Post, 380 U.S. at 688, 85 S.Ct. at 1244, citing Congressional Act of July 22, 1790, 1 Stat. 137. See *e.g.* U.S. Const., Art. 1, §8, cl. 3; 25 U.S.C. §261, et. seq., 25 CFR 140, et. seq. Congress' extensive regulation of Indian Traders has continued through present time.

Title 25, section 261 of the U.S. Code grants the Commissioner of Indian Affairs the "sole power and authority" to appoint Indian traders and to make rules and regulations governing trade with the Indians.

This Court recognized Congress' preemption of state direct taxation of Indian traders in Warren Trading Post when it struck down an Arizona tax on a federally licensed Indian trader. The Court held:

> We think the assessment and collection of this tax would to a substantial extent frustrate the evident congressional purpose of ensuring that no burden shall be imposed upon Indian traders for trading with Indians on reservations except as authorized by Acts of Congress or by valid regulations promulgated under those Acts.

Warren Trading Post, 380 U.S. at 690-91, 85 S.Ct. 1245-46.

This Court has consistently recognized the federal government's near exclusive authority to govern trade with Indians. In Central Machinery Company v. Arizona State Tax Commission, 448 U.S. 160, 100 S.Ct. 2592, (1980), this Court struck down an Arizona sales tax imposed upon the sale of farm machinery by a seller to an Indian tribe on an Indian reservation. Citing Warren Trading Post, this Court held that state legislation of Indian trading was completely preempted by Congress' "comprehensive" regulation of the area. 448 U.S. at 166, 100 S.Ct. at 2596, citing Warren Trading Post, 380 U.S., at 691, n. 18, 85 S.Ct., at 1246. See also White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 100 S.Ct. 2578 (1980) (finding Arizona preempted from imposing motor fuel and motor carrier excise taxes on Indian tribe and logging company because of comprehensive Congressional regulation of the harvesting and sale of tribal timber).

B. Millhelm Attea Decision

Despite this well-established body of law finding that states are preempted from directly taxing Indian trading, New York State has nonetheless misinterpreted this Court's decision in Milhelm Attea and taken it as carte blanche to directly tax and heavily regulate Indian traders.

Milhelm Attea involved a challenge to New York State's authority to impose regulations on Indian traders aimed at collecting the state's cigarette tax from non-Indians who had purchased cigarettes from Indian retailers located on Indian reservations. In Milhelm Attea, this Court upheld state regulations that limited the quantity of untaxed cigarettes the traders could sell because the State showed evidence of documented and pervasive tax evasion by non Indians who purchased untaxed cigarettes on Reservations. The regulations were upheld on the basis that they were "reasonably necessary to the assessment or collection of lawful state taxes." 512 U.S. at 75, 114 S.Ct. at 2036.

The decision, however, recognized that the relevant inquiry in cases where the legal incidence of a tax does not fall on an Indian or Indian Trader is different from the inquiry in situations where a state imposes a direct tax and pervasive regulation on Indian traders. The opinion distinguished a regulatory burden, *i.e.* a situation where the incidence of the tax falls on the non-Indian consumer,

from a direct tax on an Indian Trader.

This Court found that unlike in its earlier cases striking down taxes where the incidence of tax was on the Indian trader, the incidence of the tax in Milhelm Attea fell upon "a class -- non-Indians -- whom the State had power to tax." 512 U.S. at 71, 114 S.Ct. at 2034.

The importance of the consideration of who bears the incidence of a state tax relating to Indian traders was again recognized by this Court in Wagnon v. Prairie Band Potawatomi Nation ("Wagnon"), 126 S. Ct. 676; 163 L. Ed. 2d 429 (2005); *rehearing denied*, 126 S. Ct. 1187, 163 L. Ed. 2d 1142 (2006). The issue in Wagnon was whether a state (Kansas) has authority to impose a motor fuel tax on initial non-Indian fuel distributor on that distributor's receipt of fuel from his supplier. In Wagnon, this Court reiterated that although the dispositive question in Indian tax cases is generally who bears the legal incidence of the tax,"even when a State imposes the legal incidence of its tax on a non-Indian seller, the tax may nonetheless be preempted if the transaction giving rise to tax liability occurs on the reservation and the imposition of the tax fails to satisfy the [White Mountain Apache Tribe et al. v. Bracker et al., 448 U.S. 136; 100 S. Ct. 2578; 65 L. Ed. 2d 665 (1980)] interest-balancing test." Wagnon v. Prairie at 682.

In upholding the regulations in Milhelm Attea, this Court recognized the danger that New York would overstep its regulatory bounds, stating that

the state's regulatory scheme"may present significant problems to be addressed in some future proceeding." The New York decisions in this case show that this Court's concern was well-placed.

At the outset of this issue, the State made its position clear.

An undated letter to Petitioner soon after the Milhelm Attea decision was released, the New York State Department of Taxation and Finance insisted that Petitioner's Indian Trader income is subject to New York's income tax, "[New York] believe[s] that the income reported on Schedule C and derived from wholesale tobacco sales to a reservation physically located within New York State is considered New York source income and must be allocated to New York." (Record at 307.)

In the 'Explanation of Adjustments' section of the assessments in this case, New York auditors explicitly asserted the right to tax income arising solely from Indian trading:

> It is [New York's] position that your activities as a seller of tobacco products are systematically and regularly carried on as a trade or business in this state with a fair amount of permanency and continuity. As such, this income would be subject to New York tax regardless of whether or not the activities were exclusively attributable to trade with Native Americans under your Indian Trader license.

(Record at 413.)

From the beginning, Petitioner relied on this Court's decisions for the premise that his income was not taxable to the State.

Although the state's arguments in the proceedings below focused on Petitioner's failure to comply with the state's regulatory requirements, footnote 5 in the state's brief before the Third Department makes clear that New York has not changed its position that its state income tax applies even to income Petitioner derives from trade with Indian's pursuant to his federal license. "In fact, it is far from clear that *Warren Trading Post Co. v. Arizona Tax Comm'n,* 380 U.S. 685 (1965), would bar the personal income tax at issue as applied to an Indian trader." Brief for Respondent Commissioner of Taxation and Finance at p. 22, fn. 5.

C. New York State Department of Taxation and Finance Applied a legal standard to Mr. Attea which is inconsistent with this Court's prior rulings

In upholding the state's income tax assessment, the Third Department erred in allowing the State to retroactively apply general tax regulations in order to tax the income of a Federally Licensed Indian Trader on his Indian Trade.

Again, the Third Department applied a standard of proof to Petitioner applicable to an exemption rather than a preemption, stating, "the

Tribunal was again unable to substantiate that the sales made by petitioner actually took place on reservations and were made to qualified tribal members - as required by petitioner's Indian trader licenses - or to formulate any allocation of what percentage of petitioner's sales might be tax exempt." Elias H. Attea v. Tax Appeals Tribunal (Lower Court Case), 64 A.D.3d 909, 911, 883 N.Y.S.3d 610, 612 (N.Y.App.3d 2009).

The Court said that it was Petitioner's burden to prove his income was derived solely from Indian trading, which can not be done without turning over all Indian trade books, US Customs records not even in Petitioner's possession, and all business and personal financial records. "It was incumbent upon petitioner to come forward with evidence establishing that [he] traded exclusively with Native Americans residing on Indian reservations..." Lower Court Case at 911.

The Court found that although Petitioner "produced documents indicating that he imported and shipped tobacco products to Indian reservations," the documents were not those required by the state and thus were not sufficient to meet his burden. Id. The Court found that Petitioner should have kept certain books and records desired by the auditor and that his US Customs and shipping documents, required under Federal law, were insufficient under New York regulations.

Petitioner submits that applying such detailed and personal regulation to his Indian Trade, unless

there is an affirmative reason to suspect that a Trader has traded outside of his license, is preempted by Federal law.

The books and records required of an Indian Trader are regulated by US Customs and the US Bureau of Indian Affairs. There is no room for the State's regulation in imposing its general record keeping regulations on an Indian Trader because Federal law preempts such action. Petitioner's burden of proof regarding this preemption should be significantly less stringent than if he were attempting to apply an exemption.

Even if the lawmakers of the State of New York had the authority to pass legislation requiring Indian Traders to keep income tax related records for their trades with Indians within the boundaries of New York State, there simply were no such regulations in place during the assessment that is at issue here. Absent law or regulation requiring Petitioner to keep certain books and records of his Indian Trades, there is a simple lack of fairness in taxing Mr. Attea because he did not keep records he had no notice of in the first place.

A careful reading of this Court's jurisprudence on the issue of taxation of Indian traders shows that the continuing extensive federal regulation of the area preempts direct state taxation of Indian trading. This Court's review of the instant case is needed to prevent New York State usurping the authority that the federal government has explicitly reserved for itself.

II. NONRESIDENT CONSTITUTIONAL ISSUES

If, as the State claims, this court determines that Petitioners trade with Indians is taxable to the State, then the Third Department imposed the same standard of proof of allocation for a nonresident as it does for a resident. In other words, the State assumes all income is taxable to itself unless the taxpayer can prove otherwise versus the previous nonresident standard of taxing only income affirmatively and reasonably connected with the State.

Here, Petitioner asserts that the New York Appellate Division, Third Department promulgated an unreasonable and unconstitutional standard of proof for nonresident small business owners who perform no work in New York State. This new standard removes any 'rational basis' for tax reallocation and allows a New York auditor to assess an indiscriminate amount of tax to a nonresident taxpayer who may not have sufficient business records to prove to the auditor's satisfaction exactly how much of his or her income should be allocated to the taxpayer's home state or elsewhere. While this standard is acceptable for State residents, it has not been acceptable for nonresidents who do not work in New York State in the past. This is particularly acute where the taxpayer works from one state directing multi national or multi state operations.

A. Standard promulgated by the Appellate Division, Third Department

For nonresidents, New York State Tax Law Section 631(a) allows New York State to tax income derived from or connected with New York Sources. On its face, the law passes constitutional muster and correctly taxes only the tax due to New York. However, in imposing its new burden and standard of proof, the New York State Courts have enlarged the scope of the statute and allowed the State to tax large amounts of nonterritorial income without providing a rational basis for doing so.

In interpreting New York State Tax Law Section 631, the Third Department states that it is, "incumbent on [the taxpayer] to come forward with evidence establishing that he ...had no income derived from or connected with New York Sources. Lower Court Case Slip Op at 5.

It is impossible to prove a negative (that anyone had no income derived from New York) as the State claims there could always be unknown income.

There is no mistake that the standard does not allow for a partial allocation. The nonresident taxpayer has a 'heavy burden to demonstrate by clear and convincing evidence that his business ... maintained no presence in New York State.' Lower Court Case Slip. Op. at 4.

The decision of the lower court allows the State to tax all net income of a nonresident who performs no work in the state, whether or not there is a

rational basis for such taxation and whether or not the tax allocation is reasonable if the taxpayer, as here, fails to meet that heavy burden of proof for whatever reason. Petitioner submits that by using such a standard, New York denies him his right to Due Process under the United States Constitution and also violates the dormant Commerce Clause with respect to his multinational, multi state business operated completely from Tennessee.

B. Nonresident Due Process and Dormant Commerce Clause requirements

If Mr. Attea's income is not preempted, then nonresident income tax laws and rules become applicable and Constitutional questions involving rational tax allocation become relevant. These constitutional issues were raised in the courts below but not given meaningful consideration.

Due Process and Commerce Clause tests and protections, as they relate to income tax, are designed to ensure that a state acts more reasonably than not and with rational basis toward nonresident individuals and businesses. Here, the decision of the New York State Appellate Division, Third Department, as affirmed by the New York State Court of Appeals, eviscerates any standard of reasonableness or rational basis by allocating nothing short of 100% of Mr. Attea's income to the State of New York when it is undisputed that he did not work in New York, he lived and worked in

Tennessee, and ran a multinational business which shipped its goods from outside of the United States through New York and New Jersey on the way to Indian Reservations, pursuant to the rules and regulation set up by the US Bureau of Indian Affairs and the US Customs Office.

Constitutional Due Process demands that there be "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax," as well as a rational relationship between the tax and the "values connected with the taxing State." Quill Corp. v. North Dakota, 504 U.S. 298, 306, 112 S.Ct. 1904 (1992).

This Court recently and clearly expressed the law regarding nonresident taxation of multinational and multi state businesses:

> The Due Process and Commerce Clauses forbid the States to tax "extraterritorial values." Container Corp. of America v. Franchise Tax Bd., 463 U. S. 159, 164 (1983); see also Allied-Signal, Inc. v. Director, Div. of Taxation, 504 U. S. 768, 777 (1992); Mobil Oil Corp. v. Commissioner of Taxes of Vt., 445 U. S. 425, 441-442 (1980). A State may, however, tax an apportioned share of the value generated by the intrastate and extrastate activities of a multistate enterprise if those activities form part of a " `unitary Business.' " Hunt-Wesson, Inc. v. Franchise Tax Bd. of Cal., 528 U. S. 458, 460 (2000)

Meadwestvaco v. Illinois (Meadwestvaco), 533 US ___ , 128 S. Ct. 1498 at 1505 (2008).

In Meadwestvaco, this Court went on to discuss the minimum connections to a State required to impose taxation and also recited the established law that even if minimum connections are established, the tax must be fairly apportioned. In reciting the Quill decision, this Court further clarified that the Due Process Clause requires that there be a rational relationship between the tax and the values connected with the taxing state.

In summing up the Constitutional requirements of both the Due Process and Commerce Clauses, the main test is `whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state' "-that is, " `whether the state has given anything for which it can ask return.' " ASARCO Inc. v. Idaho Tax Comm'n, 458 U. S. 307, 315 (1982) (quoting Wisconsin v. J. C. Penney Co., 311 U. S. 435, 444 (1940)).

All of this Court's standards require a taxing state to act reasonably and with a rational basis for it's decision.

C. How the Appellate Division's standard violates nonresident's Due Process rights and the Commerce Clause.

The nonresident taxpayer burden of proof and removal of rational basis requirements from the

State's nonresident tax scheme violates due process rights of Mr. Attea and those in his position.

Mr. Attea contends that the State has a duty to act reasonably. Here, after acknowledging that a good portion of Mr. Attea's business income was earned out of state, New York taxed all of Mr. Attea's Schedule C business income simply because there was insufficient proof of how much income was attributable to any state.

Due Process and the Commerce Clause require some rational method of determining the tax imposed. The State is able to use models and indices, as it does in sales tax cases, to estimate business income and expenses of nonresidents. As this Court has noted in the past, the process does not need to be perfect, just reasonable. Here, any reasonable method of allocation would have produced less than 100% New York allocation. Petitioner seeks this Court's guidance in tax allocation standards for nonresident individuals who operate multi state business.

Further, Mr. Attea, as a Tennessee resident who did not avail himself to New York economic markets at all as an Indian Trader, received no benefit from the State of New York for which the State can ask for tax funds in return.

REASONS FOR GRANTING THE PETITION

The first reason this Court should hear this Case is because New York State's court of last resort

has decided an important federal question in a way that conflicts with the decision this Court regarding the Federal preemption of the direct taxation of Indian Traders.

This case deals with the State's attempt to control an area of law and commerce clearly and completely reserved to the Federal Government. New York State has taken the decision of this Court in Milhelm Attea and twisted it to rationalize its ability to usurp Federal authority and regulation.

Secondly, the standard of proof set forth by the Third Department for nonresidents is so onerous and impossible to meet, it gives New York State auditors carte blanche to assess nonresidents high amounts of New York State tax without a rational basis.

The New York State Court's decision (the "New York decision") impermissibly expands the scope of permissible state regulation of federally licensed Indian traders, a scope that was clearly set forth by this Court in Department of Taxation and Finance of New York, et. al. v. Milhelm Attea & Bros., Inc., etc., 512 U.S. 61, 114 S.Ct. 2028 (1994). The New York decision also allows the state of New York to impose its income tax on Indian traders, contrary to well-established precedent which preempts the states from imposing direct taxes on Indian traders. See Warren Trading Post Company v. Arizona State Tax Commission, 380 U.S. 685, 85 S.Ct. 1242 (1965). In addition, the New York decision improperly allowed New York to allocate 100% of the income of a nonresident running a multinational business from

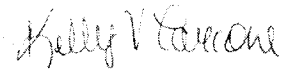
Tennessee to New York in violation of the Due Process and Commerce Clauses of the Constitution of the United States.

CONCLUSION

Based on the foregoing, Petitioner respectfully submits that this Petition for Writ fo Certiorari should be granted.

Dated: January 24, 2010

Respectfully submitted,



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APPENDICES

13 N.Y.3d 830, 918 N.E.2d 955, 890 N.Y.S.2d 441, 2009 N.Y. Slip Op. 86978

Decision of Court of Appeals of New York.

In the Matter of **Elias H. ATTEA**, Jr., Appellant,

v.

TAX APPEALS TRIBUNAL, et al., Respondents.

Oct. 27, 2009.

Appeal dismissed without costs, by the Court sua sponte, upon the ground that no substantial constitutional question is directly involved.

N.Y.,2009.

Attea v. Tax Appeals Tribunal