

13-135

Supreme Court, U.S.
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In the Supreme Court of the United States

JESSICA MAE MATHESON, dba
JESS'S WHOLESALE,

Petitioner,

v.

STATE OF WASHINGTON
DEPARTMENT OF REVENUE

Respondent.

*On Petition for Writ of Certiorari to the
Washington State Supreme Court*

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the state courts below err in entering a state excise tax and penalty judgment against a tribal Indian who is exempt from state taxes and who also had a state tobacco license to transport cigarettes free of state tax stamps?
2. Is a tribal Indian, whose only activity was to transport cargo in round trips to Indian reservations, exempt from state taxes under the Indian and interstate commerce clauses of the U.S. Constitution?

PARTIES TO THE PROCEEDING

Respondent-Appellee, the State of Washington, was the Respondent below. Petitioner-Appellant Jessica Mae Matheson dba Jess's Wholesale was the Petitioner below.

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Petitioner, Jessica Mae Matheson, a tribal Indian, (“Petitioner”) respectfully petitions for a Writ of Certiorari to review the judgment of the Washington Supreme Court upholding a nine million dollar judgment for state cigarette taxes and penalties against her, even though she is immune from the state tax.

OPINIONS BELOW

In 2006, Petitioner obtained a Washington state tobacco license allowing her to transport unstamped commercial cigarettes. She filed forms reporting transportation to the State who assessed a tax of \$1,424,385 and a \$10 per pack penalty on her of \$7,034,000 plus other penalties and interest based solely on the transportation. She appealed to the Washington State Board of Tax Appeals. The board upheld the assessment. All the state courts denied review of the Board of Tax Appeals decision.

On April 30, 2013, the State of Washington Supreme Court, No. 88244-4, declined to review the opinion of the Court of Appeals Division II dated September 17, 2012, No. 42723-1-II. The Court of Appeals granted a Motion on the Merits upholding the decision of the State of Washington, Thurston County Superior Court Case Number 11-2-00795-0 denying review.

JURISDICTION

The judgment of the Washington State Supreme Court was entered April 30, 2013. The jurisdiction of the Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED.

This case seeks reversal based on the exclusive federal preemption of the state law of taxation on tribal Indians. U.S. Const. art. 1, § 8, cl. 3, art. VI, cl.2, art. 1 §10, cl. 2. Wash. Const., Art. XXVI, § 2. Wash. Rev. Code § 82.24.040(3), § 82.24.250(1)(a), § 82.24.250(7)(c), § 82.24.120, § 82.24.300, § 82.24.550(3), § 82.24.900.

STATEMENT

All the State administrative procedures and the State courts in this case applied state statutes in total disregard of the constitutional rights of Jessica Matheson to be exempt from state licensing and taxation. The proceedings were conducted in complete denial of federal Indian law. This petition seeks recognition of federal law to reverse the decision.

A. Background

Jessica Mae Matheson, then 26 years old, is a lifetime resident of the Coeur d'Alene Indian Reservation or Puyallup Indian Reservation. She qualifies as a member of both reservations. She applied for and obtained a Washington state tobacco license allowing her to transport unstamped commercial cigarettes. At that time, she was an enrolled member of the Coeur d'Alene reservation but living on the Puyallup Indian reservation. She never did any business in Washington. She hauled commercial cigarettes exclusively to her full brother's tribally licensed convenience store on the Coeur d'Alene Indian reservation or to her father's tribally licensed

convenience store on the Puyallup reservation. Her father is a Puyallup Indian enrolled in that tribe. Her full brother is an enrolled Indian of the Coeur d'Alene Indian tribe. The only reason she obtained the license was to transport commercial cigarettes and other cargo to her two relatives without prior notification required by Wash.Rev.Code § 82.24.250(7)(c) forcing persons transporting cigarettes to an Indian reservation to give notice in advance to the state Liquor Control Board. A wholesaler in her own vehicle is exempt from the notice and cigarette tax stamping requirements. Wash.Rev.Code § 82.24.250(1)(a). When the Liquor Board employees found out about the tobacco license issuance, the employees of the Washington State Department of Revenue began harassing and constantly monitoring Matheson. They filed the multi-million dollar assessment against Matheson and cancelled her tobacco license. The tax assessment was bogus as Matheson only transported to her father and brother as an enrolled Indian and wholesaler. *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 480 (1976) holds that the U.S. Const. art 1, § 8, cl. 3 and art IV, cl. 2 preempt state excise tax on Indians living on their reservation. She could possess and transport unstamped cigarettes anywhere in and out of the State of Washington. The statute only requires stamps on cigarettes when Matheson, an exempt person, sold to a taxable person. Wash.Rev.Code § 82.24.080. Wash.Rev.Code § 82.24.260(1)(c) and federal case law prohibit the State cigarette tax on Indian to Indian sales. Since Petitioner was licensed, the greatest penalty she could have received under the state tobacco license law was a 30 day license suspension. Wash.Rev.Code § 82.24.550(3). The Respondent did not allow Petitioner the notice and

opportunity to be heard that Wash.Rev.Code § 82.24.550(3) requires. Instead, without any hearing, the Respondent assessed a \$10 per pack penalty under Wash.Rev.Code § 82.24.120 totaling \$7,034,000. Further, the Respondent never waived or cancelled the penalty when in fact they had no evidence of any tax loss. The assessment of the 7 million dollar fine lacked due process of the right to be heard, was under the wrong statute and was grossly disproportionate. Matheson never dealt with anyone else other than her brother and father. The Respondent's employees knew and were repeatedly informed that Jessica was a tribal Indian and always lived on an Indian reservation. The state employees' conduct resulted in a civil rights suit by Matheson, *Matheson v. Smith, et al*, that is pending in the Ninth Circuit Court of Appeals No. 12-35479.

B. The state Court's decisions are in clear conflict with the *Moe* case.

Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation, 425 U.S. 463 (1976) states the reason for reversal:

For these reasons, the personal property tax on personal property located within the reservation; the vendor license fee sought to be applied to a reservation Indian conducting a cigarette business for the Tribe on reservation land; and the cigarette sales tax, as applied to on-reservation sales by Indians to Indians, conflict with the congressional statutes which provide the basis for decision with respect to such impositions.

The *Moe* opinion, *id* at 477, cited *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164, 181 (1973) holding that a state is without jurisdiction to tax a reservation Indian or to collect a state tax. In support of the above quoted language, the State decisions below also failed to follow *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450, 458 (1985), stating: “. . . a State is without power to tax reservation lands and reservation Indians.” A special statute in the State’s cigarette tax chapter, Wash.Rev.Code § 82.24.900, recognizes federal preemption stating: “The provisions of this chapter shall not apply in any case in which the state of Washington is prohibited from taxing under the Constitution of this state or the Constitution or the laws of the United States.” Unbroken off reservation conduct between reservations does not give jurisdiction to apply state excise tax. *Red Earth LLC v. U.S.*, 657 F.3d 138, 145 (2d Cir. 2011) applies nexus requirements to shipments to reservation Indians. Leaving the reservation and returning in a round trip does not subject the Indian vehicle to state law. *Prairie Band Potawatomi Nation v. Wagnon*, 476 F.3d 818, 825 n.10 (10th Cir. 2007). *Cabazon Indians v. Smith*, 388 F.3d 691, 701 (9th Cir. 2004); *Mahoney v. State Tax Commission*, 524 P.2d 187 (Idaho 1973) and *Ward v. New York*, 291 F.Supp.2d 188 (D.C.N.Y. 2003) all uphold unbroken round trip Indian travel off reservation to be free of state taxation. The state courts refused to apply the law of federal preemption.

C. The Respondent violated the requirements of notice and right to be heard and assessed grossly disproportionate penalties, all of which violate the Fourteenth Amendment.

Philip Morris USA v. Williams, 549 U.S. 346, 353 (2007) requires notice and an opportunity to present every available defense. Harm caused by conduct must not be “unconstitutionally excessive” *id* at 354. The fine must be proportional to the violation of state law that occurs within the jurisdiction. *BMW of North America v. Gore* 517 U.S. 559, 576 (1996). Petitioner Jessica Matheson hauled cigarettes to Indian Reservations where they were sold at retail with State or Puyallup tribe tax stamps on them. The State agreed not to tax the cigarettes sold by Indians on Indian reservations. Wash.Rev.Code § 82.24.300; Wash.Rev.Code § 82.24.040(3). The State was not harmed at all. There was no gravity of the offence as all that was alleged was wrongful reporting. Reporting offenders are not harmful or at the most, minimal and violate the excessive fines clause. U.S. Const. amend. 8. *U.S. v. Bajakajian*, 524 U.S. 321, 337 (1998).

REASONS FOR GRANTING THE PETITION

The Petition for a Writ of Certiorari in this case should be granted for three reasons. The first is that Sup.Ct.R. 10(c) applies as the state court decisions are in direct conflict with *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 480 (1976) holding that federal supremacy requires that tribal Indians are exempt from state cigarette tax.

The Second reason is that the nine million dollar assessment is grossly excessive and violates due process of the U.S. Constitution. U.S. Const. amend. 8, amend. 14.

The third reason is that 28 U.S.C. § 1257(a) applies to the state statute Wash.Rev.Code. § 82.24.250(7)(c), for the reason that it is repugnant to the U.S. Const. art. I, § 8, cl. 3; VI, cl. 2, Washington's own Constitution, Art. XXVI, § 2, and its own statute, Wash.Rev.Code § 82.24.900 acknowledging that exclusive jurisdiction of enrolled Indians is vested in the federal government, not the states.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully Submitted,

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APPENDIX A

THE SUPREME COURT OF WASHINGTON

NO. 88244-4

C/A NO. 42723-1-II

[Filed April 30, 2013]

JESSICA MATHESON dba JESS'S)
WHOLESALE,)
)
Petitioner,)
)
v.)
)
STATE OF WASHINGTON, DEPARTMENT)
OF REVENUE,)
)
Respondent.)

ORDER

Department I of the Court, composed of Chief Justice Madsen and Justices C. Johnson, Fairhurst, Stephens and González, considered at its April 30, 2013, Motion Calendar, whether review should be granted pursuant to RAP 13.4(b), and unanimously agreed that the following order be entered.

App. 2

IT IS ORDERED:

That the Petition for Review is denied.

DATED at Olympia, Washington this 30th day of
April, 2013.

For the court

s/

Chief Justice

APPENDIX B

**IN THE COURT OF APPEALS OF THE STATE
OF WASHINGTON**

DIVISION II

No. 42723-1-11

[Filed September 27, 2012]

JESSICA MAE MATHESON, dba)
JESS'S WHOLESALE,)
)
Appellant,)
)
v.)
)
STATE OF WASHINGTON)
DEPARTMENT OF REVENUE,)
)
Respondent.)

**RULING GRANTING MOTION
ON THE MERITS TO AFFIRM**

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Jessica Mae Matheson¹ sought superior court review of a Board of Tax Appeals decision ordering her to pay over \$8 million in taxes, interest, and penalties for failing to pay cigarette taxes on 703,400 packs of cigarettes she acquired through her wholesaler company, Jess's Wholesale. The superior court dismissed her petition, ruling that Jessica had failed to pay the contested tax, which is a statutory prerequisite to obtaining review, and that a restraining order on the tax collection is inappropriate. Because Jessica failed to pay the contested tax before seeking review and because her constitutional challenges are meritless, the superior court correctly dismissed her petition. Accordingly, this court grants the motion on the merits to affirm. RAP 18.14.

FACTS

Jessica is a registered member of the Puyallup Indian Tribe. In July 2006, she obtained a Washington cigarette wholesaler's license under the trade name "Jess's Wholesale." Administrative Record (ARC) at 545. It operated as a sole proprietorship, and she listed a Milton address for the office.

Between July 2006 and June 2007, two Spokane area cigarette distributors, Burke's Distributing and Blacksheep Distributing, sold 703,400 packs of unstamped cigarettes to Jess's Wholesale. Neither distributor is located on a reservation or in Indian

¹ For clarity, this ruling refers to the various Mathesons by their first names. No disrespect is intended.

Country.² Jessica never purchased Washington State or Puyallup tribal cigarette tax stamps, so she could not have stamped these cigarettes.

The Department of Revenue soon began investigating whether Jessica sold the unstamped cigarettes. Jessica, through her attorney, first claimed that she sold the cigarettes only to Baby lack's, her father's tribally-licensed retailer located on the Puyallup Reservation.

When the Department requested Schedule C reports—reports that wholesalers statutorily must file with the Department detailing their transfers of stamped and unstamped cigarettes—Jessica's attorney provided a Schedule C report claiming that she sold 103,900 cigarette packs to Baby Zack's. She failed to account for the remaining packs.

Jessica's attorney also claimed that the distributors had stamped the cigarettes before selling them to her. Both distributors refuted this claim, submitting their own Schedule C reports. Jessica's attorney then claimed that the distributors delivered the cigarettes in Idaho, upon her request. The distributors, however, showed that Jess's Wholesale picked up the cigarettes in Spokane.

By January 2008, Jessica had not provided Schedule C reports documenting sale or disposal of the

² Indian Country includes all lands within an Indian Reservation, all dependent Indian communities, and all Indian allotments. 18 U.S.C. § 1151.

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unstamped cigarettes. The Department assessed her \$1,424,385 in taxes and a \$10-per-pack penalty of \$7,034,000, plus additional penalties and interest. When Jessica appealed to the Department's internal appeals division, the appeals division offered her another opportunity to provide the Schedule C reports. She failed to do so, and the appeals division upheld the assessment.

Jessica then sought an informal appeal to the Board of Tax Appeals (BTA). The Department converted the appeal to a formal proceeding. *See* RCW 82.03.140 (permitting the Department to convert an informal appeal to a formal appeal).

Before the formal hearing, Jessica provided Schedule C reports stating that she made no sales in June 2006 and from January to June 2007. She provided no information for sales made between September to December 2006.

At the hearing, Jessica appeared only through her attorney and did not testify. She elicited testimony from the manager of Baby Zack's that her father's store had never purchased cigarettes from Jess's Wholesale.

Her brother, Nick Matheson, submitted amended Schedule C reports that he had signed in 2010 stating that the unstamped cigarettes were delivered to Nick's home in Idaho. Errors in the reports included that the reports merely copied the monthly totals from the two distributors' Schedule C reports, even though not all of the lines reflected sales to Jess's Wholesale, thus falsely indicating that Jess's Wholesale purchased and sold more than 3 million unstamped cigarette packs.

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Nick claimed that he acquired all of Jessica's cigarettes, but he admitted that no invoices or other corroborating documentation showed that Jessica sold any unstamped cigarettes to him or his retail business. He confirmed that Jess's Wholesale picked up the unstamped cigarettes from the Spokane distributors.

The BTA upheld the Department's assessment. It found that Jessica failed to meet her burden of proving that she disposed the unstamped cigarettes through tax-exempt activity. The BTA found that Baby Zack's manager was credible and that Jessica never sold cigarettes to Baby Zack's on the Puyallup reservation. It also rejected Nick's explanation that he acquired all of the cigarettes, finding that no one reported the transfer until 2010, that Nick did not know how much he paid for the cigarettes, that he had no documentation, and that he did not know who created the Schedule C reports.

Jessica petitioned for review in Thurston County Superior Court and sought a restraining order. The Department moved to dismiss, arguing that Jessica failed to pay the contested tax, penalties, and interest before seeking review, as required by statute. It also argued that she could not seek an injunction, but even if she could, her legal arguments were incorrect. The superior court dismissed the petition. Jessica appeals. The Department filed a motion on the merits.

ANALYSIS

I. Standard of Review

This court will grant a motion on the merits to affirm if the appeal is clearly without merit. RAP 18.14(e)(1). It considers all relevant factors, including whether the issues on review are clearly controlled by settled law, are factual and supported by the evidence, or are matters of judicial discretion and the decision was clearly within the trial court's or administrative agency's discretion. RAP 18.14(e)(1).

This court reviews constitutional questions and questions of jurisdiction de novo. *In re Personal Restraint of Talley*, 172 Wn.2d 642, 649, 260 P.3d 868 (2011); *Crosby v. County of Spokane*, 137 Wn.2d 296, 301, 971 P.2d 32 (1999). When reviewing a Board of Tax Appeals' decision, it reviews the findings of fact for substantial evidence. RCW 34.05.570(3)(e); *Xenith Group, Inc. v. Department of Labor & Indus.*, 167 Wn. App. 389, 393, 269 P.3d 414 (2012).

The court sits in the same position as the superior court, limiting its review to the administrative record. *Xenith Group*, 167 Wn. App. at 393. The challenger bears the burden of proving that an agency action is invalid. RCW 34.05.570(1)(a).

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II. Overview of Cigarette Tax Laws³

To understand the parties' arguments, it is first necessary to examine Washington's cigarette tax scheme. Washington's cigarette tax is levied upon the "sale, use, consumption, handling, possession, or distribution of all cigarettes." RCW 82.24.020(1). The tax is to be collected from the person who first performs a taxable act in Washington. RCW 82.24.080(1) and (2).

The Department collects the tax through tax stamps. RCW 82.24.030. Only licensed wholesalers can purchase cigarette tax stamps from the Department, which they affix to each pack of cigarettes. RCW 82.24.030(2). Once stamped, cigarettes can be sold to licensed cigarette retailers, to be sold to the public. RCW 82.24.040(5). Cigarette retailers cannot legally possess unstamped cigarettes unless they also hold a wholesaler's license. RCW 82.24.040(1).

A licensed cigarette wholesaler can sell cigarettes in several ways:

- She can purchase tax stamps from the Department, affix them to cigarette packs, and sell them to a licensed retailer. RCW 82.24.040; WAC 458-20-186(101)(b).

³ Many of the relevant statutes and regulations have since been amended in ways not material to this case. Unless otherwise noted, this decision refers to the current versions where there were no changes relevant to the facts and arguments in this case.

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- She can sell the unstamped cigarettes to another Washington licensed wholesaler. RCW 82.24.040(2).
- She can sell unstamped cigarettes to a person in another state or country, or to federal government instrumentalities. RCW 82.24.040(2)(b); WAC 458-20-186(302) & (304).
- Or she can sell unstamped cigarettes to a tribally licensed wholesaler or retailer on an Indian reservation, if that tribe has a compact with Washington providing for tribal cigarette tax stamps. RCW 82.24.020(5); RCW 82.24.295; WAC 458-20-186(303); *see State v. Comenout*, 173 Wn.2d 235, 241, 267 P.3d 355 (2011), *cert. denied*, 132 S. Ct. 2402 (2012).

Both federal and state laws require cigarette wholesalers to carefully track and report to the Department any sales of unstamped cigarettes. RCW 82.24.040(3) (invoice copies for out-of-state sales must be filed monthly); 15 U.S.C. § 376 (sales into other states or onto Indian reservations must be reported). As a result, wholesalers are to use monthly Schedule C reports to report their sales.

III. The Superior Court Properly Dismissed the Petition Because Jessica Failed to Pay the Contested Tax

The Department argues that the superior court properly dismissed the petition because Jessica failed to pay the contested tax, as required by statute. Jessica responds that she is not a taxpayer and thus not subject to the statute. Because RCW 82.03.180 plainly

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required Jessica to pay the contested tax, the superior court correctly dismissed her petition and her appeal on this basis is clearly without merit. RAP 18.14(e)(1).

RCW 82.03.180 governs superior court review of BTA decisions. It provides that where the BTA rendered a decision after a formal hearing, a party may seek review in superior court pursuant to the Administrative Procedures Act, but the taxpayer must first pay the contested tax, interest, and penalties:

Judicial review of a decision of the board of tax appeals shall be de novo in accordance with the provisions of RCW 82.32.180 or 84.68.020 as applicable except when the decision has been rendered pursuant to a formal hearing elected under RCW 82.03.140 or 82.03.190, in which event judicial review may be obtained only pursuant to RCW 34.05.510 through 34.05.598: PROVIDED, HOWEVER, That nothing herein shall be construed to modify the rights of a taxpayer conferred by RCW 82.32.180 and 84.68.020 to sue for tax refunds: AND PROVIDED FURTHER, That no review from a decision made pursuant to RCW 82.03.130(1)(a) may be obtained by a taxpayer unless within the petition period provided by RCW 34.05.542 the taxpayer shall have first paid in full the contested tax, together with all penalties and interest thereon, if any.

RCW 82.03.180.⁴

Not only does the plain statutory language require prepayment of the contested tax, but Washington appellate courts have previously used RCW 82.03.180 as a bar to judicial review. *Booker Auction Co. v. Department of Revenue*, 158 Wn. App. 84, 88-89, 241 P.3d 439 (2010).

The *Booker Auction* Court held that a taxpayer seeking review of a BTA decision must first pay the tax in full, explaining that RCW 82.03.180 is jurisdictional and that prepayment was consistent with the public interest in not disrupting tax streams into the treasury. 158 Wn. App. at 89. The court held that based “on the dear statutory language of RCW 82.32.150 and RCW 82.03.180, the superior court does not have jurisdiction to hear [the taxpayer’s] complaint until an auction sale occurs and the excise tax is paid.” *Booker Auction*, 158 Wn. App. at 89.

Here, it is undisputed that Jessica has not paid in full the contested tax, penalties, and interest. Under the plain language of RCW 82.03.180, she could not obtain judicial review unless she did so. The superior court correctly dismissed her petition for review because she failed to meet the plain statutory prerequisite. Since the superior court’s decision

⁴ RCW 82.32.150 similarly provides that “[a]ll taxes, penalties, and interest shall be paid in full before any action may be instituted in any court to contest all or any part of such taxes, penalties, or interest.”

followed well-settled law, Jessica's appeal is without merit. RAP 18.14(e).

Jessica further argues that she is not a taxpayer, so RCW 82.03.180 does not apply. But, for purposes of Title 82, a "taxpayer" includes any individual, group of individuals, corporation, or association liable for any tax or the collection of any tax hereunder, or who engages in any business or performs any act for which a tax is imposed by this title." RCW 82.02.010(3). Jessica, an individual, was liable for the cigarette tax when she petitioned for review. She therefore qualifies as a taxpayer. *See Booker Auction*, 158 Wn. App. at 88 n.1 (rejecting Booker Auction's argument that it was not a taxpayer). Her argument fails, and the superior court correctly dismissed the petition.

IV. Jessica's Constitutional Arguments Are Meritless, So She Cannot Obtain Injunctive Relief

To get around the statutory prepayment requirement, Jessica argues that the superior court can award injunctive relief to restrain the collection of a tax or tax penalty based on various constitutional violations. The Department argues that Jessica cannot obtain injunctive relief for constitutional violations, but even if she could, her arguments are meritless. While Jessica could seek injunctive relief, the superior court correctly dismissed her petition because well-settled law shows that she failed to prove that she would likely prevail.

At the outset, the Department argues that Jessica cannot seek injunctive relief. Its argument fails.

A taxpayer has three options following the Department's tax decision. First, she can pay the tax and penalties and then seek a refund directly in Thurston County. RCW 82.32.180. Second, RCW 82.32.150 allows the taxpayer to obtain an injunction or restraining order for constitutional violations:

All taxes, penalties, and interest shall be paid in full before any action may be instituted in any court to contest all or any part of such taxes, penalties, or interest. No restraining order or injunction shall be granted or issued by any court or judge to restrain or enjoin the collection of any tax or penalty thereof, except upon the ground that the assessment thereof was in violation of the Constitution of the United States or that of the state.

Third, she can appeal to the BTA, without prepayment of the tax, penalties, and interest due. RCW 82.32.180.

Chapter 82.32 RCW "does not expressly prohibit a taxpayer from seeking administrative and court review simultaneously." *AOL, LLC v. Department of Revenue*, 149 Wn. App. 533, 544, 205 P.3d 159 (2009).⁵ In *Booker Auction*, for example, Division Three of this court held that both RCW 82.03.180 and RCW 82.32.150 applied on appeal from a BTA decision. 158 Wn. App. at 88-89. The *Booker Auction* Court held that according to "the

⁵ While the Department recognizes these three options, it does not argue or cite authority for the proposition that Jessica had to choose only a single option.

plain language of [RCW. 82.32.150], the sole time when collection of a tax can be prospectively enjoined is when a tax assessment violates the federal or state constitution.” 158 Wn. App. at 88.

Here, Jessica sought review of the BTA decision and requested injunctive relief. Since chapter 82.32 RCW nowhere prohibits her from utilizing these two approaches simultaneously and since case law has recognized RCW 82.03.180’s and RCW 82.32.150’s interrelationship, Jessica could seek injunctive relief to avoid the prepayment requirement.⁶

Jessica’s constitutional arguments are nonetheless meritless because well-settled law controls or her factual assertions are not supported by the record. RAP 18.14(e)(1). Thus, the superior court correctly dismissed her petition.⁷

For a taxpayer to obtain injunctive relief, she must show a violation of a clear legal or equitable right:

It is an established rule in this jurisdiction that one who seeks relief by temporary or permanent injunction must show (1) that he has a clear legal or equitable right, (2) that he has a well-grounded fear of immediate invasion of that right, and (3) that the acts complained of are

⁶ To the extent Jessica makes nonconstitutional arguments, they remain barred by RCW 82.03.180.

⁷ This court may affirm on any ground established by the law and the record. *State v. Villarreal*, 97 Wn. App. 636, 643, 984 P.2d 1064 (1999), *review denied*, 140 Wn.2d 1008 (2000).

either resulting in or will result in actual and substantial injury to him.

Tyler Pipe Indus., Inc. v. Department of Revenue, 96 Wn.2d 785, 792, 638 P.2d 1213 (1982). When ‘examining the first factor, the court must determine the likelihood of the moving party ultimately prevailing on the merits. *Tyler Pipe*, 96 Wn.2d at 793. An injunction “will not issue in a doubtful case.” *Tyler Pipe*, 96 Wn.2d at 793 (quoting *Isthmian S. S. Co. v. National Marine Eng’rs’ Beneficial Ass’n*, 41 Wn.2d 106, 117, 247 P.2d 549 (1952)).

Turning to Jessica’s constitutional arguments, they are meritless, so she would not likely ultimately prevail on the merits. First, Jessica contends that Washington cannot regulate interstate or on-reservation shipments of cigarettes. But, Jessica failed to prove that she shipped the cigarettes in question to another state or onto an Indian reservation.

As the taxpayer challenging the Department’s decision, Jessica bore the burden when challenging the tax. RCW 34.05.570(1)(a). Jessica acquired the cigarettes outside of Indian country. While she claimed that she transferred the cigarettes either to another member of an Indian tribe or out of State—both tax-exempt transfers—the BTA found her version not credible. Appellate courts will not review an administrative agency’s credibility findings. *Goldsmith v. Department of Social & Health Servs.*, _ Wn. App. _, 280 P.3d 1173, 1176 (2012). She failed to meet her burden before the BTA, so she has failed to establish the prerequisite fact that she transferred the cigarettes

to another tribal member or out-of-state. *See also* RAP 18.14(e)(1)(b) and (c). Her argument is without merit.

Jessica next argues that she was not a taxpayer and lacks sufficient contacts or nexus with Washington to be responsible for Washington tax. To satisfy due process, a taxpayer must have “sufficient contacts with the taxing state such that imposing the tax does not offend traditional notions of fair play and substantial justice.” *Lamtec Corp. v. Department of Revenue*, 170 Wn.2d 838, 843, 246 P.3d 788, *cert. denied*, 132 S. Ct. 95 (2011) (internal quotations omitted); *see* U.S. CONST. amend XIV.

Under the Commerce Clause, “the crucial factor governing nexus is whether the activities performed in this state on behalf of the taxpayer are significantly associated with the taxpayer’s ability to establish and maintain a market in this state for the sales.” *Lamtec*, 170 Wn.2d at 850 (internal quotations omitted); *see* U.S. CONST. art. I, § 8, cl. 3. For example, even periodic visits by the taxpayer’s employees can establish nexus. *Lamtec*, 170 Wn.2d at 846, 851.

Here, Jessica had the requisite contacts and nexus for the Department to tax her. She voluntarily obtained a Washington cigarette wholesaler license, allowing her to possess and transport unstamped cigarettes in Washington. RCW 82.24.040. As a licensed wholesaler, she had to pay the cigarette tax or report the exempt disposition of unstamped cigarettes. RCW 82.24.040. It is undisputed that she or her employees drove into non-Indian Washington land to purchase cigarettes. She presented no credible evidence proving that she sold those cigarettes anywhere but in Washington. By

taking affirmative steps to engage in wholesaling cigarettes in Washington, Jessica established sufficient contacts and nexus to satisfy the Due Process and Commerce Clauses. Her arguments to the contrary lack any merit.

Third, Jessica argues that she is immune from all state taxes because she is an Indian. But, Indians who conduct business off-reservation are subject to generally applicable state law. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49, 93 S. Ct. 1267, 36 L. Ed. 2d 114 (1973) (citing cases). A state may not tax Indians for on-reservation activities. *Grand River Enters. Six Nations, Ltd. v. Pryor*, 425 F. 3d 158, 173 (2d Cir. 2005) (“the Indian Commerce Clause’s grant of authority to the federal government, and preemption of state authority, extends only to activities occurring in ‘Indian country’”), *cert. denied*, 549 U.S. 951 (2006). Because Jessica presented no credible evidence showing that any of her activities occurred on-reservation, her argument fails.⁸

Finally, Jessica contends that the fine was excessive under the Due Process Clause and the Eighth Amendment to the U.S. Constitution. Even assuming that the constitutional excessive fine analysis applies to the penalty, Jessica’s argument fails.

⁸ Her argument that Article 26 of the Washington State Constitution provides that Congress has exclusive power over enrolled Indians is also flawed, where that provision applies only to Indian lands. WASH. CONST. art. XXVI, § 2.

When deciding whether a fine is disproportionate to the offense so that it is constitutionally excessive, we compare the fine amount to the gravity of the offense, and if it is grossly disproportional, it is unconstitutional. *United States v. Bajakajian*, 524 U.S. 321, 336-37, 118 S. Ct. 2028, 141 L. Ed. 2d 314 (1998). This standard derives from two important considerations: (1) courts give the legislature substantial deference in making a judgment about the appropriate punishment for an offense; and (2) any judicial determination regarding the gravity of an offense will be inherently imprecise. *Bajakajian*, 524 U.S. at 336.

Here, the Legislature determined that the remedial penalty for failing to pay cigarette taxes is either \$10-per-pack or \$250, whichever is greater. RCW 82.24.120(1). Giving that legislative decision its due deference, it is not grossly disproportional. The legislature has a strong government interest in deterring tax evasion and the black market sales of cigarettes. *See Bajakajian*, 524 U.S. at 338 (suggesting tax evasion warrants higher fines).

A cigarette wholesaler who sells unstamped cigarettes without paying the taxes significantly impacts the public fisc. In this case, between 2006 and 2007, the state cigarette tax amounted to \$2.025 per pack, while the federal excise tax amounted to an additional \$0.39 per pack. ARC at 716-18; former RCW 82.24.020 through .028 (1994); former 26 U.S.C. § 5701 (b) (1997). The state tax has increased to \$3.025 per pack, and the federal tax has increased to \$1.01 per pack. RCW 82.24.020 through .028; 26 U.S.C. § 5701(b). And since the fine, like the tax, is on a per-

pack basis, the penalty increases based on the amount of packs that have not been stamped. Jessica's penalty is over \$7 million because she did not pay taxes on 703,400 packs. Since the state has a strong interest in deterrence and making its public dollars, well-settled law shows that the fine was not constitutionally excessive.

Jessica's constitutional arguments are clearly without merit and unsupported by settled case law. Because she could not prevail on the merits of her constitutional claims, the superior court correctly denied injunctive relief. Her appeal is without merit. RAP 18.14(e)(1)(a)-(c). Accordingly, it is hereby

ORDERED that the Department's motion on the merits is granted and the superior court's decision is affirmed.

DATED this 17th day of September, 2012.

s/ Aurora R. Bearnse

Aurora R. Bearnse
Court Commissioner

cc: Robert E. Kovacevich
David Hankins
Rebecca Glasgow
Hon. Thomas McPhee

APPENDIX C

**SUPERIOR COURT OF WASHINGTON
FOR THURSTON COUNTY**

NO. 11-2-00795-0

[Filed October 7, 2011]

JESSICA MAE MATHESON, dba)
JESS'S WHOLESALE,)
)
Petitioner,)
)
v.)
)
STATE OF WASHINGTON)
DEPARTMENT OF REVENUE,)
)
Respondent.)

**ORDER DISMISSING PETITION FOR REVIEW
AND ORDER DENYING MOTION FOR
PRELIMINARY INJUNCTION**

THIS MATTER came on for hearing on Petitioner's Motion for Preliminary Injunction and Respondent's Motion to Dismiss on September 30, 2011. The Respondent appeared by Robert M. McKenna, Attorney General, and David M. Hankins, Senior Counsel and

Petitioner appeared by Robert E. Kovacevich. The court having considered:

1. Petitioner's Motion to Stay Collection Pending Resolution of the Proceeding (Motion for Preliminary Injunction);
2. Affidavit of Jessica Mae Matheson;
3. Respondent, Department of Revenue's Response to Motion for Injunction and Renewal of Respondent's Motion to Dismiss;
4. Petitioner's Reply to Respondent's Response;

The Court has considered the documents filed by the parties in support and opposition to Petitioner's Motion for Preliminary Injunction and Respondent's Motion to Dismiss and the records and files herein and has heard argument of counsel, and being fully advised. For the reasons stated in my oral ruling, IT IS HEREBY ORDERED:

Respondent's Motion to Dismiss is GRANTED and this case is hereby DISMISSED with prejudice. Alternatively, Petitioner's Motion for a Preliminary Injunction is DENIED.

DATED this 7th day of October, 2011.

THOMAS McPHEE
JUDGE Wm. THOMAS McPHEE

PRESENTED BY:

ROBERT M. MCKENNA
Attorney General

DAVID M. HANKINS
DAVID M. HANKINS, WSBA No. 19194
Senior Counsel
Attorneys for Respondent

APPENDIX D

**BEFORE THE BOARD OF TAX APPEALS
STATE OF WASHINGTON**

Docket No. 09-098

[Filed January 21, 2011]

JESSICA MAE MATHESON, d/b/a)
JESS'S WHOLESALE)
)
Appellant,)
)
v.)
)
STATE OF WASHINGTON)
DEPARTMENT OF REVENUE,)
)
Respondent.)

RE: Excise Tax Appeal

FINAL DECISION

This matter came before the Board of Tax Appeals (Board) on September 13, 2010, for a formal hearing pursuant to the rules and procedures set forth in chapter 456-09 WAC (Washington Administrative Code). Robert E. Kovacevich, Attorney, represented Appellant, Jessica Mae Matheson (Ms. Matheson), sole

proprietor of Jess's Wholesale (Jess's Wholesale). David M. Hankins and Peter Gonick, Assistant Attorneys General, represented Respondent, State of Washington Department of Revenue (Department). Appearing as witnesses for the Appellant were Nicholas Matheson (Ms. Matheson's brother) and Melissa Lawson. Appearing as a witness for the Respondent was Lee Smith, Excise Tax Examiner.

The Board heard the testimony, reviewed the evidence, and considered the arguments made on behalf of both parties. The Board now makes its decision as follows:

ISSUE

Slonim. Has Jess's Wholesale proven that it disposed of 703,400 packages of untaxed cigarettes, purchased in Spokane, Washington, during the relevant period, in a transaction or at a location that precludes taxation by the State of Washington?

Answer: No.

PROCEDURAL HISTORY

Ms. Matheson brought a summary judgment motion asking for dismissal of all tax assessments against her.

There are three possible dispositions of cigarettes: non-taxable disposition outside the state of Washington (i.e., an interstate sale) pursuant to RCW 82.24.040(2)(b) and federal interstate commerce law; non-taxable disposition in the state of Washington in an exempt sale (e.g., on an Indian reservation where

there is a cigarette tax compact with the State); or taxable disposition in the state of Washington in a non-exempt location or non-exempt transaction. Because of Ms. Matheson's various representations to the Department regarding the disposition of the cigarettes delivered to Ms. Matheson in Spokane, Washington, the Board concluded that there were genuine issues of material facts about where the cigarettes received in Spokane were disposed of, i.e., whether they were disposed of in a location in Washington that creates tax liability, or a location where no tax liability is created. Accordingly, the Board denied the summary judgment motion and ordered a hearing to determine if the untaxed cigarettes were disposed of in a location where no tax liability is created.

Ms. Matheson's failure to report out-of-state sales, even when specifically asked to provide the information and given months to respond, resulted in the Department's assessment. R19-7-8 (Schedule 2 and 3 of assessment showing calculation of tax as purchase of unstamped cigarettes less amount shown by taxpayer as valid reason why tax not due); *see also* R2-2 (Department determination stating that "relief would be granted if your client provided documentation that the cigarettes were never received in Washington.").

FINDINGS OF FACT

Facts supporting the assessment against Ms. Matheson dba Jess's Wholesale.

1. Cigarette wholesalers making interstate and in-state sales of untaxed cigarettes are required to report those sales monthly to the Department of

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Revenue; Schedule C is a form used by the Department of Revenue Cigarette Tax Program for reporting:

- a. Interstate shipments into Washington, as required by the Federal Jenkins Act, and
 - b. In-state distributor's report of interstate sales and in-state exempt sales.¹
2. Jess's Wholesale's taxable wholesaling activity was conducted in Spokane Washington, not in Indian Country.²
3. During the audit period, Jess's Wholesale legally purchased unstamped cigarettes outside of Indian Country because Ms. Matheson dba Jess's Wholesale held a Washington cigarette wholesaler's license.
4. LA Nelson Company dba Burke's Distributing (Burke's) and Blacksheep Distributing (Blacksheep) timely filed Schedule C forms that reported Jess's Wholesale purchased a total of 703,400 packs of unstamped cigarettes from them between July 1, 2006, and June 30, 2007,³ and that these cigarettes were picked up from their

¹ Exhibits R4-1 and R6.

² Indian Country is defined in WAC 458-20-192.

³ Exhibits R-7, R-8, and R-22.

respective places of business in Spokane, Washington.⁴

5. Jess's Wholesale was then required to file Schedule C forms reporting the distribution of the 703,400 packs of cigarettes Burke's and Blacksheep reported had been sold to Jess's Wholesale.

6. Tax stamps are only sold to wholesalers, who should place the stamps on the cigarettes prior to delivery to the retailer, or make an exempt sale (e.g., to an out-of-state customer, the federal government, or another wholesaler who must then apply the stamps); retailers may not possess tax stamps.⁵

7. Pursuant to the Department's regulations, Jess's Wholesale had 72 hours after taking possession of the cigarettes to either stamp them or make an exempt sale; Jess's Wholesale, however, failed to provide documentation that an exempt sale or other exempt disposition took place within either 72 hours after taking possession of the cigarettes, or within such period of time after receipt as is reasonably necessary to affix the stamps required for a non-exempt sale.⁶

⁴ Exhibit R4-2.

⁵ Testimony of L. Smith.

⁶ Testimony of L. Smith.

8. There is no testimony or credible, contemporaneous documentation of an exempt disposition.

Ms. Matheson's failure to appear in these proceedings and the audit and appeal process:

9. Ms. Matheson, as reported on the Master Application for a business license and a cigarette and tobacco wholesaler license (License Application), is the sole proprietor of Jess's Wholesale.⁷

10. Ms. Matheson did not testify at the hearing.

- a. No explanation was provided for why Ms. Matheson did not appear and testify on her own behalf.
- b. Ms. Matheson had knowledge of many of the key facts at issue, and her appearance and testimony on these key facts would have been logical to prove her case.

11. Ms. Matheson did not respond to requests for information from the Department's tax examiner during the audit, although Mr. Smith attempted to speak to Ms. Matheson several times by telephone, using the telephone number on file for her, and by

⁷ Exhibit R22-2.

visiting the business address of Jess's Wholesale on the Puyallup reservation.⁸

12. Ms. Matheson did not contribute any information to the Department's discovery requests.⁹

Lack of credible, contemporaneous records or documentation (e.g., copies of invoices or receipts, or cancelled checks) of the actual transactions by which Ms. Matheson disposed of the 703,400 packs of cigarettes delivered to her in Spokane, Washington.

13. Various and conflicting assertions by Jess's Wholesale regarding the disposition of the 703,400 packs of cigarettes:

- a. Jess's Wholesale's Schedule C form filed with the Department for the third quarter of 2006 reported: sales of cigarettes to Baby Zack's, an Indian smokeshop on the Puyallup reservation (7403 Pacific Highway E, Milton, Washington); the sale was to an out-of-state Indian retail outlet, and there was no tax paid for the destination state.¹⁰
- b. Jess's Wholesale prepared, but did not file with the Department, Schedule C reports

⁸ Testimony of Mr. Smith, Declaration in Response to Appellant's Motion for Summary Judgment, and Exhibits R6 and 7.

⁹ Exhibit R25-6.

¹⁰ Exhibits R 9-5 and R6-2 (which has the codes for the "sale type" and "tax paid" parts of Schedule C).

stating it did no business at all for the rest of the audit period; copies of these unfiled reports were provided in response to requests of the audit examiner, Lee Smith, and interrogatories or in response to interrogatories.¹¹

- c. Upon the appeal of the Department's determination to this Board, Ms. Matheson asserted that the cigarettes were transported to Idaho.¹²
- d. The answer to the Department's written interrogatory requesting identification of all the Native American Indian reservations where Jess's Wholesale "hailed or delivered cigarettes" was "Coeur d'Alene Indian Reservation."¹³
- e. The response to the Department's Request for Production No. 3 (for copies of all documents "evidencing sales of cigarettes sold by you during July 1, 2006 through the present") includes this statement: "Essentially they may not be sales as Fightn' Creek advanced the funds."¹⁴

¹¹ Exhibits R25-13 and 14, and R16-2-11.

¹² See Notice of Appeal, attached document, page 2.

¹³ Exhibit 25-8.

¹⁴ Exhibits 25-9 and R26-1.

- f. Amended reports dated September 1, 2010, which were received by the Department on September 7, 2010 (one week before the September 13, 2010 hearing before the Board), state that the cigarettes were sold to or received by Jess's Wholesale at Ms. Matheson's brother's address on the Coeur d'Alene reservation in Idaho.¹⁵
- g. The Board gives these conflicting reports no credibility in terms of showing where the cigarettes were actually delivered.

14. Several different signatures for Ms. Matheson:

- a. The signature on the Declaration is different than the signature on the License Application; both are different than the signature for Ms. Matheson on the Wholesale Cigarette Dealers Bonding agreement dated June 27, 2006, and all three are different than the signature on the Agreement of Indemnity dated July 30, 2009.¹⁶
- b. All four of the above signatures are different than the signatures on a letter to the Department dated September 28, 2006, and

¹⁵ Exhibit R33.

¹⁶ Exhibits R29-2, R22-4, R23-1, and A5.

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the second quarter 2006 excise tax return (which appear to be the same).¹⁷

- c. All five of the above signatures are different than the signature on the Schedule C form for the third quarter of 2006.¹⁸
- d. All six of the above signatures are different than the signatures on the third and fourth quarter 2007 Schedule C forms (which appear to be the same).¹⁹
- e. All seven of the above signatures are different than the signature on first and second quarter 2008 Schedule C forms (which appear to be the same)²⁰
- f. All eight of the above signatures are different than the signature on the first quarter 2007 Schedule C form.²¹
- g. The two, fourth quarter Schedule C forms:
 - 1. All but one of the above nine signatures are different than the signature on the

¹⁷ Exhibit R9-2 and 3.

¹⁸ Exhibit R9-5 (which is also Exhibits A10, R16-2, and R28-2.

¹⁹ Exhibits R16-8 and 9.

²⁰ Exhibits R16-10 and 11.

²¹ Exhibit R16-3.

second quarter Schedule C form dated August 22, 2007, and bearing the following fax information: Dates August 21 and 22, 2007, and "Kovacevich Law."²²

2. All but one of the above ten signatures are different than the signature on the second quarter Schedule C form dated April 29, 2008, and bearing the following fax information: (a) fax date October 8, 2007, and "Fightin Creek", and (b) fax date April 30, 2008, and "Kovacevich Law."²³
- h. All eleven of the above signatures are different than the signature on the Confidential Tax Authorization dated April 29, 2008, and which has the following fax information: sent to Attorney Robert Kovacevich on October 29, 2007, from Fightin Creek The signature on Exhibits R9-2 and this document, however, are somewhat similar.²⁴
- i. The only signatures similar to the signature on the Declaration are the signatures on the second quarter 2007 Schedule C form dated

²² Exhibits R16-6 and R9-2.

²³ Exhibits R 16-7 and R16-8 and 9.

²⁴ Exhibit R16-6.

August 22, 2007, and the letter dated September 28, 2006.²⁵

- j. Nicholas Matheson examined the signature on the second quarter 2006 Schedule C report and does not know who filed it.²⁶
- k. Nicholas Matheson's signature appears on the first quarter 2008 Schedule C report provided to the Department by Attorney Robert Kovacevich.²⁷

15. The various addresses for the business of Jess's Wholesale and the residence of Ms. Matheson:

- a. The following information appears on the License Application for Jess's Wholesale:²⁸
 - a. The business mailing address is 7403 Pacific Highway East, in Milton, Washington; Pierce County is stated to be the county in which the business is located.

²⁵ Exhibits R29-2, R9-2, and R16-5.

²⁶ Testimony of Mr. Matheson.

²⁷ Exhibit R16-10 and testimony of Mr. Matheson.

²⁸ Exhibit R22-1.

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- b. Ms. Matheson's home address is listed as 6915 5th Street East, #101, in Fife, Washington
- c. The mailing address for Jess's Wholesale listed on the License Application was the same as the "location address" for Jess's Wholesale;²⁹ but the Department's certified letter to that address requesting Schedule C reports sent on August 7, 2007, was undeliverable.³⁰
- b. The residence address given for Ms. Matheson on the application for a bond to be effective June 27, 2009, is 6915 E 5th Street East, #101, Fife, Washington.³¹
- c. The response to the Department's interrogatory No.3 to identify the location of the business of Jess's Wholesale is "Office at 7403 Pacific Hwy E, Milton, WA 98354 and at 23181 S Highway 95, Coeur d'Alene, ID 83814,"³² The address for Jess's Wholesale is reported in the interrogatory response to be the address in Idaho instead of Milton,

²⁹ Exhibit R23-3.

³⁰ Exhibit RS-4.

³¹ Exhibit A5.

³² Exhibit 25-6.

Washington; because it is Ms. Matheson's residence.³³

- d. Ms. Matheson's Puyallup enrollment card, faxed to an unknown recipient on December 15, 2009, from fax no. 208-686-4406, states that Ms. Matheson's address is 25029 South Highway 95, Worley, Idaho; a portion of the card is obliterated, and no signature is on the enrollment card except for the signature of the issuer on the back.³⁴ The response to the Department's written interrogatory No.5 requesting identification of the Native American Tribe in which Ms. Matheson has been an enrolled member "during the last five years" was "The Coeur d'Alene Tribe and the Puyallup Tribe."³⁵
- e. Amended reports dated September 1, 2010, state that the cigarettes were sold to or received by Jess's Wholesale at 12727 W. Elder Road in Idaho.³⁶

16. The response to "List your bank's name" on Jess's Wholesale's License Application is "Will open

³³ Testimony of Mr. Matheson.

³⁴ Exhibits R25-6 and R26-1 and 15.

³⁵ Exhibits R25-6 and 7.

³⁶ Exhibit R33.

new account."³⁷ Jess's Wholesale paid cash for its purchases from Washington wholesalers, Burke's Distributing and Blacksheep Distributing.³⁸

17. Estimated gross annual income of only \$12,001 to \$28,000 was reported on the License Application for Jess's Wholesale.³⁹

18. The License Application for Jess's Wholesale stated there was no plan to have employees, but persons other than Ms. Matheson signed invoices for the delivery of cigarettes to Jess's Wholesale.⁴⁰

Facts contradicting the original assertion that Jess's Wholesale had sold untaxed cigarettes to retailer Baby Zack's located on the Puvallup Reservation: Testimony of Melissa Lawson.

19. Melissa Lawson was the general manager of Baby Zack's during the audit period, and placed orders for cigarettes during the audit period; she managed the day-to-day operation, which included ordering cigarettes.

20. The Puyallup Tribe has a cigarette tax compact with the State of Washington; Baby Zack's affixed only tax compact tribal stamps to cigarettes

³⁷ Exhibit R22-1.

³⁸ Exhibit R13.

³⁹ Exhibit R22-1.

⁴⁰ Exhibits R22-1, R12, and R13-3,5,8,11,12,13,17,18, and 26.

sold on the Puyallup Reservation; it did not put Washington state tax stamps on cigarettes it sold.

21. Ms. Matheson dba Jess's Wholesale does not do business or have an office on Baby Zack's premises.

22. During the audit period Melissa Lawson did not order or purchase any cigarettes from Jess's Wholesale, and Baby Zack's did not receive any deliveries of untaxed cigarettes from Jess's Wholesale to be sold at Baby Zack's.

23. Baby Zack's has only purchased from approved wholesale vendors, and neither Ms. Matheson nor Jess's Wholesale is on the approved list.

24. In her experience at Baby Zack's, wholesalers gave her invoices that she files away.

25. Ms. Lawson's testimony was clear and unequivocal, particularly in her articulation that Baby Zack's never bought any cigarettes from Jess's Wholesale; Ms. Lawson is a credible witness.

Facts relating to Jess's Wholesale's assertion that the untaxed cigarettes were sold to the "Fighting Creek Smokeshop" owned by Nicholas Matheson (Nicholas Matheson's testimony).

26. Nicholas Matheson is Ms. Matheson's brother. His relationship to the taxpayer shows bias on his part. His testimony was not candid; he was

not a credible witness about key actions by his sister.

27. Nicholas Matheson is an enrolled Coeur d'Alene Indian who lives on the Coeur d'Alene reservation in Worley, Idaho, about 30 miles east of Spokane, Washington. His residence address is 12727 West Elder Road, Worley, Idaho.⁴¹

28. Between 2005 and 2007, Mr. Matheson operated a convenience store (the "Fighting Creek Smokeshop") at 23181 S. Highway 95, Coeur d'Alene, Idaho. The store was 15 miles south of Coeur d'Alene and about two miles from his residence.

29. Mr. Matheson testified that he purchased the 703,400 packs of cigarettes from Jess's Wholesale and took them to his store, and that he stamped them with Coeur d'Alene tribal stamps at the stamp machine located in an outbuilding behind his home at 12727 West Elder Road in Worley.

30. The stamping machine has a conveyer system; it opens each carton often packs of cigarettes, then individually stamps each pack; and then closes up each carton.

31. Mr. Matheson's testimony that he purchased all 703,400 packs sold to Jess's Wholesale during the 12-month audit period is not credible for the following reasons:

⁴¹ Exhibit R26-1.

- a. He responded affirmatively to the question of whether he and Ms. Matheson get along, do each other favors, and “take care of each other.”
- b. The Department had been trying to contact Ms. Matheson to inquire about the disposition of the untaxed cigarettes numerous times beginning on January 10, 2007, until the assessment was issued, but neither Ms. Matheson nor Mr. Matheson came forward with this information then or in the course of the appeal to the Department’s Appeals Division.⁴²
- c. Mr. Matheson’s February 9, 2010, affidavit recites that he knows of his own knowledge that all of the 703,400 packages of cigarettes listed on an attachment to the affidavit were delivered on the Coeur d’Alene Indian reservation to “myself at my business.” In contrast, however, are these items:
 - 1) In response to being asked at the hearing to explain how he determined that, he states “just off the top of my head,” and when asked specifically if 703,400 packs is accurate he responded that he “assumes” so because she would have told him if she sold to anyone else, but also states “I don’t know for sure.”

⁴² Exhibit R2–1-3, R3, R4 and R5.

- 2) The response to the Department's Request for Admission No. 2 includes the statement that "all shipments were into Indian reservations." (Plural emphasis added.)
- d. Mr. Matheson states he:
- 1) Does not remember how much Jess's Wholesale charged him for the cigarettes;
 - 2) Has no documentation of the purchases;
 - 3) Paid cash for the cigarettes.
- e. Mr. Matheson states that he and Ms. Matheson had a "pretty informal" relationship and they did not keep track of who owed whom or other aspects of their business relationship.⁴³
- f. Mr. Matheson testifies that the signature on Exhibit R13-12 looks a little like his, but he does not recall signing that invoice; that the signature on Exhibit R13-18 looks more like his; and that the signature on Exhibit R 13-26 is definitely his signature.
- g. He testifies that he assumes that no one else would have been with Mr. Cotton (the driver) and that no one else was authorized to act on Ms. Matheson's behalf, but five invoices have

⁴³ Testimony of Mr. Matheson.

the signature of "Sam Lozeau" (Exhibits R13-5, 7, 8, 11, and 13) and he testifies that he does not know who that is.

- h. When asked if he was authorized to act on behalf of Jess's Wholesale when he signed the amended Schedule C reports filed the week before the hearing:
 - 1) Without looking at the documents he answered "I think so";
 - 2) He testifies that he does not know why Ms. Matheson did not sign;
 - 3) He cannot remember how these Schedule C reports came to be done, nor who typed them up;
 - 4) When asked why these were being filed four years later, he responded that he thinks it is because the "original" was wrong, but does not know what the mistake was and did not do anything to make sure that the new.
- i. Before being shown his February 9, 2010, affidavit in which he states "I helped my sister Jessica Matheson get her wholesale cigarette license from the State of Washington," his response upon cross-examination at the hearing to the question "Did he help Jessica Matheson get a wholesaler's license?" was that he had "nothing to do with her getting" that license.

- j. In that same affidavit, Mr. Matheson stated that he helped her buy a 2008 Dodge Sprinter van to use to haul cigarettes, but that it was purchased on January 23, 2007. At the hearing, he stated that he purchased her a truck in 2007 or 2008.⁴⁴
- k. In his affidavit, he states that he helped her buy “the *only van she has ever used to haul cigarettes,*” and also that he “let her use one of his vans” prior to purchasing the Dodge van on January 23, 2007.⁴⁵ (Emphasis added.)
- l. His affidavit reciting that “Charles Cotton was the only driver of Ms. Matheson’s wholesale delivery business” conflicts with his testimony at the hearing that Mr. Cotton was the driver “most of the time,” that Mr. Matheson picked up some orders once or twice, and that Ms. Matheson picked up orders occasionally.

Other facts related to the question of the disposition of the untaxed cigarettes.

32. The only Schedule C reports actually filed with the Department are:

⁴⁴ Exhibit R34-2, par. 3.

⁴⁵ *Id.*

- a. The Schedule C filed for June of 2006, which was received by the Department on August 10, 2006,⁴⁶ and
- b. The Schedule C filed for the third quarter of 2006, which was received by the Department on November 10, 2006. On that form Jess's Wholesale reported sales to Baby Zacks in the months of August and September of 2006.⁴⁷

33. The record also includes purported original Schedule C reports provided to the Department in response to its formal requests to Attorney Robert Kovacevich for the first quarter of 2007,⁴⁸ the second quarter of 2007,⁴⁹ the third and fourth quarters of 2007,⁵⁰ and the first two quarters of 2008.⁵¹ All but Exhibit R16-2 reported either:

- a. "no sales or deliveries of cigarettes this period,"⁵² or

⁴⁶ Exhibits R16-1 and R26-11.

⁴⁷ Exhibit R28-2 and A-10.

⁴⁸ Exhibit R16-3 (also R26-12).

⁴⁹ Exhibits R16-5 and 7.

⁵⁰ Exhibits R16- 8 and 9.

⁵¹ Exhibits R16-10 and 11.

⁵² Exhibits R16-3 (hand-printed), R16-7 (stamped), and R16-8 and 9 (also R26-13 and 14) (also stamped).

b. "No sales or deliveries for this period."⁵³

34. No credible records or reports of the disposition of the untaxed cigarettes purchased by Ms. Matheson from the two Spokane distributors were provided to the Department or this Board.

Exhibit R33.

35. The Department received documents purported to be amended Schedule C forms (Exhibit R33) dated September 1, 2010, showing an address for Jess's Wholesale that is Mr. Matheson's residence, not the Milton, Washington, address on file with the Department for Jess's Wholesale.

36. Mr. Matheson signed the Schedule C reports dated September 1, 2010, which show his address on them, but he (1) does not remember reviewing them; (2) does not know (a) why amended schedules were filed in September of 2010, (b) the purpose of the schedules, (c) what the initials "I" and "U" on the schedules mean, and (d) whose phone number is on the schedules; and (3) cannot explain the notation at the bottom of the amended schedules that the van could only carry about 30,000 packs per load and not all of the packs were transported on the invoice date.⁵⁴

⁵³ Exhibits R16-1 (typed in capitals) and Exhibits R16-10 and 11 (hand-printed).

⁵⁴ Testimony of Mr. Matheson.

37. Mr. Matheson has never prepared a Schedule C report.⁵⁵

38. The Board denied the motions of the Department and Jess's "Wholesale for summary judgment on the ground that a material fact issue remained concerning the disposition of the 703,400 packs of cigarettes taxed by the Department. Any Conclusion of Law that should be deemed a Finding of Fact is hereby adopted as such. From these findings, the Board comes to these

CONCLUSIONS OF LAW

1. The Board has jurisdiction over this appeal (RCW 82.03.130).

2. The intent and purpose of chapter 82.24 RCW is to levy a tax on all of the articles taxed under this chapter that are sold, used, consumed, handled, possessed, or distributed within this state, and to collect the tax from the person who first sells, uses, consumes, handles, possesses, or distributes them in the state.⁵⁶

3. There is levied and collected as provided in chapter 82.24 RCW, a tax upon the sale, use, consumption, handling, possession, or distribution of all cigarettes of 12.125 cents per cigarette.⁵⁷

⁵⁵ Testimony of Mr. Matheson.

⁵⁶ RCW 82.24.080(1).

⁵⁷ RCW 82.24.020(1).

4. For purposes of chapter 84.24 RCW, "possession" means both (a) physical possession by the purchaser and, (b) when cigarettes are being transported to or held for the purchaser or his or her designee by a person other than the purchaser, constructive possession by the purchaser or his or her designee, which is deemed to occur at the location of the cigarettes being so-transported or-held.⁵⁸

5. Except as otherwise provided in chapter 82.24 RCW, only a wholesaler shall cause to be affixed, on every package of cigarettes, stamps of an amount equaling the tax due thereon or stamps identifying the cigarettes as exempt before he or she sells; offers for sale, uses, consumes, handles, removes, or otherwise disturbs and distributes the same.⁵⁹ The statutory requirement applies to all persons who are not licensed wholesalers, not just Indians, and purpose is to ensure the ability to monitor compliance with Washington's taxing statutes.⁶⁰

6. Licensed cigarette wholesalers are the only entity that can possess unstamped, untaxed cigarettes.⁶¹ Without a cigarette wholesaler's

⁵⁸ RCW 82.24.020(32).

⁵⁹ RCW 82.24.030.

⁶⁰ RCW 82.24.250.

⁶¹ RCW 82.24.030, 040, and .050. One exception to this rule is persons transporting unstamped cigarettes who have given prior

license, Ms. Matheson db a Jess's Wholesale would not be able to legally purchase unstamped and untaxed cigarettes.⁶²

7. With certain exceptions not applicable here, licensed wholesalers have "such period of time after receipt as is reasonably necessary to affix the stamps as required."⁶³

8. There are three categories of disposition of cigarettes: (1) non-taxable disposition outside the state of Washington (i.e., an interstate sale) pursuant to RCW 82.24.040(2)(b) and federal interstate commerce law; (2) non-taxable disposition in the state of Washington in an exempt sale (e.g., sales on an Indian reservation where there is a cigarette tax compact with the State pursuant to RCW 82.24.020(5), RCW 82.24.080(4), and federal Indian law codified in WAC 458-20-192, and sales to the federal government pursuant to RCW 82.24.040(2)(b)); or (3) taxable disposition in the state of Washington in a non-exempt location or non-exempt transaction. If Jess's Wholesale had sold these unstamped cigarettes to a non-Indian Washington retailer, she would be required to collect the tax by affixing stamps to the cigarettes.⁶⁴

notice to the Liquor Control Board of the transportation. RCW 82.24.250

⁶² RCW 82.24.030(3).

⁶³ RCW 82.24.040(2).

⁶⁴ RCW 82.24.020, .030(2), 040, .050.

9. Every wholesaler or retailer subject to the provisions of chapter 82.24 RCW shall keep and preserve for a period of five years an accurate set of records. These records must show all transactions relating to the purchase and sale of any of the articles taxed under this chapter and show all physical inventories performed on those articles, all invoices, and a record of all stamps purchased. All such records and all stock of taxable articles on hand shall be open to inspection at all reasonable times by the department of revenue or its duly authorized agent.⁶⁵

10. During the audit period, Jess's Wholesale handled and possessed 703,400 packs of unstarnped cigarettes outside of Indian Country, as permitted by her Washington cigarette wholesaler's license, within the meaning of RCW 82.24.030, and upon the dates set forth in the Burke's and Blacksheep invoices.

11. Taxpayers bear the burden to prove that a tax assessment is not proper. *Ford Motor Company v. City of Seattle Executive Services*, 160 Wn.2d 32, 41, 156 P.3d 185 (2007).

12. Ms. Matheson's enrollment in the Puyallup Tribe has no bearing on the requirement to complete accurate records and file those with the Department.

⁶⁵ RCW 82.24.090(1).

13. Indians engaging in activities outside of Indian Country are subject to nondiscriminatory statutes of general application, including taxing statutes. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49, 93 S.Ct. 1267, 36 L.Ed.2d 114 (1973) (“Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State.”)

14. The Jenkins Act requires wholesalers transporting cigarettes outside the state of purchase to file a report (Schedule C reports in Washington) that shows the final disposition of the cigarettes.

15. Every licensed cigarette wholesaler shall keep and preserve for a period of five years an “accurate set of records” that “must show all transactions relating to the purchase and sale of any of the articles taxed under this chapter and show all physical inventories performed on those articles, all invoices, and a record of all stamps purchased.”⁶⁶

16. Jessica Mae Matheson dba Jess’s Wholesale has not met her burden to prove the assessment is improper.

Any Finding of Fact that should be deemed a Conclusion of Law is hereby adopted as such.

⁶⁶ RCW 82.24.090(1).

From these conclusions, this Board enters this

DECISION

The Board sustains the Department's Determination assessing tax, interest, and penalties against Jessica Mae Matheson sole proprietor of Jess's Wholesale.

DATED this 21 day of January 2011.

BOARD OF TAX APPEALS

s/ Terry Sebring

TERRY SEBRING, Chair

s/ Kay S. Slonim

KAY S. SLONIM, Vice Chair

s/ Stephen L. Johnson

STEPHEN L. JOHNSON, Member

Right of Reconsideration of a Final Decision

Pursuant to WAC 456-09-955, you may file a petition for reconsideration of this Final Decision. You must file the petition for reconsideration with the Board of Tax Appeals within 10 business days of the date of mailing of the Final Decision. The petition must state the specific grounds upon which relief is requested. You must also serve a copy on all other parties and their representatives of record. The Board may deny the petition, modify its decision, or reopen the hearing.

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* * * * *

Please be advised that a party petitioning for judicial review of this Final Decision is responsible for the reasonable costs incurred by this agency in preparing the necessary copies of the record for transmittal to the superior court. Charges for the transcript are payable separately to the court reporter.

* * *

*[Certificate of Mailing Omitted
for Purposes of this Appendix]*

APPENDIX E

**IN THE COURT OF APPEALS OF THE STATE
OF WASHINGTON**

DIVISION II

No. 42723-1-II

[Filed May 10, 2013]

JESSICA MAE MATHESON, dba)
JESS'S WHOLESALE,)
)
Appellant,)
)
v.)
)
STATE OF WASHINGTON)
DEPARTMENT OF REVENUE,)
)
Respondent.)

MANDATE

Thurston County Cause No.
11-2-00795-0

The State of Washington to: The Superior Court of
the State of Washington
in and for Thurston
County

This is to certify that the Court of Appeals of the State of Washington, Division II, entered a Ruling Granting Motion on the Merits to Affirm in the above entitled case on September 17, 2012. This ruling became the final decision terminating review of this court on April 30, 2013. Accordingly, this cause is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the determination of that court.

IN TESTIMONY WHEREOF, I have
hereunto set my hand and affixed the
seal of said Court at Tacoma, this
10th day of May 2013.

s/

Clerk of the Court of Appeals
State of Washington, Div. II

cc:

David M. Hankins
Robert Eugene Kovacevich
Rebecca R Glasgow

APPENDIX F

Relevant Statutory Excerpts

U.S. Const. art. I, § 8, cl. 3

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

U.S. Const. art. I, § 10, cl. 2

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

U.S. Const., art. VI, cl. 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. amend. VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. amend. XIV

Section 1.

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.

Wash. Const., Art. XXVI, § 2

COMPACT WITH THE UNITED STATES

The following ordinance shall be irrevocable without the consent of the United States and the people of this state:

First. That perfect toleration of religious sentiment shall be secured and that no inhabitant of this state shall ever be molested in person or property on account of his or her mode of religious worship.

Second. That the people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries of this state, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States and that the lands belonging to citizens of the United States residing without the limits of this state shall never be taxed at a higher rate than the lands belonging to residents thereof; and that no taxes shall be imposed by the state on lands or property therein, belonging to or which may be hereafter purchased by the United States or reserved for use: *Provided*, That nothing in this ordinance shall preclude the state from taxing as other lands are taxed any lands owned or held by any Indian who has severed his tribal relations, and has obtained from the United States or from any person a title thereto by patent or

other grant, save and except such lands as have been or may be granted to any Indian or Indians under any act of congress containing a provision exempting the lands thus granted from taxation, which exemption shall continue so long and to such an extent as such act of congress may prescribe.

Third. The debts and liabilities of the Territory of Washington and payment of the same are hereby assumed by this state.

Fourth. Provision shall be made for the establishment and maintenance of systems of public schools free from sectarian control which shall be open to all the children of said state.

28 USC § 1257 Judiciary and Judicial Procedure

§ 1257 State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

RCW 82.24.040

Duty of wholesaler.

(1) Except as authorized by this chapter, no person other than a licensed wholesaler shall possess in this state unstamped cigarettes.

(2) No wholesaler in this state may possess within this state unstamped cigarettes except that:

(a) Every wholesaler in the state who is licensed under Washington state law may possess within this state unstamped cigarettes for such period of time after receipt as is reasonably necessary to affix the stamps as required; and

(b) Any wholesaler in the state who is licensed under Washington state law and who furnishes a surety bond in a sum satisfactory to the department, shall be permitted to set aside, without affixing the stamps required by this chapter, such part of the wholesaler's stock as may be necessary for the conduct of the wholesaler's business in making sales to persons in another state or foreign country or to instrumentalities of the federal government. Such unstamped stock shall be kept separate and apart from stamped stock.

(3) Every wholesaler licensed under Washington state law shall, at the time of shipping or delivering any of the articles taxed herein to a point outside of this state or to a federal instrumentality, make a true duplicate invoice of the same which shall show full and complete details of the sale or delivery, whether or not stamps were affixed thereto, and shall transmit such true

duplicate invoice to the department, at Olympia, not later than the fifteenth day of the following calendar month. For failure to comply with the requirements of this section, the department may revoke the permission granted to the taxpayer to maintain a stock of goods to which the stamps required by this chapter have not been affixed.

(4) Unstamped cigarettes possessed by a wholesaler under subsection (2) of this section that are transferred by the wholesaler to another facility of the wholesaler within the borders of Washington shall be transferred in compliance with RCW 82.24.250.

(5) Every wholesaler who is licensed by Washington state law shall sell cigarettes to retailers located in Washington only if the retailer has a current cigarette retailer's license or is an Indian tribal organization authorized to possess untaxed cigarettes under this chapter and the rules adopted by the department.

(6) Nothing in this section shall be construed as limiting any otherwise lawful activity under a cigarette tax compact pursuant to chapter 43.06 RCW.

RCW 82.24.080

Legislative intent — Taxable event — Tax liability.

(1) It is the intent and purpose of this chapter to levy a tax on all of the articles taxed under this chapter, sold, used, consumed, handled, possessed, or distributed within this state and to collect the tax from the person who first sells, uses, consumes, handles, possesses (either physically or constructively, in accordance with

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RCW 82.24.020) or distributes them in the state. It is further the intent and purpose of this chapter that whenever any of the articles taxed under this chapter is given away for advertising or any other purpose, it shall be taxed in the same manner as if it were sold, used, consumed, handled, possessed, or distributed in this state.

(2) It is also the intent and purpose of this chapter that the tax shall be imposed at the time and place of the first taxable event and upon the first taxable person within this state. Any person whose activities would otherwise require payment of the tax imposed by subsection (1) of this section but who is exempt from the tax nevertheless has a precollection obligation for the tax that must be imposed on the first taxable event within this state. A precollection obligation may not be imposed upon a person exempt from the tax who sells, distributes, or transfers possession of cigarettes to another person who, by law, is exempt from the tax imposed by this chapter or upon whom the obligation for collection of the tax may not be imposed. Failure to pay the tax with respect to a taxable event shall not prevent tax liability from arising by reason of a subsequent taxable event.

(3) In the event of an increase in the rate of the tax imposed under this chapter, it is the intent of the legislature that the first person who sells, uses, consumes, handles, possesses, or distributes previously taxed articles after the effective date of the rate increase shall be liable for the additional tax, or its precollection obligation as required by this chapter, represented by the rate increase. The failure to pay the additional tax with respect to the first taxable event

after the effective date of a rate increase shall not prevent tax liability for the additional tax from arising from a subsequent taxable event.

(4) It is the intent of the legislature that, in the absence of a cigarette tax contract or agreement under chapter 43.06 RCW, applicable taxes imposed by this chapter be collected on cigarettes sold by an Indian tribal organization to any person who is not an enrolled member of the federally recognized Indian tribe within whose jurisdiction the sale takes place consistent with collection of these taxes generally within the state. The legislature finds that applicable collection and enforcement measures under this chapter are reasonably necessary to prevent fraudulent transactions and place a minimal burden on the Indian tribal organization, pursuant to the United States supreme court's decision in *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980).

RCW 82.24.120

Violations — Penalties and interest.

(1) If any person, subject to the provisions of this chapter or any rules adopted by the department of revenue under authority of this section, is found to have failed to affix the stamps required, or to have them affixed as provided in this section, or to pay any tax due under this section, or to have violated any of the provisions of this chapter or rules adopted by the department of revenue in the administration of this chapter, there must be assessed and collected from such person, in addition to any tax that may be found

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due, a remedial penalty equal to the greater of ten dollars per package of unstamped cigarettes or ten dollars per twenty roll-your-own cigarettes, or two hundred fifty dollars, plus interest on the amount of the tax at the rate as computed under RCW 82.32.050(2) from the date the tax became due until the date of payment, and upon notice mailed to the last known address of the person or provided electronically as provided in RCW 82.32.135. The amount is due and payable in thirty days from the date of the notice. If the amount remains unpaid, the department or its duly authorized agent may make immediate demand upon such person for the payment of all such taxes, penalties, and interest.

(2) The department, for good reason shown, may waive or cancel all or any part of penalties imposed, but the taxpayer must pay all taxes due and interest thereon, at the rate as computed under RCW 82.32.050(2) from the date the tax became due until the date of payment.

(3) The keeping of any unstamped articles coming within the provisions of this chapter is prima facie evidence of intent to violate the provisions of this chapter.

(4) This section does not apply to taxes or tax increases due under RCW 82.24.280.

RCW 82.24.250

Transportation of unstamped cigarettes — Invoices and delivery tickets required — Stop and inspect.

(1) No person other than: (a) A licensed wholesaler in the wholesaler's own vehicle; or (b) a person who has given notice to the board in advance of the commencement of transportation shall transport or cause to be transported in this state cigarettes not having the stamps affixed to the packages or containers.

(2) When transporting unstamped cigarettes, such persons shall have in their actual possession or cause to have in the actual possession of those persons transporting such cigarettes on their behalf invoices or delivery tickets for such cigarettes, which shall show the true name and address of the consignor or seller, the true name and address of the consignee or purchaser, and the quantity and brands of the cigarettes so transported.

(3) If unstamped cigarettes are consigned to or purchased by any person in this state such purchaser or consignee must be a person who is authorized by this chapter to possess unstamped cigarettes in this state.

(4) In the absence of the notice of transportation required by this section or in the absence of such invoices or delivery tickets, or, if the name or address of the consignee or purchaser is falsified or if the purchaser or consignee is not a person authorized by this chapter to possess unstamped cigarettes, the cigarettes so transported shall be deemed contraband

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subject to seizure and sale under the provisions of RCW 82.24.130.

(5) Transportation of cigarettes from a point outside this state to a point in some other state will not be considered a violation of this section provided that the person so transporting such cigarettes has in his possession adequate invoices or delivery tickets which give the true name and address of such out-of-state seller or consignor and such out-of-state purchaser or consignee.

(6) In any case where the department or its duly authorized agent, or any peace officer of the state, has knowledge or reasonable grounds to believe that any vehicle is transporting cigarettes in violation of this section, the department, such agent, or such police officer, is authorized to stop such vehicle and to inspect the same for contraband cigarettes.

(7) For purposes of this section, the term "person authorized by this chapter to possess unstamped cigarettes in this state" means:

(a) A wholesaler, licensed under Washington state law;

(b) The United States or an agency thereof;

(c) Any person, including an Indian tribal organization, who, after notice has been given to the board as provided in this section, brings or causes to be brought into the state unstamped cigarettes, if within a period of time after receipt of the cigarettes as the department determines by rule to be reasonably necessary for the purpose the person has caused stamps to be affixed in

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accordance with RCW 82.24.030 or otherwise made payment of the tax required by this chapter in the manner set forth in rules adopted by the department; and

(d) Any purchaser or consignee of unstamped cigarettes, including an Indian tribal organization, who has given notice to the board in advance of receiving unstamped cigarettes and who within a period of time after receipt of the cigarettes as the department determines by rule to be reasonably necessary for the purpose the person has caused stamps to be affixed in accordance with RCW 82.24.030 or otherwise made payment of the tax required by this chapter in the manner set forth in rules adopted by the department.

Nothing in this subsection (7) shall be construed as modifying RCW 82.24.050 or 82.24.110.

(8) Nothing in this section shall be construed as limiting any otherwise lawful activity under a cigarette tax compact pursuant to chapter 43.06 RCW.

(9) Nothing in this section shall be construed as limiting the right to travel upon all public highways under Article III of the treaty with the Yakamas of 1855.

RCW 82.24.260

Selling or disposal of unstamped cigarettes — Person to pay and remit tax or affix stamps — Liability.

(1) Other than:

(a) A wholesaler required to be licensed under this chapter;

(b) A federal instrumentality with respect to sales to authorized military personnel; or

(c) An Indian tribal organization with respect to sales to enrolled members of the tribe,

a person who is in lawful possession of unstamped cigarettes and who intends to sell or otherwise dispose of the cigarettes shall pay, or satisfy its precollection obligation that is imposed by this chapter, the tax required by this chapter by remitting the tax or causing stamps to be affixed in the manner provided in rules adopted by the department.

(2) When stamps are required to be affixed, the person may deduct from the tax collected the compensation allowable under this chapter. The remittance or the affixing of stamps shall, in the case of cigarettes obtained in the manner set forth in RCW 82.24.250(7)(c), be made at the same time and manner as required in RCW 82.24.250(7)(c).

(3) This section shall not relieve the buyer or possessor of unstamped cigarettes from personal liability for the tax imposed by this chapter.

(4) Nothing in this section shall relieve a wholesaler from the requirements of affixing stamps pursuant to RCW 82.24.040 and 82.24.050.

RCW 82.24.300

Exceptions — Puyallup Tribe of Indians.

The taxes imposed by this chapter do not apply to the sale, use, consumption, handling, possession, or distribution of cigarettes by an Indian retailer during the effective period of a cigarette tax agreement under RCW 43.06.465.

RCW 82.24.550

Enforcement — Rules — Notice — Hearing — Reinstatement of license — Appeal.

(1) The board shall enforce the provisions of this chapter. The board may adopt, amend, and repeal rules necessary to enforce and administer the provisions of this chapter.

(2) The department may adopt, amend, and repeal rules necessary to administer the provisions of this chapter. The board may revoke or suspend the license or permit of any wholesale or retail cigarette dealer in the state upon sufficient cause appearing of the violation of this chapter or upon the failure of such licensee to comply with any of the provisions of this chapter.

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(3) A license shall not be suspended or revoked except upon notice to the licensee and after a hearing as prescribed by the board. The board, upon finding that the licensee has failed to comply with any provision of this chapter or any rule adopted under this chapter, shall, in the case of the first offense, suspend the license or licenses of the licensee for a period of not less than thirty consecutive business days, and, in the case of a second or further offense, shall suspend the license or licenses for a period of not less than ninety consecutive business days nor more than twelve months, and, in the event the board finds the licensee has been guilty of willful and persistent violations, it may revoke the license or licenses.

(4) Any licenses issued under chapter 82.26 RCW to a person whose license or licenses have been suspended or revoked under this section shall also be suspended or revoked during the period of suspension or revocation under this section.

(5) Any person whose license or licenses have been revoked under this section may reapply to the board at the expiration of one year from the date of revocation of the license or licenses. The license or licenses may be approved by the board if it appears to the satisfaction of the board that the licensee will comply with the provisions of this chapter and the rules adopted under this chapter.

(6) A person whose license has been suspended or revoked shall not sell cigarettes or tobacco products or permit cigarettes or tobacco products to be sold during the period of such suspension or revocation on the premises occupied by the person or upon other

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premises controlled by the person or others or in any other manner or form whatever.

(7) Any determination and order by the board, and any order of suspension or revocation by the board of the license or licenses issued under this chapter, or refusal to reinstate a license or licenses after revocation shall be reviewable by an appeal to the superior court of Thurston county. The superior court shall review the order or ruling of the board and may hear the matter de novo, having due regard to the provisions of this chapter and the duties imposed upon the board.

(8) If the board makes an initial decision to deny a license or renewal, or suspend or revoke a license, the applicant may request a hearing subject to the applicable provisions under Title 34 RCW.

(9) For purposes of this section, "tobacco products" has the same meaning as in RCW 82.26.010.

RCW 82.24.900

Construction — 1961 c 15.

The provisions of this chapter shall not apply in any case in which the state of Washington is prohibited from taxing under the Constitution of this state or the Constitution or the laws of the United States.