

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
May 11, 2015, 2:50 pm
BY RONALD R. CARPENTER
CLERK

NO. 91489-3

E CRF
RECEIVED BY E-MAIL

SUPREME COURT OF THE STATE OF WASHINGTON

JESSICA MAE MATHESON, d/b/a JESS'S WHOLESALE,

Petitioner,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Respondent.

ANSWER TO PETITION FOR REVIEW

ROBERT W. FERGUSON
Attorney General

DAVID M. HANKINS
Senior Counsel
WSBA No. 19194
Revenue Division
P.O. Box 40123
Olympia, WA 98504-0123
(360) 753-7084
OID No. 91027

 ORIGINAL

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	COUNTERSTATEMENT OF THE CASE.....	1
	A. Matheson’s Wholesaling Activities	1
	B. The Department’s Assessment & Matheson’s Appeals.....	3
	C. Proceedings to Cancel Matheson’s Business License	5
III.	COUNTERSTATEMENT OF THE ISSUES	7
IV.	REASONS WHY REVIEW SHOULD BE DENIED	8
	A. The Court of Appeals Considered Matheson’s Arguments And Correctly Upheld the Revocation Order.	8
	1. Matheson is a “taxpayer.”.....	9
	2. The Department properly served Matheson with the revocation notice.	10
	3. The Department had personal jurisdiction to revoke Matheson’s certificate of registration.....	10
	4. Tribal courts have no jurisdiction over the state laws governing businesses operating in Washington.	11
	5. Applying RCW 82.32.215 is constitutional as applied to Matheson.	12
	6. The Department properly conducted the hearing, and Matheson failed to demonstrate any bias in the administrative law judge.....	12
	B. The Court of Appeals Decision Does Not Conflict With This Court’s Decision in <i>State v. Jim</i>	13

C.	The Court of Appeals Decision Does Not Conflict With Any Other Court of Appeals Decision.....	14
D.	The Court of Appeals Decision Does Not Present a Significant Question of Law Under the Federal Constitution.....	14
1.	The process under RCW 82.32.215 does not violate the due process or commerce clause standards.	15
2.	The Department properly served Matheson notice of the revocation hearing.	16
3.	Federal law does not preempt regulation and taxation of Indians doing business outside Indian country.	17
E.	The Court of Appeals Decision Does Not Present Issues of Substantial Public Importance That Should Be Determined By This Court.....	18
V.	CONCLUSION.....	20

TABLE OF AUTHORITIES

Cases

<i>Bercier v. Kiga</i> , 127 Wn. App. 809, 103 P.3d 232 (2004).....	17
<i>Buell v. City of Bremerton</i> , 80 Wn.2d 518, 495 P.2d 1358 (1972).....	18
<i>Chicago Bridge & Iron Co. v. Dep't of Revenue</i> , 98 Wn.2d 814, 659 P.2d 463 (1983).....	12
<i>Complete Auto Transit, Inc. v. Brady</i> , 430 U.S. 274, 97 S. Ct. 1076, 51 L. Ed. 2d 326 (1977).....	16
<i>Dillon v. Montana</i> , 634 F.2d 463 (9th Cir. 1980)	19
<i>Direct Marketing Ass'n v. Brohl</i> , ___ U.S. ___, 135 S. Ct. 1124, 191 L. Ed. 2d 97 (2015).....	19, 20
<i>International Shoe Co. v. Washington</i> , 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945).....	15
<i>King Mountain v. McKenna</i> , 768 F.3d 989 (9th Cir. 2014), <i>cert. denied</i> , 135 S. Ct. 1542 (2015).....	17
<i>Lamtec Corp. v. Dep't of Revenue</i> , 170 Wn.2d 838, 246 P.3d 788 (2011).....	15
<i>Magula v. Dep't of Labor & Indus.</i> , 116 Wn. App. 966, 69 P.3d 354 (2003).....	18
<i>Matheson v. Dep't of Revenue</i> , 177 Wn.2d 1004 (2013).....	5
<i>Matheson v. Dep't of Revenue</i> , No. 45489-8, 2015 WL 563970 (Wn. App., Feb. 10, 2015).....	passim

<i>Mescalero Apache Tribe v. Jones</i> , 411 U.S. 145, 93 S. Ct. 1267, 36 L. Ed. 2d 114 (1973).....	12, 17
<i>Myrick v. Bd. of Pierce County Comm'rs</i> , 102 Wn.2d 698, 677 P.2d 140, 687 P.2d 1152 (1984).....	16
<i>Organization to Preserve Agric. Lands v. Adams County</i> , 128 Wn.2d 869, 913 P.2d 793 (1996).....	18
<i>Peoples v. Puget Sound's Best Chicken!, Inc.</i> , ___ Wn. App. ___, 345 P.3d 811 (2015).....	14
<i>Quill Corp. v. North Dakota</i> , 504 U.S. 298, 112 S. Ct. 1904, 119 L. Ed. 2d 91 (1992).....	15, 16
<i>Ritter v. Bd. of Comm'rs of Adams County Publ. Hosp. Dist. No. 1</i> , 96 Wn.2d 503, 637 P.2d 940 (1981).....	18, 19
<i>Rosewell v. LaSalle Nat'l Bank</i> , 450 U.S. 503, 101 S. Ct.1221, 67 L. Ed. 2d 464 (1981).....	19
<i>State v. Jim</i> , 173 Wn.2d 672, 273 P.3d 434 (2012).....	13
<i>Washington State Med. Disciplinary Bd. v. Johnston</i> , 99 Wn.2d 466, 663 P.2d 457 (1983).....	13

Constitutional Provisions

Commerce Clause, U.S. Const. art. I, § 8, cl. 3	15, 16
Due Process Clause, U.S. Const. amend. XIV	15
Wash. Const. art. I, § 7.....	14

Statutes

28 U.S.C. § 1341.....	19
RCW 34.05.010(19).....	10

RCW 34.05.570	8
RCW 82.02.010	9
RCW 82.03.180	5
RCW 82.24.010(6).....	2
RCW 82.24.020(1).....	9
RCW 82.24.030	2
RCW 82.24.040	2
RCW 82.24.110(1)(a)	2
RCW 82.24.120	3
RCW 82.24.120(1).....	3
RCW 82.24.250(1).....	2
RCW 82.24.250(2).....	2
RCW 82.24.250(7)(c)	2
RCW 82.32.130	10, 16
RCW 82.32.150	5
RCW 82.32.210.....	6
RCW 82.32.210(1).....	10
RCW 82.32.215	passim
RCW 82.32.215(1)(a)	10

Rules

CR 82.5(a).....	11
-----------------	----

RAP 13.4(b)	8, 20
RAP 13.4(b)(1)	13
RAP 13.4(b)(2)	14
RAP 13.4(b)(3)	14
RAP 13.4(b)(4)	18, 20

Regulations

WAC 458-20-10001(3)(a)	10
WAC 458-20-10001(5)	10, 16
WAC 458-20-186(204)(d)(i)	2
WAC 458-20-186(702)(a)	4

I. INTRODUCTION

When a business in Washington fails to comply with state tax laws, it can lose its permission to conduct business in the state. Jessica Matheson, d/b/a Jess's Wholesale, requested and was granted a certificate of registration to conduct business in Washington, and she requested and was granted a cigarette and tobacco wholesaler license. When she failed to comply with statutes and regulations concerning cigarette wholesalers, the Department of Revenue assessed her for taxes and penalties. Matheson's appeals of the assessment, which reached this Court, were unsuccessful.

Four years after the Department issued the assessment, Matheson had not paid it. Thus, the Department undertook the necessary proceedings to revoke Matheson's certificate of registration to conduct business. The Thurston County Superior Court and the Court of Appeals correctly affirmed the Department's revocation of Jessica Matheson's certificate of registration to conduct business. Matheson seeks review by this Court, but nothing in the Court of Appeals decision warrants further review or consideration. Because Matheson's petition for review does not establish a reasonable basis for this Court to accept review under RAP 13.4(b), the Department requests that this Court deny the petition.

II. COUNTERSTATEMENT OF THE CASE

A. Matheson's Wholesaling Activities

On June 6, 2006, Jessica Matheson filed a license application to do business in the State of Washington as the sole owner, under the name

Jess's Wholesale. AR at 40-43. She indicated in her application that her business would be wholesaling cigarettes and tobacco products and that she would be open for business on the same date as the license application date, June 6th. AR at 40-42. In the application, she attested that the business would operate at a street address in Milton, Washington, and that she resided in Fife, Washington. AR at 41. She was granted a license to act as a Washington licensed cigarette wholesaler.

The reports of two Washington licensed cigarette wholesalers in Spokane reveal that, between July 1, 2006, and June 30, 2007, Jess's Wholesale purchased 703,400 packs of unstamped cigarettes from these two cigarette wholesalers.¹ AR at 55 & 110, ¶ 4. The cigarettes were picked up from businesses located in Spokane. AR at 110, ¶ 4. Matheson failed to complete her required reports to indicate the disposition of the unstamped cigarettes that she had purchased from the Spokane cigarette wholesalers. AR at 110, ¶ 5.

¹ Cigarette tax stamps must be affixed on all packages of cigarettes for sale in the State of Washington to indicate that the cigarette tax has been paid. RCW 82.24.030. Only licensed Washington wholesalers may possess the stamps. *Id.* And only licensed wholesalers may possess unstamped cigarettes. RCW 82.24.040. Licensed wholesalers have 72 hours after receipt of unstamped cigarettes to purchase cigarette tax stamps and affix the stamps to the cigarette packages. WAC 458-20-186(204)(d)(i). It is unlawful to purchase or possess unstamped cigarettes otherwise. RCW 82.24.110(1)(a). However, any person, including an Indian tribal organization, can bring into the state unstamped cigarettes, but only after providing advance notice to the Liquor Control Board and that within 72 hours stamps are affixed to the cigarette packages or the taxes paid. RCW 82.24.250(1), (2), (7)(c); WAC 458-20-186(204)(d)(i). Matheson did not provide advance notice or pay the cigarette taxes, and her business did not qualify as an "Indian tribal organization" as defined in RCW 82.24.010(6).

B. The Department's Assessment & Matheson's Appeals

The Department conducted an examination of Jess's Wholesale's records and her failure to report the disposition of the cigarettes. In January 2008, the Department issued an assessment to Matheson for \$1,424,385 in cigarette tax and a \$10-per-pack penalty of \$7,034,000 under RCW 82.24.120(1), plus additional penalties and interest. AR at 52-60. Matheson's failure to accurately report the disposition of the unstamped cigarettes as required of licensed cigarette wholesalers made her liable for the cigarette tax and penalties under RCW 82.24.120. Matheson appealed the assessment to the Department's Appeals Division, which upheld the assessment. AR at 11, ¶¶ 2, 3. Matheson then appealed the assessment in the Board of Tax Appeals. AR at 11, ¶ 4.

The Board conducted a formal hearing and issued a decision upholding the assessment, to which Matheson sought reconsideration. Thereafter, the Board issued a Revised Final Decision. AR at 108-23 (adding details about how Matheson conducted business outside Indian country). The Board recognized that cigarette wholesalers making sales of untaxed cigarettes must report those sales to the Department. AR at 110. Because Matheson took possession of the cigarettes in Spokane, outside Indian country, she was conducting business off the reservation. *Id.* In fact, she could purchase unstamped cigarettes off the reservation only because she had a state wholesaler's license. *Id.*

Matheson is an enrolled member of the Puyallup Indian Tribe. AR at 46. Matheson asserted she had sold the unstamped cigarettes on the

Puyallup Reservation or in Idaho. AR at 111, 116-19. The Board found there was no credible, contemporaneous documentation to show how Matheson had disposed of the unstamped cigarettes. *Id.* The Board outlined the conflicting assertions in both testimony and documents and concluded they were not credible. AR at 111-12. The Board, finding one retail manager credible, found that Matheson did not sell cigarettes onto the Puyallup Reservation. AR at 116.

Turning to the claim the cigarettes were sold into Idaho, the Board found the testimony of her brother, Nick Matheson, was not credible for several reasons, including: (1) the Mathesons did not report sales into Idaho until 2010; (2) Mr. Matheson did not know how much he paid for the cigarettes; (3) he had no documentation; and (4) he signed the amended Schedule C reports, but he could not recall how they were created or by whom.² AR at 116-18.

The Board concluded as follows: Matheson had the burden to prove the assessment was not proper. AR at 122. Her enrollment in the Puyallup Tribe had no bearing on the requirement that she must keep and provide to the Department accurate records as a licensed Washington cigarette wholesaler because Indians engaging in activities outside of Indian country are subject to nondiscriminatory state laws of general application, including tax statutes. *Id.* During 2006 and 2007, Matheson purchased 703,400 packs of unstamped cigarettes outside of Indian

² In "Schedule C" reports filed monthly, manufacturers and wholesalers must report all sales of cigarettes in the state. AR at 109; WAC 458-20-186(702)(a).

country, but she failed to account for their sale. AR at 122-23. Therefore, Matheson was liable for the tax and penalties unless she could prove a non-taxable disposition of the cigarettes. AR at 123. The Board concluded that she had not met her burden and upheld the assessment. *Id.*

Matheson petitioned for review of the Board's decision in Thurston County Superior Court. AR at 11. The Department moved to dismiss the case because Matheson failed to satisfy the statutory prerequisite in RCW 82.03.180 that the taxpayer, within the 30-day period for petitioning for review, pay "in full the contested tax, together with all penalties and interest thereon." After the Department moved to dismiss her petition for judicial review, Matheson sought a restraining order pursuant to RCW 82.32.150 to enjoin collection of the tax. AR at 126. The superior court dismissed the petition for lack of jurisdiction because Matheson failed to comply with RCW 82.03.180. AR at 126-27. The court also denied Matheson's motion for preliminary injunction.*Id.*

Matheson appealed to the Court of Appeals. The Department filed a motion on the merits under RAP 18.14 for an order affirming the superior court's order, which the Court of Appeals granted. This Court denied Matheson's petition for discretionary review. *Matheson v. Dep't of Revenue*, 177 Wn.2d 1004 (2013).

C. Proceedings to Cancel Matheson's Business License

In September 2009, the Department issued a tax warrant for taxes and penalties related to the unpaid assessment in the amount of \$9,142,016.14 and sent the tax warrant by first-class mail to Matheson's

business address listed with the Department.³ AR at 336-38. Matheson failed to pay the amounts due, and in January 2010, the Department filed the warrant with the clerk of the Superior Court in Thurston County, which entered it as a judgment. AR 336, 339-41. Over two years later, Matheson still had failed to pay the assessment, and the Department issued a Notice of Hearing in February 2012, to revoke the registration certificate issued to Jessica Matheson. AR at 336, 342-45.

The Department served Matheson by first-class mail to her business address provided to the Department from her registration certificate application and on file with the Department, 7403 Pacific Hwy E., Milton, WA. AR at 137, 336, 342-45. The Department also mailed and faxed the Notice of Hearing to Matheson's representative, Mr. Robert Kovacevich. *Id.* The Department noted that there were several address changes for this business registration in its Business Registration Management System, but none of the changes were to the business location. AR at 16, ¶ 26, 137. Matheson also listed the Milton address as the address for her cigarette wholesaler's license and the address for her performance bond. AR at 137. In an affidavit filed in Thurston County Court, Matheson also stated, "My location for license contact on the Puyallup Indian Reservation is 7403 Pacific Highway, East, Milton, WA." AR at 48. At the hearing, Mr. Kovacevich confirmed that Matheson's father allowed her to use that address as her business address. AR at 327.

³ To collect an assessment of taxes, the Department issues a tax warrant and files it with the clerk of the superior court. *See* RCW 82.32.210.

The Department held a brief adjudicative hearing in March 2012. AR at 299-302. Matheson did not attend the hearing, but Mr. Kovacevich attended and presented argument. AR at 299-335. The Department upheld the revocation of her registration certificate. Pursuant to the Department's rules, she appealed the decision to the Appeals Division within the Department. The Reviewing Officer provided both sides the opportunity to present additional evidence. AR at 30-95, 97-104, 105-13, 136-38. The Reviewing Officer upheld the revocation and issued findings of fact, conclusions of law, and a final order in July 2012. AR at 10-29.

Matheson subsequently petitioned for judicial review under the Administrative Procedure Act before the Thurston County Superior Court. CP 4-20. In September 2013, the Honorable Gary Tabor affirmed the Department's decision. CP 64-67. Matheson appealed, CP 68-73, and on February 10, 2015, the Court of Appeals in an unpublished opinion rejected Matheson's numerous challenges and affirmed the revocation of Matheson's certificate of registration. *Matheson v. Dep't of Revenue*, No. 45489-8, 2015 WL 563970 (Wn. App., Feb. 10, 2015).

III. COUNTERSTATEMENT OF THE ISSUES

1. Did the Department have jurisdiction to revoke Matheson's certificate of registration, when she purchased 703,400 packs of unstamped cigarettes using her wholesaler's license, failed to report the disposition of the cigarettes, and failed to pay the resulting assessment of taxes and penalties?

2. Did Matheson receive proper notice and an opportunity to be heard at the revocation hearing?

3. Does Matheson's status as an enrolled member of an Indian tribe affect the applicability of the registration revocation statute, RCW 82.32.215, and the hearing process?

IV. REASONS WHY REVIEW SHOULD BE DENIED

Matheson's petition for discretionary review fails to satisfy any of the criteria for review in RAP 13.4(b). Because the Department properly revoked her certificate of registration, and the courts below correctly affirmed the revocation, Matheson's petition for review should be denied.

A. The Court of Appeals Considered Matheson's Arguments And Correctly Upheld the Revocation Order.

Before addressing why Matheson's petition for review lacks merit, it is useful to summarize what the Court of Appeals ruled in its decision. Contrary to Matheson's arguments, the Court of Appeals effectively addressed Matheson's myriad challenges to the Department's revocation of her certificate of registration. The Court applied the APA standards directly to the record created before the agency. *See* RCW 34.05.570. Based on Matheson's arguments, the Court grouped Matheson's challenges into six main arguments:

(1) Because she was not a "taxpayer," RCW 82.32.215 did not apply to her, (2) the Department failed to properly serve her with the revocation notice, (3) the Department lacked jurisdiction because she was an Idaho resident who had no minimum contacts with Washington, (4) Indian

Tribal Court had exclusive jurisdiction over licensing matters involving her, (5) RCW 82.32.215 is unconstitutional when applied to her because she is not a resident of Washington, and (6) the Administrative Law Judge hearing the matter was biased.

Matheson, 2015 WL 563970 at *1.

The Court did not consider any of her arguments challenging the validity of the assessment, because that was not at issue in the revocation proceeding. *Id.* at *6. Further, because the assessment was upheld in Matheson's previous appeal of the assessment, res judicata precluded relitigation of the validity of the assessment. *Id.*

1. Matheson is a "taxpayer."

The Court quickly and correctly dispatched Matheson's argument that she was not a "taxpayer," and thus not subject to revocation of her registration for failure to pay taxes. *Id.* at *3. Under RCW 82.02.010, 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.*" (Emphasis added). A cigarette wholesaler must collect the cigarette tax upon the "sale, use, consumption, handling, possession, or distribution of all cigarettes." RCW 82.24.020(1). Because Matheson, as a cigarette wholesaler, was liable for the collection of any

tax and engaged in a business for which a tax was imposed, she was a “taxpayer.”⁴

2. The Department properly served Matheson with the revocation notice.

Matheson challenged the Department’s jurisdiction because she alleged the Department failed to properly serve her with the notice of revocation hearing. *Matheson*, 2015 WL 563970 at *3. The Department’s rules and the APA provide for notice by mail. *See* WAC 458-20-10001(3)(a), (5) and RCW 34.05.010(19). Further, under RCW 82.32.130, if notice is mailed it must be “addressed to the address of the taxpayer as shown by the records of the department.” The Department mailed the notice to Matheson by first class mail to the address provided in her application for her registration certificate and license to act as a cigarette wholesaler. *Matheson*, 2015 WL 563970 at *3. This also matched the address on her performance bond to act as a cigarette wholesaler. The Court of Appeals correctly concluded that the Department had jurisdiction to conduct the revocation hearing. *Id.* at *3-4.

3. The Department had personal jurisdiction to revoke Matheson’s certificate of registration.

Matheson argued that the Department lacked jurisdiction to revoke her certificate. *Id.* at *4. She argued that her application for the certificate

⁴ In a related argument, Matheson argues for the first time in her petition that RCW 82.32.215 only applies to retail sales taxes, and she is not liable for collecting sales tax. Am. Pet. at 11. But the revocation statute allows revocation when a tax warrant is not paid within 30 days, and a warrant may be issued for “any fee, tax, increase or penalty” that has not been paid. RCW 82.32.210(1); RCW 82.32.215(1)(a). This new argument is without merit and does not provide a basis for review.

of registration and subsequent license did not satisfy minimum contacts for long-arm jurisdiction, as she had no minimum contacts with Washington because she was an Idaho resident and because she is a Native American living on an Indian reservation, not subject to state licensing laws. The Court correctly rejected this argument. *Id.* at *4.

Jessica Matheson voluntarily applied for and obtained a registration certificate and requested a license to operate as a “cigarette and tobacco wholesaler.” AR at 40-43. In the application, she attested that the business would operate at a street address in Milton, Washington, and that she resided in Fife, Washington. AR at 41. After she received her cigarette wholesaler’s license, Jessica Matheson purchased 703,400 packs of unstamped and untaxed cigarettes from two Washington licensed cigarette wholesalers. AR at 55 & 110, ¶ 4. The cigarettes were picked up from businesses located in Spokane. AR at 110, ¶ 4. Based upon these facts, Matheson was operating by choice in Washington, and the Department had jurisdiction with respect to her certificate of registration.

4. Tribal courts have no jurisdiction over the state laws governing businesses operating in Washington.

Matheson argued that the case should have been transferred pursuant to CR 82.5(a) to a tribal court. *Matheson*, 2015 WL 563970 at *4. The Court properly rejected this argument, because Matheson offered no authority for the proposition that federal law grants exclusive jurisdiction to tribal courts for state license revocation proceedings. *Id.*

5. Applying RCW 82.32.215 is constitutional as applied to Matheson.

The Court rejected a variety of Matheson's arguments relating to the constitutionality of RCW 82.32.215. *Matheson*, 2015 WL 563970 at *4-5. At the time of her application, she attested that the business would operate at a street address in Milton, Washington, and that she resided in Fife, Washington. AR at 41. Regardless of her ethnicity or her residency, Matheson purposely availed herself of Washington's jurisdiction by engaging in a regulated business, selling cigarettes. She was required to comply with Washington's statutes and regulations. As the Court noted, Washington did not tax Matheson beyond its jurisdictional reach under due process standards, and like other Indians conducting business off-reservation, Matheson was subject to generally applicable state law. *Matheson*, 2015 WL 563970 at *4-5 (citing *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49, 93 S. Ct. 1267, 36 L. Ed. 2d 114 (1973) and *Chicago Bridge & Iron Co. v. Dep't of Revenue*, 98 Wn.2d 814, 820, 659 P.2d 463 (1983)).

6. The Department properly conducted the hearing, and Matheson failed to demonstrate any bias in the administrative law judge.

Matheson argued that the ALJ, as a Department of Revenue employee, had a direct interest in the matter and was biased. *Matheson*, 2015 WL 563970 at *5-6. The Court rejected the argument, pointing out that the Court must first assume the adjudicator is impartial. *Id.* at *5. Matheson failed to demonstrate any fact suggesting the Department employee was biased just because she was a Department of Revenue

employee. *Id.* at *6 (citing *Washington State Med. Disciplinary Bd. v. Johnston*, 99 Wn.2d 466, 479, 663 P.2d 457 (1983)).

In sum, the Court of Appeals correctly affirmed the revocation of Matheson's certificate of registration.

B. The Court of Appeals Decision Does Not Conflict With This Court's Decision in *State v. Jim*.

Matheson asserts that review should be granted because the Court of Appeals decision conflicts with this Court's decision in *State v. Jim*, 173 Wn.2d 672, 273 P.3d 434 (2012). Am. Pet. at 5, 15;⁵ *see* RAP 13.4(b)(1). Matheson's description of the case is inaccurate.

In *Jim*, state fish and wildlife officers cited Lester Jim, an enrolled member of the Yakama Nation, for unlawfully retaining undersized sturgeon. *Id.* at 675. This occurred at the Maryhill treaty fishing access site. *Id.* The Court concluded that the state lacked jurisdiction to issue a citation, because the Maryhill site was created by Congress "for the permanent use and enjoyment of the Indian Tribes" and for all relevant purposes retained the character of the Yakama reservation. *Id.* at 681.

Here, all of the activity took place off a reservation. Matheson purposefully availed herself of state jurisdiction by obtaining a certificate of registration and cigarette wholesaler's license and purchasing cigarettes from two Spokane wholesalers. These activities are not addressed in any treaty. *Jim* does not conflict with the Court of Appeals decision.

⁵ Because space limitations do not allow the Department to address every point Matheson has raised in her petition for review, the Department addresses only those issues that fall within the standards in RAP 13.4(b).

C. The Court of Appeals Decision Does Not Conflict With Any Other Court of Appeals Decision.

Matheson asserts that discretionary review should be granted under RAP 13.4(b)(2) because the Court of Appeals decision conflicts with its recent decision in *Peoples v. Puget Sound's Best Chicken!, Inc.*, ___ Wn. App. ___, 345 P.3d 811 (2015). Am. Pet. at 5, 15-16. The *Peoples* decision recognized the federal enclave doctrine, which barred certain civil damage claims that arose on a federal enclave, Joint Base Lewis-McChord. Therefore, the plaintiff was precluded from bringing statutory claims against his employer for discrimination, and other common-law tort claims, in state court. *Id.* at 813.

Nothing in this case remotely involves the federal enclave doctrine. All of the activity occurred off the reservation and within the state's jurisdiction. Matheson applied for a certificate of registration and a license to operate as a cigarette wholesaler in Washington. She purchased cigarettes off the reservation in Spokane. She fails to establish that a conflict exists between the decision below and the decision in *Peoples*.

D. The Court of Appeals Decision Does Not Present a Significant Question of Law Under the Federal Constitution.

To qualify for discretionary review under RAP 13.4(b)(3), Matheson alleges a number of constitutional violations. None of these presents any real or significant questions of constitutional law.⁶

⁶ Matheson's petition also cites several provisions of the Washington Constitution, without any argument whatsoever, apart from an assertion that Article I, section 7 "requires freedom from warrantless government trespass." Am. Pet. at 18. Matheson does not identify any conduct in this case that might constitute a "trespass."

1. The process under RCW 82.32.215 does not violate the due process or commerce clause standards.

Matheson asserts that RCW 82.32.215 violates the Due Process and Commerce Clauses, because her only act was to apply for business license. Am. Pet. at 10. But she was not required to apply for a registration certificate or cigarette wholesaler license. The State did not compel her to engage in the cigarette business. It is a verity on appeal that she voluntarily applied for a registration certificate and a cigarette wholesaler license. AR at 40-43, 46. Once she obtained these documents, she could purchase and transport untaxed, unstamped cigarettes. She does not contest that her license was used to purchase 703,400 packs of cigarettes from two licensed wholesalers in Spokane.

To satisfy the Due Process Clause, 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. Dep’t of Revenue*, 170 Wn.2d 838, 843, 246 P.3d 788 (2011) (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945)). This requires “minimum contacts” with the jurisdiction, or, in other words, “some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.” *Quill Corp. v. North Dakota*, 504 U.S. 298, 306, 112 S. Ct. 1904, 119 L. Ed. 2d 91 (1992). The “minimum contacts” requirement of the due process clause does not require that the taxpayer have a physical presence in the taxing state. *Id.* at 308. The requirement of a minimum connection

was satisfied here when Matheson engaged in the business of wholesaling cigarettes in the state.⁷

A state tax is consistent with the commerce clause “when the tax [1] is applied to an activity with a substantial nexus with the taxing state, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the state.” *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279, 97 S. Ct. 1076, 51 L. Ed. 2d 326 (1977). Matheson fails to demonstrate that the revocation of her certificate of registration violated these standards.

2. The Department properly served Matheson notice of the revocation hearing.

Matheson complains that mailing her the notice of the hearing violated her due process rights, because she should have been personally served. Am. Pet. at 4. The Constitution and the statute do not require personal service. Contrary to Matheson’s assertion that she had to be personally served, the Department’s rules provide for service of notices by mail. See WAC 458-20-10001(5). The governing statute also provides for service by mail: Under RCW 82.32.130, if a notice is mailed, it must be addressed “to the address of the taxpayer as shown by the records of the

⁷ Matheson also cites several *Lochner*-era decisions that have long since been superseded. Am. Pet. at 10-11. Even if they were good law, Matheson’s argument rests on her false assertion that her only act in Washington was to apply for business license. Her citation to *Quill* is inapposite for the same reason. And *Myrick v. Bd. of Pierce County Comm’rs*, 102 Wn.2d 698, 677 P.2d 140, 687 P.2d 1152 (1984), which she cites, addresses “the automatic denial of a license,” which bears no factual similarity to this case.

department” Accordingly, Matheson did not have a right to be personally served with the notice of hearing.

Additionally, Matheson actually received notice of the hearing. AR at 344-45. Her representative not only appeared at the hearing, but provided written and oral argument, including filing an appeal to the Department’s appeal division. Matheson fails to cite a case that due process requires personal service. She was provided notice and an opportunity to be heard. Despite Matheson’s protests, both the facts and the law support the holding below that the Department had jurisdiction to revoke the registration certificate.

3. Federal law does not preempt regulation and taxation of Indians doing business outside Indian country.

Well-established federal and state authority establishes that Indians coming off the reservation are subject to the authority and regulations of the state, including payment of taxes. *Mescalero Apache Tribe*, 411 U.S. at 148-49 (“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.”); *King Mountain v. McKenna*, 768 F.3d 989, 993-94 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 1542 (2015) (tribal member owned cigarette manufacturer operating on member’s reservation required to comply with Washington’s regulatory requirement relating to sales of cigarettes on and off the reservation); *Bercier v. Kiga*, 127 Wn. App. 809, 818, 103 P.3d 232 (2004) (member of Fort Peck Tribe in Montana operating a smoke

shop business on the Puyallup reservation held not exempt from cigarette and tobacco taxes). No supremacy clause issue is present here because federal law does not preempt revocation of Matheson's certificate of registration under RCW 82.32.215.

E. The Court of Appeals Decision Does Not Present Issues of Substantial Public Importance That Should Be Determined By This Court.

It is unclear precisely which of Matheson's many arguments are directed to RAP 13.4(b)(4). One might be her assertion that the Department's hearing officer was biased, requiring reversal. Am. Pet. at 4. She argues that because the revocation was initiated by the Department, having a Department employee act as the hearing officer violated the separation of powers doctrine and demonstrated bias. *Id.* at 19-20. The Court of Appeals properly rejected Matheson's arguments, because Matheson failed to make a showing that the hearing officer was biased.

Because public officers are presumed to perform their duties properly and legally, a party asserting an appearance of fairness claim must show evidence of actual or potential bias. *Organization to Preserve Agric. Lands v. Adams County*, 128 Wn.2d 869, 890, 913 P.2d 793 (1996); *Magula v. Dep't of Labor & Indus.*, 116 Wn. App. 966, 972, 69 P.3d 354 (2003). This Court has recognized at least three types of bias that call for disqualification under the appearance of fairness doctrine. *Ritter v. Bd. of Comm'rs of Adams County Publ. Hosp. Dist. No. 1*, 96 Wn.2d 503, 512, 637 P.2d 940 (1981) (quoting *Buell v. City of Bremerton*, 80 Wn.2d 518, 524, 495 P.2d 1358 (1972)). Matheson fails to offer any evidence or to

explain how any type of bias identified in *Ritter* was present here. Matheson therefore fails to overcome the presumption that the public officers performed their duties properly and legally.

In addition to her bias argument, Matheson also argues that a recent federal decision is significant. Matheson apparently believes this Court should consider arguments addressing the validity of the assessment that she made in her prior federal litigation, and not just the revocation of her registration, based upon the United States Supreme Court decision in *Direct Marketing Ass'n v. Brohl*, ___ U.S. ___, 135 S. Ct. 1124, 191 L. Ed. 2d 97 (2015). Am. Pet. at 4, 17.

The *Direct Marketing* decision is significant, but it does not raise an issue of substantial public interest that should be determined by this Court. The Tax Injunction Act,⁸ 28 U.S.C. § 1341, prohibits federal district courts from enjoining the collection of any state tax where an adequate remedy is available in state court. The Act is a broad jurisdictional bar to federal interference with state tax systems. *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 522, 101 S. Ct. 1221, 67 L. Ed. 2d 464 (1981); *Dillon v. Montana*, 634 F.2d 463, 466 (9th Cir. 1980). In *Direct Marketing*, the Supreme Court held that the Act did not bar a lawsuit against the State of Colorado challenging a statute that required out-of-state retailers who did not collect sales tax from Colorado customers to notify the customers of their use-tax liability and to report

⁸ Matheson erroneously refers this as the "Anti-Injunction Act."

tax-related information to customers and the Colorado tax agency. *Direct Marketing*, 135 S. Ct. at 1227.

Direct Marketing and the Act have no bearing on this state court litigation concerning the revocation of Matheson's certificate of registration to conduct business. In sum, Matheson fails to demonstrate that any of her arguments justify review under RAP 13.4(b)(4).

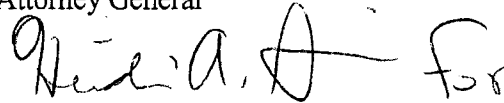
V. CONCLUSION

This case does not satisfy any of the criteria under RAP 13.4(b) for further review. This Court should deny review.

RESPECTFULLY SUBMITTED this 11th day of May, 2015.

ROBERT W. FERGUSON
Attorney General

WSBA No.
17500



David M. Hankins, WSBA No. 19194
Senior Counsel
Attorneys for Respondent
State of Washington,
Department of Revenue
OID No. 91027

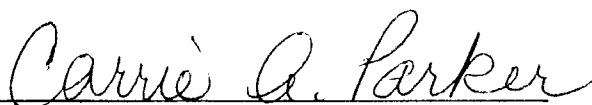
PROOF OF SERVICE

I certify that I served a copy of this document, electronically by email and by U.S. Mail, postage prepaid, through Consolidated Mail Services, on the following:

Robert Kovacevich
Robert E. Kovacevich PLLC
818 West Riverside Suite 525
Spokane, WA 99201
kovacevichrobert@qwestoffice.net

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 11th day of May, 2015, at Tumwater, WA.


Carrie A. Parker, Legal Assistant

OFFICE RECEPTIONIST, CLERK

To: Parker, Carrie (ATG)
Cc: Hankins, David (ATG); Johnson, Julie (ATG); Irvin, Heidi (ATG)
Subject: RE: Jess's Wholesale v. Dep't of Revenue, Supreme No. 91489-3

Received 5-11-2015

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Parker, Carrie (ATG) [mailto:CarrieP@ATG.WA.GOV]
Sent: Monday, May 11, 2015 2:50 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Hankins, David (ATG); Johnson, Julie (ATG); Irvin, Heidi (ATG)
Subject: Jess's Wholesale v. Dep't of Revenue, Supreme No. 91489-3
Importance: High

Attached for filing is the Answer to Petition for Review.

Carrie A. Parker
Lead Support
Revenue Division
(360) 586-9675