No. 91489-3

SUPREME COURT
STATE OF WASHINGTON

JESSICA MAE MATHESON, dba JESS'S WHOLESALE,

Petitioner,

v.

STATE OF WASHINGTON DEPARTMENT OF REVENUE;

Respondent.

Division II No. 45485-8-II

PETITIONER'S REPLY TO RESPONDENT'S ANSWER

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INTRODUCTION

Petitioner Jessica Mae Matheson, dba Jess's Wholesale, Appellant below, through her attorney, Robert E. Kovacevich, submits this reply to issues raised in Respondent's answer that were not raised in the Petition.

I.

DISAGREEMENT WITH DEPARTMENT OF REVENUE'S STATEMENT AT INTRODUCTION

Matheson can never be a Washington taxpayer. The first sentence of the Department's Answer raises and assumes that Jessica Matheson did business in Washington. It states: "When a business in Washington. . ." Matheson never did any business in Washington giving the state any nexus to tax or to revoke her license.

At page 9 of the Department's brief, the Department cites RCW § 82.02.010 defining a taxpayer as anyone liable for the collection of any tax. Matheson is not liable for the tax unless she actually collected it. She transported only to exempt businesses outside the state's jurisdiction. *Confederated Tribes and Bands of the Yakama Indian Nation v. Gregoire,* 658 F.3d 1078 (9th Cir. 2011), unequivocally holds that a tribal Indian does not have to collect state cigarette tax. It is an economic choice left to the Indian person. The quote from its case is: "While it would be prudent for any

Indian retailer to pass on and collect the tax from the consumers, the Act does not *require* it: rather that is an economic choice left to the Indian retailers." *Id.* at 1087. The case also concludes at 1088 "The language also indicates that if an Indian retailer ever found itself facing a state collection effort for the retailer's non-payment of the tax, the retailer would be shielded from civil or criminal liability." Matheson sold to no one and only hauled to her Indian father and brother, who were licensed Indian retailers. She was a licensed wholesaler who was licensed to haul unstamped cigarettes to Indian retailers. The Department of Revenue never responded to the *Gregoire* case that was extensively reviewed in Matheson's opening brief at pages 11-14.

Matheson shipped to Indians on reservations who did not require state taxes to be collected as they charged cigarette tax. RCW §§ 82.24.300; 82.24.900. The Department of Revenue brought this proceeding trying to use RCW § 82.32.215, a statute that only applies to a "taxpayer". This argument fails to refute Matheson's citation of authorities on the issue at pages 13-14 of Matheson's opening brief. The Department also cites RCW § 82.24.020(1) as requiring a wholesaler to collect tax. RCW § 82.24.040(2)(a) allows Matheson, a licensed wholesaler at the time, to possess unstamped cigarettes. RCW § 82.24.040(2)(b) allows a wholesaler to stock cigarettes

destined for out-of-state sale. RCW § 82.24.040(5) allows a wholesaler to sell cigarettes to an Indian tribal organization. At page 4 of the Department's brief, reference is made in the underlying Board of Appeals proceeding to determine the tax. The Department argues that the Board of Tax Appeals only found one of Matheson's witnesses credible. No mention is made that Lee Smith, the Department's employee called by Matheson as an adverse witness, proved Matheson's case. On September 13, 2010, Defendant Lee Smith, called by Matheson as her witness in the Board of Tax Appeals hearing, testified under oath as follows:

> Do you know of your own knowledge whether Doug Burke actually loaded those cigarettes for Jess's Wholesale?
>
> Smith: No.
>
> Do you know of your own knowledge whether any of the people you talked to physically loaded the cigarettes that were destined for Jess's Wholesale?
>
> Smith: No.
>
> Do you know of anyone today that is employed by the Department of Revenue or the Washington State Liquor Control Board that has any personal knowledge of whether those cigarettes were stamped or unstamped? I am referring to the Schedule C's regarding Jess's Wholesale.
> Smith: You mean with the Department or Liquor Control Board?
>
> Smith: I would say no.

(Transcript pages 4 and 5.)

The Department's argument, assuming that possession alone of unstamped cigarettes are automatically contraband, is misleading and presents a federal preemption constitutional issue that should allow this review under RAP 13.4(b)(3). The reason is that the misstatement by the Department violates the general law on the subject. Until cigarettes are sold at retail, no tax is payable. This has been the law for at least 60 years when *State v. 483 Cases, More or Less, of Assorted Brands of Cigarettes,* 96 A.2d 568 (N.H. 1953) was decided. The Court held that cigarettes, still in unopened sealed cartons transported by the unlicensed owner, had to be returned. The relevant quote is:

> The persons required to affix the stamps are thus the persons in the marketing chain leading to retail sale. Section 12 does not require the affixation of stamps, but prohibits sale, and possession with intent to sell, of any products "not properly stamped hereunder" by anyone;. . .The circumstances must first be shown that such stamps are "required here" to be affixed, before it can be established that stamps are not so affixed.

Harder's Express, Inc. v. State Tax Commission, 418 N.Y.S.2d 199 (N.Y.App. 1979) held that unstamped cigarettes stolen during transportation required no cigarette stamps or tax as a retail sale did not occur. *Galesburg EBY-Brown Company v. Department of Revenue,* 497 N.E.2d 874 (Ill. 1986) answers the fundamental question. It allowed unstamped stock where the

cigarettes were bound out of state. The opinion states:

> Imposition of an Illinois tax on cigarettes destined only for retail sale in Iowa, even though delivered in Illinois, would subject the sellers to a substantial disadvantage in the Iowa market place since they would be required to pay the Illinois tax not required otherwise. Retailers with facilities in Illinois would have to either relocate in Iowa or add facilities in Iowa to receive shipments of the Iowa stamped cigarettes. It is our opinion that the legislative intent clearly prohibits double taxation, that the facts of this case disclose double taxation, and, finally, that the practice is a violation of the Commerce Clause of the United States Constitution. *Id.* at 139, 140.

The Department of Revenue insists on imposing untenable and impractical rules requiring that all unstamped cigarettes, except those sold on military bases, must bear Washington tax stamps immediately when the cigarettes physically enter into the state, even when carried by Matheson who was then an exempt wholesaler. All cigarettes, except for tobacco grown on the Yakama reservation, are manufactured outside of Washington.

Applying for a business license without more, does not give the state nexus to banish Matheson.

The Department did not refute the only applicable case, *Rylander v. Bandag Licensing Corp.*, 18 S.W.3d 296 (Tex.App. 2000), on nexus. The case held that if the only state contact was to get a business license, no state taxing nexus exists.

The *Bandag* quote i.e. "As construed in Quill Corp. and Bellas Hess,

when a corporation conducts its activity solely through interstate commerce and lacks any physical presence in the state, no sufficient nexus exists to permit the state to assess tax." *Id.* at 300. The *Bandag* references are to *Quill Corp. v. North Dakota,* 504 U.S. 298, 309, 112 S.Ct. 1904, 119 L.Ed.2d 91 (1992) and *National Bellas Hess, Inc. v. Department of Revenue,* 386 U.S. 753, 758, 87 S.Ct. 1389, 18 L.Ed.2d 505 (1967). Both cases hold that if the only state activity is transport within a state, the state has no basis to impose any state tax. If additional authority is needed, it is supplied by *Mahoney v. State Tax Commission,* 524 P.2d 187 (Idaho 1974), a case applying both the Interstate and Indian Commerce Clause, U.S. Const. art. 1, § 8, cl. 3 to Indian cigarette transportation into a state. The opinion states "in this case appellant's rights as a reservation Indian were violated when the state collected a tax from her which it had no jurisdiction to impose," *id.* at 195.

In *Red Earth, LLC v. U.S.,* 657 F.3d 138, 142 (2nd Cir. 2011), the Court granted an injunction against enforcement of state tax collection on cigarettes destined for Indian reservations.

State ex rel. Wasden v. Native Wholesale Supply Co., 312 P.3d 1257 (Idaho 2013) holds that no state wholesaler's permit is required if the only wholesale transportation is out of state to an in-state Indian reservation. The

opinion states "As a result, NWS's sales to Warpath were not subject to tax, and were thus exempt from the wholesaler permit requirement." *Id.* at 1261.

Matheson did not have to give any notice.

In attempting to find state business, the Department of Revenue's Answer makes a colossal and critical misstatement at footnote 1, page 2. "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)." Regarding advance notice, Matheson, at the time and before the state rejected her license renewal, was a licensed wholesaler. Wholesaler includes Matheson, who had a valid wholesaler license at the time of the pick up of unstamped cigarettes from the Spokane Valley. Therefore, she could possess unstamped cigarettes. RCW § 82.24.010(6) "includes an Indian wholesaler or retailer conducting business under tribal license or similar tribal approval." RCW §§ 82.24.050(1); 82.24.250(1) allow wholesalers to transport unstamped cigarettes. Matheson picked up the cigarettes in her own vehicle and was not required to give notice, RCW § 82.24.250(1)(a); 7(a). The footnote statement is completely wrong on a material issue. The Interstate Commerce Clause denies state taxes on delivery to wholesalers who enter the state to deliver goods purchased by citizens of the state in other

states. *Miller Bros. v. Maryland,* 347 U.S. 340, 347, 74 S.Ct. 535, 98 L.Ed. 744 (1954). In *Miller,* the residents bought out of state to save taxes. Matheson did not have to pay or stamp the cigarettes as she was a wholesaler and also a tribal Indian who was exempt under RCW § 82.24.080; and *Confederated Tribes and Bands of the Yakama Indian Nation v. Gregoire,* 658 F.3d 1078, 1087 (9th Cir. 2011). Matheson, contrary to the assumption of the Department of Revenue, had a state wholesaler's license and operated from Idaho. Her business address, her apartment and her house in Idaho on the Coeur d'Alene Indian Reservation were all located on Indian reservations where she was or qualified as a tribal member. The reservations are not part of the state's jurisdiction. See *State v. Jim*, 173 Wash.2d 672, 684-5, 273 P.3d 434 (2012).

The Department of Revenue and the trial court had the burden of proof to establish jurisdiction to make the assessment or hear the case.

At page 4 of the Department of Revenue's Brief, the argument is made that Matheson had the burden to prove the assessment was not proper. The appeal Petition raised the issue of jurisdiction. There can be no waiver of jurisdiction. Once the facts of Indian membership and residence are raised, a court must satisfy its own jurisdiction as a federal constitutional right. U.S. Const. art. 1, § 8, cl. 3 is at issue. See *Petition of Carmen,* 165

F.Supp. 942 (N.D. Cal. 1958), a case where the state court, in a death case of an Indian, ignored the issue. *In re Carmen,* 48 Cal.2d 851, 859 , 313 P.2d 817 (1957) and the U.S. Supreme Court upheld the decision *Carmen v. Dickson,* 355 U.S. 924, 78 S.Ct. 367, 2 L.Ed.2d 354 (1958). However, the habeas petition in federal court was granted and the defendant walked. *Petition of Carman,* 165 F.Supp. 942 (N.D. Cal. 1958). Where exclusive jurisdiction is vested in federal courts by Indian issues, no presumption applies. *Gerard v. U.S.,* 167 F.2d 951, 953 (9th Cir. 1948). Lack of jurisdiction of a state court is a constitutional issue. It is a denial of "fundamental constitutional rights." *Id.* at 949. The actual assessment was on the alleged failure to correctly file records. Tax cannot be assessed on wholesale reports. Matheson filed all wholesale reports under the then statute in force, RCW § 82.24.550. The only action that could be taken against Matheson was, after notice to her, and then, at most, a 30 day suspension, RCW § 82.24.550(3). A member Indian living on a reservation is not liable for state tax. *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973). This exemption includes cigarette taxes, regardless of amount. *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 480, 96 S.Ct.

1634, 48 L.Ed.2d 96 (1976). A larger issue is that a Court has the burden of establishing jurisdiction to decide the case.

This Court has no adjudicatory or subject matter jurisdiction. It is preempted by federal law.

The State Constitution Art. 4, § 6, is titled "Jurisdiction of Superior Courts." Its relevant provision is "The superior court shall also have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been vested exclusively in some other court." A startling example in Indian country is *Magnan v. Trammell,* 719 F.3d 1159 (10th Cir. 2013) where an Indian was relieved of a state court death sentence where the crime occurred in Indian country. The court held exclusive jurisdiction was federal, not state. *Id.* at 1176.

RCW § 2.08.010 follows the constitution and grants state superior court jurisdiction including "the legality of any tax. . . and shall have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court." The State Constitution Art. 1, § 2 also states that "The Constitution of the United States is the supreme law of the land." The Federal Constitution Art. III, § 2 extends the judicial power to all cases arising under the Constitution. The U.S. Constitution Art. VI states that the Constitution and laws of the United

States are the supreme laws of the land. U.S. Constitution Art. 1, § 10 denies the states power to make treaties as Article 1, § 8, cl. 3 gives exclusive power to Indian matters to Congress. *Cabazon v. Smith*, 388 F.3d 691 (9th Cir. 2004) holds that discriminatory state laws treating Indian off reservation travel by tribal police officers different than other law enforcement is "precluded by the preemptive force of federal Indian law," *id.* at 701. In *Cabazon*, tribal police had to stop and cover their emergency lights while traveling off reservation while other emergency vehicles could merely turn off the lights but did not have to cover the lights. The discriminating statutes involved here are RCW § 82.24.260(7)(b) and (c).

CR 82.5(a) applies.

CR 82.5(a) mandates transfer of this action to the Coeur d'Alene Tribal Court. CR 82.5 plainly states that "where. . .exclusive jurisdiction over the matter in controversy has been granted or reserved to an Indian tribal court. . .the superior court shall dismiss such action pursuant to CR 12(b)(1)." This new rule applies RCW § 2.08.010 and the State Constitution Art. 4, § 6 to tribal courts. To date, CR 82.5 has not been reviewed by Washington appellate courts. It means what it says. RCW § 82.32.215(2) requires that the Department of Revenue post the final order at the taxpayer's place of

business. Matheson's addresses are all on Indian reservations, beyond state jurisdiction.

The State Law eliminates notice of Military Cigarette Transportation, but requires notice of Indian transportation. The different treatment is a violation of Indian law.

The Department of Revenue used the notification statute, RCW § 82.24.250(c), against Matheson, but allows all military commissaries deliver without notice. There are fifteen military outlets in Washington that sell groceries at commissaries, including cigarettes. A December 1995 study, titled "Cigarette Tax Study" by the Cigarette Tax and Revenue Loss Advisory Committee Report to the State Legislature, estimated at that time that military bases sold 23 million packs of unstamped cigarettes to 285,000 eligible purchasers. This amounts to 25% of Indian reservation sales. The study was to justify the 1995 amendments.

Collection against an Indian tribal member living on the reservation is exclusively in tribal court.

The jurisdiction over Matheson, a tribal Indian, is in the tribal courts when collection is the issue. Matheson lives on the Coeur d'Alene reservation and her residence was known to the Department of Revenue. *Williams v. Lee*, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959) applies. *Williams* concludes that exclusive jurisdiction over a collection action against

a tribal Indian was in tribal court. *Babbitt Ford, Inc. v. Navajo Indian Tribe,* 710 F.2d 587 (9th Cir. 1983) held that the Indian tribal court had jurisdiction over a non Indian repossessing a tribal member's auto on the reservation. *Franchise Tax Board v. Hyatt,* 538 U.S. 488, 489, 123 S.Ct. 1683, 155 L.Ed.2d 702 (2003) held that collection actions of California Income Tax in Nevada granted Nevada jurisdiction as the collection action was against a Nevada citizen. *Peoples v. Puget Sound's Best Chicken!, Inc.,* 185 Wash.App. 691, 345 P.3d 811 (2015) states: "The federal enclave doctrine bars state law causes of action arising from events occurring on a federal enclave if the cause of action did not exist in state law at the creation of the enclave." *Id.* at 812. The state cigarette tax was first enacted in 1949. RCW § 82.24.010. The major revisions were enacted in 1995, thus no state tax law could apply as the Indian reservations were established in the 1850's. An Indian reservation is a federal enclave located within a state's boundaries under exclusive control of the federal government. Federal law, 25 U.S.C. § 465, grants exclusive federal control. See also *Oneida Tribe of Indians v. Village of Hobart*, 732 F.3d 837 (7th Cir. 2013), comparing Indian land to military bases and rejecting a storm water tax on Indian trust land within a city. *Confederated Tribes of Chehalis Reservation v. Thurston County Bd.*

of Equalization, 724 F.3d 1153, 1159 (9th Cir. 2013), relying on 25 U.S.C. § 465, rejected a Thurston County real estate tax on an off reservation allotment. Indian country includes reservations and off reservation trust allotments. 18 U.S.C. § 1151(c).

This court has no jurisdiction of the commissary stores at McChord Air Force base. See *Best Chicken!, supra*, at 814 (2015) and *Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518, 535, 58 S.Ct. 1009, 82 L.Ed. 1502 (1938); 4 U.S.C. § 108 and § 109. The administrative law proceedings under review have no jurisdiction that exceeds the state courts. Jurisdiction to hear a case can be raised at any time. The case should be dismissed.

The state cannot banish someone who was never within the state's jurisdiction.

The State had no jurisdiction over Matheson's registration. The Department of Revenue, at page 11 of its answer, contends that the State had jurisdiction over Matheson since she applied for a wholesaler's license. The statement is "the Department had jurisdiction with respect to her certificate of registration." The statement is contrary to the published questions and answers for Indian Tribes and Tribal members on the Department of Revenue's website. It states:

Registration is different from licensing. Licensing is about

> regulation. Registering a business will place your business information on the Business Records Data Base (BRD) but will not subject the business to state jurisdiction or taxes. Registration only means your business will be found on the department website as a registered business. (Underlining supplied.)

The website controls. Registration confers no jurisdiction. If registration does not confer jurisdiction, there is no jurisdiction to revoke the registration.

The statement is also directly contrary to *Wauneka v. Campbell,* 526 P.2d 1085 (Ariz. 1974) holding that a Navajo tribe requirement that Navajo tribe members obtain state drivers licenses did not allow Arizona to enforce its motor vehicle laws on the reservation. "The tribal drivers license statute has not ceded either civil or criminal jurisdiction over Reservation events to Arizona courts or administrative agencies." *Id.* at 1089.

In addition, *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation,* 425 U.S. 463, 480, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976) applies. It holds that tribal Indians do not have to get state tobacco licenses. In the case of *State v. Atcitty,* 215 P.3d 90 (N.M. 2009), the court held that even though a federal mandate required registration in the jurisdiction of residence, the court held that the federal law did not override tribal sovereignty. "The language of the statute betrays no indication that

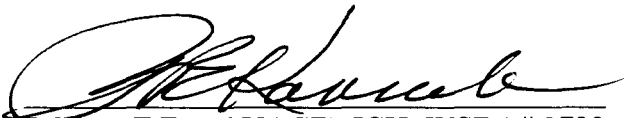
Congress intended the term 'resident' by itself to override historically recognized and accepted limits on the reach of state criminal and regulatory law in Indian country." *Id.* at 96.

The same rules and law apply to the Department of Revenue's assertion that mailing into Indian country complies with the long arm statute. The personal addresses were all in Indian country. The statutes for registration provide for a registered agent. Probates are required to appoint a resident for service. RCW § 11.26.010. Corporations and LLC's must appoint a registered agent for service. RCW §§ 23B.05.010; 23B.05.040. Registration to do business in Washington has no such requirement. The Department of Revenue cannot legislate such a requirement.

CONCLUSION

This court should grant review of first impression issues of application of CR 82.5, constitutionality of RCW § 82.32.215, the long arm jurisdiction of Indians living on their reservation, and Indian commerce.

DATED this 5th day of June, 2015.



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CERTIFICATE OF SERVICE

This is to certify that a copy of the Petitioner's Reply to Respondent's Answer was served on Counsel for Respondent by first class mail addressed as follows:

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