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STATE OF WASHINGTON
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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ROBERT COMENOUT
EDWARD COMENOUT
ROBERT COMENOUT, SR.

APPELLANTS

Appeal from the Superior Court of Pierce County
The Honorable Katherine Stolz

No. 08-1-04680-1

Respondents Brief

RESPONSE TO DISCRETIONARY REVIEW

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether or not the State has criminal jurisdiction over enrolled Indians for failing to pay Washington State cigarette tax when engaged in the business of buying, selling, and transporting cigarettes at an off reservation location.

2. Whether or not the Washington State cigarette tax compact exemption, RCW 82.24.295, prevents prosecution of a Quinault tribal member, who is not a party to the Cigarette Compact between the Quinault Tribe and the State, when engaged in the business of buying selling and transporting cigarettes at an off reservation location.

B. STATEMENT OF THE CASE.

1. Procedure

On 9/26/08, the State filed an Information charging each of three separate defendants Edward Comenout, Jr., Robert Comenout Sr. and Robert Comenout Jr. with: (1) Engaging in the Business of Cigarette Purchase, Sale, Consignment, or Distribution Without a License (RCW 82.24.500); (2) Unlawful Possession or Transportation of Unstamped Cigarettes (RCW 82.24.110(2)); and Theft in the First Degree (RCW 9A.56.030.110(a)). CP 1-3.[1] The theft charge involved the failure of the

[1] The majority of Clerk's Papers referred to are from defendant Robert Comenout, Jr., and will be referred to as CP. There are 3 entries of Clerk's Papers referring to Robert Comenout, Sr., and these will be referred to as CR Sr. The State means no disrespect and is only labeling to clarify.

Comenouts to remit to the State the taxes on 37,000 cartons of unstamped cigarettes seized on 7/25/08. CP 4-5.

The Defendants filed a Motion to Dismiss, alleging a variety of jurisdictional issues and a claim that because a cigarette tax compact existed between the Quinault Tribe and the State, the defendants were exempt from paying State cigarette taxes.

On June 9th, 2009, the parties appeared before the Honorable Katherine M. Stolz, Department 2, of the Pierce County Superior Court. The Court read the briefs and heard oral argument. The Court ruled that the State had jurisdiction over the property that was the site of the Comenout's business. CP 81-84. The Court ruled that the Quinault Tribe and the State had concurrent jurisdiction over the Comenout's possession and sale of cigarettes. CP 81-84. The Court ruled that the defendants owed either the Quinault Tribe or the State of Washington the taxes on 37,000 cartons of cigarettes. CP 81-84. The Court ruled that the Quinault Tribe has given enforcement authority for violations of RCW 82.24 to the State of Washington. CP 81-84. The Court denied the Comenout's Motion to Dismiss. CP 81-84.

The defendants then moved the Court of Appeals Division II for discretionary review. The defendants raised three claims that the trial court committed obvious error that rendered further proceedings useless: (1) State courts do not have jurisdiction over Indians for offenses that occur on Indian trust land; (2) A 2005 Cigarette Compact between the

State of Washington and the Quinault Indian Tribe prevents the State from taxing "tribal retailers"; and (3) federal law preempts state law. CP Sr. 612- 622, 613.

The Court of Appeals Commissioner granted the motion for discretionary review for claim number two. The trial court erred when it denied the Comenout's Motion to Dismiss because they were exempt from cigarette taxes under RCW 82.24.295(1). CP Sr. 612-622, 622. The trial court did not err when it held that the State has jurisdiction over the Comenout's for the alleged crimes committed at their place of business, the Indian Country Store. CP Sr. 612-622, 622.

The State has moved this Court to dismiss the appeal and the Superior Court case involving Edward Amos Comenout, due to the death of Edward Amos Comenout on 6/3/10.

2. Facts

On July 25th, 2008, agents from the Washington State Liquor Control Board served a search warrant on the Indian Country Store located at 908/920 River Road, Puyallup, Washington. The WSLCB agents seized 37,000 cartons of cigarettes (approximately 7.4 million cigarettes) that did not have Washington State authorized tax stamps attached. Generally, there were no stamps attached, although, a few packages did have Couer d' Alene tribal stamps attached. The Washington State cigarette excise tax is $20.25 per carton. These are taxes that must be paid at the time the

cigarettes are purchased by a retail or a wholesale business. The loss of revenue to the State of Washington on 37,000 cartons is $750,000. CP 4-5

The Indian Country Store is on land held in trust by the United States for several Indian individuals. Edward Amos Comenout, Jr., an enrolled Quinault Tribal member, is the majority owner. CP4-5. (Edward Amos Comenout, Jr. passed away on 6/3/10.) The daily activities of the business are the responsibility of Robert Comenout, Sr.. Robert Comenout, Jr. is an employee of the business. Robert Comenout, Sr. and Robert Comenout, Jr. are not enrolled members of the Quinault Tribe, but may be members of other Washington tribes. CP 4-5.

The primary purpose of the business is the retail sale of tobacco products. Agents of WSLCB made numerous purchases, between April of 2007 and July 25th 0f 2008, of cigarettes that did not have tax stamps attached. The Comenouts and the Indian Country Store are not licensed by the State of Washington or any Indian Tribe to sell cigarettes. CP 4-5.

The Quinault Tribal Reservation is approximately 60 miles to the west of the Indian Country Store. The Indian Country Store is not within the boundaries of any recognized Indian Reservation. CP 4-5.

The Quinault Tribe and the State of Washington entered into a cigarette compact on the 3rd of January, 2005. CP 33-50. The Compact is to remain in effect for eight years and is still currently in effect. CP 33-50, 47. Cigarette Compacts are authorized by RCW 43.06.450, RCW 43.06.455 and RCW 46.06.460. The legislative intent is to reduce the

conflict between Indian Tribal governments and the State, to promote economic development, and to provide revenue for tribal governments. RCW 43.06.450.

C. ARGUMENT.

The primary claim by the defendants in this matter is that they are exempt from paying State cigarette excise taxes under RCW 82.24.295(1) because they are "Indian retailers". RCW 82.24.295(1) provides that during the effective period of a cigarette tax contract, the taxes imposed by chapter 82.24 RCW do not apply to the sale, use, consumption, handling, possession or distribution of cigarettes by an Indian retailer. RCW 43.06.455(14)(b) provides that an "Indian retailer" includes a business owned and operated by an Indian person or persons in whose name the land is held in trust. Edward Amos Comenout, an enrolled Quinault tribal member, was the majority landowner of the property at 908/920 River Rd, the place of business of the Indian Country Store. The Comenouts base their claim on Edward Amos Comenout's status as an enrolled Quinault. The land at 908/920 River Road is held in trust by the U.S. Government for the benefit of Edward Amos Comenout and others. The State and the Quinault Nation have a cigarette Compact that has been in effect since January, 2005. Robert Reginald Comenout, Sr. and Robert Reginald Comenout, Jr. are not making any claim on their status as enrolled tribal members of other tribes.

1. THE STATE HAS CRIMINAL JURISDICTION OVER ENROLLED INDIANS FOR FAILING TO PAY WASHINGTON STATE CIGARETTE TAXES WHEN ENGAGED IN THE BUSINESS OF BUYING, SELLING, AND TRANSPORTING CIGARETTES AT AN OFF RESERVATION LOCATION.

In 1953, Congress enacted Public Law 280 which permitted several states to assume jurisdiction over Indian Country by statute and/or amendment to their constitutions. ***State v. Cooper***, 130 Wn.2d 770, 773, 928 P.2d 406 (1996). In 1963, the Washington legislature amended RCW 37.12.010 to assert nonconsensual civil and criminal jurisdiction over all Indian Country with certain exceptions. ***Cooper*** at 773-774. All of the exceptions are for lands within the boundaries of an Indian reservation. ***Cooper*** at 775-776. Washington has assumed full nonconsensual and criminal jurisdiction over all Indian country outside of an established Indian reservation. ***Cooper*** at 775-776. Allotted or trust lands are not excluded unless they are within the boundaries of an established Indian reservation. RCW 37.06.010 and ***Cooper*** at 775-776.

The Comenouts argue that the federal definition of "Indian Country" applies to 908/920 River Road, Edward Amos Comenout's land, 18 U.S.C. s 1151. The court in ***Cooper*** did consider this issue and declined to use the federal definition. ***Cooper*** at 778-779. The court stated that with

the passage of RCW 37.12.010 asserting state jurisdiction over particular Indian lands (or over particular areas of the law) presents a question of state law. ***Cooper*** at 778.

The United States Supreme Court has held that RCW 32.12.010 is constitutional and complies with Public Law 280. ***Washington v. Confederated Bands and Tribes of the Yakima Indian Nation,*** 439 U.S. 463, 473-74, 99 S. Ct. 74, 58 L. Ed. 740 (1979), cited by ***State v. Pink,*** 144 Wn. App. 945, 951, 185 P.3d 634 (2008). "Generally, the Superior Court has original jurisdiction in all proceedings in which jurisdiction has not been vested exclusively in some other court. Wash. Const., art. IV s. 6." ***State v. Pink***, at 949.

The trail court was correct when it held that the State of Washington has jurisdiction over the Comenout's property at 908/920 River Road, Puyallup, Washington.

The Comenouts status as enrolled tribal members does not prevent the State from prosecuting violations of the State's cigarette excise tax statutes.

The State of Washington imposes a cigarette excise tax on all cigarettes sold, used, consumed, handled, possessed, or distributed in the state. RCW 82.24.020, ***Matheson v. Washington State Liquor Control Board***, 132 Wn. App. 280, 284, 130 P.3d 897 (2006). The State collects the tax by requiring that cigarette tax stamps be affixed to every package

of cigarettes, RCW 82.24.020 and RCW 82.24.030. ***Matheson*** at 284. RCW 82.24.110(2) makes it a felony to possess more than 10,000 cigarettes without the proper tax stamps attached.

In ***Matheson*** the defendant, an enrolled tribal member, made claims similar to the current claims of the Comenouts. The State had seized approximately 41,700 packs of unstamped, untaxed, cigarettes and notified Mr. Matheson that they would be forfeited. ***Matheson*** at 283. Matheson argued that Washington's cigarette tax as applied to him was contrary to federal and Constitutional law. Matheson argued that federal law prevented the State from taxing Indians; the tax is an impermissible burden on interstate and Indian commerce; differing treatment of military cigarette sales violates equal protection, state privileges, and immunities guarantees; and the tax violates the state's constitutional guarantees of uniform taxation. ***Matheson*** at 284-285.

The State may not tax Indians who are enrolled members while purchasing cigarettes on their reservation. RCW 82.24.900, RCW 82.24.040(5). Washington may tax non-Indians and non-tribal Indians. WAC 458-20-192(2)(a). Those Indian persons not enrolled with the tribe where they are purchasing cigarettes, even while purchasing cigarettes on the reservation. WAC 458-20-192(2)(a). Off-reservation cigarette sales are always subject to taxation. RCW 82.24.040. ***Matheson*** at 285.

Washington's cigarette excise tax scheme was upheld by the United States Supreme Court. ***Washington v. Confederated Tribes of Colville***

Indian Reservation, 447 U.S. 134,139, 100 S. Ct. 2069, 65 L.Ed.2d 10 (1980). In ***Washington v. Confederated Tribes*** several Indian tribes challenged Washington's authority to tax non-member Indians and non-Indians. The Court stated: "Federal statutes, even given the broadest reading to which they are reasonably susceptible, cannot be said to pre-empt Washington's power to impose taxes on Indians not members of the tribe." *Id.* at 160-161, 100 S. Ct. 2069. ***Matheson*** at 285.

The court in ***Matheson*** concluded that: "Mr. Matheson's Indian status does not prevent the State from imposing an excise tax on his activities off-reservation." *See* ***Confederated Tribes of Colville***, 447 U.S. at 159-61, 100 S. Ct. 2069. ***Matheson,*** at 285-286.

The Comenout's Indian status does not prevent the State from imposing cigarette excise taxes on their off-reservation purchases and sales of cigarettes.

2. THE WASHINGTON STATE CIGARETTE TAX COMPACT EXEMPTION, RCW 82.24.295, DOES NOT PREVENT PROSECUTION OF A QUINAULT TRIBAL MEMBER, WHO IS NOT A PARTY TO THE CIGARETTE COMPACT BETWEEN THE QUINAULT TRIBE AND THE STATE, WHEN ENGAGED IN THE BUSINESS OF BUYING, SELLING, AND TRANSPORTING CIGARETTES AT AN OFF-RESEVATION LOCATION?

In January 2005, the Quinault Indian Nation and the State of Washington entered into a Cigarette Tax Compact. CP 33-50. The Compact applies to retail cigarette sales by "tribal retailers". The Compact

defines "tribal retailer" as "a cigarette retailer wholly owned by the Quinault Nation and located in Indian country or a member-owned smokeshop located in Indian Country and licensed by the Tribe." CP 33-50, 34.

The Compact requires the Quinault Nation to maintain and enforce its terms. CP 33-50, 37. The Compact requires that any member owned smokeshop must be licensed by the Tribe and the Tribe must impose taxes on all sales by the tribal retailer. CP 37. All cigarettes sold by tribal retailers must bear either a Washington State Tribal Compact Stamp or a Quinault Nation Tax Stamp. CP 39.

The Comenouts assert that they are "tribal retailers", and therefore exempt from State cigarette taxes. They claim because the Indian Country Store is owned by an enrolled member of the Quinault Tribe, Edward Amos Comenout, and because the land is held in trust for Edward Amos Comenout that they qualify as "tribal retailers".

The Comenouts and their store do not qualify as "tribal retailers" for two reasons: (1) none of the Comenouts are licensed by the Quinault Tribe, CP 4-5; and (2) none of the 37,000 cartons of cigarettes seized on 7/25/08 bore either Washington State Tribal Tax Stamps or Quinault Nation Tax stamps. CP 4-5.

Since the Comenouts are not "tribal retailers", the Comenouts are not exempt from State cigarette taxes because the Compact does not apply to them. The Compact specifically provides, on page #17(3), that the

Compact does not create any third party beneficiaries. CP 48. The Quinault Nation cannot enforce the terms of the Compact on a business that is not a part of the Compact.

The Compact states that the legislature intended for the Washington Liquor Control Board to be responsible for enforcement activities that come under the terms of Chapter 82.24 RCW. CP 42, 47. *See* ***Matheson v. Washington State Liquor Control Board,*** 132 Wn. App. 280, 130 P.3d 897 (2006).

The Comenouts argue that they are exempt from State cigarette taxes under RCW 82.24.295(1). RCW 82.24.295(1) provides that: "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 contract subject to RCW 43.06.455." RCW 43.06.455(14)(b) provides that an Indian retailer includes a business owned and operated by an Indian person or persons in whose name the land is held in trust. The Comenouts contend that they qualify under this definition and so are exempt from taxes under RCW 82.24.295(1).

RCW 43.06.455 in general provides the requirements, use of revenue, enforcement, and definitions for cigarette contracts.

43.06.455(2) provides that cigarette contracts shall be only in regards to Indian retail sales by Indian sellers transferring possession of cigarettes to buyers in Indian country.

43.06.455(3) provides a cigarette contract with a tribe shall provide for a tribal tax in lieu of State cigarette taxes.

43.06.455(4) provides that cigarette contracts shall require that all cigarettes possessed or sold by a retailer shall bear a cigarette stamp.

43.06.455(7) provides that cigarette contracts shall include provisions for compliance, such as transport and notice requirements, inspection procedures, stamping requirements, recordkeeping, and audit requirements.

43.06.455(12) provides that the WSLCB is responsible for the enforcement of activities that come under the terms of chapter 82.24 RCW.

Nowhere in RCW 43.06.455 is it contemplated that an Indian retailer could sell cigarettes without paying the taxes. The statute contemplates that either the State taxes will be paid or the retailer will be a part of a contract and pay the required tribal tax. RCW 43.06.455. The Legislature did not intend to create a third category that would be exempt from any cigarette taxes.

The caption for RCW 82.24.295 reads: **Exceptions—Sales by Indian retailer under cigarette contract.** The caption indicates that the Legislature intended that the exemption provided by RCW 82.24.295(1) would apply only to Indian retailers under a cigarette contract. This is consistent with the requirements for a cigarette tax contract provided in

RCW 43.06.455. RCW 43.06.455 does not make any exceptions to the State cigarette tax except for Indian tribes that have a cigarette tax contract with the State.

It is also consistent with other provisions in chapter 82.24 RCW. RCW 82.24.020(1)-(5) provides that taxes will be imposed on the sale, use consumption, handling, possession, or distribution of all cigarettes. RCW 82.24.020(6) provides an exemption for enrolled tribal member purchasing from an Indian tribal organization that is under the jurisdiction of the member's tribe.

RCW 82.24.020(7) provides an exemption for federally recognized tribes that enter into a cigarette contract under RCW 43.06. It further provides that the terms of the contract or agreement shall take precedence over any conflicting provisions of chapter 82.24 RCW.
RCW 82.24.040(1) provides that except as authorized, no person other than a licensed wholesaler shall possess unstamped cigarettes.

RCW 82.24.040(2), (3), (4), (5), and (6) provide the exceptions for licensed wholesalers to be in possession of unstamped cigarettes.

RCW 82.24.050 provides that no retailer shall possess unstamped cigarettes, unless the person is a licensed wholesaler in possession of cigarettes in accordance with RCW 82.24.040.

The Comenouts are not exempt from State cigarette taxes for three reasons:

(1) The Comenouts are not licensed by the Quinault tribe as tribal retailers. CP 4-5.

(2) The Comenouts are not licensed by the State as either a wholesaler or as a retailer. CP 4-5.

(3) The Comenouts would appear to qualify as "Indian retailers" under RCW 43.06.455(14)(b) but the exception to State taxes under RCW 82.24.295(1) only applies if they are under a cigarette contract.

Furthermore, the State would argue that because the Quinault Nation and the State have a cigarette contract, the provisions of RCW 82.24.020(7) apply and the terms of the contract would take precedence over any conflicting provisions of chapter 82.24 RCW.

The Compact provides, on page #17 Part XIII (3) (CP 48), that it does not create any third party beneficiaries. The Comenouts are not parties to the Compact because they are not licensed by the tribe and the seized cigarettes did not have tax stamps attached. The Comenouts did not pay the taxes on the seized cigarettes to the Quinault Nation. The Comenouts would be third party beneficiaries if the existence of the Compact between the State and the Quinault Nation exempted the Comenouts from paying taxes to the State. Clearly, neither, the State or the Quinault Nation would exempt the Comenouts from paying the cigarette excise tax.

The Comenouts appear to read the provisions of chapter 82.24 RCW and chapter 43.06 RCW in isolation. Their interpretation of RCW

82.24.295(1) does not make sense when the statutes are read as a whole. The Comenouts would carve out an exemption that applies only to them. They claim to be exempt from State taxes under RCW 82.24.295(1) due being protected by the Cigarette Compact between the State and the Quinault Nation. Yet, they are not a party to the Compact and do not conform to its provisions to pay taxes to the Quinault Nation.

If the statutes are read as a whole, both chapter 82.24 RCW and chapter 43.06 provide that the only exemption from State taxes is for federally recognized tribes who have a cigarette contract with the State. *See* RCW 82.24.020(6),(7); 82.24.040; 43.06.455.

The trial court was correct when it held that the Comenouts owe cigarette taxes to either the State of Washington or the Quinault Nation. The Quinault Nation has given the authority to enforce the provisions of chapter 82.24 to the WSLCB. CP 42, 47.

D. CONCLUSION.

For the reasons given above, the State respectfully requests that this Court find that the Comenouts are not exempt from paying State cigarette excise taxes. The State of Washington may enforce the payment

of cigarette excise taxes by the Comenouts doing business as the Indian Country Store.

DATED: June 16, 2010.

MARK LINDQUIST
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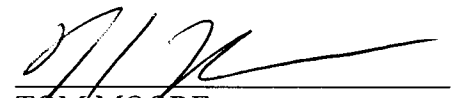
Prosecuting Attorney



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Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

Lowe Brown, and Kovacevich

6-16-10 Helen Ko
Date Signature

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STATE OF WASHINGTON
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