No. 45485-8-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

JESSICA MAE MATHESON,

Petitioner/Appellant,

v.

STATE OF WASHINGTON DEPARTMENT OF REVENUE;

Respondent/Appellee.

AMENDED OPENING BRIEF OF APPELLANT

Robert E. Kovacevich, #2723
818 W. Riverside Ave, Ste 525
Spokane, WA 99201
(509) 747-2104
Attorney for Petitioner/Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Federal Constitution

State Constitution

State Statutes

Court Rules and Miscellaneous

Other

INTRODUCTION

The State Department of Revenue ordered a lifetime ban on Matheson, a tribal Indian residing on an Idaho Indian reservation. If sustained, she cannot do any business in Washington, including its 29 Indian reservations. The statute, RCW 82.32.215, enacted in 1983, has no reported decision upholding banishment. Six months before the revocation hearing was commenced, Matheson, through an affidavit, notified the Department of Revenue that she resided in Idaho on an Indian reservation. A first impression issue is whether revocation of a business license requires long arm service for in personam jurisdiction of an unincorporated reservation Indian in Idaho. Application of *International Shoe Co. v. Washington,* 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945), *Pennoyer v. Neff,* 95 U.S. 714, 5 Otto, 24 L.Ed. 565 (1877) and the new case of *Daimler AG v. Bauman,* 134 S.Ct. 746 (Jan. 14, 2014) is pertinent.

Matheson, in a preamble, also explains the background of why "all the kings men" stalked her. An attached addendum contains Coeur d'Alene tribe laws cited in the brief.

I.

ASSIGNMENTS OF ERROR

One

The administrative officer erred by finding subject matter and personal jurisdiction was acquired over Matheson. CP 38. The revocation judgment is void.

Two

The court erred by not transferring this case to the Coeur d'Alene tribal court as required by Superior Court Civil Rule 82.5(a) and *Williams v. Lee,* 358 U.S. 217, 223, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959).

Three

The court erred by conducting the administrative proceeding where the State never personally served Matheson, who resided in Idaho.

Four

The administrative officer erred by conducting an administrative proceeding by a state against a citizen of a different state, thereby violating federal preemption conferring federal court jurisdiction, U.S. Const. art. III, § 2, cl. 7 (between a state and citizens of another state); art. IV, § 1, cl. 1 (judicial proceedings of every other state).

Five

The administrative officer erred by determining that a business license alone conferred in personam jurisdiction of Matheson.

Six

The administrative officer erred by violating the U.S. Constitution Art. 1, § 8, cl. 3 and Wash. Const. article 26, Second, by finding state jurisdiction to forcibly prohibit an American Indian residing on an Idaho Indian reservation from doing business in Washington.

Seven

The administrative officer erred by applying a state tax law, RCW 82.32.215 to an Indian living on an Idaho Indian reservation in violation of U.S. Const. art. 1, § 8, cl. 3; art. III, § 2, cl. 7, art. IV, § 1, cl. 1; § 2, cl. 1 and Wash. Const. art. 26, Second.

Eight

The administrative officer erred in finding that Matheson did business in Pierce County, CP 35, and applying RCW 82.32.215 to an Idaho resident who never did business in Washington. All physical activity within Washington's borders was in interstate or Indian commerce and no other minimum contact facts were present.

Nine

RCW 82.32.215 allows an administrative agency to revoke a business license. If revoked, it is a crime for a person to continue in business. RCW 82.32.290(2)(a)(i). The statute does not provide practical conditions to allow Matheson reinstatement. It violates the Wash. Const. art. 1, § 17 prohibiting imprisonment for debt. By barring an individual from lifetime business in Washington, the administrative officer also acted unconstitutionally in violation of Wash. Const. art. 1, § 1, 2, 3 and 17 and U.S. Const. amendment VIII as the action violated the excessive fines constitutional protections.

Ten

Assuming for argument that RCW 82.32.215 applies, the court erred by failing to except the eight Indian reservations with cigarette compacts and the 20 other reservations within Washington's boundaries as the court has no jurisdiction on Indian reservations on activity of tribal Indians.

Eleven

The presiding officer in the appeals hearing, pursuant to WA ADC 458-20-10001(d)(I) was employed by the compliance division as assistant director. The review was not heard by a disinterested judge and cannot be binding. The judicial code applies to anyone who performs judicial

functions. The code of judicial conduct CJC 1 and 2.11(A)(2)(a) and (c) require that an officer cannot preside as a judge or have more than a de minimus interest that could be affected by the proceeding. Impartiality means an open mind. *Stern v. Marshall,* 131 S.Ct. 2594, 2620, 180 L.Ed.2d 475 (2011) holds that an appointed judge who decided a constitutional issue of personal and substantive jurisdiction exceeded the separation of powers doctrine. The judgment was void. U.S. Const. art. III, § 1, Washington Const. art. 4, § 1. The trial court erred by failing to dismiss the case.

Twelve

By acting as a judge and also as a reviewing officer for the State Department of Revenue, the administrative officer violated the due process rights of Matheson. Wash. Const. art. 1, § 3, U.S. Const. amend. 5 and 14, Wash. Const. art. IV, § 6, 15, 19, 28.

Thirteen

By refusing to recognize that it was impossible that Matheson could be liable for any cigarette tax and failing to review the illegality of the tax judgment, the administrative officer and the lower court denied due process and committed reversible error.

Fourteen

By failing to recognize a mistake of fact and lack of jurisdiction and no substantial evidence was introduced in the proceedings, the lower court committed reversible error.

Fifteen

The court erred by upholding the action by the administrative review in concluding personal and subject matter jurisdiction existed by ruling that a state tax judgment supported business license revocation against Jessica Matheson, a Native American Indian living on a reservation in Idaho.

Sixteen

The court erred by refusing to examine the only reason the license was revoked to determine whether the underlying judgment causing the business license revocation was void and unenforceable.

Seventeen

The trial court erred by using a void judgment to uphold revocation of Matheson's business license.

Eighteen

The trial court erred by assuming jurisdiction in all the proceedings against Matheson where no personal service was ever made.

Nineteen

The trial court erred in entering a lifetime ban against Jessica Matheson forbidding her to do business in the state when she has never been in business or conducted any activity sufficient to give minimum state contacts necessary for jurisdiction. Traveling into a state by an Indian vehicle on a round trip is not off reservation activity allowing state jurisdiction. Minimum contact is not the criterion when infringement of tribal court jurisdiction is involved.

Twenty

Procedural due process of law was violated by requiring Matheson to prove that she never sold at retail or collected the state's cigarette tax when the State admitted it had no evidence of any facts of unstamped cargo, or sales to taxable consumers, but used a void judgment to expel Matheson from doing business in Washington solely on the basis of the void judgment. The entire proceeding was mistaken.

Twenty-One

As an Indian living on her reservation and also as a licensed wholesaler, Matheson could transport untaxed cigarettes. By requiring Jessica Matheson to prove she never sold to taxable persons who were the

persons liable for the cigarette tax and that she collected a cigarette tax from a taxable person, the proceedings were based on speculation and conjecture, not facts and were void. The tribunals erred by failing to recognize the illusory conjecture.

Twenty-Two

The court erred by entering a tax judgment on an Indian who cannot be taxed.

Twenty-Three

The trial court erred by ignoring the constitutional violations of internal inconsistency, interstate and Indian commerce, federal preemption and supremacy, the privileges and immunities clauses denying due process of law.

Twenty-Four

Since at least 2010, Petitioner Jessica Matheson resided at 25029 S. Highway 95, Worley, Idaho 87876. The application for Jessica Matheson's address on the 2006 tobacco license application was 6915 5th Street, #187, Fife, WA 98424, CP 36. The State knew that the 7403 Pacific Highway address was on the Puyallup reservation, CP 7. All of the personal addresses and also the business mail drop at 7403 Pacific Highway E, Milton,

Washington, were located within the exterior boundaries of federal recognized Indian reservations. CP 40, CP 34. One reservation was the Puyallup Indian reservation. The Idaho personal address is on the Coeur d'Alene Indian reservation. No personal jurisdiction was ever obtained over Matheson. The tribunals erred by ignoring valid service of process procedures to obtain long arm jurisdiction.

Twenty-Five

The business license application does not require an appointment of a registered agent for service. No duty is owed the State to furnish an address to be personally served. Matheson filed an affidavit stating she lived in Idaho. CP 32, 33. The tribunals erred by upholding a failure to follow the service requirements of RCW Ch. 4.18.

Twenty-Six

The administrative officer erred by ignoring that only the Coeur d'Alene tribal court had jurisdiction of Matheson (CP 30) thereby violating the federal supremacy and preemption rights of an Idaho resident and a Native American Indian living on an Indian reservation. Wash. Const. § 2, U.S. Const. art. 1, § 8, cl. 3; art. 1, § 10, art. III, §1, RCW 82.24.900.

Twenty-Seven

The trial court erred by failing to dismiss the proceeding as the record has no facts to support it. A firm and definitive conviction exists that a mistake has been committed.

PREAMBLE TO ARGUMENT

Matheson respectfully submits the following preamble seeking to prove that the agency violated public policy on Indian matters and to review related proceedings.

A. Lack of State Control over Indians living on reservations.

States have never had jurisdiction over Native American Indians who reside on their reservation. This principle was first established in 1843, when the Royal Court of London in *Governor of Connecticut and Moheagan Indians,* 126 London (1743) rejected jurisdiction of the Colonial Court of Connecticut over the Moheagan Indians stating "The Indians though living amongst the kings subjects in those countries, are a separate and distinct people from them, they are treated with as such, they have a polity of their own." Nothing has changed in the intervening 270 years. See Robert N. Clinton "*State Power Over Indian Reservations: A Critical Comment On Burger Court Doctrine*". 26 S.D.L.Rev. 434, 435 (1981), quoting from the

Moheagan case. In order to get into the union, the state of Washington agreed that Congress had exclusive control of Indians. Wash. const. 26, Second states "Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States." *Makah Indian Tribe v. Clallam County,* 73 Wash.2d 677, 687, 440 P.2d 442 (1968) upheld the reservation rights denying state tax on personal property of a female Indian residing on her reservation stating that Congress had to solve the tax issues. Justice Hale's colorful writing applies to prove the State policy toward Indians, which the State now refuses to follow.

> There exist other quite sound reasons why the property is not now taxable. In event of failure to pay an ad valorem tax, the property is subject to foreclosure and sale. An Indian would thus lose his property in clear contravention of federal policy that he keep it, use it and develop it. If the personal property of the Elvrum community were kept, maintained, and used off the reservation, it would be taxable as personal property even though one spouse was a tribal Indian; when kept, used and maintained on the reservation, it was not taxable as personal property by Clallam County, even though one spouse was a non-Indian.
>
> The reasons for such a ruling lie almost exclusively in the discernible federal policy of encouraging Indians to become economically self-sufficient on their reservations. In some instances, the government even augments the policy by supplying the means. We are simply adapting this policy of encouragement to property acquired by the Indians as the fruits of their own work, labor and enterprise as well as to the property given by the United States in aid of tribal Indians.

Id at 685.

> But they have additional rights, privileges and immunities vouchsafed them by contracts with the United States, called treaties, and implementing federal legislation, not enjoyed by the descendants of the white settlers on whose behalf, in part, the United States negotiated and made treaties with the Indians' forebears.

Id at 686.

The same policy is adopted in the Centennial Accord dated August 4, 1989 with Indian tribes. In reviewing a decision of an administrative board, public policy is an element. *Polygon Corp. v. City of Seattle,* 90 Wash.2d 59, 578 P.2d 1309 (1978).

McClanahan v. State Tax Commission, 411 U.S. 164, 173, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973) involved the State of Arizona's income tax. The court reviewed the history of Arizona's admission as a state and held that Arizona could not tax a reservation Indian. In this state, *Cates and Erb Logging v. Washington State Tax Commission,* U.S.D.C., E.D.Wn. No. C-89-690-RJM (1990) holds that a tribal Indian is exempt from the state income tax (B&O). It cancelled a tax warrant and enjoined the state from lien filing. *Cree v. Flores,* 157 F.3d 762, 774 (9th Cir. 1998) holds that round-trip travel by Indian business people from and back to their reservation does not give Washington a nexus for tax or penalties.

When Indian vehicles are owned and kept on Indian reservations, the state cannot apply its regulatory power to Indians in any different way than it does to vehicles from other states. Otherwise, it is an infringement on tribal sovereignty. *Cabazon Band of Mission Indians v. Smith*, 388 F.3d 691, 701 (9th Cir 2004). *Prairie Band Potawatomi Nation v. Wagnon,* 476 F.3d 818, 827 (10th Cir. 2007). The essential principle is that when travel originates from the reservation and back again, it is treated as interstate or Indian commerce. The new cases of *Commonwealth Brands v. Morgan,* 110 So.3d 752, 760 (Miss. 2013) and *Wasden v. Native Wholesale Supply,* 312 P.3d 1257, 1261 (Idaho 2013) reach the same result. If cigarettes are bound for out of state sale, they cannot be taxed by the state of origin. If inbound by and Indian to an Indian reservation retail seller, the state cigarette tax does not apply.

B. The Indian Cigarette Seizure Campaign

In the 1980's, the state and federal governments began a campaign to seize loads of cigarettes hauled by Indians. In this way, state budgets are met. See Leonard W. Levy "*A License to Steal*" (University of North Carolina Press 1966). However, the state and federal tax compliance litigants often lost for failure to prove probable cause allowing seizure. See *U.S. v.*

Simchen; U.S. v. Swiger, 884 F.2d 1396 (9th Cir. 1989), *Paul v. State Department of Revenue,* 110 Wash.App. 387, 40 P.3d 1203 (Div. 1 2002).

Both the State and federal government can no longer seize shipments of unstamped cigarettes in interstate commerce by Indians for the reason that the contraband cigarette tax law, 18 U.S.C. § 2346(b)(1), applies. It states in part "No civil action may be commenced under this paragraph against an Indian tribe or an Indian in Indian Country (as defined in section 1151)". Since 2006, a state cannot bring action against a tribal Indian wholesaler. The federal statute applies and also prohibits any state law action imposing penalties. 18 U.S.C. § 2345(a). Another federal statute, 4 U.S.C. § 109 excludes state tax on Indians. The federal act applies to shipments between states and Indian reservations. See also *Mahoney v. Idaho Tax Commission,* 524 P.2d 187, 191 (Idaho 1974) holding that the state has no jurisdiction of tribal member transportation between the Coeur d'Alene reservation and the state of Washington. Interstate and Indian commerce prevented state jurisdiction. See also *City of New York v. Gordon,* 2013 WL 2190060 *5 (S.D.N.Y. 2013). *Gordon, supra,* also validated *Red Earth LLC v. U.S.,* 657 F.3d 138 (2nd Cir. 2011) holding that delivery to sellers into a state does not satisfy due process. *Commonwealth Brands v. Morgan, supra,* holds that the

interstate consistency test prohibits cigarette stamps on the shipments distributed out of the state violates the interstate commerce laws. *Commonwealth Brands* supplements *Paul v. State Department of Revenue, supra.* The 2013 breakthrough cases eliminate the application of notice provisions in the state cigarette tax law.

C. The 1995 Amendments to the Cigarette Tax Statutes

In 1995, the state of Washington was attempting to remedy the probable cause issue by enacting RCW 82.24.250(1) requiring an Indian transporter of cigarettes to notify the state prior to the commencement of transportation. If no one notified the Liquor Board, the Liquor Board took the cigarettes. If an Indian person did notify the Liquor Board, they threatened to take the cigarettes. See *Bob v. McMinn*, U.S.D.C., Western District of Washington, No. C96-5421RJB, Complaint filed May 3, 1996, pages 6-11; 9th Circuit No. 97-35015, (1996-1997) a completely unreported federal case from the Western District of Washington reveals this fact. Paula Bob is Jessica Matheson's sister. Since *Wasden, supra,* the method of requiring notice to Indian cigarette transportation, at least in Idaho, is no longer the law.

D. The MSA Arbitration

In 1998, 46 states, including Washington, entered into a Master Settlement Agreement with major tobacco companies. See Margaret A. Little "*A Most Dangerous Indiscretion: The Legal, Economic, and Political Legacy of the Governments' Tobacco Litigation*" 33 Conn. L. Rev. 1143 (2001). The Act required the states to get repaid their medical costs. To date, Washington has received 2.07 billion from cigarette sales paying a $4 to $5 per carton addition for the "MSA". Washington Attorney General News Release, September 11, 2013. If the major tobacco manufacturers lost cigarette sales, the majors could get repayment from the funds. In 2012, the major tobacco manufacturers commenced a secret arbitration to get the money back from lost market share. Washington was threatened with a pay back. See an article in a weekly newsletter serving Indian nations owned by the Oneida Indian tribe: "*Where There's Smoke There's Cigarette Money*", page 12 Indian Country Today, June 27, 2012. In order not to pay back the MSA to the major tobacco companies the State must prove "diligent enforcement" by putting Indians out of the cigarette business. In 2013, however, the State won the arbitration and could keep the disputed $14.8 million. One of the reasons is that big tobacco complained that the states

were not putting Indians out of business. The Indian Country Today magazine of June 12, 2012, p. 12 states: "The state protects Big Tobacco's market share; it gets the MSA payments and the extra tax revenues; and all it has to do is put some Indians out of business". This easily explains why the Department of Revenue and State Liquor Board employees and agents would stalk a young female Indian to get her tobacco license. In support of this assertion, the fact that three agents of the Liquor Board personally went to her listed mail drop seeking to call on her personally (CP 7, 8); cancelling licenses that allow Matheson to go into business to earn money to pay the tax assessed; an assertion of a tax liability that was not based on the filed tax returns but on reports of wholesale shipments that indicated Indian deliveries; an assertion of a 7 million dollar penalty when wholesaler violations dictated only a 30 day suspension RCW 82.24.550(3); a refusal to reduce the amount pursuant to RCW 82.24.120(2) even though good reason was conveyed by Matheson; totally ignoring the Taxpayer Rights Act to constitutional determination RCW 82.32A.020(2) and 82.24.900; or to consider what is "just and lawful" RCW 82.32.160. With the license, she did not have to notify the State in advance as required by RCW 82.24.250(1). The State has now sustained its "diligent enforcement" against Jess Matheson by trampling

her constitutional rights, so the issue is now moot. Since 2013, no Indian wholesaler needs a permit to transport cigarettes if transporting to an exempt Indian. This conduct is the opposite of the Centennial Accord of the state of August 4, 1989 where this state recognized Indian tribe governments and Indian rights each agency was to submit a plan to implement the government to government relationship. The question raised here is whether the obvious lack of personal and subject matter jurisdiction of Jessica Matheson can prevail over unpleasant political financial pressure on courts struggling to maintain budgets. Jessica Matheson is entitled to constitutional protection regardless of the superior power of the opposition.

E. The Compact Agreements

In 2001, ignoring the U.S. Constitution Art. 1, § 10 that the states cannot make treaties, the State enacted RCW 43.06.450 and 43.06.455 allowing the governor to negotiate "contracts" with twelve (RCW 43.06.460) Indian tribes "concerning the sale of cigarettes" (.450). However, the contracts must provide that the wholesaler must be licensed by the state or if not licensed must be "certified by the state". RCW 43.06.455(5)(b).

In 2005, a special statute, RCW 43.06.465, was passed allowing the Puyallup tribe to charge a tax of about 80% of the state's tax. RCW

43.06.465(2). RCW 82.24.300 also states "handling" in the exclusion. The compact with the Puyallup tribe was in effect from 2006 through 2012 and applied to all the facts in this case. The irony here is that the store of Jess Matheson's father, Paul Matheson, is on the Puyallup reservation where no state cigarette tax is required on Paul Matheson's sales. See *Solis v. Matheson,* 563 F.3d 425, 428 (9th Cir. 2009).

Red Earth LLC v. U.S., 657 F.3d 138, 142 (2nd Cir 2011) entered an injunction in favor of the Indian wholesalers against an amendment to the Jenkins Act, 15 U.S.C. § 376a(d)(1) requiring prepayment of cigarette taxes before delivery to Indian retailers on the basis that there were no minimum contacts in the state.

Ward v. New York, 291 F.Supp.2d 188, 207 (W.D.N.Y. 2003) also entered an injunction in favor of Indian wholesalers shipped to Indian retailers on reservations stating: "In sum, this Court finds that Plaintiffs are likely to succeed on the merits of their claim that the Statute unconstitutionally restricts the shipment and transportation of cigarettes from individuals located off the reservation to tribe members on the reservation."

Rowe v. New Hampshire Motor Transport Ass'n, 552 U.S. 364, 377, 128 S.Ct. 989, 169 L.Ed.2d 933 (2008) holds that federal law preempts state

law restrictions on cigarette shippers. The Matheson deliveries were either on the Puyallup reservation or the Coeur d'Alene reservation to family members who had licenses to sell cigarettes and who placed cigarette stamps on the packages. A state, in order to facilitate state tax, cannot interrupt interstate commerce to affix a tax stamp. *Toomer v. Witsell,* 334 U.S. 385, 406, 68 S.Ct. 1156, 92 L.Ed. 1460 (1948). The State's cigarette tax law specifies federal preemption, RCW 82.24.900. A law degree is not required to be a legislative member. However, it is required to be a judge in this state. Wash. Const. art. IV, § 17. All judges must take an oath to support the U.S. Constitution Art. IV, § 28.

F. Review of litigation to date and reasons they no longer apply.

Intervening decisions render collateral estoppel inapplicable. *C.I.R. v. Sunnen,* 333 U.S. 591, 599, 68 S.Ct. 715, 92 L.Ed. 898 (1948); *Prairie Band Potawatomi Nation v. Wagnon,* 476 F.3d 818, 823 (10th Cir. 2007). The rule in Washington is that res judicata claim preclusion and law of the case does not apply where the prior decision is erroneous and the error would work an injustice on one party. RAP 2.5(c)(2). *Roberson v. Perez,* 156 Wash.3d 33, 123 P.2d 844 (Wash. 2005). An additional reason is when there has been a change in controlling precedent, *id* at 42. The incidence of state

tax on a tribal Indian is a question of federal law. *Coeur d'Alene Tribe v. Hammond,* 384 F.3d 674, 682 (9th Cir. 2004) and controlled by Congress. U.S. Const. art. 1, § 8, cl. 3, *Montana v. Blackfeet Tribe of Indians,* 471 U.S. 759, 765, 105 S.Ct. 2399, 85 L.Ed.2d 753 (1985). Therefore, federal constitution and federal law is also controlling precedent by incorporation in RCW 82.24.900. "Review of an earlier decision may be granted where the law has changed between the current and former proceedings." *State v. Roy,* 147 Wash.App. 309, 315, 195 P.3d 967 (Div. 3, 2008). If the underlying judgment was entered without jurisdiction, it is subject to collateral attack. *Pardo v. Wilson Line of Washington,* 414 F.2d 1145, 1149 (D.C. Cir. 1969). Jurisdiction to hear a case is subject to review; if no jurisdiction exists the proceedings are null and void. *Donaldson v. Winningham,* 48 Wash. 374, 377, 93 P. 534 (Wash. 1908) holds that where the personal address is known, but the service not made, a prior judgment can be set aside. *Schmelling v. Hoffman,* 111 Wash. 408, 414, 191 P. 618 (Wash. 1920) holds that defective service in the first case allows reconsideration. Here, Matheson moved to the Coeur d'Alene reservation in Idaho, a major factual change of jurisdiction preventing estoppel. *Jones v. Rumsford,* 64 Wash.2d 559, 564, 392 P.2d 808 (Wash. 1964). The initial case on penalties and tax was reviewed by the

Board of Tax Appeals, Docket Number 09-098 was decided January 21, 2011 and sustained a 7 million dollar penalty. The case relied on a presumption in favor of taxation and assumed a fact that did not exist. It was a clear violation of due process. The opinion ignored the fact that Jessica Matheson listed her home address at 6915 5th Street East #101, Fife, Washington. The appeal to Division II, No. 42723-1-II decided September 27, 2012, was based on the application of a wholesaler's license. The opinion stated:

> It is undisputed that she or her employee 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.

The validity of the judgment in that case directly is dependent on the business license revocation in this case. A court may examine prior proceedings if they affect the present decision. *In re Dependency of Brown,* 149 Wash.2d 836, 841, 72 P.3d 836 (Wash. 2003).

Several reasons exist that the change in the law occurred requiring revisiting of this issue. They include 18 U.S.C. § 2346(b)(2) where Congress enacted a change in the law stating no civil action may be commenced under this paragraph against an Indian tribe or an Indian in Indian Country. See

above pages 13, 14.

Confederated Tribes of the Yakama Indian Nation v. Gregoire, 658 F.3d 1078, 1088 (9th Cir. 2011) holds that where a compact is in force like the Puyallup Tribe Compact a tribal retailer is shielded from civil liability unless he fails to remit tax collected from a retail taxable purchaser. The Motion on the Merits was wrong for many reasons. The easy reason is that an Indian owes no tax as Indians are exempt from state cigarette tax; in order to sustain the tax the State had to allege that Jess Matheson collected from taxable customers in the area of the state where the state cigarette tax applied. The Board of Tax Appeals supported the novel presumption that sales occur if Matheson did not prove otherwise. This holding is a clear violation of due process in tax cases, state or federal. It violates the Fifth and Fourteenth Amendment as it forecloses a fact which cannot be made to "exist in actuality". *Heiner v. Donnan,* 285 U.S. 312, 329, 52 S.Ct. 358, 76 L.Ed. 772 (1932). Any contrary argument is a "startling doctrine. . . this is very near to saying that the individual, innocent of evasion, may be stripped of his constitutional rights" *id* at 328. The case also held that due process is violated when "to enact into existence a fact. . . that does not and cannot be made to exist", *id* at 329, is a denial of due process. The *Hemi Group v. City*

of New York, 559 U.S. 1, 16, 130 S.Ct. 983, 175 L.Ed.2d 943 (2010) unequivocally holds that a proximate collection of sale of cigarettes to a taxable consumer, not distribution reports, must be proven. Here, the Department of Revenue even failed in its theory of what Matheson didn't prove. Therefore, the changes in the law and the fact that the action taken by the State was not based on any evidence of any sale to a taxable retail consumer and collection of tax from that consumer, which is the only way Matheson would be liable, was procured by lack of due process and abrogated by part of the statute changed in 2006 (i.e. derogatur legi cum pars detrahitur) cannot be issue preclusion as the law has been abrogated in part by statute or case law. The part abrogated is that the State cannot take civil action against Indians hauling cigarettes across state lines.

The civil rights case of *Matheson v. Smith,* 2013 WL 6816700 (9th Cir. 2013) is even easier to explain. The Ninth Circuit would not publish the case as the Tax Injunction Act was upheld. It is non precedential if not published. The Court was then able to sidestep the binding case of *National Federation of Independent Business v. Siebelius,* 132 S.Ct. 2566, 2583, 183 L.Ed.2d 450 (2012) holding unequivocally that a state penalty is not a tax. The Ninth Circuit never addressed the Indian cigarette tax case of *Moe v. Confederated*

Salish and Kootenai Tribes of Flathead Reservation, 425 US 463, 471, 96 S.Ct. 1634, 48 L.Ed 2d 96 (1976). "It seems clear (that § 1341) does not bar federal court jurisdiction in cases where immunity from state taxation is asserted on the basis of federal law with respect to pensions or entities in which the United States Has (sic) a real and significant interest." Matheson was assessed a 7 million penalty which was clearly labeled a remedial penalty. *Hart v. Massanari,* 266 F.3d 1155, 1171 (9th Cir. 2001) holds that a Supreme Court decision binds all courts.

Toyosaburo Korematsu v. U.S., 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944) the famous case upholding interment of Japanese citizens in barb-wired camps, even though there was no proof of disloyalty, is relevant here. Among the reasons is that it sustained an order requiring all persons of Japanese ancestry to be placed in a "relocation center" even though no disloyalty was proven. It was based solely on ancestry, see dissent by Justice Roberts, *id* at 226. A writ of coram nobis was later issued as reports proved suppression of evidence. *Korematsu v. U.S.*, 584 F.Supp. 1406 (D.C. Cal 1984). An easy analogy is present here. Big Tobacco wanted the state to declare war on the Indian cigarette business. Essentially, it said "jump" and the State said "how high". *Yick Wo v. Hopkins*, 118 U.S. 356, 374, 6. S.Ct.

1064, 30 L.Ed 220 (1886) is still binding law. It struck down a city law aimed primarily at a laundry owned by persons of Chinese decent. The definitions in the code of judicial conduct include classes of parties. It states:

> **"impartial," "Impartiality,"** and **"impartially"** mean absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge. See Canons 1, 2, and 4, and Rules 1.2, 2.2, 2.10, 2.11, 2.13, 3.1, 3.12, 3.13, 4.1 and 4.2

II.

STATEMENT OF THE CASE

Jessica Mae Matheson on June 26, 2006 (Petition Appendix 1, Findings of Fact of Kimberly M. Anderson, reviewing officer, dated July 18, 2012, CP 36), in order to get a tobacco license, filled in a master application. It listed her as owner and her home address as 6915 5th Street East #101, Fife, WA. 98424. Findings of Fact of Kimberly M. Anderson dated July 18, 2012, CP 36. Matheson left the business street address in Washington blank. CP 36. Matheson introduced a letter to Auditor Lee Smith stating that Matheson had no agent for service, CP 33, CP 40.

Matheson filed an Affidavit in Thurston County Superior Court on August 4, 2011, Docket No 11-2-00795-0 stating that her residence address is 25029 S. Highway 95, Worley, Idaho 83876. The Milton address, 7403

Pacific Highway East, was a mail drop and was on the Puyallup Indian reservation. CP 33, CP 32 (footnote 3, page 4, CP 28). The Affidavit predated the Notice of Revocation, which was February 21, 2012. CP 27. The administrative law judge was an officer of the Department of Revenue opinion dated July 18, 2012, CP 42. Doyle McMinn, the witness at the hearing who was the senior revenue agent for the Department of Revenue, admitted that the Matheson was in Idaho but "he had not received clear information about where the taxpayer was staying in Idaho". CP 29. However, the Idaho address was completely listed as 25029 Highway 95, Worley, ID 83876. CP 32. The Petition CP 4, CP 30 states that Matheson is a fully enrolled on reservation American Indian doing business and living on the Coeur d'Alene Indian Reservation. The State admitted that the mail drop was on the Puyallup reservation. CP 8.

III.

SUMMARY OF THE ARGUMENT

1. The revocation of business license proceeding must follow the rules of service of process law suit commencement to comply with due process. Matheson, an Indian who resided on an Indian reservation in Idaho, was never served so the judgment is void. Even if served, the judgment

would be void for the reason that applying for a license in 2006 does not satisfy due process minimum contacts for long arm jurisdiction of a non resident.

2. The only reason for revocation was a tax judgment on an Indian who did no business in Washington and was based on insufficient allegations and illusory facts. No subject matter jurisdiction was present. It is void, so the reason for revocation is void.

3. The business license revocation statute, RCW 82.12.215, cannot be applied to an American Indian whose residence is on an Idaho Indian reservation. The failure to transfer violated CR 82.5(a). The business license revocation was an unnecessary and excessive penalty and is constitutionally void. A business license revocation cannot apply to the 29 Indian reservations in the state to deny Matheson Indian to Indian business.

The entire proceedings in this case are void for lack of subject matter and personal jurisdiction since all Matheson's activity was not within state jurisdiction and was exempt even if within state jurisdiction.

IV.

ARGUMENT

The standard of review is to determine from the entire record whether a mistake has been committed. Legal conclusions are reviewed de novo.

The standard of review of an agency decision is whether it is clearly erroneous. "A finding is clearly erroneous when, although there may be evidence to support it, the reviewing court on the entire record is left with the firm and definitive conviction that a mistake has been committed." *State Department of Ecology v. P.U.D. of Jefferson County,* 121 Wash.2d 179, 201, 849 P.2d 646 (Wash. 1993) citing *Cougar Mt. Assocs. v. King County,* 111 Wash.2d 742, 747, 765 P.2d 264 (1988). This case has no facts to support the tax decision, an obvious mistake. *Polygon Corp. v. City of Seattle,* 90 Wash.2d 59, 70, 578 P.2d 1309 (1978) also requires a determination of the public policy involved. An administrative decision cannot violate constitutional due process. The Court reviews legal questions de novo. *Preserve Our Islands v. Shorelines Hearings Board,* 133 Wash.App. 503, 514, 137 P.3d 31 (Div. 1, 2006). The law is reviewed independently before it is applied to the facts. *Lewis County v. Western Washington Growth Mgmt.,* 157 Wash.2d 488, 498 (Wash. 2006). Therefore, this issue is reviewed de novo. The decision must be supported by substantial evidence.

Hardee v. State Department of Social and Health Services, 172 Wash.2d 1, 6, 256 P.3d 339 (Wash. 2011). *Ancheta v. Daly,* 77 Wash.2d 255, 260, 461 P.2d 531 (Wash. 1969) holds that erroneous facts may be corrected on appeal. *Farm Supply Distributors v. Washington Utilities,* 83 Wash.2d 446, 451, 518 P.2d 1237 (Wash. 1974) holds that evidence of public interest must be examined; the facts must be examined "in light of properly applicable law". Disregard of the facts is sufficient to vacate an agency decision. *Lenca v. Employment Security,* 148 Wash.App. 565, 578, 200 P.3d 281 (Div. 2, 2009). To be sustained, evidence must show that something occurred. *Lanzce Douglass v. City of Spokane Valley,* 154 Wash.App. 408, 418, 225 P.3d 448 (Div. 3, 2010).

The undisputed facts in this case are that Matheson's driver drove a vehicle from Idaho into Spokane Valley, Washington and loaded a truck with cigarettes bought from another licensed tobacco wholesaler. After loading, the vehicle drove to Indian reservations. Also undisputed is that Matheson was licensed by the state to haul cigarettes off reservation that did not have the state cigarette tax stamps glued to the packages.

The State knew that Matheson's business address was on the Puyallup Indian reservation, CP 8; that Matheson never sold to a taxable person; that

she never collected the state cigarette tax from a sale to a taxable consumer or that she was ever in business anywhere. CP 32, Matheson affidavit. The only evidence, which the State did not believe, was that she trucked cigarettes to her dad and brother who were licensed cigarette retailers. The State never introduced any evidence of where the vehicle ceased hauling in interstate commerce. The State knew where the vehicle went as they have tracked Matheson's vehicles for over twenty years. Their sales were at retail on Indian reservations. There is also no dispute that Matheson is an enrolled Puyallup Indian and all the addresses she gave were all on Indian reservations, whether personal or business. The State introduced no evidence of any other sites or activity. There is also no legal doubt that an Indian who resides on an Indian reservation where she is a member is not liable for state taxes; that Matheson's tax returns filed with the state claimed exemption and the tax returns were never questioned. CP 32. No inferences of taxation can be drawn from these known facts as they all point to Indian to Indian transportation and nothing else.

When there is no jurisdiction, a prior adjudication can be challenged.

Where the issue on a prior adjudication and the suit was brought in the wrong court due to facts of domicile, the judgment is not binding if the

first court lacked in personam jurisdiction. *Riley v. New York Trust Co.,* 315 U.S. 343, 349, 62 S.Ct. 608, 86 L.Ed. 885 (1942). *In re Estate of Tolson,* 89 Wash.App. 21, 32, 947 P.2d 1242 (Div. 2, 1997) states "Although there are few exceptions to the application of the Full Faith and Credit Clause, enforcement of a judgment under that provision can be challenged by a showing that the court rendering judgment lacked jurisdiction." Where a change of circumstances of residence occurs and the evidence presented was inadequate, the judgment can be modified. *In re Rankin,* 76 Wash.2d 533, 537, 458 P.2d 176 (Wash. 1969). If no in personam jurisdiction exists and the case was in the wrong court, the judgment is not valid and may be vacated. *SCM Group USA v. Proteck Machinery,* 136 Wash.App. 569, 576, 150 P.3d 141 (Div. 3, 2007). To conclude that Jess Matheson owes 9 million to the State is not only a mistake, it is preposterous.

Physical Presence of Cigarettes in this state, without more, cannot be subject to a State cigarette tax causing loss of license to do business.

The overriding reason that this case must be dismissed is that Matheson never had any activity in Washington that supports jurisdiction to adjudicate. *International Shoe v. Washington,* 326 U.S. 310, 317, 66 S.Ct. 154, 90 L.Ed. 95 (1945) states "Presence in the state in this sense has never

been doubted when the activities of the corporation there have been continuous and systematic, but also give rise to the liabilities sued on." It is undisputed that Matheson had a wholesalers license to have untaxed cigarettes everywhere in the state without state cigarette tax stamps on them. Matheson did not incorporate. She acted as an individual. Corporations must designate and file a registered agent for service. RCW 23B.05.010. Tobacco and business licenses do not require registered agents. RCW 82.24.510; RCW 19.02.070. Matheson never designated anyone to accept process. CP 33. The omission requires dismissal. Matheson had no other activity than hauling cigarettes from a state wholesaler who was also exempt. *Heiner v. Donnan,* 285 U.S. 312, 329, 52 S.Ct. 358, 76 L.Ed. 772 (1932) holds that no presumption, whether a rule of evidence or substantive law, can presume "the existence of facts that do not exist and cannot be made to exist." If so, due process of the 14th Amendment is violated. *Pennoyer v. Neff,* 95 U.S. 714, 720, 5 Otto 714 (1877) states that extraterritorial jurisdiction is a "illegitimate assumption of power." *Daimler AG v. Bauman,* 134 S.Ct. 746, 761 (2014) citing *International Shoe* requires specific jurisdiction to be substantial only if the facts "give rise to the activities sued on" *id* at 761. The *Daimler* court distinguishes between specific jurisdiction to try the facts giving rise to acts

within the state or general jurisdiction on facts having nothing to do with anything that occurred within the state. Applying *Daimler* here must include *Hunt-Wesson Inc. v. Franchise Tax Board of California,* 528 U.S. 458, 484, 120 S.Ct. 1022, 45 L.Ed.2d 974 (2004) that states:

> the 'Due Process and Commerce Clauses. . .do not allow a State to tax income arising out of interstate activities—even on a proportional basis—unless there is a "minimal connection" or "nexus" between the interstate activities and the taxing State' (quoting *Container Corp. of America v. Franchise Tax Board,* 463 U.S. 159, 165-66, 103 S.Ct. 2933, 77 L.Ed.2d 545 (1983)).

Pioneer Packing v. Winslow, 159 Wash. 655, 664, 294 P. 227 (Wash. 1930) holds that sale of goods transported from an Indian reservation includes sale in the original packages after the destination is reached. Off reservation seizure of Quinault goods while in interstate commerce violated treaty rights. *Toomer v. Witsell,* 334 U.S. 385, 406, 68 S.Ct. 1156, 92 L.E. 1460 (1948) holds the same way. It held that a state statute requiring affixation of a state tax stamp on loads heading out of state was unconstitutional as violative of the commerce clause. RCW 82.24.250(a)(1) is also unconstitutional for the same reason. *Big Boys Toy, Ltd. v. Limbach*, 597 N.E.2d 76, 79 (Ohio 1992) holds that a one month interruption of interstate commerce to repair a boat was not sufficient to be an interruption of interstate commerce. *Consolidated*

Coal v. Porterfield, 267 N.E.2d 304, 307-8 (Ohio 1971) holds that round trips in and out of a state where the stop is only to load is not sufficient to allow tax by a state. No interruption of interstate commerce occurred to allow tax assessment. "The Supreme Court of the United States has consistently invalidated state taxation amounting to a direct taxation upon the operation of interstate commerce."

Assuming, however, that Jess Matheson was subject to the State's jurisdiction, she still had her tobacco license to transport unstamped cigarettes. Where did the illusory and hypothetical sale to a consumer take place? These irrational hallucinations did not deter the litigation on these issues thus far. However, can the court indulge in a presumption from the fact that Matheson couldn't prove a negative to presume that she sold to a consumer? *C.I.R. v. Shapiro,* 424 U.S. 614, 629, 96 S.Ct. 1062, 47 L.Ed.2d 278 (1976) holds to the contrary. It refused to uphold a tax where the Government contended "it has absolutely no obligation to prove that the seizure has any basis in fact". *Weimerskirch v. C.I.R.*, 596 F.2d 358 (9th Cir. 1979) also applies. Even though the taxpayer did not testify "a minimal evidentiary foundation" must be established by the taxing authority. *Id* at 361. "There was no evidence from which it can be inferred that he engaged

in these activities." *Ibid* at 361. Here, the State has no facts whatsoever. A "naked assumption" is insufficient. *Id* at 361. F.R. Evid. 401 requires the existence of probable facts. Here, there was no evidence.

City of New York v. Milhelm Attea & Bros., Inc., 2012 WL 3579568 *18 (D.C.S.D. NY 2012) is in point and requires the instant case to be reversed. It notes that the City never had any proof of injury. The opinion states that there was only evidence that after the litigation started a City Investigator bought eight cartons from a customer of Day. "the city has failed to present any evidence...that cigarettes sold by Day to other Native American reservations ever entered the City." The Court held that the assertion of harm was conjectural and dismissed Day, a cigarette wholesaler for violation of state law and the contraband cigarette tax act. 18 U.S.C. § 2341. Here, the decision to cancel the license was based on a void judgment that was unconstitutional. The judgment was not supported by any material evidence of sales to taxable consumers anywhere. The burden of proof shifted when Matheson proved that the cigarettes were shipped to her non taxable Indian family. All the litigation never had any evidence to sustain the decisions. It could never persuade a fair minded person. *Id* at 7. Administrative decisions on constitutional questions are law questions reviewed de novo. *Johnson v.*

Washington Dept. of Fish and Wildlife, 175 Wash.App. 765, 772, 305 P.3d 1130 (Div. 2, 2013). Before the determination of standard is made, the reviewing court must determine whether the decision was supported by substantial evidence. "'Substantial evidence' is evidence sufficient to persuade a fair-minded, rational person that the finding is true." *In re Estate of Langeland,* 177 Wash. App. 315, 320, 312 P.3d 657 (Div. 1, 2013). *Langeland* also holds that Washington cases do not provide any general guidelines for presumptions. *Id* at 322. "If there is a total want of jurisdiction, the proceedings are void and a mere nullity." *Thompson v. Tolmie,* 27 U.S. 157, 162, 2 Pet. 157, 7 L.Ed 381 (1829).

By applying revocation to a non resident, RCW 82.32.215 is unconstitutional as a violation of due process.

Terral v. Burke Const. Co., 257 U.S. 529, 42 S.Ct. 188, 189, 66 L.Ed. 352 (1922) held a revocation to do business statute unconstitutional where it forbids removal to federal court. The reason was that it denied a federally protected constitutional right. The right to do business is protected by U.S. Const. art. IV, Section 2 and the Fourteenth Amendment. *State v. Carey,* 4 Wash. 424, 428, 30 P. 729 (Wash. 1892). A business is a property right. *Truax v. Corrigan,* 257 U.S. 312, 327, 42 S.Ct. 124, 66 L.Ed. 254 (1921). It is subject to the 14th Amendment protection of life and liberty, *id* at 334. A

business is property. *Phelps Dodge v. United Elec.,* 42 A.2d 453 (N.J. 1946). *Terral, id* at 533, adopted the dissent in *Security Mutual Life Co. v. Prewitt,* 202 U.S. 246, 249, 26 S.Ct. 619, 50 L.Ed. 1013 (1906) stated the principle as "A state has the right to prohibit a foreign corporation from doing business within its borders, unless such prohibition is so conditioned as to violate some provision of the Federal Constitution." The dissent agreed with this statement, *id* at 262, and applied it to the right to continue business. The court also adopted the dissent in *Doyle v. Continental Ins. Co.,* 94 U.S. 535, 543, 4 Otto 535, 24 L.Ed. 148 (1876) stating "Though a state may have the power, if it sees fit to subject its citizens to the inconvenience, of prohibiting all foreign corporation from transacting business within its jurisdiction, it has no power to impose unconstitutional conditions upon their doing so. Matheson has a constitutional right, U.S. Const. art. VI, cl. 2, to be free of state licensing laws. *Moe v. Confederated Salish and Kootenai Tribe,* 425 U.S. 463, 480-1, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976); *Wasden v. Native Wholesale Supply,* 312 P.3d 1257, 1261 (Idaho 2013). Neither the U.S.; State of Idaho or the laws of the Coeur d'Alene tribe contain any statute forbidding continued business if state tax judgments are unpaid. The uneven treatment of commercial activity outside the state violates the dormant

commerce clause. *American Trucking v. Scheiner,* 483 U.S. 266, 284, 107 S.Ct. 2829, 97 L.Ed.2d 226 (1987) holds that if free trade of commerce is violated by financial state barriers, the commerce clause is violated. *Commonwealth v. Morgan,* 110 So.3d 752, 759 (Miss. 2013) holds that imposing cigarette tax on cigarettes bound out of state violates the commerce clause. The privileges and immunities clause, U.S. Const. art. IV, § 2, cl. 1, is also violated. This includes a right to a trade or business. *Jones v. City of Memphis,* 852 F.Supp.2d 1002, 1009 (W.D. Tenn. 2012). Matheson has the protection of freedom from state licensing under the supremacy clauses; the interstate commerce and Indian commerce and privileges and immunities clause to be free to do business anywhere in the United States. RCW 82.32.215 is unconstitutional when it is attempted to apply to an Idaho resident or tribal Indian. Matheson is both.

The State cannot obtain, enforce or have jurisdiction to enter any decree against a tribal Indian. A state court must dismiss or transfer to the tribal court.

Superior Court Rule 82.5(a) states:

> (a) **Indian Tribal Court; Exclusive Jurisdiction.** Where an action is brought in the superior court of any county of this state, and where, under the Laws of the United States, exclusive jurisdiction over the matter in controversy has been granted or reserved to an Indian tribal court of a federally recognized Indian tribe, the superior court shall, upon motion

> of a party or upon its own motion, dismiss such action pursuant to CR 12(B)(1), unless transfer is required under federal law.

The State Constitution Art. 26, Second recognizes exclusive federal control. The U.S. Constitution Art 1, § 8, cl. 3 gives congress exclusive control of Indians who reside on their reservation. This includes Matheson. This court rule was cited to the trial court but the court did not address it. Public Law 280, RCW 37.12.060 states unequivocally that the state has no jurisdiction of Indians when on their tribal land. The prohibition includes "licensing".

All the addresses given by Matheson, except the Idaho address, are within the boundaries of the Puyallup Indian Reservation. During all the times involved in this proceeding no Washington State cigarette tax was required for Indian tribal organization sales on the reservation. Matheson was never personally served with any notices pertaining to the Washington state cigarette tax. CP 35, 40.

Williams v. Lee, 358 U.S. 217, 223, 79 S.Ct. 269, 3 L.Ed.2d 257 (1959) required civil actions by non Indians against tribal Indians to be brought in tribal court. "The cases in this Court have consistently guarded the authority of Indian governments over their reservations. Congress

recognized this authority in the Navajos in the treaty of 1868, and has done so ever since. If this power is to be taken from them, it is for Congress to do it." Matheson never left her reservation of residence. She did not drive her vehicle. The State contends that Indians have no state tax immunity off reservation. *Wright v. Colville Tribal Enterprises Corp.,* 159 Wash.2d 108, 112, 147 P.3d 1275 (Wash. 2006) provides off reservation immunity to a tribe and tribal business employee. *Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 158, 93 S.Ct. 1267, 36 L.E.2d 114 (1973) denied a state use tax on assets bought in another state and installed off reservation. The seminal case of *Washington v. Confederated Tribes of Colville Reservation,* 447 U.S. 134, 163, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980) rejected a tax on Indian vehicles that were used both on and off the reservation. *Prairie Band Potawatomi Nation v. Wagnon,* 476 F.3d 818, 827 (10th Cir. 2007) upholds tribal sovereignty over state jurisdiction on registration of vehicles owned by trial Indians both on and off the reservation. Here the issue is moot as all off reservation travel by Matheson's driver, not Matheson, was in interstate or Indian commerce also outside the State's jurisdiction. If only the business license proceeding is considered, there is no contact whatever in the state. *Wofford v. Department of Revenue*, 28 Wash.App. 68, 70, 622 P.2d 1278

(Div. II, 1980) denied excise taxes on Indian owned vehicles driven both on and off the reservation. Matheson never left her reservation. If income on hauling cigarettes was made, it was made by her without leaving the reservation. Her base of operation was on the reservation. *McClanahan v. State Tax Commission,* 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973) applies. In *Babbit Ford v. Navajo Indian Tribe,* 710 F.2d 587, 594 (9th Cir. 1983), the non Indian auto dealer sold autos to tribal Indians. The sale agreements were made off reservation. The non Indian, non resident dealer entered onto the reservation and repossessed the autos. They did not comply with the reservation laws requiring written consent by the Indian at the time of repossession or a decree from the tribal court allowing repossession. The Navajo code cited in the case required written consent of the purchaser or an order from the Navajo tribal court to accomplish on reservation repossession 7 NTC §§ 607-609. Identical requirements are imposed on the Coeur d'Alene Indian reservation. Coeur d'Alene Indian Tribe Rules of Civil Procedure 95-99.[1] (Addendum 1). The decision upheld exclusive tribal court jurisdiction over the non resident, non Indian auto dealers. The Coeur d'Alene tribe law asserts jurisdiction over non Indians proceeding against

[1] The relevant Coeur d'Alene Civil Procedure Statutes are set forth in the addendum attached to this brief.

Indians. Where the tribal code has enacted applicable code provisions and a reservation Indian is the litigant, exclusive jurisdiction lies in the tribal court. *In re Estate of Big Spring,* 255 P.3d 121, 135 (Mont. 2011). *Joe v. Marcum,* 621 F.2d 358, 362 (10th Cir. 1980) rejected a state garnishment on an Indian living on his reservation on the basis of federal preemption. The state writ violated the authority of the tribal courts. The Indian person, unlike Matheson, was served on the reservation. The argument that the proceeding was ancillary to the state court judgment arising out of a transaction off reservation was rejected. *Id* at 362. The reason was that the attachment affected collection of assets on the reservation.

Annis v. Dewey County Bank, 335 F.Supp. 133 (D.C.S.D. 1971) held that off reservation service of an Indian to enforce a judgment was invalid. The opinion states, *id* at 136 ". . .state officials have no jurisdiction on Indian reservations either to serve process or to enforce a state judgment." Tribal agreements of state jurisdiction are not valid. *Kennerly v. District Court,* 400 U.S. 423, 481, 91 S.Ct. 480, 27 L.Ed.2d 507 (1971) held that a tribe could not agree to state jurisdiction for collection suits against tribal Indians.

Even if the State had served Matheson by county sheriff service, jurisdiction was not accomplished as the Sheriff has no authority to extend

its laws to an Indian reservation. *Francisco v. State,* 556 P.2d 1, 4 (Ariz. 1976).

The Coeur d'Alene Tribal Code of Civil Procedure requires a BIA action to obtain money from an Individual Indian Money (IIM) trust account. CTC 4-17.01 (Addendum 2). In order to execute on a foreign civil judgment, the Coeur d'Alene Tribal Counsel must appoint a tribal counsel to determine whether the judgment be given full faith and credit. CTC 4-21.01 (Addendum 3). If there is no subject matter jurisdiction, the state court judgment is void. CTC 4-25.04 (Addendum 4). Even if a judgment is valid, 75% of Jess Matheson's wages are exempt from levy. CTC 4-20.01 (Addendum 5). The State collected money from a bank account of Jess Matheson in a bank located in Washington in violation of due process. See *North Georgia Finishing, Inc. v. Di-Chem, Inc.,* 419 U.S. 601, 605, 95 S.Ct. 719, 42 L.Ed.2d 751 (1975) and cases cited therein. A state court tax judgment, even if valid, must be processed in the court of the judgment debtor's residence. If the activity was off reservation, the Indian person must still be served with service of process to institute suit. *State Securities v. Anderson,* 506 P.2d 786, 788 (N.M. 1973). "Thus, although a tribe may be within the geographical boundaries of a state, the tribe is jurisdictionally

distinct from the state, and the state has no authority to impose its laws on the reservation." *Tracy v. Superior Court of Maricopa County,* 810 P.2d 1030, 1043 (Ariz. 1991). State courts have no jurisdiction over Indians living on their reservation beyond that expressly granted by Congress. Indian tribes have federal rights to establish their own governments since 1934. 25 U.S.C. § 476. The tribes have exclusive jurisdiction. See *State ex rel Adams v. Superior Court for Okanogan County,* 57 Wash.2d 181, 185, 356 P.2d 985 (1960). Principles of comity apply to Indian courts. *Wilson v. Marchington,* 127 F.3d 805, 810 (9th Cir. 1997).

The Administrative Law Judge had a Direct Interest as an Employee of The Department of Revenue, the Agency that brought the License Hearing. Therefore, the Fourteenth Amendment was Violated.

The issue of the administrative hearing officer acting as an advocate was raised and denied. CP 41. It was signed Kimberly M. Anderson, Administrative Law Judge, Reviewing Officer, Appeals Division. This issue was also raised and held immaterial by the trial judge. WAC 458-20-10001(2)(d) states that the presiding officer must be an "assistant director of the department's compliance division" and has the authority granted under RCW Ch. 34.05. The revocation was initiated by the department of Revenue that employed the presiding officer. Since the review is of a constitutional

core issues in the case, this procedure is a clear separation of powers violation. *Stern v. Marshall,* 131 S.Ct. 2594, 2608, 180 L.Ed.2d 475 (2011). The U.S. Constitution, Article III, § 1 requires executive and judicial powers to be separate. History indicates that judges who are dependent on the will of the king was a concern of the framers of the constitution, *id* at 2609. Lifetime banishment is a fundamental issue that must be accorded due process. If not, the judgment is void.

Tumey v. Ohio, 273 U.S. 510, 533, 47 S.Ct. 437, 71 L.Ed. 749 (1927) a liquor possession case, reversed the decision for the reason that the judge had a pecuniary interest in the outcome. The financial interest violated due process. The 14th Amendment is violated if an auditor who acts as a judge in a summary proceeding is rewarded by the assessment of an illegal tax. *Meyers v. Shields,* 61 F. 713, 716 (N.D. Ohio 1894). Whether civil or criminal, if the appearance of fairness is violated, a new trial is necessary. *Barnett v. Ashmore,* 5 Wash. 163, 164, 31 P. 466 (Wash. 1892) resulted in a new trial where a judge paid some of the claims of a sheriff and also had advised the sheriff who was a litigant. The court held that the judge was an "intense partisan" and not disinterested. The judgment was reversed. In *Tatham v. Rogers,* 170 Wash.App. 76, 105-7, 283 P.3d 583 (Div. 3, 2012) the

court ordered a new trial where the trial judge was a former law partner with the attorney for the party and was the attorney's designate in a power of attorney. This violated the appearance of fairness doctrine. The opinion, *id* at 90, cites *Caperton v. A.T. Massey Coal Co.,* 556 U.S. 868, 877, 129 S.Ct. 2252, 173 L.Ed. 1208 (2009) as holding recusal "where someone with a personal stake in a proceeding has had a significant and disproportionate role in placing the judge on the case". *Id* at 91. The *Tatham* opinion also states an important rule "When a court disregards a person's due process rights, the resulting judgment is void", *id* at 99. Here, the proceeding was intense as Big Tobacco was looking over the Department of Revenue's shoulder to prove "diligent enforcement" of Indians. The State had at least 14 million at stake. *Wounded Knee v. Andera,* 416 F.Supp. 1236, 1241 (D.C.S.D. 1976) held that even though the judge was conscientious and fair acting as prosecutor and judge is "like a referee in a sporting event when only one team shows up" is inherently unfair and violates due process. *Figueroa v. Delgado,* 359 F.2d 718, 720 (1st Cir. 1966) holds that cross examination by a trial judge violates inherent unfairness and is lack of due process.

The administrative officer refused to examine the validity of the judgment which was the only reason the license was revoked.

The Department of Revenue's records contained the personal address

of Matheson since 2006 but the Notice of Revocation was never mailed to her. The hearing officer ruled that "taxpayer's personal residence is irrelevant." CP 40. The hearing officer ignored RCW 37.12.060 that is part of chapter 37.12 RCW titled "Assumption of Criminal and Civil Jurisdiction of the State". CP 40. The revocation of the business license was based entirely on the failure to pay the tax warrant in the amount of $9,142,016.14. The hearing officer found that the judgment was lawful. CP 35, 41. The appeal alleged that Matheson, a Tribal Indian is not required to pay Washington State taxes and does not need a certificate of registration and that Washington has no nexus to tax Matheson. CP 4, 5.

An Indian living on an Indian Reservation is not subject to State Licensing Laws

An Indian who has not left her reservation need not obtain a license to engage in off reservation conduct. *Tulee v. Washington,* 315 U.S. 681, 685, 62 S.Ct. 862, 86 L.Ed. 1115 (1942). Even though Indians are citizens, the registration laws do not apply to Indians who reside in Indian Country. *State v. Atcitty,* 215 P.3d 90, 95 (New Mexico 2009). If registration is not required, there can be no ban on doing business in the state. Post conviction relief was given an Indian who failed to register with the State of Arizona, In *State v. John,* 308 P.3d 1208, 1210 (Ariz. 2013), the Indian was arrested

off the reservation. The State asserted it had personal jurisdiction of the Indian "The moment he stepped off the reservation", *id* at 1211, but the court held "the state could not impose a duty on John to register based on his residence in tribal territory". *Ibid* at 1211. The requirement was regulatory and preempted. Like the collection laws, the tribe had its own registration system.

The Cumulative Penalty of Revocation violated Due Process

Matheson was assessed a remedial penalty of $7,034,000, and a tax penalty of $71,219. The State levied on her bond. Therefore, she could not renew her license. Since she could not post a cash bond, the 9 million judgment will prohibit any credit to ever get a bond. She could never do business again because she is no longer able to get a bond.

The State has never lost a penny since the cigarettes, despite the unwillingness of the State to believe Matheson's witnesses, they were sold on the Indian reservations with tribal taxes on them. *BMW of North America v. Gore,* 517 U.S. 559, 580, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996) held that 4 million state punitive damages in a civil case was grossly excessive as it was 500 to 1 between actual harm inflicted and violated due process. The penalty here tops the *BMW* award by 3 million and the ratio is infinity.

Matheson was in good faith, didn't violate any law nor act with any deliberate intent. The judgment never mentions the Puyallup Indian reservation. Matheson's potential inheritance rights are ruined. She cannot run her dad's business. The administrative judge ordered Matheson not to do business throughout the state of Washington. Cancellation of the business license is outrageous piling on as she is deprived of an ability to earn money to pay the penalty. On January 17, 2014, the Yakama Tribe, by virtue of H.B. 2233, 2011 c 336 § 765, creating a new section under chapter 37.12, and was allowed to retrocede from state jurisdiction. Eight tribes in the state have cigarette contracts that suspend state cigarette tax. 20 other tribes exist. These reservations must be treated like another state or they infringe on tribal sovereignty. *Prairie Band Potawatomi Nation v. Wagnon,* 476 F.3d 818, 827 (10th Cir. 2007). The order fails to recognize these limits. The tax judgment, if not paid, might expire in 10 years. The banishment is for her lifetime akin to a life sentence for a crime never committed. The excessive fines clauses of the state constitution and the Eighth Amendment applies to civil fines. *Towers v. City of Chicago,* 173 F.3d 619, 624 (7th Cir. 1999). In *State v. WMJ Corp.,* 138 Wash.2d 595, 980 P.2d 1257 (Wash. 1999), the procedure to revoke the business license was useless and an abuse of power. The court

held that the Eighth Amendment applied to a civil fine. *U.S. v. Bajakajian,* 524 U.S. 321, 118 S.Ct. 2028, 141 L.Ed.2d 314 (1998) applies the Eighth Amendment and requires proportionality.

The State had no in personam jurisdiction of Matheson.

Jessica Matheson never entered Washington for the round trip pickups. She had no employees in Washington, never advertised, never had any personal or real property in Washington, never hauled commercially and actually never engaged in business since she only hauled to her father and brother. *Miller Bros. v. Maryland,* 347 U.S. 340, 74 S.Ct. 535, 98 L.Ed. 744 (1954) held that the tax burden of consumers could not apply to a carrier who delivered the goods in Maryland as it violated the Interstate Commerce Clause. *Confederated Tribes and Bands of the Yakama Indian Reservation v. Gregoire,* 658 F.3d 1078, 1087-8 (9th Cir. 2011) holds that:

> The cigarette tax applies only to the 'first taxable event and upon the first taxable person' under RCW § 82.24.080. There is no dispute between the parties that as between an Indian retailer and a non Indian purchaser, the latter is the *first* 'taxable person'. . .A fair construction of these provisions leads to the conclusion that an Indian retailer will be excluded from paying a tax for sales to members. The language also indicates that if an Indian retailer even found itself facing a State collection effort for the retailer's non payment of tax, the retailer would be shielded from civil and criminal liability, except where the Indian retailer has failed to transmit the tax paid by the consumer and collected by the retailer.

Jess Matheson was a licensed wholesaler. She is an Indian tribal organization as wholesaler is included in the definition. RCW 82.24.010(6). As a wholesaler, she can possess unstamped cigarettes in Washington. RCW 82.24.040(1), (2)(a). She could get unstamped cigarettes from another wholesaler and transport them. RCW 82.24.020(5); RCW 82.24.250(3); (1)(a). The State has contended that once the Indian leaves the reservation the Indian is taxable. If not before, *Yakama supra* at 1087, refuted this argument by holding that RCW 82.24.080 applies to Indians and they are exempt from tax anywhere. *Cabazon Band of Mission Indians v. Smith*, 388 F.3d 691, 701 (9th Cir 2004) holds that off reservation travel is within federal preemption when the travel is between reservations. The legal principle is expressed in *Prairie Band,* 476 F.3d 818, 827 (10th Cir. 2007) that tribal sovereignty requires the same comparison as another state. *U.S. v. Washington,* 645 F.2d 749 (9th Cir. 1987) exempted Indians off reservation from state boat restrictions. The supremacy clause prevented applications, *id* at 756.

When reservation Indians are the subject, "Congress has consistently acted upon the assumption that the States lacked jurisdiction over Indians residing on their reservations. *McClanahan v. State Tax Commission,* 411

U.S. 164, 171, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973), where state tax is the issue "it follows that Indians and Indian property on an Indian reservation are not subject to state taxation except by virture of express authority conferred on the State by act of Congress ". *Oklahoma Tax Commission v. Chickasaw Nation,* 515 U.S. 450, 458, 115 S.Ct. 2214, 132 L.Ed.2d 400 (1995) states "A State is without power to tax reservation lands and reservation Indians." When infringement of tribal sovereignty is affected, events within the state outside the reservation are insufficient to permit state court jurisdiction. *McKenzie County Social Services Board v. V.G.,* 392 N.W.2d 399, 402 (N.D. 1986). Contacts with the state off reservation even if sufficient for state jurisdiction do not preempt jurisdiction of the tribal courts. *Byzewski v. Byzewski,* 429 N.W.2d 394, 398 (N.D. 1988). When these legal principles are applied, it is clear that their was no evidence that Matheson collected the retail cigarette tax and never sent it to the State. A rational person would not believe evidence that does not exist. The tax judgment was never within state jurisdiction and can be collaterally attacked for the reason that Matheson, long before any audit commenced, proved that she was an Indian living on an Indian reservation. The presumption was against state jurisdiction and the State had the burden to rebut Matheson's evidence which it could not do as

no evidence existed. "In law, as in life, two wrongs add up to two wrongs, nothing more". Kozinski J, dissent *Cubanski v. Heckler,* 794 F.2d 540, 546 (9th Cir. 1986). Here, there is no "other person" who owes the tax so no tax can apply. The State accuses Jess Matheson of wholesaler misconduct which must, if at all, be limited to a 30 day license suspension. RCW 82.24.550(3). There is no valid tax judgment. Tobacco license suspension is insufficient to deny a right to do business.

When Matheson's cargo was picked up in Washington from another wholesaler she was exempt from any state cigarette tax as a licensed wholesaler. Regardless of ethnic origin, a state cannot tax cigarettes with a cigarette tax until they are sold at retail at a place where state cigarette tax applies. The Puyallup Indian Reservation was a state cigarette tax free zone. Idaho does not require Washington State cigarette tax. Cigarettes passing through the state to an Indian reservation to another state are exempt. *Paul v. Dept. of Revenue*, 110 Wash.App 387, 392, 40 P.3d 1203 (Div. 1, 2002) "More important here are the trial court's findings that *Paul* purchased the cigarettes in Canada and intended to sell them to the Blackfeet Reservation in Montana."

Harders Express v. New York State Tax Commission, 402 N.Y.S.2d

721 (NY1987) explains the incidence of tax theory. In *Harder's* the state of New York argued that "it is entitled to the statutory presumption that all cigarettes within the state are subject to tax unless the contrary is established by the person in possession" the court held that in the case only a question of law needs to be addressed. *Harders Express, id* at 450, held that where the cigarettes were stolen in transit, it was not "possession" for sale but only to deliver them to a person lawfully entitled to possession. The carrier did not have to pay tax. *Galesburg Eby-Brown Co. v. Department of Revenue*, 497 N.E.2d 874, 876 (Ill 1986) illustrates the double taxation issue. It holds, like *Commonwealth Brands v. Morgan*, 110 So.3d 752 (Miss 2013) that cigarettes destined for out of state do not have to have state cigarette tax stamps on them in the state where the trip originates. The tax at origin violated the internal consistency test of interstate commerce. *Lac Du Flambeau Band of Lake Superior Indians v. Zeuske,* 145 F.Supp.2d 969, 977 (D.C.W.D. Wis. 2000) applies to this case for the reason that the Indian pensioner who earned his pension in Minnesota off reservation as a long haul trucker, at retirement returned to his permanent residence on his reservation in Wisconsin. Wisconsin did not have jurisdiction to tax the reservation Indian. He drove his car to Minnesota from the reservation in Wisconsin to get to his terminal

in Minnesota. The opinion states:

> Congress has never authorized the states to tax tribal members living on reservations solely because of their residence within the taxing state; without such authorization, Wisconsin has no legal right to tax Jackson or any other tribal member similarly situated. As plaintiff points out, if residence on a reservation were equivalent to residence within a state, a state could claim authority to collect a tax merely by showing that a tribal member lived on a reservation within the state borders. If this were the law, the Supreme Court would not have barred the states of Arizona, Montana and Washington from imposing taxes on reservation Indians within their states. *See McClanahan,* 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129; *Moe,* 425 U.S. at 469, 96 S.Ct. 1634 (Montana could not impose sales taxes or property taxes upon tribal members living on reservation): *Washington v. Confederated Tribes of Colville,* 447 U.S. 134, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980) (state could not impose excise tax for privilege of using car within state upon reservation members but probably could impose tax based upon use outside reservation).

The administrative law judge had no right to apply the license revocation order solely because of residence in Idaho or Washington. The order exceeded her jurisdiction. Matheson was domiciled at all times on the Puyallup reservation, a state cigarette tax free zone, and in Idaho on the Coeur d'Alene reservation. Her place of business, i.e. terminal, was on Indian reservations. There is no proof the contrary as she never lived off Indian reservations. *Zenske* applies. The state of Washington is an optional Public Law 280 state. See RCW 37.12.010. However, Matheson lives in

Idaho on the Coeur d'Alene reservation. It has no jurisdiction over Indian reservation members living on Indian reservations outside the state's borders, even though the Indian in question temporarily lived in Washington. *Matter of Adoption of Buehl,* 87 Wash.2d 649, 662, 555 P.2d 1234 (Wash. 1976).

Homier Distributing Co. Inc. v. City of Albany, 681 N.E.2d 390 (NY 1997) holds that temporary storage within a state of unsold goods transferred back out of state also violates the commerce clause. To date no Washington court has considered the express federal preemption clause of RCW 82.24.900. New Hampshire has a similar statute stating "no tax is imposed on any transactions the taxation of which is prohibited by the constitution of the United States." R.L. c 79 § 5. The case of *State v. 483 Cases, More of Less, of Assorted Brands of Cigarettes,* 96 A.2d 568, 570 (N.H. 1953) held that a person who had cigarettes in a country farm house and "there was no evidence that the claimant was engaged in selling at retail or that she acquired the cigarettes for use or consumption within the state or the that she intended to sell them here" the State contended that all cigarettes found in New Hampshire had to be stamped. The Court rejected this argument and ordered the return. The Court held that the Interstate Commerce Clause would also apply to Section 5. *Id* at 185.

Pfeiffer v. State, 295 S.W.2d 365, 368 (Ark 1956) holds that in order for cigarettes transported into a state, the interstate transportation must come to an end. "The State has no authority to levy a tax on property where it is being transported in interstate commerce."

This tax case is like the analogy to the 1892 fiction novel "Uncle Tom's Cabin or Life Among the Lowly", an anti-slavery novel by Harriet Beecher Stowe. *Grider v. Cavazos,* 911 F.2d 1158, 1164 (5th Cir. 1990) states: "like Topsy 'just grew' as a result of stacking one inopposite citation upon another until, in the aggregate they take on the appearance of valid precedent". A total lack of any evidence that Matheson, who is exempt from state tax, sold to a taxable consumer and collected the state tax makes the entire proceeding a mockery, clearly a mistake of fact and law.

The U.S. Constitution Art. 3, § 2 forbids Washington courts from jurisdiction of tribal Indian cases

The U.S. Const. art. 1, § 8, cl. 3 grants exclusive control of Indian tribes to Congress. The last paragraph of art. 1, § 8 reserves to Congress the power "for carrying into execution the foregoing powers". The laws of the United States are "the supreme law of the land". U.S. Const. article VI, § 2, the Wash. Const. art. 1, § 2 acknowledge federal supremacy. Article 26 Second recognizes absolute control of Indian lands in the United States. The

U.S. Constitution Art. III, § 2 reserves federal court jurisdiction of cases "between a state and citizens of another state". "But the authority of Congress to withhold all jurisdiction from state courts obviously includes the power to restrict the occasions when that jurisdiction may be invoked." *Bowles v. Willingham,* 321 U.S. 503, 512, 64 S.Ct. 641, 88 L.Ed. 892 (1944). If a state seeks to collect taxes from a non resident, it must do so in the state of residence and also waives any immunity. *Franchise Tax Board of California v. Hyatt,* 538 U.S. 488, 498, 123 S.Ct. 1683, 155 L.Ed.2d 702 (2003). "It gives them the right of full ingress into other states and egress from them." *Paul v. Virginia,* 75 U.S. 168, 180, 19 L.Ed. 357 (1868), construing U.S. Const. art. IV, § 2. The exemption from state taxes is based on Indian Treaties and the U.S. Const. art. 1, § 8. *McClanahan v. State Tax Commission,* 411 U.S. 164, 172, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973). Indians have the right of free access into the state and that right cannot be taken from them. RCW 82.32.215 cannot be applied to an Indian resident living on an Indian reservation in Idaho. Matheson has a federal right to free access to enter into the state when in interstate or Indian commerce.

Business License Application does not establish jurisdiction.

When all the other issues are reviewed, the core issue is whether Matheson, whose only personal activity in Washington is only applying for a license, is sufficient to confer state court jurisdiction. *Rylander v. Bandag Licensing Corp.,* 18 S.W.3d 296 (Tex. 2000) conclusively holds that when there is no "physical presence in the state, no sufficient nexus exists to permit the state to assess tax." *Id* at 300. It violated the 14th Amendment and the interstate commerce clause. U.S. Const. Amend. 14; art. 1, § 8, cl. 3. If no tax can be assessed, even compliance with long arm process does not confer revocation jurisdiction. The mailing on the Puyallup reservation address could not support out of state jurisdiction. *Hellerstein and Hellerstein, State Taxation,* Third Ed. 2001, Thompson Reuters ¶ 6.05[1] pages 6-26, 7, reviews *Bandag* as follows:

> A Texas court held that the Commerce Clause and Due Process Clauses forbid a state from asserting franchise tax jurisdiction over a corporation that has merely qualified to do business in a state without engaging in any other activity there. It was undisputed that the sole contact on which the Comptroller relied in asserting jurisdiction was the company's "passive possession of a certificate of authority to do business in Texas" The court held that such a contact was insufficient to establish jurisdiction under the Commerce Clause because of its view that *Quill, Bellas Hess,* and *Complete Auto* required the physical presence of the taxpayer in the state for franchise tax purposes under the

> Commerce Clause. The court further held that such contact also failed even to satisfy the Due Process Clause standard of nexus because "[o]ur courts have consistently held that this kind of contact, standing alone, provides an insufficient contact under the Due Process Clause to subject a party to in personam jurisdiction.

In the present case, according to the trial judge's unchallenged findings of fact, the sole contact relied on by the court was the business license application. CP 39, 40. *Bandag, supra* at 301 states:

> In the present case, according to the trial judge's unchallenged findings of fact, the sole contact relied upon by the Comptroller is BLC's passive possession of a certificate of authority to do business in Texas. Our courts have consistently held that this kind of contact, standing alone, provides insufficient contact under the Due Process Clause to subject a party to in personam jurisdiction.

Washington requires a foreign corporation to appoint a registered agent for process. RCW 23B.15.100. No such agent is required for a business license. RCW 19.02.070. This regulatory failure makes the proceedings totally without jurisdiction. Adequacy of service was considered by the reviewing officer. CP 39. If the tax proceedings are ignored, the physical presence of Matheson's driver in interstate and Indian commerce, even though legal and not in the state's jurisdiction, is a moot point. *Bandag, supra* at 300, applied the federal due process case and *Quill Corp.,* 504 U.S. at 305 and held that the business license alone did not amount to minimum

contacts. The case progresses full circle to *International Shoe v. State,* 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945) as currently interpreted. Matheson was entitled to come into the state both as an Idaho citizen and a person living on an Indian reservation out of state. Presence in 2006 to get a license does not eliminate constitutional guarantees.

V.

CONCLUSION

The revocation proceeding was conducted without facts to support it and violated subject matter and personal jurisdiction. It is void.

DATED this 6th day of March, 2014.

ROBERT E. KOVACEVICH, #2723
Attorney for Petitioner/Appellant

CERTIFICATE OF SERVICE

This is to certify that a copy of the Amended Opening Brief of Appellant was served on Counsel for Respondent/Appellee by first class mail addressed as follows:

David M. Hankins, Senior Counsel
Assistant Attorney General
Revenue Division
7141 Cleanwater Drive SW
P.O. Box 40123
Olympia, WA 98504-0123

DATED this 6th day of March, 2014.

ROBERT E. KOVACEVICH
Attorney for Petitioner/Appellant

No. 45485-8-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

JESSICA MAE MATHESON,

Petitioner/Appellant,

v.

STATE OF WASHINGTON DEPARTMENT OF REVENUE;

Respondent/Appellee.

ADDENDUM

proceeding shall have the right to appeal the judgment in the small claim proceeding to the Coeur d'Alene Tribal Court.

Rule 93 **Stay of Execution**

At the time of filing a notice of appeal from a small claim judgment, or at any time thereafter, the party appealing may file a cash bond in the sum of the judgment appealed from, and such filing shall automatically stay further execution on the judgment until determination of the appeal.

Rule 94 **Appeal of Small Claim Judgment**

Any appeal of a small claim judgment of the small claims court shall be conducted as a trial de novo by the Coeur d'Alene Tribal Court.

PROCEDURE FOR REPOSSESSION OF PROPERTY

Rule 95 **Personal Property of Indians and Property Located on Indian Owned Lands**

The Coeur d'Alene Tribe possesses exclusive jurisdiction over the repossession of any personal property located within the exterior boundaries of the Coeur d'Alene Reservation held by or belonging to a Coeur d'Alene Tribal member or any other Indian, who resides on the Reservation or property owned by any person, Indian or non-Indian, located on Indian owned property, including trust property. Such Indian's and other's personal property shall not be taken from such lands except in strict compliance with the procedures set forth in Civil Rules 95 to 99. Failure to comply with Civil Rules 95 to 99 of the Coeur d'Alene Tribal Court Rules shall be considered "Creditor Misbehavior" according to Article 9-507 of the Uniform Commercial Code.

Rule 96 **Repossession of Indian Personal Property or Personal Property Located on Indian Owned Lands**

A creditor may contact an Indian or other debtor orally or in writing concerning a dispute with such debtor that may lead to repossession of personal property located within the exterior boundaries of the Coeur d'Alene Reservation. Such Indian or other debtor may give written consent to the creditor, permitting a repossession of the personal property without formal court proceedings. A creditor may enter the Reservation for the purpose of repossessing personal property with the debtor's written consent only when accompanied by a Tribal law enforcement officer.

Rule 97 **Court Order and Absence of Written Consent by Indian or Other Debtor**

If an Indian or other debtor refuses to sign a written consent allowing repossession, the property may be removed by the creditor from the Reservation only by order of a judge of the Coeur d'Alene Tribal Court entered in accordance with the procedure set forth in Tribal Court Rule 98.

Rule 98 **Procedure to Obtain Court Order for Repossession**

A creditor may seek an order of repossession against an Indian or other debtor in accordance with the following procedures:

A) Petition by Creditor. The creditor shall file a written petition with the clerk of the Coeur d'Alene Tribal Court, accompanied by a verified copy of the contract or other document entitling the creditor to repossess the personal property of the Indian or other debtor. The petition shall contain a concise statement of the creditor's claim against the debtor. The petition shall be served upon the Indian or other debtor in the manner prescribed by the Tribal Code 4-8.01. (service, certified mail.)

B) Answer by Debtor. The Indian or other debtor may file with the clerk of the Court a written answer or response to the creditor's petition within ten (10) days prior to hearing on the petition.

C) Hearing on Petition. After the ten (10) day notice to the Indian or other debtor, a hearing shall be held on the petition for repossession. Both the creditor and debtor may present evidence and witnesses relevant to the contract or debit dispute which forms a basis for the repossession request. The timing of the hearing on the petition may be accelerated by the court if;

1) The petition contains verified allegations showing a reasonable cause to believe that the personal property involved may be lost, damaged, or removed off of the Reservation prior to the regularly scheduled hearing; and
2) An accelerated hearing can be held without substantially prejudicing the Indian or other debtor to present any good faith defense to the petition for repossessing.

D) Content of Court Order. If after a hearing the Court determines that repossession is justified, the Court shall issue an order authorizing the creditor to repossess the personal property involved in the proceeding. The Court shall direct a Tribal law enforcement officer to accompany the creditor to repossess the property. If the Indian or other debtor has failed to appear at the hearing despite reasonable notice, the Court shall enter the repossession order in the absence of the debtor.

Rule 99 **Remedies for Violations of these Rules**

A) Denial of business privileges: Any creditor and any agents or employees of any creditor who are found by the Tribal Court to be in deliberate and willful violation of these rules may be denied the privilege of doing business within the Coeur d'Alene Reservation. The Court shall afford any creditor fair notice and opportunity for hearing prior to denial of any business privileges on the Reservation.

B) Civil Damage Liability: Any person who violates these rules shall be deemed to have breached the peace of the Coeur d'Alene Reservation, and shall be civilly liable to any debtor for actual damages caused by the deliberate or negligent failure to comply with the provisions of these rules and may be liable to the Coeur d'Alene Tribe for any costs or expenses associated with violation of these rules.

included in any judgment including filing fees, service fees, expense of witnesses, expert witness fees, compensation of jurors and other incidental expenses.

4-16.01 Appeal

Any person who is a plaintiff or defendant in a civil proceeding and is aggrieved by a final order of the Court may appeal as provided in Coeur d'Alene Tribe Rules of Civil Procedure (CTRCP) 71.

4-17.01 Payment of Judgment from Individual Indian's Monies

Whenever the Tribal Court has ordered payment of damages to an injured party and payment is not made within the time specified therein and when the party against whom judgment is rendered has sufficient funds to his/her credit in an individual Indian money account with the BIA, to satisfy all or part of the judgment against him/her, the Clerk of the Court shall certify a copy of the case record to the superintendent of the Agency where the losing party has such funds on deposit. Said superintendent shall send this record and a statement as to the amount of funds available in the individual's account, to the Secretary of the Interior. The Secretary may direct the disbursing agent to pay over from the delinquent party's account to the injured party the amount of the judgment or such amount as may be specified by the Secretary of the Interior not to exceed the amount of the judgment.

4-18.01 Where Applicable

Provisions for the payment of judgments from Individual Indian Monies shall not be applicable in any case where the judgment creditor is neither the Tribe nor an Indian as defined in this Code.

4-19.01 Effect on Estate

A judgment by this Court shall be considered a lawful debt for purposes of probate proceedings or other actions regarding decedent's estate.

4-20.01 Judgment Lien

An unsatisfied judgment shall be a lien against funds owing the judgment debtor by the Tribe upon the delivery of a copy of the judgment to the Chairman or Secretary of the Tribe. When such copy is received, the Chairman or Secretary of the Tribe shall arrange for the pay over of the amount specified in the judgment as the funds become available to the credit of the judgment debtor. If such funds be wages, seventy-five percent (75%) of the disposable earnings of the defendant shall be exempt, such percentage to be computed for each interval said wages are to be paid the defendant.

4-21.01 Enforcement of Civil Judgment

Civil judgments and writs of the Coeur d'Alene Tribal Court or foreign civil judgments and writs recognized with the full faith of the Tribal Court are enforced by special marshals appointed by the Tribal Council or by law enforcement officers. The law enforcement officers shall execute such writs in the event that special marshals are unable or unavailable to do so. Jurisdiction to enforce civil judgments and writs is inherent with the Coeur d'Alene Tribe and stems from the Tribe's adjudicatory powers.

4-21.02 Writs of Execution

The judgment creditor may seek a writ of execution in Tribal Court upon specific non-trust fee lands or personal property located on non-trust fee lands owned by the judgment debtor to be sold in order to satisfy all or part of a judgment. Such writ shall specify the property to be sold in order to satisfy all or part of the judgment. The writ shall specify the property to be levied and the amount owing to the judgment creditor.

4-21.03 Sale of Property through Writ of Execution

A notice of sale must be posted at five (5) public places within the Reservation for ten (10) days prior to the sale by the special marshal, or, in the alternative, by the law enforcement officers. The notice must contain the amount of the judgment, the name of the judgment debtor, the items to be sold, when the sale is to take place, where the sale is to be held, and what time the sale is to begin. The notice must also contain the name of the action leading to the judgment. The property will be sold to highest bidder but not for less than the appraised value. The proceeds of the sale shall first go to satisfy the cost of the sale. After satisfying the costs of the sale, and any unpaid court costs, the remainder shall satisfy any portion of the judgment still owing. Any amount remaining after the above has been paid shall be paid over to the defendant.

4-21.04 Special Marshal

(A) Appointment: The Tribal Council may appoint persons to act as special marshal for the Coeur d'Alene Tribe. Such persons may act in concert with, or independent from, the Tribe's law enforcement officers. The special marshal is appointed through resolution by the Tribal Council.

(B) Powers and Duties: The special marshal shall have the power to:

(1) serve notice and/or Summons upon persons located within the exterior boundary of the Reservation;

(2) execute a writ based upon judgments issued or recognized by the

4-25.04 Review of Jurisdictional Basis for State or Tribal Judgment

At the hearing upon the petition, the Tribal Court shall examine the underlying facts of the state or tribal judicial order sought to be enforced in order to determine: (a) that the state or tribal court had proper subject matter jurisdiction over the dispute to enable it to render a valid judgment; (b) that the state or tribal court had proper personal jurisdiction over the judgment debtor to enable it to render a valid judgment; and (c) that the judgment debtor received fair notice and opportunity to be heard prior to entry of the state or tribal judgment. Full faith and credit shall be given to a state or foreign tribal court judgment only if the Coeur d'Alene Tribal Court determines that all the requirements of subsection (a), (b), and (c) were met.

4-25.05 Review of Consumer Transactions

In considering a petition for full faith and credit by a judgment creditor in connection with a consumer transaction, the Tribal Court shall review the underlying facts and circumstances of the consumer transaction in order to determine the existence of any unconscionable act or practice by the supplier. In determining whether an act or practice by the supplier is unconscionable, the Tribal Court shall consider the following circumstances which the supplier knew or had reason to know:

(A) That the supplier took advantage of the inability of the consumer reasonably to protect his or her interests because of physical infirmity, ignorance, illiteracy, inability to understand the language of an agreement, or similar factors.

(B) That when the consumer transaction was entered into, the price may have exceeded the price at which similar property or services were readily obtainable in similar transactions by like consumers.

(C) That when the consumer transaction was entered into there was no reasonable probability of payment in full of the obligation by the consumer.

(D) That the supplier made a misleading statement of opinion on which the consumer was likely to rely to his/her detriment.

If the Tribal Court determines that an act or practice of a consumer transaction was unconscionable, the Court may refuse to enforce the state or other tribal court judgment or may enforce only such part of the judgment that was not affected by the unconscionable act or practice.

4-25.06 Entry of Judgment

Once the Coeur d'Alene Tribal Court has satisfied itself that the state or tribal judicial

included in any judgment including filing fees, service fees, expense of witnesses, expert witness fees, compensation of jurors and other incidental expenses.

4-16.01 Appeal

Any person who is a plaintiff or defendant in a civil proceeding and is aggrieved by a final order of the Court may appeal as provided in Coeur d'Alene Tribe Rules of Civil Procedure (CTRCP) 71.

4-17.01 Payment of Judgment from Individual Indian's Monies

Whenever the Tribal Court has ordered payment of damages to an injured party and payment is not made within the time specified therein and when the party against whom judgment is rendered has sufficient funds to his/her credit in an individual Indian money account with the BIA, to satisfy all or part of the judgment against him/her, the Clerk of the Court shall certify a copy of the case record to the superintendent of the Agency where the losing party has such funds on deposit. Said superintendent shall send this record and a statement as to the amount of funds available in the individual's account, to the Secretary of the Interior. The Secretary may direct the disbursing agent to pay over from the delinquent party's account to the injured party the amount of the judgment or such amount as may be specified by the Secretary of the Interior not to exceed the amount of the judgment.

4-18.01 Where Applicable

Provisions for the payment of judgments from Individual Indian Monies shall not be applicable in any case where the judgment creditor is neither the Tribe nor an Indian as defined in this Code.

4-19.01 Effect on Estate

A judgment by this Court shall be considered a lawful debt for purposes of probate proceedings or other actions regarding decedent's estate.

4-20.01 Judgment Lien

An unsatisfied judgment shall be a lien against funds owing the judgment debtor by the Tribe upon the delivery of a copy of the judgment to the Chairman or Secretary of the Tribe. When such copy is received, the Chairman or Secretary of the Tribe shall arrange for the pay over of the amount specified in the judgment as the funds become available to the credit of the judgment debtor. If such funds be wages, seventy-five percent (75%) of the disposable earnings of the defendant shall be exempt, such percentage to be computed for each interval said wages are to be paid the defendant.