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Treaties and Statutes

899 F.3d 954

UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT

No. 14-36055
16-35607

FILED: Aug. 13, 2018

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

KING MOUNTAIN TOBACCO COMPANY, INC.,
Defendant-Appellant.

D.C. No. 2:12-cv-03089-RMP, Eastern District of Washington, Spokane

Argued and Submitted: March 15, 2018
San Francisco, California

Decided: August 13, 2018

Counsel: Randolph H. Barnhouse (argued) and Justin J. Solimon, Johnson Barnhouse & Keegan LLP, Los Ranchos de Alburquerque, New Mexico; Timothy J. Carlson, Carlson Boyd PLLC, Yakima, Washington; for Defendant-Appellant.

Patrick J. Urda (argued), Teresa E. McLaughlin, and

Gilbert S. Rothenberg, Attorneys; David A. Hubbert, Acting Assistant Attorney General; Tax Division, United States Department of Justice, Washington, D.C.; for Plaintiff-Appellee.

**Before**: Ferdinand F. Fernandez, M. Margaret McKeown, and Julio M. Fuentes,* Circuit Judges.

## OPINION

[*956] McKEOWN, Circuit Judge:

In this case of first impression, we consider whether King Mountain Tobacco Company, Inc. ("King Mountain"), a tribal manufacturer of tobacco products located on land held in trust by the United States, is subject to the federal excise tax on manufactured tobacco products. The district court awarded the United States almost $58 million for unpaid federal excise taxes, associated penalties, and interest. Because we conclude that neither the General Allotment Act of 1887, 24 Stat. 388 (codified as amended in scattered sections of 25 U.S.C.), nor the Treaty with the Yakamas of 1855, 12 Stat. 951, entitles King Mountain to an exemption from the federal excise tax, we affirm the judgment of the district court.

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* The Honorable Julio M. Fuentes, United States Circuit Judge for the U.S. Court of Appeals for the Third Circuit, sitting by designation.

## BACKGROUND

In 2006 the late Delbert Wheeler, Sr., a lifelong-enrolled member of the Yakama Nation in Washington State, purchased "80 acres of trust property . . . from the Yakama Nation Land Enterprise, the agency of the Yakama Nation which is charged with overseeing the maintenance of real property held in trust by the United States for the benefit of the Yakama Nation and its members." Wheeler then opened King Mountain Tobacco Company, which manufactures cigarettes and roll-your-own tobacco in a plant located on this trust land. After making significant investments to improve and develop the trust property, Wheeler transferred his interest in the property to King Mountain so that King Mountain could commence farming, agricultural, and manufacturing operations on Wheeler's land.[1]

King Mountain received a federal tobacco manufacturer's permit in February 2007. Today, King Mountain manufactures all of its tobacco products, and grows some of its own tobacco, on trust lands within the boundaries of the Yakama Nation. Some of those trust lands—including those [*957] on which King Mountain is located—are allotted to Wheeler, while others are allotted to other Yakama members.

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[1] Mr. Wheeler died in June 2016. According to King Mountain, "[h]is estate is in probate, including his allotted lands, which must pass to enrolled members of the Yakama Nation under federal probate procedures, and all shares of King Mountain, which also will pass to his Yakama[-]enrolled family members."

King Mountain initially obtained all of the tobacco for its products from an entity in North Carolina. But according to King Mountain, "[t]obacco has historically grown on the Yakama Nation Reservation." Over time, King Mountain increased the proportion of tobacco grown on trust land and incorporated into its manufactured products. In 2010 the "approximately 3.1% of the tobacco used [in 2009 had] risen to 9.5%. In 2011, it rose again, to 37.9%." *King Mountain Tobacco Co., Inc. v. McKenna*, 768 F.3d 989, 991 (9th Cir. 2014). By the end of 2013, King Mountain's products were composed "of at least 55 percent tobacco grown exclusively on allotted land held in trust by the United States for the beneficial use of . . . Wheeler." The bulk of King Mountain's products are now manufactured by blending "[t]rust-land grown tobacco . . . with non-trust-grown tobacco." King Mountain also manufactures a small amount of "'traditional use tobacco' that is intended for Indian . . . ceremonial use" and consists entirely of trust land-grown tobacco.

The federal government imposes excise taxes on manufactured tobacco products, including cigars, cigarettes, and roll-your-own tobacco. *See* I.R.C. § 5701.[2] The current tax rate for cigarettes, for example, is approximately $1 per pack, or $10 per carton. *Id.* § 5701(b). The current tax rate for roll-your-own tobacco is approximately $24.78 per pound. *Id.* § 5701(g). Administered by the Treasury

[2] An excise tax is "[a] tax imposed on the manufacture, sale, or use of goods (such as a cigarette tax), or on an occupation or activity (such as a license tax or an attorney occupation fee)." *Excise Tax*, *Black's Law Dictionary* (West, 10th ed. 2014).

Department's Alcohol and Tobacco Tax and Trade Bureau ("TTB"), these excise taxes are assessed on the privilege of manufacturing tobacco products and determined at the time the tobacco products are removed from a factory or bonded warehouse. *See id.* §§ 5703(b), 5702(j).

Although King Mountain initially paid federal excise taxes on its tobacco products, it began to fall behind in 2009. The Treasury gave King Mountain statutory notice, under I.R.C. § 5703(d), of the delinquent taxes and afforded the company an opportunity to show cause why the taxes should not be assessed. King Mountain did not challenge the statutory notice. Accordingly, the Treasury delegate timely made assessments against King Mountain for unpaid excise taxes, failure-to-pay penalties, failure-to-deposit penalties, and interest for periods in October, November, and December 2009. In February 2010, the Treasury issued King Mountain a Notice and Demand for Payment pursuant to I.R.C. § 6303. King Mountain paid the assessed taxes in installments over a five-month period in 2010, but it failed to pay the associated penalties and interest. Eventually, King Mountain ceased paying federal excise taxes altogether.

This case has shuttled between the district court and our court on both procedural and substantive grounds. Back in 2012, the United States brought suit against King Mountain to collect the delinquent taxes. The suit was a companion to an earlier-filed action brought by King Mountain, Wheeler, and the Yakama Nation for declaratory and injunctive relief against the imposition of the federal tobacco excise

tax on King Mountain's products. *See King Mountain Tobacco Co., Inc. v. Alcohol & Tobacco Tax and Trade Bureau*, 996 F. Supp. 2d 1061 (E.D. Wash. 2014) (the "Yakama case"), *vacated and remanded sub nom. Confederated Tribes and Bands of the Yakama Indian Nation v. Alcohol & Tobacco Tax and Trade Bureau*, 843 F.3d 810 [*958] (9th Cir. 2016). The district court granted the Government's motion to dismiss as to King Mountain and Wheeler on the basis that the claims were barred by the Anti-Injunction Act, 26 U.S.C. § 7421(a). The court concluded, however, that the Yakama's claims fell within the exception to the Anti-Injunction Act set forth in *South Carolina v. Regan*, 465 U.S. 367, 104 S. Ct. 1107, 79 L. Ed. 2d 372 (1984). *See King Mountain Tobacco Co., Inc. v. Alcohol & Tobacco Tax and Trade Bureau*, No. CV-11-3038-RMP, 2012 U.S. Dist. LEXIS 199861, 2012 WL 12951864, at *4 (E.D. Wash. Sept. 24, 2012).

The district court then granted summary judgment in favor of the United States on the merits, reasoning that neither the General Allotment Act nor the Treaty with the Yakamas precluded the imposition of federal excise taxes. 996 F. Supp. 2d at 1067-70.

On appeal, we held that the Yakama Nation's suit was barred by the Anti-Injunction Act. 843 F.3d at 815-16. We thus vacated the judgment and remanded with instructions to dismiss the suit for lack of subject-matter jurisdiction. *Id.*

Back in the district court, the court granted summary judgment to the Government on King Mountain's liability for payment of the excise tax. Observing that the merits issues were "essentially identical" to those presented in the earlier *Yakama* case, the court expressly incorporated its conclusions of law from the summary judgment order. The district court reserved ruling on the amount of liabilities owed by King Mountain, however, in order to enable King Mountain to obtain additional discovery.

After further discovery, the district court granted summary judgment in favor of the government on the amount of King Mountain's liabilities—$57,914,811.27. However, when the district court entered final judgment in favor of the government, it accidentally omitted this amount from its order. The government quickly moved to alter or amend the judgment pursuant to Federal Rule of Civil Procedure 59(e) to reflect that King Mountain owed "to the United States federal tobacco excise tax liabilities totaling $57,914,811.27 as of June 11, 2013, plus interest and other statutory additions accruing after that date until paid in full."

Before the district court could issue an amended judgment, however, King Mountain filed a timely notice of appeal. Citing Federal Rule of Civil Procedure 60(a), the district court initially ruled that it lacked jurisdiction to amend the judgment, but that it would do so if we remanded. Three months later, the district court reconsidered its ruling *sua sponte*, concluding that our precedent permitted it to correct the omission of the amount of judgment as a

mere "clerical error." Accordingly, the district court granted the government's motion and amended the judgment. Again, King Mountain filed a timely notice of appeal, which is now before us.

## ANALYSIS

### I. APPELLATE JURISDICTION

Before considering the merits, we must resolve a preliminary question of appellate jurisdiction. *Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 430-31, 127 S. Ct. 1184, 167 L. Ed. 2d 15 (2007) (holding that a court "generally may not rule on the merits of a case without first determining that it has jurisdiction over the category of claim in the suit"). Under 28 U.S.C. § 1291, we have jurisdiction of appeals from all "final decisions of the district courts," except of course where a direct appeal lies to the Supreme Court. As a result, "an appeal ordinarily will not lie until after final judgment has been entered in a case." *Cunningham v. Hamilton County, Ohio*, 527 U.S. 198, 203, 119 S. Ct. 1915, 144 L. Ed. 2d [*959] 184 (1999). According to King Mountain, the district court's amended judgment was not a "final judgment," and so we lack jurisdiction over the appeal of that order. We disagree.

The Supreme Court has cautioned that "no statute or rule . . . specifies the essential elements of a final judgment," *United States v. F. & M. Schaefer Brewing Co.*, 356 U.S. 227, 233, 78 S. Ct. 674, 2 L. Ed. 2d 721 (1958), and "[n]o form of words and no peculiar formal act is necessary to evince" a final

judgment, *United States v. Hark*, 320 U.S. 531, 534, 64 S. Ct. 359, 88 L. Ed. 290 (1944). But the Court has held that "a final judgment for money must, at least[] determine, or specify the means for determining, the amount" of the judgment. 356 U.S. at 233. At the very least, therefore, a money judgment lacks finality when it fails to "specify either the amount of money due the plaintiff or a formula by which the amount of money could be computed in mechanical fashion." *Buchanan v. United States*, 82 F.3d 706, 707 (7th Cir. 1996) (per curiam) (citing *F. & M. Schaefer Brewing Co.*, 356 U.S. at 227).

In this case, the amended judgment states that the United States is entitled to "57,914,811.27 as of June 11, 2013, plus interest and other statutory additions accruing after that date until paid in full." King Mountain does not dispute that the judgment adequately "specif[ies] the amount of money due" as of June 11, 2013. And King Mountain concedes that the Internal Revenue Code provides "highly mechanical" formulas for computing the statutory additions accruing thereafter. King Mountain objects, however, to the amended judgment's failure to specify the portions of the $57,914,811.27 award that are attributable to unpaid taxes, to unpaid penalties, and to unpaid interest, because King Mountain claims that it cannot determine how much it owes in statutory additions without those figures.

Assuming without deciding that the determination of the statutory additions depends on these figures, we conclude that the amended judgment sufficiently provides them. In the district

court, the Government submitted the "Transaction History Report," "Corrected Final Notice & Demand of Taxes Due / Notice of Intent to Levy," and "Second Corrected Final Notice & Demand of Taxes Due / Notice of Intent to Levy" that it had issued to King Mountain, collectively referred to as the "Blue Ribbon Transcript." For each taxable period, the TTB's Blue Ribbon Transcript detailed the additional penalties and interest for failure to pay the amounts due. The Government also introduced three binders containing "detailed copies of the computations done in connection with" the Blue Ribbon Transcript. In granting the Government's renewed motion for summary judgment, the district court held that "the Blue Ribbon Transcript constitutes presumptive proof of a valid assessment."

The district court expressly entered the amended judgment "pursuant to" its order granting the United States' renewed motion for summary judgment, which ruled that the Government's Blue Ribbon Transcript "establishes [that] the . . . sum" of King Mountain's liability, as of June 11, 2013, was $57,914,811.27. As explained above, the Blue Ribbon Transcript did not pull that sum from thin air. Rather, it specified the exact amounts of King Mountain's unpaid taxes, unpaid penalties, and unpaid interest for each taxable period, and then added all of those amounts together.[3] In other words, the amended [*960] judgment reduced the amounts of unpaid taxes, unpaid penalties, and unpaid interest in the Blue Ribbon Transcript to judgment.

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[3] King Mountain does not dispute the accuracy of the amounts listed in the Blue Ribbon Transcript.

Hence, a "remand to effectuate that intent is a matter of 'mere form.'" *See Huey v. Teledyne, Inc.*, 608 F.2d 1234, 1237 (9th Cir. 1979) (quoting *Crosby v. Pac. S.S. Lines, Ltd.*, 133 F.2d 470, 474 (9th Cir. 1943)). After all, King Mountain can easily calculate for itself how much of the $57,914,811.27 award is attributable to taxes, to penalties, and to interest by consulting the Blue Ribbon Transcript and compute the statutory additions accordingly. Finality does not require the court to do all of the math.

Because the amended judgment sufficiently specified both "the amount of money due the plaintiff" as of June 13, 2013 and "a formula by which that amount of money" owed in statutory additions accruing thereafter "could be computed in mechanical fashion," *Buchanan*, 82 F.3d at 707, the amended judgment did not lack finality and we have jurisdiction of this appeal. 28 U.S.C. § 1291.

## II. IMPOSITION OF FEDERAL EXCISE TAX FOR TOBACCO PRODUCTS

The merits of King Mountain's tax appeal require us to decide whether a tobacco manufacturer located on trust land is subject to a federal excise tax applicable to all tobacco products "manufactured in . . . the United States." I.R.C. § 5702. The presumptive answer to that question is yes. After all, the federal government enjoys plenary and exclusive power over Indian tribes. *Bryan v. Itasca County*, 426 U.S. 373, 376 n.2, 96 S. Ct. 2102, 48 L. Ed. 2d 710 (1976). And "[t]he right to tribal self-government is ultimately dependent on and subject to the broad

power of Congress." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143, 100 S. Ct. 2578, 65 L. Ed. 2d 665 (1980). For those reasons, Indians—like all citizens—are subject to federal taxation unless expressly exempted by a treaty or congressional statute. *Hoptowit v. Comm'r*, 709 F.2d 564, 565 (9th Cir. 1983).[4]

King Mountain claims an exemption based on both a congressional statute—the General Allotment Act of 1887—and the Treaty with the Yakamas of 1855.

### A. GENERAL ALLOTMENT ACT

Congress passed the General Allotment Act of 1887, 24 Stat. 388 (codified as amended in scattered sections of 25 U.S.C.), in the midst of a major shift in national policy toward Indian tribes. By the late nineteenth century, the prevailing policy of segregating lands for the exclusive use and control of tribes had given way to a new policy of allotting those lands to tribe members individually. *See Affiliated Ute Citizens v. United States*, 406 U.S. 128, 142, 92 S. Ct. 1456, 31 L. Ed. 2d 741 (1972) ("Allotment is a term of art in Indian law . . . . It means a selection of specific land awarded to an

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[4] A state's authority to tax tribal members, on the other hand, is limited depending on the subject and location of the tax. *See McClanahan v. State Tax Comm'n,* 411 U.S. 164, 170-71, 93 S. Ct. 1257, 36 L. Ed. 2d 129 (1973); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49, 93 S. Ct. 1267, 36 L. Ed. 2d 114 (1973). "The different standards stem from the state and federal government's distinct relationships with Indian tribes." *Ramsey v. United States*, 302 F.3d 1074, 1078 (9th Cir. 2002).

individual allottee from a common holding.") (citations omitted). The objectives of allotment were simple: to extinguish tribal sovereignty, erase reservation boundaries, and force the assimilation of Indians into society at large. *See, e.g., In re Heff*, 197 U.S. 488, 499, 25 S. Ct. 506, 49 L. Ed. 848 (1905); *Blackfeet Tribe of Indians v. Montana*, 729 F.2d 1192, 1195 (9th Cir. 1984) (en banc) (observing that the "primary purpose" of allotment was [*961] the "speedy assimilation of the Indians"), *aff'd,* 471 U.S. 759, 105 S. Ct. 2399, 85 L. Ed. 2d 753 (1985).

Congress was selective at first, allotting lands under differing approaches on a tribe-by-tribe basis. *See Cohen's Handbook of Federal Indian Law* § 3.04 (Nell Jessup Newton ed., 2012) (hereinafter "Cohen's Handbook"); Paul W. Gates, *Indian Allotments Preceding the Dawes Act, in The Frontier Challenge: Responses to the Trans-Mississippi West* 141 (J. Clark ed. 1971). But the results of this initial policy proved unsatisfactory. Because allotted land could be sold immediately after it was received, many early allottees quickly lost their parcels through transactions that were unwise or even fraudulent. *See Cohen's Handbook* § 1.04. And even if sales were for fair value, allottees divested of their land were deprived of opportunities to acquire self-sustaining economic skills as landowners, which thwarted the congressional goal of assimilation.

Congress tried to address some of these problems in the General Allotment Act, which empowered the President to allot most tribal lands nationwide without the consent of the Indian nations involved. Section 5 of the Act, 25 U.S.C. § 348, for example,

prohibited alienation or encumbrance of allotments by providing that each parcel would be held by the United States in trust for a twenty-five year period. Upon expiration of the trust period, which the President could extend at his discretion, the United States was to convey the land by patent "discharged of said trust and free of all charge or incumbrance whatsoever." 25 U.S.C. § 348. Only then would a fee patent issue to the allottee. *See United States v. Mitchell,* 445 U.S. 535, 543-44, 100 S. Ct. 1349, 63 L. Ed. 2d 607 (1980). Congress added Section 6, 25 U.S.C. § 349, as a later amendment to authorize the Secretary of the Interior to issue a patent in fee simple upon satisfaction that any Indian allottee is "competent and capable of managing his or her affairs." At that point, all "restrictions as to sale, incumbrance, or taxation of [the allotment] land" were to "be removed." *Id.*[5]

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[5] By 1934, however, Congress had abandoned the Act's emphasis on individual ownership and passed the Indian Reorganization Act, ch. 576, 48 Stat. 984 (1934) (codified at 25 U.S.C. §§ 461-479) (the "IRA"). "One of the purposes of the [IRA] was to put an end to the allotment system[,] which had resulted in a serious diminution of [the] Indian land base and which, through the process of intestate succession, had resulted in many Indians holding uneconomic fractional interests of the original allotments." *Stevens v. Comm'r*, 452 F.2d 741, 748 (9th Cir. 1971). Accordingly, the IRA prohibited further allotment of Indian land, extended indefinitely existing periods of trust and restrictions on alienation of Indian lands, prohibited transfers of restricted lands except to Indian tribes, and limited testamentary disposition of such lands. The IRA also authorized the Secretary of the Interior to acquire land in trust for Indians, restore remaining surplus lands to tribes, promulgate conservation regulations, and declare lands as new reservations or extensions of existing ones. *Cohen's Handbook* § 1.05.

The first (and only) Supreme Court decision recognizing a tax exemption under the General Allotment Act is *Squire v. Capoeman*, 351 U.S. 1, 76 S. Ct. 611, 100 L. Ed. 883, 1956-1 C.B. 605 (1956). In *Capoeman*, the Court held that the General Allotment Act exempted a "noncompetent Indian"[6] from federal capital-gains taxes on the proceeds of a sale of timber from his allotted land. The taxpayer claimed that the tax constituted a "charge or incumbrance" on his land in violation of Section 5. *See* 25 U.S.C. § 348. The Supreme Court conceded that "the general words [of] 'charge or incumbrance' [*962] might well be sufficient to include taxation," 351 U.S. at 7, and observed that Congress "gave additional force to" that position when it passed section 6, which provides for the "*removal*" of all restrictions "as to sale, incumbrance, *or taxation* of" allotment land upon the Secretary's issue of a fee patent. *Id.* (quoting 25 U.S.C. § 349) (emphases added). "The literal language of [section 6]," the Court noted, "evinces a congressional intent to subject an Indian allotment to all taxes only after a patent in fee is issued to the allottee. This, in turn, implies that, until such time as the patent is issued, the allotment shall be free from all taxes, both those in being and those which might in the future be enacted." *Id.* at 7-8.

But the Court concluded that the Act's tax exemption for trust land must also "extend[] to the *income* derived directly therefrom." *Id.* at 9 (quoting

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[6] The term "noncompetent Indian" refers to one who holds allotted land under a trust patent and who may not alienate or encumber that land without the consent of the United States. *See Hoptowit,* 709 F.2d at 565 n.1.

F. Cohen, *Handbook of Federal Indian Law* 265) (emphasis added) (footnote omitted). Noting that "[t]he purpose of the allotment system was to protect the Indians' interest and 'to prepare the Indians to take their place as independent, qualified members of the modern body politic,'" *id.* (quoting *Bd. of Comm'rs v. Seber*, 318 U.S. 705, 715, 63 S. Ct. 920, 87 L. Ed. 1094 (1943)), the Court deemed it "necessary to preserve the trust and income derived directly therefrom" from taxation. *Id.* But it affirmed that it was unnecessary "to exempt reinvestment income from tax burdens." *Id.* (citing *Superintendent of Five Civilized Tribes v. Comm'r*, 295 U.S. 418, 55 S. Ct. 820, 79 L. Ed. 1517, 1935-1 C.B. 158 (1935)).[7]

Relying on *Capoeman*'s language and the General Allotment Act, several circuits—including ours—have recognized federal tax exemptions for allotment land or the "income derived directly" from such land. *See, e.g., Kirschling v. United States*, 746 F.2d 512, 513 (9th Cir. 1984) (holding that an allottee "Indian's gift to a non-Indian of the proceeds from [allotted] timber lands" is exempt from the federal gift tax); *Stevens,* 452 F.2d at 746 (holding that "income derived from farming and ranching operations" on an allottee's lands is exempt from the federal income tax); *United States v. Daney*, 370 F.2d 791, 795 (10th Cir. 1966) (holding that bonuses from oil and gas leases of an Indian's allotted land are exempt from the federal income tax).

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[7] That was particularly true considering that Capoeman's allotment land "was not adaptable to agricultural purposes, and was of little value after the timber was cut." *Id.* at 4; *see also id.* at 10.

None of these cases, however, supports King Mountain's exemption from a federal tax on *manufactured tobacco products* at issue in this appeal. First, that tax is an excise tax, not a tax on land or income. *See Patton v. Brady*, 184 U.S. 608, 615, 22 S. Ct. 493, 46 L. Ed. 713 (1902) (holding that the federal tax on tobacco products, which was the precursor to I.R.C. § 5701 *et seq.*, is an excise tax). King Mountain concedes as much. But no court has held that the General Allotment Act's tax exemption extends to a federal excise tax of any kind. Indeed, our decisions explicitly recognize the limited "scope of [*Capoeman's*] exemption" as extending only to "Indian lands" and "the *income derived directly therefrom*." *Dillon v. United States*, 792 F.2d 849, 854 (9th Cir. 1986).

That distinction makes good sense. Unlike an income or property tax, an excise tax is "[a] tax imposed on the manufacture, sale, or use of goods (such as a cigarette tax), or on an occupation or activity (such as a license tax or an attorney occupation fee)." *Black's Law Dictionary* (West, 10th ed. 2014); *see also Flint v. Stone Tracy Co.,* 220 U.S. 107, 151-52, [*963] 31 S. Ct. 342, 55 L. Ed. 389, T.D. 1685 (1911) ("[T]he requirement to pay such taxes involves the exercise of privileges . . . ."), *overruled on other grounds as stated in Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 105 S. Ct. 1005, 83 L. Ed. 2d 1016 (1985); *United States v. 4,432 Mastercases of Cigarettes*, 448 F.3d 1168, 1185 (9th Cir. 2006) ("An excise tax . . . is one imposed on the performance of an act . . . or the enjoyment of a privilege.") (second alteration in original) (citation

and internal quotation marks omitted).[8] In other words, the "obligation to pay an excise tax is usually based upon the *voluntary action* of the person taxed either for enjoying the privilege or engaging in the occupation which is the subject of the excise, and the element of *absolute and unavoidable demand* as in the case of property tax," or an income tax, "is lacking." *Munn v. Bowers*, 47 F.2d 204, 205 (2d Cir. 1931) (emphases added). And, quite unlike a property or income tax, the cost of an excise tax is easily—and in the case of tobacco products, virtually always—passed along to consumers. The unique characteristics of excise taxes implicate few, if any, of the purposes of a tax on land or on income derived directly from the land.

Since *Capoeman*, the Supreme Court has hinted that federal excise taxes are categorically distinct from the sort of taxes from which trust lands are exempt under the General Allotment Act. In *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 112 S. Ct. 683, 116 L. Ed. 2d 687 (1992), for example, the Court addressed whether a state could validly impose an excise tax on the sale of fee-patented lands—i.e., allotments no longer held in trust by the United States. *Id.* at 253. The Court reiterated its longstanding, "*per se* rule" that "categorical[ly] prohibit[s] . . . state taxation" of Indians absent

[8] The federal excise tax in this case, for example, is assessed on King Mountain's tobacco products upon removal from King Mountain's warehouse, regardless of whether those products are ultimately sold for a profit. *See* I.R.C. § 5703(b)(1) (imposing excise tax "at the time of removal of the tobacco products and cigarette papers and tubes").

congressional authorization. *Id.* at 267 (quoting *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215 n.7, 107 S. Ct. 1083, 94 L. Ed. 2d 244 (1987)).[9] Applying that rule, the Court held that section 6 of the General Allotment Act does not authorize the state to impose an excise tax on sales of fee-patented land.

The Court acknowledged *Capoeman's* dictum that "'the literal language of [section 6] evinces a congressional intent to subject an Indian allotment to all taxes' after it has been patented in fee." *Id.* at 268 (quoting 351 U.S. at 7-8); *see also* 25 U.S.C. § 349 (providing that upon issue of the fee patent, "all restrictions as to sale, incumbrance, or taxation of said land shall be removed"). But the Court explained that the phrase "'[a]ll taxes,' *in the sense of federal as well as local*, in no way expands the text [of the statute] beyond 'taxation *of . . . land*.'" 502 U.S. at 268. (first emphasis added). The Court observed that the excise tax on land sales was not a tax "of . . . land," but rather a tax on "the Indian's *activity* of selling the land." *Id.* at 269 (emphasis added). Thus, it did not qualify as the sort of taxation that section 6 of the Act authorizes states to impose on fee-patented land. *Id.* ("The short of the matter is that the General Allotment Act explicitly authorizes only 'taxation of . . . land,' not [*964] 'taxation with respect to land,' [or] 'taxation of transactions involving land.'").

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[9] The federal government—unlike the states—is categorically *permitted* to tax Indians unless expressly *prohibited* from doing so by a statute or treaty. *See Cohen's Handbook* § 8.02.

Importantly, the Court in *Capoeman* was only able to imply a tax exemption into the General Allotment Act by reading sections 5 and 6 together. *See generally* 351 U.S. at 7 (reading section 6's termination of "all restrictions as to sale, incumbrance, or taxation" into section 5's prohibition on any "charge or incumbrance"). If excise taxes are not taxes "on . . . land" within the meaning of section 6, *see County of Yakima*, 502 U.S. at 268, it follows that they are not taxes "on land" encompassed by "the general words 'charge or incumbrance'" in section 5. *See Capoeman*, 351 U.S. at 7; 25 U.S.C. § 349 (providing that upon issuance of a fee patent, "all restrictions as to sale, incumbrance, or taxation of said land shall be r*emoved*" (emphasis added)). And since the federal government, unlike the states, is categorically permitted to tax Indians unless expressly *prohibited* from doing so by a statute or treaty, *see Cohen's Handbook* § 8.02, *County of Yakima* is consistent with federal excise taxation of products manufactured on trust land. *Cf. Confederated Tribes of Warm Springs Reservation of Or. v. Kurtz,* 691 F.2d 878, 881-82 (9th Cir. 1982) (holding tribe was liable for federal excise tax on manufacture of truck chassis under I.R.C. § 4061 (repealed 1984)).

Additionally, we note that King Mountain's interpretation of the General Allotment Act as extending to federal excise taxes raises serious constitutional questions. The Constitution grants Congress the "power to lay and collect taxes, duties, imposts and excises," but guarantees that "all duties, imposts and *excises shall be uniform* throughout the United States." U.S. Const. art. I, § 8. Legally

speaking, allotments are part of the United States; they are land held by the federal government in trust for the benefit of individual Indians or tribes. *See* 25 U.S.C. § 348. Exempting allotments as King Mountain urges would, therefore, result in a federal excise tax on tobacco products that is not "uniform throughout the United States." *Cf. Head Money Cases*, 112 U.S. 580, 594, 5 S. Ct. 247, 28 L. Ed. 798, Treas. Dec. 6714 (1884) (holding that a "tax is uniform when it operates with the same force and effect in every place where the subject of it is found"). Under the circumstances, the constitutional avoidance canon favors the Government's interpretation of the Act, which exempts only the trust land and income derived directly therefrom from federal taxation. That interpretation is not inconsistent with our case law and would in no way jeopardize the uniformity of congressional excises "throughout the United States." *See Clark v. Martinez*, 543 U.S. 371, 381, 125 S. Ct. 716, 160 L. Ed. 2d 734 (2005) ("[O]ne of the canon's chief justifications is that it allows courts to avoid the decision of constitutional questions. It is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts.").

Furthermore, even assuming that the General Allotment Act's exemption extends to federal excise taxes, King Mountain cannot prevail because the excise tax in this case does not "encumber" any allotment land. *See United States v. Anderson*, 625 F.2d 910, 914 (9th Cir. 1980) ("[W]e recognized that

Capoeman's point was that if an Indian's allotted land (or the income directly derived from it) was taxed, and the tax was not paid, the resulting tax lien on the land would make it impossible for him to receive the land free of 'incumbrance' at the end of the trust period.").

For one thing, King Mountain is not the allottee of any trust land. The land on [*965] which King Mountain operates was allotted to and held in trust for Delbert Wheeler (and now for his estate)—not King Mountain. The only trust land used to grow tobacco for King Mountain's products was allotted to Wheeler or to other Yakama members—not King Mountain. In the context of income taxation, we have held that "the General Allotment Act provides no tax exemption for the income a noncompetent Indian derives from other Indians' [trust land], or his tribe's trust land." *Id.*; *see also Fry v. United States*, 557 F.2d 646, 648 (9th Cir. 1977). That principle recognizes that because "taxation of the taxpayer's individual profit derived from his lease of tribal (or other allottees' trust) land cannot possibly represent a burden or encumbrance upon the tribe's (or other allottees') interest in such land." *Anderson,* 625 F.2d at 914. *Anderson's* reasoning applies with equal force to products that a corporation manufactures on, or with the fruits of, trust land allotted to others. Since no allottee of trust land is liable for the excise tax in this case, an exemption would be inconsistent with *Anderson's* logic.

Additionally, I.R.C. § 5763(d)'s threat of property forfeiture "to the United States" does not apply to allotment land. Most obviously, the United States is

already the titleholder of those lands. *See* 25 U.S.C. § 348 (providing that "the United States does and will hold the land . . . allotted" under the Act). King Mountain fails to explain how it is possible to "forfeit" land to the existing titleholder. And again, King Mountain is not the allottee of the trust land on which it operates. Thus, King Mountain itself has no land, or even a trust relationship with the United States, to "forfeit" as a penalty for nonpayment. Any liability incurred by King Mountain cannot result in a lien on or forfeiture of allotment land, because the allotment on which King Mountain operates is held *in trust* for Wheeler's estate. *See Trust*, *Black's Law Dictionary* (West, 10th ed. 2014) ("The right, enforceable solely in equity, to the beneficial enjoyment of property to which another person holds the legal title; a property interest held by one person . . . for the *benefit of a third party*. . . .") (emphasis added). The same is true of allotments held in trust for other Indians that are used to grow tobacco for King Mountain's products.

Notably, IRS regulations expressly prohibit forfeiture or attachment of tax liens to property held in trust "by the United States for an individual incompetent Indian." *See* 26 C.F.R. § 301.6321-1 (2017). That is because the regulations exclude allotment land from the definition of "property" in which rights are extinguished, and which may be subject to forfeiture or lien, under the Code. *See* 26 C.F.R. § 301.6321-1 (2017). Like the district court, we are aware of no authority "permitting the forfeiture of allotment land under any statute" or even "applying [the forfeiture provisions of the Code]

to . . . real property, as opposed to personal property, even real property belonging to non-Indians."

We thus hold that the General Allotment Act does not provide a tax exemption from the federal excise tax on manufactured tobacco products. King Mountain is liable for payment of the tax and associated penalties and interest.

### B. TREATY WITH THE YAKAMAS

In the 1850s, the United States entered into a series of treaties with Indian tribes to extinguish the last set of conflicting claims to lands lying west of the Cascade Mountains and north of the Columbia River in what is now the State of Washington. *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 661-62, 99 S. Ct. 3055, 61 L. Ed. 2d 823 (1979). The Treaty with the Yakamas, 12 Stat. 951 (1855) [*966] (the "Treaty") was among those treaties. Under the Treaty, the Yakama ceded certain lands to the United States, while other lands—and attendant rights therein—were reserved to the Yakama. 12 Stat. at 951-52. The latter lands now comprise the Yakama Indian Reservation in southern Washington State, where King Mountain operates.

Courts have recognized that the "Treaty embodies spiritual as well as legal meaning for the [Yakama]; it enumerates basic rights secured to the Yakama[] that encompass their entire way of life." *Yakama Indian Nation v. Flores*, 955 F. Supp. 1229, 1238 (E.D. Wash. 1997). Those "basic rights" appear

in each of the Treaty's eleven articles. This appeal implicates Articles II, III, and VI.

Article II of the Treaty establishes the physical boundaries of the Yakama reservation in Washington State and prohibits non-Indians from inhabiting reservation land unless an exception applies. After delineating the reservation's boundaries, Article II provides that "[a]ll . . . tract [land] shall be set apart . . .for the exclusive use and benefit of said confederated tribes and bands of Indians, as an Indian reservation . . . ." 12 Stat. at 952. Article II also affords compensation to the Yakama for their improvements to lands that were ceded to the United States. *Id.*

Article III addresses the Yakama's right to travel. Prior to the signing of the Treaty, the Yakama traveled extensively. "Travel was significant for many reasons, including trade, subsistence, and maintenance of religious and cultural practices." *Flores,* 955 F. Supp. at 1238. The most important of these reasons, however, was trade. The Yakama's "way of life depended on goods that were not available in the immediate area; therefore, they were required to travel to the Pacific Coast, the Columbia River, the Willamette Valley, California, and the plains of Wyoming and Montana to engage in trade." *Id.* Thus, Article III of the Treaty reserves to the Yakama the right to travel on public highways and the right to fish and hunt. In relevant part, Article III reads:

*And provided*, That, if necessary for the public

> convenience, roads may be run through the said reservation; and on the other hand, the right of way, with free access from the same to the nearest public highway, is secured to them; as also the right, in common with citizens of the United States, to travel upon all public highways.

12 Stat. at 952-53. During Treaty negotiations, then-Governor of the newly created Washington Territory, Isaac Stevens, made explicit the economic purpose of the Yakama's right to travel:

> You will be allowed to go on the roads to take your things to market, your horses and cattle. You will be allowed to go to the usual fishing places and fish in common with the whites, and to get roots and berries and to kill game on land not occupied by the whites. All that outside the reservation.

In the years after the Treaty was negotiated and ratified, the Yakama continued to travel off-reservation extensively for trading purposes. *Flores,* 955 F. Supp. at 1245.

Finally, Article VI of the Treaty provides for the division of reservation lands into individual lots, much like the General Allotment Act:

> The President may, from time to time, at his discretion, cause the whole or such portions of such reservation as he may think proper, to be surveyed into lots, and assign the same to

> such individuals or families of the said confederated tribes and bands of Indians as are willing to avail themselves of the privilege, and will locate on the same as a permanent home.

[*967] 12 Stat. at 954.[10] Article VI further guarantees that any such division will occur "on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas." *Id.* In turn, the Treaty with the Omaha provides that individual lots "shall not be aliened or leased for a longer term than two years; and shall be exempt from levy, sale, or forfeiture . . . ." 10 Stat. 1043, 1044-45 (1854).

King Mountain contends that each of these provisions bestows an exemption from the federal excise tax on manufactured tobacco products. "The applicability of a federal tax to Indians depends on whether express exemptive language exists within the text of the . . . treaty." *Ramsey,* 302 F.3d at 1078. The requisite "language need not explicitly state that Indians are exempt from the specific tax at issue; it must only provide evidence of the federal government's intent to exempt Indians *from taxation*." *Id.* (emphasis added).

As explained below, the Treaty with the Yakamas does not contain "express exemptive language" sufficient to relieve King Mountain of its liability for

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[10] In this sense, Article VI was a harbinger of the General Allotment Act.

the federal excise tax on manufactured tobacco products. For that reason, we also decline to apply the Indian canons of construction when analyzing the Treaty's provisions. *See Carpenter v. Shaw*, 280 U.S. 363, 367, 50 S. Ct. 121, 74 L. Ed. 478 (1930) ("Doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith.").

The canon of construction favoring Indians "when ambiguities are present in a statute or treaty does not come into play absent [express exemptive] language." *Ramsey,* 302 F.3d at 1079. King Mountain contends that *Capoeman* "held that when both Treaty and General Allotment Act claims are at issue, the court applies the Indian canons of treaty construction." But *Capoeman* did not so hold. To be sure, *Capoeman* did apply the Indian canon, but it exclusively analyzed a General Allotment Act issue. *Capoeman* did not, however, establish a different analytical framework for treaty interpretation where, as in this case, potential exemptions under both the General Allotment Act and a treaty are at issue. And in *Dillon*, we analyzed the Treaty and the General Allotment Act issues separately, refusing to employ the Indian canons to the Treaty claims absent "definitively expressed" exemptive language. 792 F.2d at 853. Like the district court, we therefore decline to apply the Indian canons of construction to King Mountain's treaty claims.

### 1. Article II

Article II of the Treaty provides that "[a]ll . . . tract land shall be set apart[] for the exclusive use and benefit of said confederated tribes and bands of Indians, as an Indian reservation . . . ." 12 Stat. at 952. King Mountain's argument that this language provides an exemption the federal excise tax is foreclosed by our decision in *Hoptowit*. *See* 709 F.2d at 566. In *Hoptowit*, we held that "any tax exemption created by" the "exclusive use and benefit" language in Article II of the Treaty tracks the exemption recognized in *Capoeman* for land or "income derived directly from the land." *Id.* As King Mountain acknowledges, the federal excise tax applies to neither of those.

King Mountain goes on to claim that *Hoptowit* is distinguishable because it "only addressed per diem payments received by a Tribal Council member that were not related to an allotment or manufacture of a product on an allotment." But [*968] *Hoptowit's* language is clear: the scope of "*any* exemption" under Article II is "*limited to* the income derived directly from the land." 709 F.2d at 566 (emphases added). To the extent Article II contains "express exemptive language," *Hoptowit* confirms that such language does not afford an exemption from federal excise taxes, including those on manufactured tobacco products.

### 2. Article III

Article III of the Treaty provides "[t]hat, if necessary for the public convenience, roads may be run through the [Yakama] reservation," but that "the right of way, with free access from the same to the nearest public highway, is secured to [the Yakama]; as also the right, in common with citizens of the United States, to travel upon all public highways." 12 Stat. at 952-53.

With respect to Article III, King Mountain's argument is foreclosed by *Ramsey*. In *Ramsey*, we held that the Treaty with the Yakamas does not exempt Yakama Indians from federal excise taxes on heavy-vehicle and diesel-fuel use. 302 F.3d at 1080. We reasoned that Article III's guarantees of "free access from the [reservation] to the nearest public highway" and of the "right, in common with citizens of the United States, to travel upon all public highways," 12 Stat. at 953, do not "provide express language from which we can discern an intent to exempt the Yakama from federal heavy vehicle and diesel fuel taxation." 302 F.3d at 1079-80.

The threshold inquiry is whether the language of the Treaty "provide[s] evidence of the federal government's intent to exempt Indians from *taxation*," *id.* at 1078 (emphasis added)—not whether the language of the Treaty evinces the Government's intent to exempt Indians from a *particular* tax. *Ramsey*, 302 F.3d at 1079 ("Only if express exemptive language is found in the text of the . . . treaty should the court determine if the

exemption applies to the tax at issue."). If the language of Article III did not provide sufficient evidence of the Government's intent to exempt the Yakama from federal taxation in *Ramsey*, it surely does not provide sufficient evidence of an intent to exempt the Yakama from federal taxation here. *See id.* at 1080 ("[W]e hold that [Article III] contains no 'express exemptive language.'"). That *Ramsey* involved "off-reservation activities" and a different federal tax, is immaterial.[11] The language in Article III simply does not implicate taxation by the federal government.

King Mountain's reliance on *United States v. Smiskin*, 487 F.3d 1260 (9th Cir. 2007), is misplaced. *Smiskin* involved a criminal prosecution of two Yakama Indians under the federal Contraband Cigarette Trafficking Act, which expressly incorporates state law requirements related to cigarette taxation. *Id.* at 1262. The Washington law at issue in *Smiskin*, for example, requires that "individuals give notice to state officials prior to transporting unstamped cigarettes within the State." *Id.* at 1262. The defendants in *Smiskin* had not done so. *Id.* Thus, "[t]he critical question" was "whether applying *the State of Washington's* pre-notification requirement to Yakama tribal members who possess and transport unstamped cigarettes violates the Yakama Treaty of 1855." *Id.* at 1264 (emphasis added). The "express exemptive language" required

[11] Contrary to King Mountain's assertions, this case does not "involve[] an excise tax on the right to travel." *See Flint*, 220 U.S. at 162 (noting that, with respect to an excise tax, "[i]t is [the] distinctive privilege which is the subject of taxation," not discrete acts associated with the privilege) (emphasis added).

to [*969] relieve Indians from *federal taxation* was not at issue.

### 3. Article VI

Article VI of the Treaty authorizes the President to "cause the whole or such portions of such reservation as he may think proper, to be surveyed into lots," and guarantees that such division would occur "on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas." 12 Stat. at 954. Article VI of the Treaty with the Omaha, 10 Stat. 1043, in turn, provides that such lots "shall not be aliened or leased for a longer term than two years; and *shall be exempt from levy, sale, or forfeiture* . . . ." *Id.* at 1044-45 (emphasis added).

With respect to Article VI, King Mountain's argument fails under *Dillon*. In *Dillon*, we concluded that "[t]he suggestion that an income tax exemption can be inferred from the alienation restrictions in Article 6 of the Treaty is not well founded." 792 F.2d at 853. The Supreme Court appears to take the same position. *See Superintendent of Five Civilized Tribes*, 295 U.S. at 421 ("Non-taxability and restriction upon alienation are distinct things."); *see also id.* (noting that an Indian's "wardship [status] with limited power over his property does not, without more, render him immune from the common burden"). Although this case involves an excise tax, rather than an income tax, the distinction that the Supreme Court, and we, have drawn between "non-taxability" and "restrictions upon alienation" applies with equal force. Simply put, we have concluded that

the restrictions on alienation in Article VI do not implicate federal taxation. *Dillon*, 792 F.2d at 853.

King Mountain argues that *Capoeman* "confirmed that the phrase in the text of the General Allotment Act prohibiting any 'charge or incumbrance' on allotted lands was sufficient to include taxation," and that the "same approach is required under the similar language contained in Article VI." But Article VI's language is not so similar. Indeed, the phrase "exempt from levy, sale, or forfeiture" that is incorporated by reference into Article VI of the Treaty is considerably more specific than the phrase all "charge and incumbrance" in the General Allotment Act. "Exempt from levy, sale or forfeiture" distinctly imposes a few enumerated "restrictions upon alienation," *Superintendent of Five Civilized Tribes,* 295 U.S. at 421, while "charge and incumbrance" does not.[12] For that reason, *Dillon*, and not *Capoeman*, controls, and King Mountain is not entitled to an exemption under Article VI.[13]

In sum, we hold that no provision of the Treaty with the Yakamas contains "express exemptive language" sufficient to exempt King Mountain from liability for the federal excise tax on manufactured tobacco products.

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[12] Moreover, as already noted, I.R.C. § 5763(d) does not apply to allotment land.

[13] In any event, *Capoeman* only recognizes that the language "charge or incumbrance" is sufficient for an exemption from federal taxation of the *land* or *income* derived directly therefrom, not from a federal excise tax. 351 U.S. at 7-8.

## CONCLUSION

We affirm our longstanding rule that Indians—like all citizens—are subject to federal taxation unless expressly exempted by a treaty or congressional statute. *Hoptowit*, 709 F.2d at 566. In this case, neither the General Allotment Act nor the Treaty with the Yakamas expressly exempts King Mountain from the federal excise tax on [*970] manufactured tobacco products. King Mountain is therefore liable for payment of the tax and associated penalties and interest.

**AFFIRMED**.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

NO: 2:12-cv-3089-RMP

FILED: January 24, 2014

UNITED STATES OF AMERICA,

Plaintiff/Counter Defendant,

v.

KING MOUNTAIN TOBACCO CO., INC.,

Defendant.

ORDER GRANTING UNITED STATES' MOTION FOR SUMMARY JUDGMENT

**BEFORE THE COURT** is a motion for summary judgment filed by Defendant the United States, ECF No. 48. The United States filed a similar motion for summary judgment in the companion case before this Court, *King Mountain Tobacco Co. v. Alcohol and Tobacco Tax and Trade Bureau*, Case No. 11-3038, at ECF No. 134. The Court heard oral argument on the motions in both cases. John Adams Moore, Jr., and Randolph Barnhouse represented the Plaintiff, the Confederated Tribes and Bands of the Yakama Indian Nation. W. Carl Hankla, Trial

Attorney for the Tax Division of the United States Department of Justice, represented the United States. The Court has reviewed the briefing and all supporting documents presented in this case and in Case No. 11-3038 and is fully informed.

The issues presented in the United States' motion for summary judgment in this case are essentially identical to the issues presented in the United States' motion for summary judgment in Case No. 11-3038. The Court has entered an order granting the United States' motion for summary judgment in Case No. 11-3038. Case No. 11-3038 at ECF No. 149. The Court incorporates by reference its Order Granting Summary Judgment for an explanation of its ruling on the United States' motion for summary judgment in the instant case.

The only relevant distinction between the two cases is that in the instant case, the United States initially had asserted that it was entitled to a judgment of $60,553,309.67, as of July 31, 2013, for delinquent federal tobacco excise taxes owed by King Mountain. ECF No. 48. However, the Court granted a stay of consideration on the issue of the specific amount of tax owed until after discovery has been completed. ECF No. 53. The United States has amended its prayer for relief for an order determining that King Mountain "is liable for the taxes at issue in an amount to be determined." ECF No. 56, at 2.

The Court finds that King Mountain is liable for federal tobacco excise taxes pursuant to the Court's

ruling in ECF No. 149 in Case No. 11-3038. The amount of the owed excises taxes will be determined at a future date.

According, IT IS HEREBY ORDERED that the United States' Motion for Summary Judgment, ECF No. 48, is hereby GRANTED.

The District Court Clerk is directed to enter this Order and to provide copies to counsel. Judgment shall be entered at a later date, and this case remains open. DATED this 24th day of January 2014.

/s/ Rosanna Malouf Peterson
ROSANNA MALOUF PETERSON
Chief United States District Court Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

NO: 2:12-cv-3089-RMP

FILED: August 28, 2014

UNITED STATES OF AMERICA,

Plaintiff,

v.

KING MOUNTAIN TOBACCO CO., INC.,

Defendant.

# ORDER GRANTING UNITED STATES' RENEWED MOTION FOR SUMMARY JUDGMENT

Before the Court is the United States' "Renewed Motion for Summary Judgment (Issue No. 1)," ECF No. 70. The motion was heard with oral argument in Yakima, Washington. W. Carl Hankla appeared on behalf of the Plaintiff, the United States. John Adams Moore, Jr., and Randolph H. Barnhouse appeared on behalf of the Defendant, King Mountain Tobacco Co. The Court has considered the briefing, the supporting documentation and the file, and is fully informed.

## BACKGROUND

In its motion, the United States renews one of the issues presented in its original Motion for Summary Judgment: whether the Blue Ribbon Transcript establishes the presumptive sum for tax assessments against King Mountain which should be reduced to judgment. ECF No. 48 at 5-6. In response to the United States' original motion for summary judgment, King Mountain submitted an unopposed request to take additional discovery under Federal Rule of Civil Procedure 56(d) before responding to the particular issue of assessments owed. ECF No. 52. The Court granted King Mountain's request and provided additional time for discovery as to that issue. ECF No. 53.

The Court later granted the United States' Motion for Summary Judgment as to all substantive defenses presented by King Mountain and determined that King Mountain is liable for federal tobacco excise taxes owed. ECF No. 62. The Court left open the precise amount of taxes owed per its prior Order granting King Mountain additional time on that issue. *Id.*

## DISCUSSION

Summary judgment is appropriate where the moving party establishes that there are no genuine issues of material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). If the moving party demonstrates the absence of a genuine issue of material fact, the

burden then shifts to the non-moving party to set out specific facts showing a genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-25 (1986).

Evidence that may be relied upon at the summary judgment stage includes "depositions, documents, electronically stored information, affidavits or declarations, stipulations . . . admissions, [and] interrogatory answers . . . ." Fed. R. Civ. P. 56(c)(1)(A). In evaluating a motion for summary judgment, the Court must draw all reasonable inferences in favor of the nonmoving party. *Dzung Chu v. Oracle Corp. (In re Oracle Corp. Secs. Litig.)*, 627 F.3d 376, 387 (9th Cir. 2010) (citing *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 252 (1986)).

The United States asserts that the Blue Ribbon Transcript it has produced in support of its motion establishes a prima facie case for reducing to judgment the tax assessments against King Mountain as a matter of law. King Mountain argues that the Blue Ribbon Transcript is not entitled to a presumption of correctness and that a genuine issue of material fact remains as to the precise amounts owed. In addition, King Mountain raises several defenses to certain amounts claimed, including: whether the United States should be equitably estopped from collecting excise taxes on cigarettes that King Mountain shipped to a cigarette distributor that was operating under an agreement with the United States to deprive King Mountain of payment; whether King Mountain is entitled to an advice-of-counsel defense for penalties assessed against King Mountain for failure to pay excise

taxes; and whether King Mountain is exempt from paying excise taxes because the failure to pay such taxes could result in forfeiture of allotment land. Each of these issues is examined in turn.

### A. The Blue Ribbon Transcript

The United States has introduced into the record a certified, official "Transaction History Report," a "Corrected Final Notice & Demand of Taxes Due / Notice of Intent to Levy," and a "Second Corrected Final Notice & Demand of Taxes Due / Notice of Intent to Levy," collectively referred to as the "Blue Ribbon Transcript." ECF No. 49-1; ECF No. 82-2. The Second Corrected Final Notice purported to "correct the liability assessed for May and June 2010" and account for "a recently discovered late payment that occurred in April, 2011." ECF No. 82-2. According to the Second Corrected Final Notice, King Mountain owed the United States $57,914,811.27 for back taxes, penalties and interest, as of February 25, 2014. ECF No. 82-2.

The United States contends that the Blue Ribbon Transcript is admissible under the Federal Rules of Evidence as a self-authenticating official record of the United States. The United States analogizes the Blue Ribbon Transcript to the substantially equivalent IRS Form 4340 Certificate of Assessments and Payments, which is a self-authenticating record that fits within the public records exception for the hearsay rule and which constitutes "presumptive proof of a valid assessment." *See Rossi v. United States*, 755 F.

Supp. 314, 316-18 (D. Or. 1990) (citing *United States v. Chila*, 871 F.2d 1015, 1018 (11th Cir. 1989)).

King Mountain does not dispute the Government's analogy to IRS Form 4340 or the basis of admissibility of the Blue Ribbon Transcript. Instead, King Mountain contends that it has produced admissible evidence countering the presumed validity of the Blue Ribbon Transcript. *See Chila*, 871 F.2d at 1018. To illustrate the inaccuracy of the Blue Ribbon Transcript, King Mountain points to 1) the Second Corrected Final Notice that the Government issued after its original motion for summary judgment was filed in this case, and 2) a payment to be received by the TTB from funds forfeited in a related action that is not accounted for in the Blue Ribbon Transcript.

The United States has submitted all computations supporting its calculation of the amounts owed in the Blue Ribbon Transcript and the Second Corrected Final Notice. ECF No. 49-1; ECF No. 81-1 at 16-19; ECF No. 82-2. In addition, the United States provided the declaration of Tonya Geis, Section Chief of the Delinquent Tax Group at the National Revenue Center of the TTB, explaining the computations and authority for the amounts claimed. ECF No. 82. King Mountain has not disputed the accuracy of Ms. Geis' conclusions, the authorities cited, or the accuracy of the computations in the Blue Ribbon Transcript, including the Second Corrected Final Notice. Therefore, the Court finds that the issuance of a Second Corrected Final Notice does not undermine the presumption of validity attached to the Blue Ribbon Transcript.

However, the fact that the Blue Ribbon Transcript and computations do not account for a payment to be received from funds forfeited in a related action presents a greater concern. As the United States explains, the Alcohol and Tobacco Tax and Trade Bureau ("TTB") will be receive between $5,000,000 and $8,995,259 in forfeited funds to which King Mountain had previously asserted a claim. *Id.* The forfeited funds are currently held by the Criminal Division of the United States Department of Justice. ECF No. 81.

TTB had not yet received this payment as of the time this motion was heard. The United States concedes that it is appropriate for TTB to credit the forfeiture amount to the judgment in this case after TTB receives the funds from the Criminal Division. ECF No. 80 at 3. However, the United States has offered no explanation of the manner in which the funds will be credited to the judgment, specifically whether the funds will be applied first to the underlying assessments, which could reduce subsequent penalities and interest, or whether the funds will be applied first to the penalties and interest, which could increase King Mountain's overall liability. The United States' position at oral argument was that TTB would apply the funds in whatever way that it deemed proper and generally in whatever way was most beneficial to the Government.

The Court concludes that the existence of the forfeited funds does not render the Blue Ribbon

Transcript inaccurate. The assessments claimed in this case, as reflected by the Blue Ribbon Transcript, are not impacted by an expected credit against the judgment stemming from funds seized in a separate civil forfeiture action. However, the Court is concerned that the United States has provided no guidance to the Court, and apparently has provided no guidance to King Mountain, as to the manner in which it will credit the forfeited funds to the judgment obtained through this action. The United States is thus directed, as a matter of due process, to provide a full accounting to King Mountain of how the forfeited funds are applied to the judgment once the judgment is entered and the funds have been received by the TTB, and is further directed to provide King Mountain with any statutory, regulatory, or other authority upon which the United States relies in applying the forfeited funds.

In conclusion, the Court finds that the Blue Ribbon Transcript constitutes presumptive proof of a valid assessment in this case.

### B. Equitable estoppel

King Mountain asserts that the United States should be equitably estopped from collecting excise taxes on certain cigarettes that King Mountain shipped to a distributor of tobacco products, FB Enterprises LLC.

King Mountain explains that it had entered into a relationship with Fred Brackett and FB Enterprises, LLC, in 2010, in which: King Mountain

would ship a total of approximately $20,000,000 worth of cigarettes to FB Enterprises; FB Enterprises would then resell the cigarettes in its South Carolina and North Carolina markets; and FB Enterprises and King Mountain would share the resale profit. Because the profits were shared, King Mountain allowed FB Enterprises to pay for the cigarettes as they were sold. ECF No. 75-4.

Unbeknownst to King Mountain, Fred Brackett and FB Enterprises entered into an agreement with the United States in late 2010 or early 2011 in which FB Enterprises would sell the cigarettes that it received from King Mountain and the United States would seize the funds before FB Enterprises could pay King Mountain for the cigarettes. The United States directed the sale price of the cigarettes at an amount well below King Mountain's wholesale price, and allowed FB Enterprises to retain a profit from each sale. FB Enterprises agreed to this course of conduct with the United States after FB Enterprises had made several large payments to King Mountain as contemplated by the agreement between King Mountain and FB Enterprises. ECF Nos. 75-4, 75-5, 75-6, 75-7. King Mountain claims that it lost over $10,000,000 in immediate cash flow through FB Enterprises' failure to make payments once the United States had intervened. ECF No. 75-7 at 2.

As a result of this scheme, King Mountain alleges that it was deprived of income that it expected on the sale of cigarettes to FB Enterprises and was effectively prevented from selling its cigarettes in the same markets as FB Enterprises because its wholesale price had been severely undercut. ECF

No. 75-7. The United States has stated in separate court proceedings that King Mountain was "a thorn in the side of . . . the tobacco industry" and that its scheme with FB Enterprises "brought the King Mountain people pretty much to their knees." ECF No. 75-5 at 2-3.

King Mountain's argument is that these actions by the United States deprived it of substantial cash flow, which then prevented King Mountain from paying excise taxes on the cigarettes that they manufactured. The United States asserts that King Mountain cannot meet its high burden of establishing equitable estoppel against the government.[1]

To establish a claim for equitable estoppel, a party must ordinarily demonstrate "(1) knowledge of the true facts by the party to be estopped, (2) intent to induce reliance or actions giving rise to a belief in that intent, (3) ignorance of the true facts by the relying party, and (4) detrimental reliance." *E.g., Estate of Amaro, v. City of Oakland,* 653 F.3d 808, 813 (9th Cir. 2011) (quoting *Bolt v. United States,* 944 F.2d 603, 609 (9th Cir. 1991)). In addition, when estoppel is asserted against the government the following additional elements must also be met: that the government "engaged in affirmative misconduct

[1] The United States additionally contends that King Mountain's assertion of estoppel is untimely because King Mountain did not raise this defense in its Answer, as required by Federal Rule of Civil Procedure 8(c)(1). Because the Court ultimately finds that King Mountain cannot prevail on a defense of equitable estoppel, it need not address the United States' argument as to procedural default.

going beyond mere negligence"; that the government's alleged wrongful acts caused "a serious injustice"; and that the imposition of estoppel will not "undu[ly] damage" the public interest. *Baccei v. United States*, 632 F.3d 1140, 1147 (9th Cir. 2011) (citing *Morgan v. Heckler*, 779 F.2d 544, 545 (9th Cir. 1985)). "Affirmative misconduct on the part of the government requires an affirmative misrepresentation or affirmative concealment of a material fact, such as a deliberate lie or a pattern of false promises." *Id.* (internal citation omitted).

The Court need not examine each of the elements here because detrimental reliance, which is a necessary element to any equitable estoppel claim, cannot be established by King Mountain. As King Mountain itself acknowledged at oral argument, it was obligated to pay the federal excise taxes at the time that its tobacco products left the bonded area of the manufacturing facility.[2] King Mountain does not dispute that payment of the federal excise taxes was due prior to, and regardless of, whether King Mountain received payment from FB Enterprises or any other buyer.

While it may be the case, as King Mountain claims, that the United States' scheme eventually starved it of cash flow that it could have used to pay taxes and satisfy other business obligations, the fact

[2] The parties explained that King Mountain had been placed on a "prepayment program" due to King Mountain's particular history in the payment of excise taxes. King Mountain does not dispute that it was subject to this program nor does it dispute the validity of the program.

remains that the excise taxes should have been paid well in advance of the time that King Mountain failed to receive payment from FB Enterprises. Put another way, King Mountain could not have relied on payment from FB Enterprises to its detriment vis-à-vis payment of the excise taxes, because it was obligated to pay the tobacco excise taxes even before FB Enterprises remitted payment for the cigarettes it purchased.

The Court rejects King Mountain's defense of equitable estoppel to prohibit the collection of excise taxes on certain shipments of cigarettes.

### C. Advice-of-counsel defense

King Mountain asserts that it is entitled to an advice-of-counsel defense to avoid payment of penalties for failure to pay excise taxes owed. According to King Mountain, it was advised by its counsel that it did not have to pay excise taxes for the manufacturer of tobacco products because it was exempt from such payments under the General Allotment Act and the Yakama Treaty of 1855. The Court ultimately concluded that King Mountain was not exempt from taxation under those provisions. ECF No. 62.

Under the Internal Revenue Code, certain penalties for failure to file, deposit, and/or pay taxes "shall be added" to the taxes owed "unless it is shown that such failure [to file, pay, or deposit] is due to reasonable cause and not due to willful neglect." 26 U.S.C. §§ 6651(a)(1) & (2), and 6656(a).

"Reasonable cause" exists where a taxpayer exercises "ordinary business care and prudence" and was nevertheless unable to pay or file taxes. 26 C.F.R. § 301.6651-1(c)(1).

A taxpayer's reliance on an accountant's or attorney's erroneous advice that no taxes are owed may constitute "reasonable cause." *See, e.g., Knappe v. United States,* 713 F.3d 1164, 1170 (9th Cir. 2013). The United States Supreme Court has explained the rationale for this rule as follows:

> When an accountant or attorney advises a taxpayer on a matter of tax law, such as whether a liability exists, it is reasonable for the taxpayer to rely on that advice. Most taxpayers are not competent to discern error in the substantive advice of an accountant or attorney. To require the taxpayer to challenge the attorney, to seek a "second opinion," or to try to monitor counsel on the provisions of the Code himself would nullify the very purpose of seeking the advice of a presumed expert in the first place. "Ordinary business care and prudence" do not demand such actions.

*United States v. Boyle,* 469 U.S. 241, 250-51 (1985); *see also United States v. Kroll,* 547 F.2d 393, 396 (7th Cir. 1977) ("Whether or not the taxpayer is liable for taxes is a question of tax law which often only an expert can answer. The taxpayer not only can, but must, rely on the advice of either an accountant or a lawyer. This reliance is clearly an exercise of ordinary business care and prudence.").

The United States argues that King Mountain cannot rely on an advice-of-counsel defense because it did not previously raise its defense in its answer or in its initial disclosures. According to the United States, King Mountain has maintained throughout the course of the litigation that it was exempt from federal excise tobacco taxes altogether, and never contended until this point that it might avoid penalties, through an advice-of-counsel defense or otherwise, even if it were liable for the tax.

The United States' position is supported by King Mountain's Answer, which identified several affirmative defenses based on the Yakama Nation Treaty of 1855, the General Allotment Act, and other federal law, but did not identify a defense based on reasonable cause for failure to pay the taxes. ECF No. 6. More importantly, King Mountain's Rule 26 initial disclosures did not include materials related to an advice-of-counsel defense, such as a letter from King Mountain's counsel to officials at the TTB and counsel for the United States that King Mountain now submits as evidence of its reliance on the advice-of-counsel defense. ECF No. 81-1 at 19-24.

Federal Rule of Civil Procedure 8(c)(1) requires a party to "affirmatively state any avoidance or affirmative defense" in its responsive pleading. A party may plead an affirmative defense for the first time in a motion for summary judgment "absent prejudice to the plaintiff." *Ledo Fin. Corp. v. Summers*, 122 F.3d 825, 827 (9th Cir. 1997). Rule 26(a)(1)(A) requires the disclosure of certain

information that the disclosing party "may use to support its claims or defenses." Rule 26(e) imposes a duty to supplement disclosures. Federal Rule of Civil Procedure 37(c)(1) provides for sanctions unless the failure to disclose "was substantially justified or is harmless."

King Mountain has not explained how its failure to plead its advice-of-counsel defense did not prejudice the United States, nor has it explained how its failure to provide Rule 26 disclosures to the United States was substantially justified or harmless. Moreover, the Court agrees with the United States' contention that it was prejudiced by the failure to plead and disclose the alleged defense, because the United States was never given an opportunity to conduct discovery on King Mountain's defense.

In addition, the materials that King Mountain now relies on in support of its advice-of-counsel defense are not persuasive. For example, King Mountain relies on resolutions passed by the Yakama Nation Tribal Council in 2010 and by the National Congress of American Indians in 2011 stating an understanding that King Mountain is exempt from federal tobacco excise taxes under the Yakama Nation Treaty of 1855. ECF Nos. 75-8, 75-11. While perhaps relevant to King Mountain's position in litigation, these materials are not directly relevant to reliance on the advice-of-counsel defense.

Similarly, the materials that King Mountain has introduced from its attorneys do not tend to support

King Mountain's assertion that it relied on the advice of counsel in failing to pay the excise taxes. Rather, these materials constitute statements of King Mountain's position in litigation. For example, King Mountain's former counsel wrote a letter to TTB and the United States Department of Justice's Criminal Division, after litigation had commenced in this Court, stating that King Mountain's position is that it was exempt from excise taxes under the Yakama Nation Treaty of 1855 and federal law. ECF No. 75-12. Such litigation posture statements do not establish that King Mountain was advised by its attorney that it could, or should, cease paying excise taxes or even that it was not liable to pay excise taxes.

Even Delbert Wheeler's declaration submitted in opposition to the United States' renewed motion for summary judgment only states "Due to my counsel's expertise in corporate and tax law, I relied on the legal advice and legal justification [sic], and ceased paying [federal excise taxes] in August 2011." ECF No. 75-3 at 3. Yet the uncontroverted evidence in this case shows that King Mountain began accruing tax liabilities for failure to pay the tobacco excise tax in 2009 and continuing through 2010. ECF No. 49-1. That King Mountain failed to pay excise taxes in 2009, long before its asserted reliance on the advice-of-counsel in 2011, would demonstrate wilfullness rather than reasonable cause. On the whole, the evidence introduced by King Mountain only supports its position in litigation that it concluded that it was exempt from federal excise taxes, not that King Mountain received legal advice on which it relied

that it could, or should, cease paying the tax altogether.

The Court concludes that King Mountain may not now assert an advice-of-counsel defense to avoid penalties for failure to pay the tobacco excise taxes.

### D. Potential forfeiture of allotment land

King Mountain contends that it cannot be penalized for its failure to pay tobacco excise taxes because 26 U.S.C. § 5763(c) allows for the forfeiture of the building where the tobacco products were manufactured "and the lot or tract of ground on which the building is located." King Mountain contends that the application of this provision to allotment land would violate the Yakama Treaty of 1855 and the General Allotment Act.

In response, the United States contends that King Mountain has misread Section 5763(c) as allowing the potential forfeiture of Delbert Wheeler's allotment land. Section 5763(c), titled "Real and personal property of illicit operators," reads:

> All tobacco products, cigarette papers and tubes, machinery, fixtures, equipment, and other materials and personal property on the premises *of any person engaged in business as a manufacturer or importer of tobacco products* or cigarette papers and tubes, or export warehouse proprietor, *without filing the bond or obtaining the permit*, as required by this chapter, together with all his right,

> title, and interest in the building in which such business is conducted, and the lot or tract of ground on which the building is located, shall be forfeited to the United States.

The United States correctly points out that Section 5763(c) applies on its face only to "illicit" manufacturers or importers of tobacco products, that is, persons who manufacture or import tobacco products without filing the necessary bond or obtaining the required permit.

King Mountain obtained the required permit from the TTB to manufacture cigarettes at its facilities and posted a surety bond approved by TTB before commencing business. ECF No. 75-3 at 2; ECF No. 83 at 2-3. Therefore, King Mountain's failure to pay the excise taxes does not subject it to forfeiture under Section 5763(c), which would apply only if King Mountain were to manufacture cigarettes without maintaining its permit or bond. This asserted defense is thus irrelevant to the instant case.

Accordingly, IT IS HEREBY ORDERED:

1. The United States' "Renewed Motion for Summary Judgment (Issue No.1)," ECF No. 70, is GRANTED consistent with the terms of this Order. IT IS SO ORDERED.

The District Court Clerk is directed to enter this Order and to provide copies to counsel.

DATED this 28th day of August 2014.

/s/ Rosanna Malouf Peterson
ROSANNA MALOUF PETERSON
Chief United States District Court Judge

UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT
No. 16-35956
NOT FOR PUBLICATION

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

KING MOUNTAIN TOBACCO COMPANY, INC.,
Defendant-Appellant.

MEMORANDUM*

Appeal from the United States District Court for the Eastern District of Washington
Rosanna Malouf Peterson, District Judge, Presiding

Argued and Submitted: March 15, 2018
San Francisco, California

Decided: August 13, 2018

Before: FERNANDEZ, McKEOWN, FUENTES,** Circuit Judges.

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Julio M. Fuentes, United States Circuit Judge for the U.S. Court of Appeals for the Third Circuit, sitting by designation.

King Mountain Tobacco Company, Inc. ("King Mountain") appeals the district court's order granting summary judgment in favor of the United States in an action to collect $6,425,683 in overdue fees under the Fair and Equitable Tobacco Reform Act ("FETRA"), Pub. L. No. 108-357 §§ 611–612, 118 Stat. 1521, 1522–24 (2004), codified at 7 U.S.C. §§ 518–519. Because the parties are familiar with the facts, we do not repeat them here. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

**A. The district court did not abuse its discretion by denying King Mountain discovery**.

"Broad discretion is vested in the trial court to permit or deny discovery, and its decision to deny discovery will not be disturbed except upon the clearest showing that denial of discovery results in actual and substantial prejudice to the complaining litigant." *Goehring v. Brophy*, 94 F.3d 1294, 1305 (9th Cir. 1996). The district court denied discovery after holding that the administrative record demonstrates the accuracy of the agency's determinations of liabilities owed by King Mountain under FETRA. *See Friends of the Earth v. Hintz*, 800 F.2d 822, 828 (9th Cir. 1986) ("With a few exceptions . . . judicial review of agency action is limited to a review of the administrative record."). King Mountain did not contest the accuracy of those determinations before the agency, and indicated that it was "satisfied with the accounting of assessments provided by [the agency] and was not further challenging the accuracy of the FETRA assessments." The agency thus affirmed the amounts owed. The district court did not abuse its discretion

when it denied King Mountain further discovery on judicial review.

### B. The Treaty with the Yakamas does not prohibit the imposition of FETRA assessments.

Whether FETRA assessments are "taxes" or "fees," the test for King Mountain's exemption is the same. The "express exemptive language" test applies to federal laws generally, not just to federal taxes. *King Mountain Tobacco Co., Inc. v. McKenna*, 768 F.3d 989, 994 (9th Cir. 2014); *see id.* (describing "the 'express exemptive language' test for determining whether a federal law applies to [Indians]"). As we have explained, *see United States v. King Mountain Tobacco Co., Inc.*, Nos. 14-36055 & 16-35607, — F.3d — (9th Cir. 2018), the Treaty with the Yakamas contains no "express exemptive language" that would entitle King Mountain to an exemption from a federal excise tax on tobacco products. For the same reasons, the Treaty does not entitle King Mountain to exemption from FETRA assessments.

### C. The FETRA assessments imposed on King Mountain are constitutional.

#### 1. FETRA assessments do not violate the Takings Clause.

The Takings Clause of the Fifth Amendment provides that "private property" shall not "be taken for public use, without just compensation." U.S. CONST. amend. V. Because the Constitution "protects rather than creates property interests, the existence of a property interest" is the threshold

question of any takings analysis, and it is "determined by reference to 'existing rules or understandings that stem from an independent source such as state law.'" *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 164 (1998) (quoting *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972)).

FETRA does not effect a "classical" taking by seizing physical property. Instead, it requires King Mountain to pay quarterly assessments in the form of money. As we have cautioned, "money differs from physical property in respects significant to [a] takings analysis." *Wash. Legal Found. v. Legal Found. of Wash.*, 271 F.3d 835, 854 (9th Cir. 2001) (en banc).

In *Koontz v. St. Johns River Water Management District*, 570 U.S. 595, (2013) the Court affirmed that confiscations of money, "despite their functional similarity to a tax," 570 U.S. at 615, are only treated as a taking when the confiscation operates upon or alters an identified property interest. *See, e.g., Phillips*, 524 U.S. at 165 (recognizing the principal owner's property right to interest earned thereon); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 162–64 (1980) (holding that a state statute taking, for the government's own use, the interest accruing on a privately owned interpleader fund deposited in the registry of the county court was unconstitutional under the Takings Clause, and that the state could not avoid the constitutional violation by legislatively or judicially recharacterizing the principal as "public money"). King Mountain fails to identify a property interest that a given FETRA

assessment "operate[s] upon or alters." *See Koontz*, 579 U.S. at 623. At best, King Mountain purports to locate such an interest in the Treaty with the Yakamas, arguing that FETRA interferes with King Mountain's property interest in "the 'exclusive benefit' of . . . activities conducted on Yakama reservation" land guaranteed by Article II of the Treaty. As explained above, however, no provision of the Treaty bars the Government from imposing FETRA assessments on King Mountain.

FETRA simply requires King Mountain to pay a sum of fungible money based on its market share. That requirement, without more, is not a taking.

**2. King Mountain's FETRA assessments do not violate the Due Process Clause.**

"It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). In conducting a review of legislation under the Due Process Clause, "federal courts are not assigned the task of making policy, determining a fair outcome, or determining the actual state of facts." *Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1342 (Fed. Cir. 2001). Rather, we "are charged simply with determining whether the congressional action was rational." *Id.* FETRA was a rational response to the unworkability of the Depression-era quota and price-support

system governing tobacco production, which by the 1990s had drastically inflated the price of American tobacco past the point of competitiveness. The wisdom of that decision is a policy judgment the Constitution leaves to Congress, not the judiciary.

FETRA was prospective and imposed assessments on King Mountain—and indeed, on all manufacturers of tobacco products—based on current market participation. *See Swisher*, 550 F.3d at 1058. Therefore, FETRA does not raise retroactivity issues implicating the due process clause. *See Eastern Enters. v. Apfel*, 524 U.S. 498, 534–36 (1998) (plurality opinion).

### 3. King Mountain's FETRA assessments do not violate any other constitutional provision.

King Mountain's unconstitutional conditions challenge fails because FETRA assessments do not "deny a benefit to [King Mountain] because [it] exercises a constitutional right." *See Koontz*, 570 U.S. at 604. King Mountain's equal protection challenge also fails because FETRA, by its express terms, applies to all manufacturers of tobacco products and apportions quarterly assessments according to market share.

**AFFIRMED.**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

NO: 1:14-cv-3162-RMP

FILED: July 27, 2015

UNITED STATES OF AMERICA,

Plaintiff,

v.

KING MOUNTAIN TOBACCO CO., INC.,

Defendant.

# ORDER REGARDING UNITED STATES' MOTION TO DISMISS, MOTION FOR SUMMARY JUDGMENT, MOTION TO STRIKE REPLY BRIEF, AND MOTION TO STRIKE JURY DEMAND; AND KING MOUNTAIN'S MOTIONS FOR DISCOVERY

BEFORE THE COURT are four motions filed by the United States: a Motion for Summary Judgment, ECF No. 15; a Motion to Dismiss Counterclaim, ECF No. 14; a Motion to Strike Jury Demand, ECF No. 22; and a Motion to Strike Reply Memorandum, ECF No. 37. Also before the Court are two motions for discovery filed by King Mountain Tobacco Co., Inc.: a Rule 56(d) Motion in Opposition to United States of

America's Motion for Summary Judgment, ECF No. 23; and a Motion in Support of Defendant's Essential Right to Conduct Discovery, ECF No. 25. The Court heard oral argument on the motions on June 18, 2015. Trial Attorney Kenneth Sealls appeared on behalf of the United States, and Randolph Barnhouse appeared on behalf of King Mountain. The Court has reviewed the motions, considered the parties' arguments, and is fully informed.

## BACKGROUND

### A. Factual Background

On October 30, 2014, the United States, on behalf of the Commodity Credit Corporation ("CCC") of the United States Department of Agriculture ("USDA"), filed a complaint against King Mountain Tobacco Co., Inc. ("King Mountain") to recover unpaid assessments mandated by the Fair and Equitable Tobacco Reform Act of 2004, codified at 7 U.S.C. §§ 518-519a ("FETRA"). ECF No. 1 at 1-2. FETRA provided for tobacco farmers to receive annual payments over a period of ten years, for fiscal years 2005 – 2014, from the Secretary of Agriculture ("Secretary"), "in exchange for the termination of tobacco marketing quotas and related price support." § 518a(a); see §§ 518a, 518b; FETRA, Pub. L. No. 108¬357, secs. 611, 612, 118 Stat. 1418 (terminating the Federal Tobacco Quota and Price Support programs).

To fund these payments, FETRA directed the Secretary to impose quarterly assessments during

the same time period on tobacco product manufacturers and importers. § 518d(b). The Secretary determined the amount of each manufacturer's quarterly assessment by first calculating the amount necessary to cover all contract payments for the quarter, then allocating that amount among six classes of tobacco products, and then dividing each class's portion among the manufacturers and importers of that product class based on their respective market share of gross domestic volume. §§ 518d(b)(2), (c), (e), (f).

After calculating a manufacturer's assessment for a given quarter, FETRA required the Secretary to notify the manufacturer of the amount to be assessed at least thirty days before the payment date. § 518d(d)(1). If a manufacturer wished to "contest an assessment," it could do so by notifying the Secretary within thirty days after receiving the assessment notification. § 518d(i)(1). Specifically, 7 C.F.R. § 1463.11 required a manufacturer to submit a written statement setting forth the basis of the dispute to the Executive Vice President of CCC. 7 C.F.R. § 1463.11(a).

The Executive Vice President would then assign a person to act as the hearing officer on behalf of CCC to develop an administrative record that would provide the Executive Vice President with sufficient information to render a final determination on the matter in dispute. § 1463.11(b). The agency could revise an assessment if the manufacturer successfully established that the "initial determination of the amount of an assessment [was] incorrect." 7 U.S.C. § 518d(i)(3). Any manufacturer

who was "aggrieved by a determination of the Secretary with respect to the amount of any assessment" could seek judicial review of the Secretary's determination. 7 U.S.C. § 518d(j)(1); 7 C.F.R. § 1463.11(d).

The administrative record in this case contains the quarterly assessment notifications, or invoices, that CCC sent to King Mountain between June 1, 2007, and December 1, 2014. ECF No. 16. CCC sent King Mountain two invoices for each quarter: one based on King Mountain's manufacture of cigarettes and one based on its manufacture of roll your own tobacco. Each invoice stated the class of tobacco product for which it applied and the total assessment owed by King Mountain for that product. ECF No. 16.

Additionally, each invoice provided the information necessary to understand how the assessment amount was calculated: the total amount of money that CCC needed to collect that quarter to fully fund its annual payments to tobacco farmers; the percentage of sales in each product class; the proportionate amount of money that CCC needed to collect for each product class; the total amount of taxes paid by all tobacco manufacturers on the product class to which the invoice pertained; the amount of taxes that King Mountain paid on the product class to which the invoice pertained; King Mountain's percentage of the total amount of paid taxes on the applicable product class; and finally, the amount of King Mountain's total quarterly assessment, calculated by multiplying King Mountain's "share," or percentage of total taxes paid

in that product class, by the total amount of money that CCC needed to collect on that class. ECF No. 16.

The administrative record indicates that, on numerous occasions, King Mountain either only partially paid a quarterly assessment or neglected to pay the assessment entirely. ECF No. 16. The United States notes that King Mountain made fourteen payments on the assessments between June 2007 and September 2010. ECF No. 15 at 6. Since September 2010, King Mountain has not made any payments. ECF No. 15 at 6; ECF No. 16. USDA sent King Mountain thirty separate demand letters between July 15, 2009, and November 15, 2014. ECF No. 16. During that time, King Mountain's alleged owed balance increased from $472,794.22 to $6,373,275.29. ECF No. 16.

The record also shows that King Mountain objected to the assessments on several occasions. In February of 2012, King Mountain contacted the Receivable Management Office ("RMO") of the Farm Service Agency ("FSA") within USDA and informed Judy Curtis, an RMO employee and the point of contact listed on the demand letters, that King Mountain was disputing its assessment. ECF No. 16, KM-AR-000101. The outcome of that contact is unclear.

On March 15, 2012, King Mountain's counsel contacted FSA again to dispute the assessments. ECF No. 16, KM-AR-000189. In a follow-up e-mail to another FSA employee, Julianna Young, King

Mountain disputed that it owed $1,519,547.71, confirmed that King Mountain's counsel's telephone conversation with Ms. Young qualified as notice of appeal as required under the statute, and informed FSA that to the extent the assessments were predicated on taxes owed by King Mountain, King Mountain was currently in litigation disputing those tax assessments. ECF No. 16, KM-AR-000189. Ms. Young did not respond to King Mountain's e-mail until eleven days later, at which time she stated that her "supervisor is coordinating with our [Tobacco Transition Assistance Program] folks," and she believed that "at some point some guidance will come back to [her]." ECF No. 16, KM-AR-000189. There is no evidence in the record that Ms. Young or any other FSA employee reengaged King Mountain on the issue.

Subsequently, it appears that counsel for King Mountain and Ms. Young had a telephone conversation on July 6, 2012, in which King Mountain demanded the return of $75,000 which the Bureau of Alcohol, Tobacco, Firearms and Explosives had agreed to give King Mountain as part of a settlement agreement in a separate excise tax case, but which FSA confiscated and applied as an "offset" to King Mountain's unpaid FETRA assessments. ECF No. 16, KM-AR-000098. Ms. Young allegedly informed King Mountain for the first time that assessment disputes should be directed to Jane Reed. ECF No. 16, KM-AR-000099. King Mountain objected to never having been directed to contact Jane Reed previously, and reminded Ms. Young of her representation that the March telephone conversation constituted sufficient notice of intent to

dispute the assessments. ECF No. 16, KM-AR-000099.

Larry Durant, Chief of RMO, responded by e-mail on July 12, 2012, to King Mountain's letter dated July 9, 2012. He did not address King Mountain's objection to the assessments, stating only that the "Receivable Management Office does not handle dispute request [sic]." ECF No. 16, KM-AR-000101. Mr. Durant stated that the $75,000 confiscation was "in compliance with DCIA regulations," and refused to return the funds to King Mountain. ECF No. 16, KM-AR-000101.

King Mountain responded to Mr. Durant on August 7, 2012. ECF No. 16, KM-AR-000103. King Mountain reiterated its position that the confiscation was wrongful, that FSA had failed to adequately inform King Mountain of available administrative remedies, and that the outcome of King Mountain's litigation against the Bureau of Alcohol, Tobacco, Firearms and Explosives would directly affect the validity of the assessments. ECF No. 16, KM-AR-000103.

On September 17, 2012, King Mountain mailed an appeal letter to CCC and the Economic and Policy Analysis Staff ("EPAS") of FSA, disputing the Notice of Acceleration or Revision letter, dated August 16, 2012, which asserted that King Mountain owed $3,033,625.80 under the Tobacco Transition Assessment Program ("TTAP") and informed King Mountain that amount would be placed in DOJ litigation status. ECF No. 16, KM-AR-000104. King

Mountain also requested a hearing before CCC. ECF No. 16, KM-AR-000104. King Mountain argued that the Yakama Treaty of 1855 prohibited the assessments on King Mountain's tobacco products and requested that "all payments made under TTAP assessments be returned to it, as well as funds illegally offset by the [FSA]." ECF No. 16, KM-AR-000106. Additionally, King Mountain disputed the offset because it received no notice of the offset action or any information regarding when it occurred. ECF No. 16, KM-AR-000107.

Juan Garcia, the Executive Vice President of CCC, responded to King Mountain's appeal letter on October 12, 2012. ECF No. 16, KM-AR-000108. Mr. Garcia informed King Mountain that "appeal rights for that issue extend only to contesting the accuracy of the amount of the debt due," and that appeal rights pertaining to any previous quarterly assessment had "expired long ago." ECF No. 16, KM-AR-000108. Mr. Garcia determined that the total amount of debt owed had been accurately calculated, and therefore denied King Mountain's appeal. ECF No. 16, KM-AR-000108. Mr. Garcia noted that King Mountain had requested an in-person administrative hearing, but denied the request as untimely. ECF No. 16, KM-AR-000108. Finally, Mr. Garcia stated that "the assessments related to this appeal are administratively final," and reiterated: "This is the final administrative decision with regard to this appeal." ECF No. 16, KM-AR-000108.

King Mountain mailed and e-mailed a second notice of appeal to EPAS on April 10, 2013, contesting the assessments appearing on invoices

dated March 1, 2013. ECF No. 16, KM-AR-000110. King Mountain raised the same arguments in objection to the assessments and the offset action. ECF No. 16, KM-AR-000110. This time King Mountain attached several supporting documents, including the Treaty of 1855 and King Mountain's complaint to enforce its treaty rights filed against the Alcohol and Tobacco Tax and Trade Bureau. ECF No. 16, KM-AR-000110. The United States admits that FSA did not respond to King Mountain's second letter of appeal. ECF No. 33 at 7.

The United States alleges that King Mountain's outstanding balance totals $6,372,209.67, including late payment interest, and seeks a judgment in its favor for the outstanding balance as well as any "assessments, interest, and/or reporting penalties that have become delinquent since September 2014, and that do become delinquent pending the resolution of this action, and interest from the date of the judgment . . . ." ECF No. 1 at 5.

King Mountain filed an answer and counterclaim seeking a declaratory judgment that imposing FETRA assessments on King Mountain violates the 1855 Yakama Treaty and is therefore prohibited. ECF No. 10.[1] King Mountain also seeks a refund of

[1] Although King Mountain also pleaded in its answer that the FETRA assessments violate the Constitution and the General Allotment Act, King Mountain has not argued those claims in its responses to the United States' Motion to Dismiss or the United States' Motion for Summary Judgment. After the briefing period on the United States' motions had concluded, King Mountain filed a motion for summary judgment on its counterclaim, arguing that the FETRA assessments violate the

all assessments paid and an abatement of any assessment payments still due. ECF No. 10.

### B. Legal Posture

#### i. Administrative Procedure Act

There are several threshold issues before the Court. First, the Court must determine whether the Administrative Procedure Act ("APA") applies to the Court's review in this case. The United States contends that this case requires "judicial review of agency action" under FETRA, subject to the Administrative Procedure Act ("APA"). ECF No. 32 at 2-3. King Mountain contends that this case is "not an administrative appeal. It is an original action to collect an assessment." ECF No. 25 at 1. King Mountain notes that in its complaint, the United States made no mention of King Mountain's attempts to contest the assessments at the agency level, or of the agency's final determination that King Mountain's assessments were accurately calculated. ECF No. 25 at 4. Therefore, King Mountain argues, the APA does not apply to this case. ECF No. 25 at 4. Additionally, King Mountain argues that FETRA provides a right of judicial

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Takings Clause of the Constitution. ECF No. 41. The briefing period for that motion has not yet concluded. King Mountain does not argue in that motion that the FETRA assessments are prohibited under the General Allotment Act. Accordingly the Court treats the General Allotment Act defense and counterclaim as having been abandoned. The Court reserves ruling on the Takings Clause defense and counterclaim pending completed briefing.

review to an aggrieved party, not the government. ECF No. 25 at 4-5.

The APA provides a right of review to a "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute . . . ." 5 U.S.C. § 702. This provision applies unless the relevant statute precludes judicial review, or by law, agency action is committed to agency discretion. § 701(a). The APA defines "person" as "an individual, partnership, corporation, association, or public or private organization other than an agency." § 551(2).

FETRA and the implementing Code of Federal Regulations provide for judicial review of adverse agency determinations. 7 U.S.C. § 518d(i); 7 C.F.R. § 1463.11(d). Thus, under the plain language of the APA, the APA would apply had King Mountain, a person under the APA, sought judicial review of FSA's final determination that the assessments imposed against it were accurate. *See Prime Time Int'l Co. v. Vilsack*, 599 F.3d 678, 686 (D.C. Cir. 2010) ("USDA's determination of [the manufacturer's] assessments for three quarters of FY 2005 was an adjudication, attendant to which [the manufacturer] had rights to an administrative appeal and judicial review.") (citing the APA, 5 U.S.C. § 551(7)).

The question is whether the APA also applies in this case where the agency has filed suit against King Mountain to recover the unpaid assessments. The Fifth Circuit Court of Appeals held that "[t]he

fact that this suit is one brought by the government for judicial enforcement rather than one brought by a citizen to challenge agency action, does not mean that judicial review of the agency's action in this suit is not pursuant to the APA." *United States v. Menendez*, 48 F.3d 1401, 1410 (5th Cir. 1995).

Similarly, the Ninth Circuit has applied the APA to a defendant's affirmative defense raised in a criminal proceeding brought by the government, as well as to a defendant's counterclaim in a civil ejectment suit brought by the United States. *United States v. Backlund*, 689 F.3d 986, 999-1001 (9th Cir. 2012); *Coleman v. United States*, 363 F.2d 190, 196 (9th Cir. 1966), *rev'd on unrelated grounds*, 390 U.S. 599 (1968). Reason compels this result because a court's failure to apply the APA would incentivize parties not to pursue the administrative appeal process in favor of judicial review, and thus undercut legislative intent to establish that process. *See Backlund*, 689 F.3d at, 999-1001 (reasoning that "parties may not use a collateral proceeding to end-run the procedural requirements governing appeals of administrative decisions.").

Regardless of whether the United States or King Mountain initiated this suit, the APA applies and outlines the scope of the Court's review, because the imposition of FETRA assessments on King Mountain was appealable at the administrative level. King Mountain has raised several affirmative defenses to CCC's collection action, and it has filed a counterclaim against CCC. ECF No. 10. *Backlund* and *Coleman* apply and mandate that the APA applies to this action.

### ii. Exhaustion and Remand

Having determined that the APA applies to this action, the Court considers whether King Mountain adequately exhausted its administrative remedies.

The APA permits judicial review of a "final agency action for which there is no other adequate remedy in a court" 5 U.S.C. § 704. "A reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not theretofore presented . . . ." *Getty Oil Co. v. Andrus*, 607 F.2d 253, 256 (9th Cir. 1979) (quoting *Unemployment Comp. Commc'n of Territory of Alaska v. Aragon*, 329 U.S. 143, 155 (1946)) (internal quotation marks omitted). "Thus, absent exceptional circumstances, a reviewing court will refuse to consider contentions not presented before the administrative proceeding at the appropriate time." *Getty Oil*, 607 F.2d at 256. The doctrine of exhaustion serves many purposes, including enabling the agency to "function efficiently and so that it may have the opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record which is adequate for judicial review." *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975).

However, the doctrine of exhaustion is "not designed to extinguish claims which, although not comprehensively or artfully presented in the early stages of the administrative process, are presented fully before the process ends." *Getty Oil*, 607 F.2d at

256. "It is the imposition of an obligation or the fixing of a legal relationship that is the indicium of finality of the administrative process." *Id.* "[W]here a claim is fully presented before the administrative process ends, the doctrines of exhaustion and waiver are not applicable." *Abel v. Dir., Office of Workers Comp. Programs*, 939 F.2d 819, 821 (9th Cir. 1991).

The United States argues that King Mountain failed to exhaust its administrative remedies with regard to all but two quarterly assessments because it did not file an appeal every quarter during the entire assessment period. ECF No. 15 at 10. King Mountain argues that the imposition of any FETRA assessment against it violates the 1855 Yakama Treaty. ECF No. 10. King Mountain also argues that the assessment calculations are likely inaccurate because they do not account for unreported cigarette production by other manufacturers. ECF No. 10 at 5; ECF No. 24 at 13-14; ECF No. 23 at 3-4.

King Mountain's argument regarding the Yakama Treaty need not have been exhausted because CCC did not have authority to consider issues of treaty law. The Supreme Court has stated that "[i]f treaties are to be given effect as federal law under our legal system, determining their meaning as a matter of federal law is emphatically the province and duty of our judicial department . . . ." *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 353-54 (2006) (citation and internal quotation marks omitted). Similarly, the Ninth Circuit has held that "challenges to the constitutionality of a statute or a regulation promulgated by an agency are beyond the power or the jurisdiction of the agency," and need

not be exhausted. *Gilbert v. Nat'l Transp. Safety Bd.*, 80 F.3d 364, 366-67 (9th Cir. 1996); *see McCarthy v. Madigan*, 503 U.S. 140, 147 (1992), *superseded by statute on unrelated grounds*.

In response to King Mountain's first appeal to the Executive Vice President of CCC, Mr. Garcia informed King Mountain that "appeal rights for that issue extend only to contesting the accuracy of the amount of the debt due." ECF No. 16, KM-AR-000108. Therefore, it appears that the agency limited its review to the accuracy of assessment calculations and debt owed. Additionally, the United States conceded during oral argument that the agency could not have considered King Mountain's treaty claim at all. Therefore, the Court finds that King Mountain need not have exhausted its claim regarding whether it is exempt from the assessments under the Yakama Treaty, and the Court properly considers that argument in the first instance, *infra*, as it pertains to all of the assessments imposed against King Mountain.

Regarding King Mountain's second contention that the FETRA assessments may be improperly calculated, King Mountain argues that it was denied the right to administratively appeal its FETRA assessments because "USDA completely faltered and miscommunicated with King Mountain during the administrative appeal process." ECF No. 26 at 17. King Mountain filed at least two formal appeals. In both appeal letters, King Mountain requested a hearing pursuant to 7 C.F.R. § 1463.11. It appears that CCC construed King Mountain's first appeal letter as an appeal of King Mountain's total debt

owed, rather than as an appeal of the most recent assessment. KM-AR-000108 ("Your current appeal is predicated on an August 16, 2012, Notice of Acceleration or Reversion letter."). Accordingly, the agency denied King Mountain's request for a hearing as irrelevant to the question of whether King Mountain's total unpaid assessments equaled the amount of debt allegedly owed, and as untimely with regard to the accuracy of each individual assessment comprising the total amount of debt owed. The agency did not grant King Mountain a hearing to contest the most recent quarterly assessment, nor did it explain why. CCC never responded to King Mountain's second request for a hearing, despite King Mountain's explicit objection to "the amounts assessed dated March 1, 2013 for invoices CG12100004 in the amount of $287,952.29 and RY13100396 in the amount of $280.61." KM-AR-000110.

The United States conceded at oral argument that CCC never held a hearing in response to King Mountain's requests and that King Mountain was denied due process. Both the United States and King Mountain concur that remand to the agency is the appropriate remedy, to enable the agency to develop properly the administrative record. Therefore, the Court will remand this case to CCC regarding King Mountain's claims that the assessment calculations are inaccurate if this case survives King Mountain's pending motion for summary judgment, which is not yet ripe.

However, the Court must address whether, on remand, King Mountain is entitled to challenge

every assessment or only those assessments associated with its first and second appeal letters, as the United States contends. Although King Mountain's first appeal letter was dated September 13, 2012, KM-AR-000104, King Mountain attempted to contest the assessments as early as February 15, 2012. KM-AR-000101; KM-AR-000189. It appears from the record that King Mountain repeatedly received inaccurate and inconsistent information regarding how to contest the assessments properly. In various communications with the agency between February 15, 2012, and April 10, 2013, King Mountain contested a demand letter, a letter notifying King Mountain of debt acceleration, and a quarterly assessment for March 1, 2013. Each time, King Mountain contended that all FETRA assessments, past, present, and future, were invalid as applied to it. King Mountain's final letter was sent on April 10, 2013, to which King Mountain never received a response.

The Court finds that King Mountain failed to exhaust its administrative remedies prior to February 2012 because there is no evidence that King Mountain attempted to challenge the assessments prior to that time. However, beginning in February of 2012, King Mountain attempted to challenge the assessments in some manner, yet was given inconsistent guidance regarding the process. After April 10, 2013, when King Mountain sent its final appeal letter, any future appeals by King Mountain can be considered futile. The agency stated on October 12, 2012, in response to King Mountain's first letter of appeal, that King Mountain's appeal rights had expired, and

subsequently failed to respond to King Mountain's second appeal at all. *See McCarthy*, 503 U.S. at 148 ("[A]n administrative remedy may be inadequate where the administrative body . . . has otherwise predetermined the issue before it.").

Therefore, if the Court remands this case as stated, the scope of remand will be limited to a determination of the accuracy of the FETRA assessments imposed against King Mountain in or after February of 2012.

### C. Discovery

#### i. Motion to Strike Reply Brief

King Mountain filed two motions for discovery requesting that the Court order discovery prior to ruling on the United States' motions to dismiss and for summary judgment. ECF Nos. 23 and 25. The United States moved to strike King Mountain's reply brief to one of the motions for discovery because it was filed one week late. ECF No. 37.[2] Although King Mountain disobeyed the Court's Scheduling Order, the Court prefers to decide the issues on their merits, absent some showing of prejudice to the opposing party. No prejudice having been found, the Court denied the United States' motion to strike the reply brief.

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[2] The Court's scheduling order required King Mountain to file its reply brief to any discovery motion no later than April 17, 2015. ECF No. 18 at 2. King Mountain filed one of its reply briefs on April 24, 2015. ECF No. 36.

### ii. Scope of Review

The United States argues that the scope of the Court's review is limited to the administrative record and that no discovery is warranted. ECF No. 32 at 3. Additionally, the United States notes that this suit was brought pursuant to 15 U.S.C. § 714b(c), which gives CCC the power to "sue and be sued," and gives federal district courts "exclusive original jurisdiction . . . of all suits brought by or against the Corporation." 15 U.S.C. § 714b(c). ECF No. 32 at 3. The United States argues that because 15 U.S.C. § 714b(c) is "silent about the appropriate standard of review . . . the Court's review is limited to the administrative record." ECF No. 32 at 3 (citing *United States v. Carlo Bianchi & Co.*, 373 U.S. 709, 715 (1963)).

King Mountain argues that discovery is warranted on several bases: (1) without discovery, King Mountain does not have the information it needs to fully and completely present its claims and defenses; (2) the assessment calculations are likely inaccurate because they do not account for unreported cigarette production by other manufacturers, and discovery is likely to produce evidence of this inaccuracy; (3) there is no exception in this case to the general rule requiring discovery because this action is not a review of an administrative appeal but an original action to collect an assessment; and (4) judicial estoppel prevents the United States from arguing against the appropriateness of discovery in this case because the United States previously represented in response to King Mountain's Motion for a More Definite

Statement that King Mountain could obtain additional information in discovery. King Mountain also maintains that the Court previously recognized King Mountain's right to conduct discovery when it denied King Mountain's motion for a more definite statement of the complaint and stated that King Mountain could obtain the additional details it sought through the discovery process. ECF No. 25 at 2 (quoting ECF No. 9 at 8).[3]

Judicial review of action by an agency generally is confined to the administrative record. *See Camp v. Pitts,* 411 U.S. 138, 142, (per curiam) ("[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court."). Thus, actions for review on an administrative record normally are exempt from initial disclosures under the Federal Rules of Civil Procedure. Fed. R. Civ. P. 26(a)(1)(B). Additionally, the Supreme Court in *Carlo Bianchi* stated that "in cases where Congress has simply provided for review, without setting forth the standards to be used or the procedures to be followed, this Court has held that consideration is to be confined to the administrative record and that no de novo proceeding may be held." *Carlo Bianchi*, 373 U.S. at 715.

The Court already has determined that this case is subject to the APA. If the case survives summary judgment and the Court remands the case to CCC for a hearing on the accuracy of any assessments

[3] King Mountain may now obtain this additional information on remand before the agency.

imposed after February 2012, no discovery is warranted in this Court on King Mountain's claim regarding the accuracy of the assessment calculations. However, the Court will not remand King Mountain's treaty defense and counterclaim, and that argument need not be limited to the administrative record because the agency neither had authority to consider that claim nor addressed it. Therefore, the Court must decide whether discovery on King Mountain's treaty claim is warranted on other grounds.

### iii. Relevance of Discovery

Federal Rule of Civil Procedure 26 states:

> Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense . . . . For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.

Fed. R. Civ. P. 26(b)(1). Thus, King Mountain is entitled to discovery on its treaty claim if the discoverable information it seeks is relevant to the treaty counterclaim or defense.

King Mountain maintains that the Court must permit discovery regarding "the Yakama people's understanding of the terms" of the 1855 Yakama

Treaty, and then make findings of fact as to whether "the Treaty terms as understood by the Yakama prevent the imposition of FETRA assessments on King Mountain . . . ." ECF No. 26 at 6-7. The United States contends that such discovery is unnecessary because "King Mountain's defenses for non-payment of its statutory FETRA assessments are meritless and should be summarily rejected . . . ." ECF No. 30 at 1. Whether such discovery is relevant to King Mountain's treaty counterclaim and defense hinges on the standard of review applicable to this case, which the parties dispute.

### a. Standard of Review

In general, federal and state laws are presumed to apply to Indians absent an exception. *Ramsey v. United States*, 302 F.3d 1074, 1078 (9th Cir. 2002) (noting that "all citizens, including Indians, are subject to federal taxation unless exempted" and quoting *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973) ("Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory State law[s].")); *Cree v. Waterbury*, 78 F.3d 1400, 1403 (9th Cir. 1996) [hereinafter "*Cree I*"] ("State tax laws applied to Indians outside of Indian country, such as those at issue here, are presumed valid '[a]bsent an express federal law to the contrary.'") (quoting *Mescalero*, 411 U.S. at 148-49); *United States v. Baker*, 63 F.3d 1478, 1484 (9th Cir. 1995) ("Federal laws of general applicability are presumed to apply with equal force to Indians.").

The applicable standard of review varies depending on whether the contested law is state or federal. If the contested law is a state law, the court presumes that the law is valid as applied to Indians "absent express federal law to the contrary." *Cree I*, 78 F.3d at 1403 (quoting *Mescalero*, 411 U.S. at 148-49) (internal quotation marks omitted). "A treaty can constitute such an express federal law." *Id.* Whether a treaty exempts an Indian Tribe from a state law depends on the parties' intent when they entered the treaty. *Id.* at 1404. In determining the parties' intent, the Court must "examine the Treaty language as a whole, the circumstances surrounding the Treaty, and the conduct of the parties since the Treaty was signed . . . ." *Id.* at 1405.

Additionally, the Treaty "must be interpreted as the Indians would have understood [it]." *Cree v. Flores*, 157 F.3d 762, 769 (9th Cir. 1998) [hereinafter "*Cree II*"]. If the plain language of the treaty is ambiguous, then the Court considers extrinsic evidence, resolving ambiguities in favor of the Indians. *King Mountain Tobacco Co. v. McKenna*, 768 F.3d 989, 993 (9th Cir. 2014) ("[E]ven though legal ambiguities are resolved to the benefit of the Indians, courts cannot ignore plain language that, viewed in historical context and given a fair appraisal, clearly runs counter to a tribe's later claims."); *United States v. Smiskin*, 487 F.3d 1260, 1264 (9th Cir. 2007) ("The text of a treaty must be construed as the Indians would naturally have understood it at the time of the treaty, with doubtful or ambiguous expressions resolved in the Indians' favor.").

In contrast, the federal government has greater power than the states to deal with Indian tribes, and thus "all citizens, including Indians, are subject to federal taxation [under federal law] unless expressly exempted." *Ramsey*, 302 F.3d at 1078. Therefore, "[t]he federal standard requires a definite expression of exemption stated plainly in a statute or treaty before any further inquiry is made or any canon of interpretation employed." *Ramsey*, 302 F.3d at 1076. The exemption language "need not explicitly state that Indians are exempt from the specific tax at issue; it must only provide evidence of the federal government's intent to exempt Indians from taxation." *Ramsey*, 302 F.3d at 1078.

The *Ramsey* court provided several examples of express exemptive language, including "free from incumbrance," "free from taxation," and "free from fees." *Ramsey*, 302 F.3d at 1078. "Only if express exemptive language is found in the text of the statute or treaty should the court determine if the exemption applies to the tax at issue." *Id.* at 1079. The Court then considers whether the exemptive language could be "reasonably construed" to support the claimed exemption. *Id.* at 1079. "[A]ny ambiguities as to whether the exemptive language applies to the tax at issue should be construed in favor of the Indians." *Id.* at 1079.

FETRA is a federal law. However, King Mountain contends that the FETRA assessments are not taxes, but fees, and that, therefore, the state law standard, rather than the federal standard, applies. ECF No. 24 at 5-8; ECF No. 26 at 7-10. The United States argues that, regardless of whether FETRA

assessments are taxes or fees, the Yakama Treaty does not exempt King Mountain from paying its FETRA assessments. ECF No. 15 at 15-18; ECF No. ECF No. 14 at 11-14.

King Mountain fails to cite any case law distinguishing a federal tax from a federal fee for purposes of determining which standard to apply to an alleged exemption. To the contrary, the *Ramsey* court used the terms "fee" and "tax" interchangeably:

> In fact, this Court recognized a distinction between the standard for state *tax* exemptions and federal *tax* exemptions in *Cree I*: The State argues that the fees 'implement federal highway financing policy,' and that consequently the *fees* are valid unless the Treaty creates a 'definitely expressed' exemption. The State presents no authority for this court to find that the state-imposed truck fees should be judged according to the standard for federal *fees*.

*Ramsey*, 302 F.3d at 1078 (emphases added) (quoting *Cree I*, 78 F.3d at 1403 n.4) (internal quotation marks omitted).

King Mountain also fails to cite, nor is the Court aware of, any case law post-*Ramsey* in which this circuit has applied the standard traditionally applied to state laws to a federal law imposing a fee, rather than a tax. The Ninth Circuit in *McKenna* generalized the two standards as applying either to state laws or to federal laws when it stated that

*Ramsey* explained "the differences between the 'express exemptive language' test, which applies to federal laws, and the 'express federal law' test, which applies to state laws." *McKenna*, 768 F.3d at 994.

Similarly, the Ninth Circuit has applied the state law standard equally to state laws imposing taxes, fees, and other regulatory measures under state law. *See, e.g., McKenna*, 768 F.3d at 993 (applying state standard to state escrow fee); *Smiskin*, 487 F.3d at 1264, 1266 (applying state standard to state notice requirement and finding that "there is no basis in either the language of the Treaty or our cases interpreting it for distinguishing restrictions that impose a fee from those, as here, that impose some other requirement."); *Cree II*, 157 F.3d at 769 (applying state standard to state license fees and permit requirements); *Cree I*, 78 F.3d at 1405 (remanding case and directing district court to apply state standard to state license fees and permit requirements).[4]

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[4] During oral argument, King Mountain stressed that the distinction between a fee and a tax is relevant for other reasons, including that a fee may be considered an unconstitutional taking, while a tax almost never is, and that a fee constitutes the taking from citizen A to give to citizen B, whereas a tax is placed into a larger pool of funds that may ultimately benefit Citizen A. However, King Mountain failed to plead in response to the United States' Motion to Dismiss that the FETRA assessments constitute an unconstitutional taking. King Mountain raises that issue in a Motion for Summary Judgment, which is not yet ripe. *See supra* note 1.

Whether the FETRA assessments solely benefit another citizen or ultimately come back to benefit King Mountain in

Although Ninth Circuit precedent may distinguish between a fee and a tax in other areas of the law, any distinction between fees and taxes is irrelevant when determining which standard applies to the interpretation of the Yakama Treaty in this instance. FETRA is a federal law, and therefore the federal standard applies. Accordingly, the Yakama Treaty must contain express exemptive language before the Court can consider whether that exemptive language applies to FETRA assessments, or consider extrinsic evidence, such as how the Yakama tribe may have understood the Treaty terms.

### b. Whether Discovery is Relevant Under the Federal Law Standard

King Mountain argues that two Articles of the Yakama Treaty prohibit imposition of FETRA assessments against it: Article II and Article III. Article II of the Treaty describes the land that was reserved to the Yakama Nation and states that the "tract shall be set apart and, so far as necessary, surveyed and marked out, *for the exclusive use and benefit* of said confederated tribes and bands of Indians . . . ." Treaty with the Yakamas, art. II, 12 Stat. 951 (1855) (emphasis added). King Mountain argues that the language "for the exclusive use and benefit" evidences an intent by the Treaty parties to prevent proceeds from the allotted land accruing to

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some way has no independent significance under the terms of the Yakama Treaty. *See infra* part C.iii.b.

any non-Indian party or government. ECF No. 24 at 11-12.

King Mountain made the same argument in its action seeking a declaratory judgment that King Mountain was exempt from paying excise taxes on its manufactured tobacco products, *King Mountain Tobacco Co. v. Alcohol and Tobacco Tax and Trade Bureau*, 923 F. Supp.2d 1280, 1285-87 (E.D. Wa. 2013) [hereinafter "*King Mountain I*"], and as a defense to the United States' action to recover those unpaid taxes, King Mountain Tobacco Co. v. Alcohol and Tobacco Tax and Trade Bureau, 996 F.Supp.2d 1061, 1068-70 (E.D. Wa. 2014) [hereinafter "*King Mountain II*"], *appeal docketed*, No. 14-35165 (9th Cir. Mar. 5, 2014).

In those cases, this Court determined that to the extent that the "exclusive use and benefit" language constitutes express exemptive language that exemption did not apply to King Mountain's manufacture of tobacco products because of the Ninth Circuit's limiting definition of that language. *King Mountain I*, 923 F.Supp.2d at 1287. The Court stated:

> The Ninth Circuit has had an opportunity to construe Article II's "exclusive use and benefit" language. In *Hoptowit v. Comm'r of Internal Revenue*, 709 F.2d 564 (9th Cir.1983), an enrolled member of the Yakama Nation sought exemptions from federal income tax for income derived from a smoke shop operated on land within the Yakama

> Nation reservation and for per diem payments received for his work on the Yakama Nation Tribal Council. *Id.* at 565. He asserted that Article II's "exclusive use and benefit" language was the source of the exemption. *Id.* at 565–66.
>
> . . . . In reviewing the language of Article II, the court noted that language "gives to the Tribe the exclusive use and benefit of the land on which the reservation is located." *Id.* The court concluded that "any tax exemption created by this language is limited to the income derived directly from the land." *Id.* . . . .
>
> This Court already has held that King Mountain does not enjoy an exemption from the federal excise tax on tobacco products under *Capoeman* because the tax is not imposed on products directly derived from the land. Therefore, to the degree that Article II contains express exemptive language, the exemption to taxation created by Article II would not apply to the facts of this case. *Id.* Accordingly, the Plaintiff has failed to establish an exemption to the excise tax under the Treaty.

*King Mountain I*, 923 F. Supp .2d at 1285-87.

The Court's reasoning in *King Mountain I* compels the same result in this case. Like the excise taxes in *King Mountain I*, the FETRA assessments

were calculated based on the quantity of manufactured cigarettes and roll your own tobacco that King Mountain placed into the market. King Mountain's market share ultimately determined the amount of King Mountain's FETRA assessments. The assessments did not apply to raw tobacco derived directly from the land. Instead, the assessments applied to the manufactured product. Thus the assessments were not imposed on a product derived directly from the land, but on a manufactured product twice or thrice removed from the land. The Court concluded that, to the extent that the "exclusive use and benefit" language in Article II constitutes express exemptive language prohibiting the imposition of taxes or fees on income that a tribal member derives directly from the land, that language does not apply to King Mountain's manufactured cigarettes or roll your own tobacco.

Because King Mountain's manufactured tobacco products are not derived directly from the land under Ninth Circuit law, no amount of discovery regarding the Yakama people's understanding of the treaty can change the result in this case.

Thus, discovery on King Mountain's counterclaim and defense regarding Article II of the Treaty is irrelevant and unnecessary.

King Mountain also argues that Article III precludes imposition of the FETRA assessments. Article III states:

> [I]f necessary for the public convenience, roads may be run throughout the said reservation; and on the other hand, the right of way, with free access from the same to the nearest public highway, is secured to them; as also the right in common with citizens of the United States, to travel upon all public highways.

Treaty with the Yakamas, art. III, 12 Stat. 951. King Mountain contends that this article guaranteed to the Yakama tribe the right to "take their goods to market free of any fees, tolls, or other impediments." ECF No. 10 at 4. King Mountain made this argument in the previous excise tax cases. *King Mountain I*, 923 F. Supp. 2d at 1285-87; *King Mountain II*, 996 F. Supp. 2d at 1068-70.

In those prior cases, this Court determined that the "free access" language in Article III "is not express exemptive language applicable to King Mountain's manufactured tobacco products." *King Mountain*, 996 F.Supp.2d at 1069. The Court relied on *Ramsey*, 302 F.3d at 1076-77, and concluded that "Article III provides 'free access' on roads running throughout the reservation to the public highways. King Mountain is not being taxed for using on-reservation roads," but rather "for manufacturing tobacco products." *Id.* at 1068-69. Thus, although the "free access" language may constitute express exemptive language, *see Ramsey*, 302 F.3d at 1080 ("The only exemptive language in the Treaty is the 'free access' language."), that language was not applicable to the excise taxes imposed on King Mountain's manufactured tobacco products.

The same principle applies to this case. The FETRA assessments are imposed against King Mountain as a manufacturer of cigarettes and roll your own tobacco, not as a driver on the roads. Therefore, Article III's "free access" language does not apply to the facts of this case. There is no ambiguity that must be resolved in King Mountain's favor.

King Mountain argues that Article III's language guaranteeing to the Yakama "the right in common with citizens of the United States, to travel upon all public highways" is infringed by the imposition of FETRA assessments. King Mountain relies on *Smiskin* to argue that the right to travel encompasses the right to trade, that a fee on King Mountain's manufactured product violates King Mountain's right to trade, and thus that the fee also violates King Mountain's right to travel under Article III of the Treaty. The United States contends that *Smiskin* is distinguishable and that McKenna's holding that the Yakama Treaty does not guarantee a "right to trade" is controlling.

In *Smiskin*, the Ninth Circuit reviewed a state law requiring individuals intending to transport unstamped cigarettes to give notice to the Washington State Liquor Control Board in advance of the transportation. *Smiskin*, 487 F.3d at 1263.

The law did not expressly exempt Yakama tribal members from the pre-notification requirement, and the Smiskins were federally indicted for failing to provide notice. *Id.* The court considered whether

applying the law to Yakama tribal members violated the right to travel under the Yakama Treaty. *Id.* at 1264-70.

The *Smiskin* court summarized its prior holding in *Cree II* in which the Ninth Circuit found that Article III of the Yakama Treaty guaranteed to Yakama members "the right to transport goods to market over public highways without payment of fees for that use." *Id.* at 1265 (quoting *Cree II*, 157 F.3d at 769) (internal quotation marks omitted). The *Smiskin* court also spoke of the "the treaty right to transport goods to market without restriction," ensured by Article III of the Treaty. *Id.* at 1266. The court rejected the Government's argument that Article III's right to travel should not apply to commercial exchanges:

> Similarly, we refuse to draw what would amount to an arbitrary line between travel and trade in this context, holding, as the Government suggests, that the Yakama Treaty does not protect the 'commerce' at issue in the Smiskins' case. We have already established that the Right to Travel provision 'guarantee[s] the Yakamas the right to transport goods to market' for 'trade and other purposes.' Thus, whether the goods at issue are timber or tobacco products, the right to travel overlaps with the right to trade under the Yakama Treaty such that excluding commercial exchanges from its purview would effectively abrogate our decision in *Cree II* and render the Right to Travel provision truly impotent.

*Id.* at 1266 (quoting *Cree II*, 157 F.3d at 769). The *Smiskin* court concluded that the pre-notification requirement operated as a "restriction" and "condition" on the right to travel and thus violated Article III of the Yakama Treaty. *Id.*

In *McKenna*, the Ninth Circuit analyzed a state escrow statute requiring King Mountain to place money into an escrow account to reimburse the State for health care costs related to the use of tobacco products. *McKenna*, 768 F.3d at 990. The amount of money to be placed in escrow was based on "the number of cigarette sales made that are subject to state cigarette taxes." *Id.* at 990-91. The court considered whether applying the statute to King Mountain violated Article III's guarantee of the Right to Travel. *Id.* at 997-98.

King Mountain argued in *McKenna* that the Ninth Circuit's "controlling case law has interpreted Article III as unequivocally prohibiting imposition of economic restrictions or pre-conditions on the Yakama people's Treaty right to engage in the trade of tobacco products." *Id.* at 997. The *McKenna* court explicitly rejected that claim, stating that "[a]s shown by the plain text of Article III, the Treaty reserved to the Yakama the right 'to travel upon all public highways.' Nowhere in Article III is the right to trade discussed." *Id.* The court distinguished *Cree II*, noting that it "involved the right to travel (driving trucks on public roads) for the purpose of transporting goods to market." *Id.* at 998. The court concluded that applying the state's escrow statute to King Mountain did not violate Article III of the

Yakama Treaty because "there is no right to trade in the Yakama Treaty." *Id.*

The FETRA assessments in this case are more analogous to the required payment into an escrow account, as in *McKenna*, than to the notification requirement held to violate Article III in *Smiskin*. In *McKenna*, King Mountain was required to pay into Washington's escrow fund because of its status as a tobacco manufacturer that elected not to participate in the Master Settlement Agreement. *McKenna*, 768 F.3d at 991. The amount that King Mountain was required to pay into the fund was determined based on "each qualifying unit of tobacco sold" by King Mountain. *Id.* at 992. Similarly, the FETRA assessments apply to King Mountain because of King Mountain's status as a manufacturer of tobacco products. The assessments are imposed on King Mountain in direct proportion to King Mountain's share of the market.

Like the escrow payments in *McKenna*, the FETRA assessments do not constitute a "restriction" or "condition" on the use of the public highways. At most, the FETRA assessments have an indirect impact on King Mountain's trade and sale of tobacco, but that impact is too attenuated from King Mountain's use of the public highways to be in any way related to the right to travel guaranteed by Article III. The attenuated nature of the FETRA assessments contrasts distinctly with the pre-notification requirement in *Smiskin*, which was only triggered if the tribal member wished to transport unstamped tobacco products within the state. *Smiskin*, 487 F.3d at 1263. The FETRA assessments

are imposed based on King Mountain's market share, and as the Court noted in *McKenna*, the Yakama Treaty does not guarantee the right to trade unencumbered. *McKenna*, 768 F.3d at 998.

Additionally, King Mountain's argument that Article III's "in common with" language guaranteeing the Yakama people the right to travel prohibits the imposition of FETRA assessments is refuted by *Ramsey*. The Ninth Circuit in *Ramsey* considered Article III's provision providing "the right in common with citizens of the United States, to travel upon all public highways," and held that the "in common with" language "contains no exemptive language." *Ramsey*, 302 F.3d at 1080. Neither *Smiskin* nor *McKenna* contain a similar holding because both cases concerned state laws, and the court applied the state standard which does not require that the treaty first contain express exemptive language. The Ninth Circuit has held already that the "in common with" language does not constitute express exemptive language, and this Court is bound by that decision.

Neither Article II nor Article III of the Yakama Treaty contains express exemptive language under the federal standard of review. Without express exemptive language, the Court may not consider extrinsic evidence regarding how Yakama tribe members understood the Treaty at the time that it was ratified.

Therefore, no discovery on King Mountain's Yakama Treaty counterclaim and defense is

warranted. King Mountain's motions for discovery are denied.

### D. Motion to Dismiss

The United States moves to dismiss King Mountain's counterclaim contending that the 1855 Yakama Treaty exempts it from paying FETRA assessments. ECF No. 14. The United States argues that King Mountain has failed to state a claim upon which relief may be granted because it did not present a cognizable legal theory. ECF No. 14.

The Federal Rules of Civil Procedure allow for the dismissal of a complaint where the plaintiff fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). A motion to dismiss brought pursuant to this rule "tests the legal sufficiency of a claim." *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). In reviewing the sufficiency of a complaint, a court accepts all well-pleaded allegations as true and construes those allegations in the light most favorable to the non-moving party. *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010) (citing *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031¬32 (9th Cir. 2008)).

To withstand dismissal, a complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."

*Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The question "is 'not whether [the Plaintiff] will ultimately prevail' on his claim, but whether his complaint was sufficient to cross the federal court's threshold." *Skinner v. Switzer*, 562 U.S. 521 (2011) (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)).

Under *Ramsey*, a statute or treaty must contain express exemptive language in order to exempt a Native American organization from paying a tax or fee. *Ramsey*, 302 F.3d at 1079. Article II and Article III of the Yakama Treaty do not contain express exemptive language applicable to this case. Consistent with the Ninth Circuit's holding in *Hoptowit*, the "exclusive use and benefit" language in Article II does not preclude imposition of FETRA assessments on King Mountain's manufactured cigarettes or roll your own tobacco because the manufactured product is not derived directly from the land. Similarly, consistent with the Ninth Circuit's holding in *Ramsey*, neither the "free access" nor the "in common with" language in Article III precludes imposition of the FETRA assessments because the assessments are levied against King Mountain's manufactured product, not against King Mountain's use of the roads.

Neither article exempts King Mountain from paying its FETRA assessments. There is no set of facts which King Mountain could plead that would change this result, and thus King Mountain has failed to plead a cognizable legal theory with regard to its treaty counterclaim. The United States' motion

to dismiss King Mountain's treaty counterclaim is granted.

### E. Motion for Summary Judgment

The United States moves for summary judgment in its favor against King Mountain on its claim to recover unpaid FETRA assessments. ECF No. 15. If this case survives King Mountain's motion for summary judgment on its counterclaim that the FETRA assessments violate the Takings Clause, the Court will remand this case to CCC for a hearing and determination regarding the accuracy of the assessment calculations. Accordingly, the Court denies with leave to renew the United States' motion for summary judgment.

### F. Motion to Strike Jury Demand

The United States moves to strike King Mountain's jury demand. ECF No. 22. The Supreme Court has held that "the Seventh Amendment right to trial by jury does not apply in actions against the Federal Government." *Lehman v. Nakshian*, 453 U.S. 156, 160 (1981). However, the "Seventh Amendment guarantees a jury trial to determine liability in a Government action seeking civil penalties." *United States v. Nordbrock*, 941 F.2d 947, 949 (9th Cir. 1991) (citing *Tull v. United States*, 481 U.S. 412, 418-25 (1987)). The United States is not seeking penalties in this case, only assessments and accrued interest. Therefore the Seventh Amendment does not provide a basis to grant King Mountain's request for a jury trial.

Section 714b(c) of Title 15 of the United States Code states that "[a]ll suits against the [CCC] shall be tried by the court without a jury." 15 U.S.C. § 714b(c). Additionally, "[a]ny suit by or against the United States as the real party in interest based upon any claim by or against the [CCC]" is subject to § 714b(c). Therefore, there is no statutory right to a jury trial in this case either.

There being no constitutional or statutory basis for a jury trial, the United States' motion to strike the jury demand is granted.

Accordingly, IT IS HEREBY ORDERED:

1. The United States' Motion for Summary Judgment, ECF No. 15, is DENIED with leave to renew.

2. The United States' Motion to Dismiss Counterclaim, ECF No. 14, is GRANTED in part. King Mountain's counterclaim that the 1855 Yakama Treaty precludes imposition of FETRA assessments against it is DISMISSED with PREJUDICE. King Mountain's counterclaim that the General Allotment Act precludes imposition of FETRA assessments against it is deemed WAIVED.

3. The United States' Motion to Strike Jury Demand, ECF No. 22, is GRANTED. King Mountain's jury demand is hereby STRICKEN from the record.

4. King Mountain's Rule 56(d) Motion in Opposition to United States of America's Motion for Summary Judgment, ECF No. 23, is DENIED.

5. King Mountain's Motion in Support of Defendant's Essential Right to Conduct Discovery, ECF No. 25, is DENIED.

6. The United States' Motion to Strike Reply Memorandum, ECF No. 37, is DENIED.

The District Court Clerk is directed to enter this Order and provide copies to counsel.

DATED this 27th day of July 2015.

/s/ Rosanna Malouf Peterson
ROSANNA MALOUF PETERSON
Chief United States District Court Judge

131 F. Supp. 3d 1088

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

NO: 1:14-cv-3162-RMP

FILED: September 17, 2015

UNITED STATES OF AMERICA,

Plaintiff,

v.

KING MOUNTAIN TOBACCO CO., INC.,

Defendant.

[*1090] ORDER DENYING KING MOUNTAIN'S MOTION FOR SUMMARY JUDGMENT

BEFORE THE COURT is King Mountain Tobacco Company, Inc.'s Motion for Summary Judgment, ECF No. 41. The Court heard telephonic oral argument on the motion on September 16, 2015. Trial Attorney Kenneth Sealls appeared on behalf of the United States, and Randolph Barnhouse appeared on behalf of King Mountain. The Court has reviewed the motions, considered the parties' arguments, and is fully informed.

## BACKGROUND

The Court incorporates by reference its Order regarding various motions, ECF No. 46, in which the Court recounts the procedural and factual background of this case.

## DISCUSSION

### A. Takings Clause

King Mountain moves for summary judgment in its favor on the basis that the FETRA assessments constitute an unconstitutional taking under the Fifth Amendment and therefore are invalid. ECF No. 41. First, King Mountain argues that the FETRA assessments are per se takings, citing *Horne et al v. USDA*, 135 S.Ct. 2419 (2015), in support of its argument. Second, King Mountain argues in the alternative that the FETRA assessments are regulatory takings under *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998) (plurality opinion).

#### i. Relevant Law

The final clause of the Fifth Amendment provides: "nor shall private property be taken for public use, without just compensation." Const. amend. V. The Takings provision "does not prohibit the taking of private property, but instead places [conditions] on the exercise of that power:" (1) the taking must be for a "public use," and (2) "just compensation" must be paid to the owner. *Brown v.*

*Legal Foundation of Wa.*, 538 U.S. 216, 231 (2003); *First English Evangelical Lutheran Church of Glendale v. Los Angeles Cnty., Ca.*, 482 U.S. 304, 315-16 (1987). The Supreme Court has emphasized the role of the takings doctrine as "barring Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Lingle v. Chevron U.S.A. Inc.*, [*1091] 544 U.S. 528, 537 (2005).

Thus, the Court conducts a two-step inquiry when analyzing a takings claim. First, the Court determines whether a "taking" has occurred: "that is, whether the complained-of government action constitutes a 'taking,' thus triggering the requirements of the Fifth Amendment." *Horne v. USDA*, 750 F.3d 1128, 1136 (9th Cir. 2014) *reversed on other grounds by Horne v. USDA*, 135 S. Ct. 2419 (2015). Second, the Court asks whether the government provided "just compensation" to the property owner. *Id.* The party challenging government action bears the burden of proving that the action constitutes an unconstitutional taking. *Eastern Enterprises v. Apfel*, 524 U.S. 498, 522 (1998).

The Supreme Court has recognized broadly two types of takings. Historically, the Court has recognized the "classic taking" or "paradigmatic taking" in which the government directly appropriates or physically invades private property. *Lingle*, 544 U.S. at 537; *Eastern Enterprises*, 524 U.S. at 522. Such physical invasion constitutes a per se taking and creates a "clear rule" establishing "a

categorical duty to compensate the former owner, regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof." *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 322 (2002).

The Supreme Court has applied this "clear rule" when the government took possession of a leasehold and physically occupied the property for its own use, *United States v. General Motors Corp.*, 323 U.S. 373 (1945); when the government appropriated part of a rooftop to provide for the installation of television cables, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); and when the government used private airspace to fly an airplane into a government airport, *United States v. Causby*, 328 U.S. 256 (1946). *See Tahoe Sierra*, 535 U.S. at 322 (referencing these examples). Although some of these per se takings may have been implemented through regulation, *see Loretto*, 458 U.S. at 423, their defining feature is a physical possession or invasion of private property, and the Court applied the clear rule to each.

In later Supreme Court jurisprudence, the Court recognized the concept of regulatory takings, in which government regulation proves to be "so onerous that its effect is tantamount to a direct appropriation or ouster . . . ." *Lingle*, 544 U.S. at 537. Whether government action constitutes a regulatory taking is "a question of degree" that "cannot be disposed of by general propositions." *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922). Accordingly, determining whether challenged government action

amounts to a regulatory taking involves an "essentially ad hoc, factual inquir[y]." *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

Within the regulatory takings doctrine, the Court has identified another form of per se taking that results whenever a regulation completely "deprives an owner of 'all economically beneficial uses' of his land." *Tahoe Sierra*, 535 U.S. at 330 (*quoting Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992)) (emphasis in original). Under *Lucas*, a regulation need not result in an actual physical invasion or possession of private [*1092] property to constitute a "total taking"; if the regulation "prohibits all economically beneficial use of land," the clear rule applies and the government has a categorical duty to compensate the owner. *Lucas*, 505 U.S. at 1030. The regulatory per se taking rule established in Lucas does not apply to the imposition of FETRA assessments in this case because there is no challenge of the government's taking of land.

Additionally, the Supreme Court has referred to the government action in *Loretta*, requiring installation of television cables on private property, both as a classic per se taking and as a regulatory per se taking. *Compare Tahoe Sierra*, 535 U.S. at 322 (grouping *Loretta* with other classic per se takings cases), with *Lingle*, 544 U.S. at 538 (referring to the rule established in *Loretta* as one of "two categories of regulatory action"). However, the distinction is irrelevant to this Court's analysis, because Loretta involved a physical invasion or possession of private property, and there has been no

physical invasion or possession of private property here.

If a challenged government action does not fall within either of these two categories constituting regulatory per se takings (*Lucas* or *Loretta*), then the court does not apply the clear rule test but instead must determine whether the challenged action nonetheless constitutes a regulatory taking under the balancing factor test set forth in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978). *Lingle*, 544 U.S. at 538. The Court considers "the economic impact of the regulation on the claimant," "the extent to which the regulation has interfered with distinct investment-backed expectations," and "the character of the governmental action – for instance, whether it amounts to a physical invasion or instead merely affects property interests through some public program adjusting the benefits and burdens of economic life to promote the common good." *Id.* at 538-39 (quoting *Penn Central*, 438 U.S. at 124) (internal quotation marks omitted). Government action must impose a severe enough burden on private property rights that it is the "functional[] equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain." *Id.* at 539.

### ii. Takings Analysis

#### a. Per Se Takings

From the outset, there is no allegation that government agents physically entered King Mountain's property or safe-deposit box and physically took possession of King Mountain's money in order to collect the FETRA assessments. To the contrary, notification of the assessments came by invoice, and King Mountain was independently responsible to wire the money to the government. Failure to do so resulted not in a physical occupation or shut-down of King Mountain's operations but in the accrual of interest on the assessments imposed. Nevertheless, King Mountain contends that the FETRA assessments constitute a per se taking comparable to the taking in *Horne et al v. USDA*, 135 S.Ct. 2419 (2015).

In *Horne*, the USDA's California Raisin Marketing Order required raisin growers to physically set aside a portion of their crop for the government. *Horne*, 135 S.Ct. at 2424. The Government could then dispose of the set aside raisins as it deemed appropriate. *Id.* The Supreme Court held that the Raisin Marketing Order was "a clear physical taking" because "[a]ctual raisins [were] transferred from [*1093] the growers to the Government." *Id.* at 2428.

King Mountain spends the majority of its argument citing to the petitioner's brief before the Supreme Court, stating that "[t]his case, just like in

Horne, involves a physical taking by the USDA." ECF No. 41 at 10. King Mountain fails to explain how the imposition of an assessment or fee constitutes a physical taking like that in Horne where there is no evidence of the government physically invading or possessing anything. This case is not analogous to *Horne*. The Court rejects the argument that imposition of FETRA assessments equates to a physical taking of King Mountain's private property.

King Mountain argues that the "clear rule" analysis traditionally employed in per se takings cases also "applies to the taking of money, or 'monetary exactions.'" ECF No. 41. King Mountain cites *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), and *Koontz,* 133 S. Ct. at 2600, to support the argument that the clear rule applies in this case. However, both cases involved a specific, identifiable monetary account. In *Webb*, the Court held that "a county's appropriation of the interest earned on private funds deposited in court in an interpleader action" constituted an unconstitutional taking, but only under the specific facts of that case, in which the county also retained a separate fee based on the amount of principle deposited. *Webb's*, 449 U.S. at 159, 164.

In *Koontz*, the Court held that a local government agency had effected an unconstitutional taking when it refused to give the petitioner a land use permit unless he either ceded a large portion of his land to the agency as a conservation easement or paid to make improvements on agency-owned land several miles away. *Koontz*, 133 S.Ct. at 2593. The agency's

extortionist conduct was untenable because it effectively prevented the petitioner from exercising his constitutional right to obtain just compensation for property appropriated by the government. *Id.* The Court stated that the monetary obligation that the agency attempted to impose on the petitioner "operate[d] upon . . . an identified property interest" because it "burdened petitioner's ownership of a specific parcel of land." *Id.* at 2599 (citing *Eastern Enterprises*, 524 U.S. at 540 (Kennedy, J., concurring in the judgment and dissenting in part)).

More importantly, the *Koontz* Court stated unequivocally: "It is beyond dispute that taxes and user fees . . . are not takings." *Koontz*, 133 S.Ct. at 2600-01. The *Koontz* holding "[did] not affect the ability of governments to impose property taxes, user fees, and similar laws and regulations that may impose financial burdens on property owners." *Id.* at 2601. Indeed, the Ninth Circuit has stated that the per se analysis or clear rule "is a particularly inapt analysis when the property in question is money. As the Supreme Court has observed, 'it is artificial to view deduction of a percentage of a monetary award as physical appropriations of property. Unlike real or personal property, money is fungible.'" *Washington Legal Foundation v. Legal Foundation of Washington*, 271 F.3d 835, 845 (9th Cir. 2001) (quoting *United States v. Sperry Corp.*, 493 U.S. 52, 62, n.9 (1989).

King Mountain attempts to distinguish FETRA assessments from taxes, but it makes no difference to the Court's analysis here. The FETRA assessments were not imposed against any specific,

identifiable property, and therefore do not constitute either a classic or regulatory per se taking.

### b. Regulatory Taking

King Mountain argues that the FETRA assessments constitute a regulatory taking under *Eastern Enterprises v. Apfel*. [*1094] ECF No. 41 at 41. In *Eastern Enterprises*, the petitioner was an energy company that was formerly involved in the coal industry. 524 U.S. at 516. Although petitioner had been out of the coal mining business for nearly forty years, the Coal Industry Retiree Health Benefit Act of 1992 required the petitioner to pay health care premiums for retired coal workers who had previously worked for petitioner's company when it mined coal. *Id.* at 517. The premiums proved to be substantial in their cost, amounting to more than $5 million for one 12-month period. *Id.* Petitioner argued that requiring it to pay health care premiums for retired coal workers violated the Takings Clause of the Fifth Amendment and petitioner's substantive due process rights. *Id.*

King Mountain's reliance on *Eastern Enterprises* is misplaced because the opinion produced by the Court was a plurality decision in which five justices held that the premiums did not violate the Takings Clause. Justice O'Connor wrote the plurality opinion, in which Justice Scalia, Justice Thomas, and Chief Justice Rehnquist joined. The four justices held that the premiums constituted a taking because of the considerable, retroactive financial burden they placed on the petitioner. *Id.* at 529-37. However, the

same four justices abstained from considering whether the premiums also violated due process. *Id.* at 538.

Justice Kennedy wrote an opinion concurring in the judgment, because he believed the premiums did violate due process, but dissenting in part, on the basis that the premiums did not constitute a taking. *Id.* at 539 (Kennedy, J., concurring in the judgment and dissenting in part). The four remaining justices, Justice Stevens, Justice Souter, Justice Breyer, and Justice Ginsburg, all agreed with Justice Kennedy that the premiums did not constitute a taking, but also found that the premiums did not violate due process. *Id.* at 550 (Stevens, J., dissenting); *id.* at 553 (Breyer, J., dissenting).

Justice Kennedy acknowledged that the Coal Act imposed a "staggering financial burden on the petitioner," but stated that the law "neither targets a specific property interest nor depends upon any particular property for the operation of its statutory mechanisms. The liability imposed on [the petitioner] no doubt will reduce its net worth and its total value, but this can be said of any law which has an adverse economic effect." *Id.* at 540; 543 (Kennedy, J., concurring and dissenting). Justice Kennedy argued that the "law simply imposes an obligation to perform an act, the payment of benefits." *Id.* at 540. He tied his analysis to the third regulatory takings factor, finding that the character of the government action proved that it was not a taking under the Fifth Amendment. *Id.* at 542. Justice Breyer agreed with him, as did Justices Stevens, Souter, and Ginsburg, stating: "This case

involves not an interest in physical or intellectual property, but an ordinary liability to pay money . . . ." *Id.* at 554 (Breyer, J., dissenting).

Nevertheless, King Mountain contends that Eastern Enterprises stands for the principle that "government taking of money is subject to Fifth Amendment protections." ECF No. 45 at 2. The Ninth Circuit has not expressly decided whether *Eastern Enterprises* establishes controlling precedent that a statute creating general liability may amount to a taking.[1] [*1095] However, other circuit courts have rejected arguments that *Eastern Enterprises* establishes binding precedent that a regulation of general liability may constitute an unconstitutional taking. *See, e.g., Swisher Int'l v. Schafer*, 550 F.3d 1046, 1054 (11th Cir. 2008) (declining to apply takings analysis to a FETRA challenge in part because five justices in *Eastern Enterprises* "expressed the view that the Takings Clause does not apply where there is a mere general liability"); *Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1339-40 (Fed. Cir. 2001) (applying the "majority" opinion in *Eastern*

[1] The Ninth Circuit Court has relied on *Eastern Enterprises* for the general proposition, supported by both Justice O'Connor's and Justice Kennedy's opinions, that "retroactivity is generally disfavored in the law." *See, e.g., Angelotti Chriopractic, Inc. v. Baker*, 791F.3d 1075, 1084 (9th Cir. 2015); *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1198 (9th Cir. 2011) (Fischer, J., dissenting in part); *RUI One Corp. v. City of Berkeley*, 371 F.3d 1137, 1167 (9th Cir. 2004) (Bybee, J., dissenting); *United States v. Ubaldo-Figueroa*, 364 F.3d 1042, 1052 (9th Cir. 2004); *Pauly v. USDA*, 348 F.3d 1143, 1152 (9th Cir. 2003); *Quarty v. United States*, 170 F.3d 961, 968 (9th Cir. 1999).

*Enterprises* that "the imposition of an obligation to pay money does not constitute an unconstitutional taking of property."); *Parella v. Retirement Bd. Of Rhode Island*, 173 F.3d 46, 58 (1st Cir. 1999) (stating that *Eastern Enterprises* stands for the principle enunciated by the dissenting justices and Justice Kennedy that "plaintiffs must first establish an independent property right before they can argue that the state has taken that right without just compensation." *See also United States v. Asarco Inc.*, No. CV 96-0122-N-EJL, CV 91-342-N-EJL, 1999 WL 33313132, at *4 (D. Id. Sep. 30, 1999) (holding that *Eastern Enterprise* is not controlling authority and has little precedential value because it is "limited to a specific result; the Coal Act is unconstitutional as applied to *Eastern Enterprises*.").

The Court is unpersuaded that *Eastern Enterprises* establishes a rule that the taking of unspecified assets through the imposition of a statute of general liability can amount to an unconstitutional taking. Five Supreme Court justices rejected this rule, and even the plurality opinion states that its holding applies to "the specific circumstances of [that] case." *Eastern Enterprises*, 524 U.S. at 537. Throughout the Supreme Court's Takings Clause jurisprudence, "the regulatory taking analysis has been employed [where] a specific property right or interest has been at stake." *Id.* at 541 (Kennedy, J., concurring in judgment and dissenting in part) (citing more than a dozen cases). FETRA does not "operate upon or alter an identified property interest." *Id.* at 540. It merely "imposes an obligation to perform an act," the payment of

assessments. *Id.* Therefore, FETRA assessments do not amount to an unconstitutional taking.

### B. Due Process Clause

King Mountain argues in the alternative that the FETRA assessments violate the Due Process Clause of the Fifth Amendment, relying again on *Eastern Enterprises*. ECF No. 41 at 18.

Laws that adjust "the burdens and benefits of economic life" are presumed to be constitutional. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). The party complaining of a due process violation must show that "the legislature has acted in an arbitrary and irrational way." *Id.* However, if the government demonstrates that the law has "a legitimate legislative purpose furthered by rational means," the law does not violate due process. *Gen. Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992). "[T]he retroactive aspects of economic legislation" must meet the same standard. *Id.* (quoting *Pension Benefit* [*1096] *Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730 (1984)) (internal quotation marks omitted).

When considering whether FETRA had a legitimate legislative purpose, the Eleventh Circuit Court of Appeals stated:

> The legitimate legislative purpose is apparent. Congress obviously perceived problems in the industry, perceived a need to eliminate the old subsidy system, and decided to move to a free

> market system. However, Congress recognized that tobacco farmers and quota holders should be provided some cushion for the transition. Seeing these economic problems in the industry, Congress exercised its legitimate legislative powers to address the same.

*Swischer Intern*, 550 F.3d at 1058. Additionally, the Eleventh Circuit concluded that "the means Congress chose to address these industry problems were rational."

> Congress recognized that such a transition to a free market system would benefit all current and future tobacco manufacturers and importers, and thus devised a system of assessments to fund the transition to the free market system – i.e., assessing all current tobacco manufacturers and importers, all of whom would benefit from the transition to the free market system.

*Id.* at 1058-59.

The Court finds the Eleventh Circuit's analysis persuasive, as have other district courts. *See, e.g., United States v. Native Wholesale Supply Co.*, 822 F.Supp.2d 326, 336 (W.D.N.Y. 2011). It is evident that the transition from a quota system to a free market system would lower the price of tobacco, to the detriment of tobacco farmers, but to the benefit of tobacco manufacturers such as King Mountain. Imposing an assessment on those tobacco manufacturers who were likely to benefit from the

price decrease was a rational and legitimate exercise of legislative authority.

King Mountain contends that FETRA is retroactive in application because it is intended to remedy the sins of large tobacco companies committed prior to FETRA's enactment. ECF No. 41. King Mountain argues that FETRA violates due process as applied to it because King Mountain was not in operation until 2004 when FETRA went into effect. ECF No. 41.

King Mountain's contentions are without merit. FETRA assessments were imposed against current tobacco manufacturers and importers based on their market share in the current quarter. No aspect of the assessment calculations was based on past conduct. Whether the legislative purpose behind FETRA related to historical price quotas is irrelevant to the question of whether FETRA assessments are retroactive in application. They do not burden King Mountain based on King Mountain's past conduct, and therefore are not retroactive in nature. *See Eastern Enterprises*, 524 U.S. at 537 (noting that the Coal Act punished the petitioner for its own "conduct far in the past"). Therefore, the Court finds that FETRA does not violate the Due Process Clause of the Fifth Amendment.

### C. Equal Protection Clause

King Mountain argues that FETRA assessments violate the Equal Protection Clause because King

Mountain is a smaller company than other tobacco companies and is therefore treated unequally. ECF No. 41 at 18-19. "In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." [*1097] *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993).

However, the Court need not apply the rational basis test in this case because there is no evidence of unequal treatment. FETRA assessments are imposed based on each tobacco manufacturer's own market share per product. The Court is perplexed by King Mountain's complaint that this somehow disadvantages King Mountain. King Mountain is required to pay no more than its own sale of tobacco in the free market commands. Larger tobacco companies presumably sell more than King Mountain, taking up a larger share of the market and resulting in the imposition of higher FETRA assessments. Because FETRA assessments are imposed proportionate to a manufacturer's own sales, there is no basis for an Equal Protection claim.

### D. Unconstitutional Conditions Doctrine

King Mountain claims that FETRA impermissibly burdens King Mountain's participation in commerce, violating the Unconstitutional Conditions Doctrine. ECF No. 41 at

18-19. The Unconstitutional Conditions Doctrine serves to "vindicate[] the Constitution's enumerated rights by preventing the government from coercing people into giving them up." *Koontz*, 133 S.Ct. at 2594. "[T]he government may not deny a benefit to a person because he exercises a constitutional right." *Id.* FETRA neither prevented King Mountain from manufacturing tobacco and placing it into the stream of commerce, nor denied King Mountain any benefit because it engaged in interstate commerce. FETRA simply imposed a fee, over a period of ten years, based on the amount of tobacco King Mountain manufactured. FETRA assessments are a cost of doing business, but their cost is not so prohibitive as to have coerced King Mountain into ceasing to manufacture tobacco. The Court finds that the FETRA assessments do not violate the Unconstitutional Conditions Doctrine.

Accordingly, IT IS HEREBY ORDERED:

1. King Mountain Tobacco Company, Inc.'s Motion for Summary Judgment, ECF No. 41, is DENIED.

2. This case is REMANDED to the United States Department of Agriculture, Commodity Credit Corporation, only for a hearing and determination regarding the accuracy of the FETRA assessments imposed against King Mountain, consistent with this Court's Order, ECF
No. 46.

The District Court Clerk is directed to enter this Order, to provide copies to counsel.

DATED this 17th day of September 2015.

/s/ Rosanna Malouf Peterson
ROSANNA MALOUF PETERSON
Chief United States District Court Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

NO: 1:14-cv-3162-RMP

FILED: November 7, 2016

UNITED STATES OF AMERICA,

Plaintiff,

v.

KING MOUNTAIN TOBACCO CO., INC.,

Defendant.

# ORDER GRANTING UNITED STATES' MOTION FOR SUMMARY JUDGMENT

BEFORE THE COURT is the United States' Motion for Summary Judgment, ECF No. 60, renewing its prior motion for summary judgment. Trial Attorney Kenneth Sealls represents the United States, and Justin Solimon represents King Mountain. The Court has reviewed the motions, the entire record in this case, considered the parties' arguments, and is fully informed.

## BACKGROUND

The Court incorporates by reference its prior orders, ECF No. 46 and 50, regarding the parties' associated motions in which the Court recounts the procedural and factual background of this case as well as the legal analysis and findings and conclusions relevant to the current motion for summary judgment. The Court previously denied the United States' Motion for Summary Judgment, ECF No. 15, but granted leave to renew, which the United States has done with its current motion, ECF No. 60, incorporating its prior briefing submitted in conjunction with ECF No. 15.

The United States argues that King Mountain is a tobacco manufacturer subject to FETRA, 7 U.S.C. § 518d(b)(1). ECF No. 15 at 6. Further, the United States contends that King Mountain has failed to make its required payments for FETRA assessments which total over six million dollars. ECF No. 15 at 7. King Mountain raised a number of legal defenses, claims, and counter claims to the FETRA assessments, all of which this Court previously has denied. *See* ECF No. 46, 50. King Mountain also repeatedly requested an opportunity for discovery, which this Court also denied. *See* ECF No. 46.

In the Order Denying King Mountain's Motion for Summary Judgment, the Court remanded this case to the Commodity Credit Corporation ("CCC") of the United States Department of Agriculture "only for a hearing and determination regarding the accuracy of the FETRA assessments imposed against King

Mountain, consistent with this Court's Order, ECF No. 46." ECF No. 50 at 17-18. A telephonic hearing with the CCC hearing officer was held on February 17, 2016. ECF No. 60-1, Soto Decl. ¶11. The United States now moves for summary judgment for the amount of FETRA assessments that were conceded by King Mountain during the telephonic hearing with the CCC hearing officer. ECF No. 60-1, Soto Decl. ¶12.

## DISCUSSION

FETRA requires courts to uphold a final assessment determination of the Secretary if it is supported by "a preponderance of the information available to the Secretary." 7 U.S.C. § 518d(j)(3). The court determines whether the evidence in the administrative record supports the agency's decision. *See Sierra Club v. U.S. Army Corps of Eng'rs*, 772 F.2d 1043, 1051 (2d Cir. 1985); *see also Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985).

The moving party is entitled to summary judgment when there are no disputed issues of material fact when all inferences are resolved in favor of the non-moving party. *Northwest Motorcycle Ass'n v. United States Dep't of Agric.*, 18 F.3d 1467, 1471 (9th Cir. 1994); FED. R. CIV. P. 56(c). At the summary judgment stage, the Court does not weigh the evidence presented, but instead assumes its validity and determines whether it supports a necessary element of the claim. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). To prevail at the summary judgment stage, a party must establish that a fact cannot be genuinely disputed and that

the adverse party cannot produce admissible evidence to the contrary. FED. R. CIV. P. 56(c). Once the moving party has met their burden, the non-moving party must demonstrate that there is probative evidence that would allow a reasonable jury to find in their favor. *See Anderson v. Liberty Lobby*, 477 U.S. 242, 251 (1986).

In the United States' renewed motion for summary judgment, the United States submitted evidence establishing that King Mountain owes FETRA assessments in an amount exceeding six million dollars. ECF No. 60-1, Soto Decl. ¶8. The United States also submitted evidence that during the telephonic hearing with the CCC hearing officer on remand, Mr. Solimon, who was representing King Mountain, had no questions regarding either the documentation or explanation of the accounting and that "[t]he hearing officer determined that because Mr. Solimon [representing King Mountain] and the CCC agreed on the accuracy of the FETRA assessments imposed in or after February 2012, the matter before him was moot." ECF No. 60-1, Soto Decl. ¶12.

In response to the United States' renewed motion for summary judgment, King Mountain now argues that King Mountain could not adequately identify any errors in the assessment amounts because it has been deprived of the opportunity to conduct discovery. ECF No. 63 at 2-3. King Mountain argues that it has been deprived due process because of the denial by the CCC to conduct discovery and as a result appears to dispute that it owes any FETRA assessments. ECF No. 63 at 6. King Mountain does

not support their contention with any evidence or legal authority, but rather appears to be resurrecting their previous arguments regarding due process and discovery that this Court previously rejected. ECF No. 64 at 5.

After reviewing the pleadings, the Court finds that the United States has submitted sufficient evidence to support its claims that King Mountain owed FETRA assessments in an amount of $6,425,683.23[1] at the time of the United States' Motion for Summary Judgment. King Mountain has not submitted any evidence to refute that amount, and apparently conceded the accuracy of that amount during the CCC telephonic hearing on February 17, 2016. *See* ECF No. 60-1, Soto Decl. ¶12.

In its prior orders, the Court fully analyzed the parties' arguments and legal authority and found that King Mountain failed to establish any exemption, legal defense, claim, or counter claim involving the FETRA assessments. *See* ECF No. 46, 50. In response to the current motion for summary judgment, King Mountain has not submitted any evidence or legal authority to raise a genuine issue of material fact as to whether the United States is entitled to the $6,425,683.23 in FETRA assessments that it claims. Therefore, the Court finds that

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[1] This was the amount that was noted at the time that Ms. Soto's declaration was submitted. The Court is aware that additional penalties or interest may have accrued in the lapsed time and that the final judgment amount may need to be adjusted accordingly.

summary judgment for the United States is appropriate in this matter.

Accordingly, **IT IS HEREBY ORDERED**:

1. The United States' Motion for Summary Judgment, ECF No. 60, is GRANTED.

2. Judgment shall be entered in favor of the United States in the amount of $6,425,683.23, plus any additional interest that may have accrued since August 16, 2016.

The District Court Clerk is directed to enter this Order, enter Judgment as outlined above, provide copies of this Order to counsel, and **close this case**.

**DATED** this 7th day of November 2016.

/s/ Rosanna Malouf Peterson
ROSANNA MALOUF PETERSON
Chief United States District Court Judge

996 F. Supp. 2d 1061

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

FILED: January 24, 2014

KING MOUNTAIN TOBACCO CO., INC., *et al.*,

Plaintiffs,

v.

ALCOHOL & TOBACCO TAX & TRADE BUREAU, *et al.*,

Defendants.

Case No.: 2:11-cv-3038-RMP

# [*1062] ORDER GRANTING UNITED STATES' MOTION FOR SUMMARY JUDGMENT

Before the Court is a motion for summary judgment filed by the United States, ECF No. 134. A similar motion was filed in the related case *United States v. King Mountain Tobacco Co.*, Case No. 12-3089 at ECF No. 48. The Court heard oral argument on the motions in both cases. John Adams Moore, Jr., and Randolph Barnhouse represented the plaintiff, the Confederated Tribes and Bands of the Yakama Indian Nation. W. Carl Hankla, Trial Attorney for the Tax Division of the United States

Department of Justice, represented the United States. The Court has reviewed the briefing and all supporting documents presented in this case and in Case No. 12-3089 and is fully informed.

## BACKGROUND

The following facts are not in dispute. Plaintiff Confederated Tribes and Bands of the Yakama Nation ("Yakama Nation") is a federally recognized Indian tribe. ECF No. 141 at 2. King Mountain Tobacco, Inc. ("King Mountain") is a corporation organized, existing, and operating under the laws of the Yakama Nation. *Id.* Delbert Wheeler, Sr., is an enrolled member of the Yakama Nation and is the owner and operator of King Mountain. *Id.*

King Mountain's manufacturing facilities are located within the boundaries of the Yakama Nation Reservation on property held in trust by the United States for the beneficial use of Mr. Wheeler. ECF No. 141 at 2. King Mountain manufactures cigarettes and roll-your-own tobacco. ECF No. 103 at 2. The parties agree that the tobacco products at issue in this case are manufactured from a blend of tobacco grown on Yakama Nation trust land and tobacco grown elsewhere on non-trust land. ECF No. 141 at 2.

The amount of tobacco used in King Mountain's products is subject to some dispute. At the time that the Court previously entered its Order Denying Plaintiff's Motion for Partial Summary Judgment, uncontroverted evidence established that [*1063]

approximately twenty percent of the tobacco used by King Mountain in its manufactured products was grown on trust land. ECF No. 103 at 9. In responding to the instant motion for summary judgment, Yakama Nation asserts that King Mountain has increased the percentage of tobacco grown on trust land since 2012. ECF No. 141-1 at 3-4. Yakama Nation further asserts that as of the fourth quarter of 2013, fifty-five percent of the tobacco used in King Mountain's manufactured products is grown exclusively on trust land. *Id.*

Yakama Nation additionally asserts that King Mountain now produces "traditional use tobacco" that is "intended for Indian traditional and ceremonial use and [] consists entirely of (100 percent) tobacco grown exclusively on [trust land]." ECF No. 141-1 at 4. According to Yakama Nation, six shipments of King Mountain's "traditional use tobacco" have been subject to federal excise taxes since 2012. *Id.* However, Yakama Nation's First Amended Complaint raised only the issue of cigarettes and roll-your-own tobacco products, ECF No. 16 at 26, and did not state a claim relating to its "traditional use tobacco." In addition, the parties presented little argument related to the "traditional use tobacco" in the course of litigating this case.

King Mountain, Mr. Wheeler, and the Yakama Nation brought this action seeking a declaration that King Mountain is not subject to payment of federal excise taxes on tobacco products; a declaration that the Yakama Nation is entitled to meaningful consultation and resolution of disputes with the executive branch; and an injunction against

Defendant Alcohol and Tobacco Tax and Trade Bureau ("TTB") prohibiting TTB from preventing the sale of King Mountain's products. ECF No. 16 at 53-54. In addition, Plaintiff seeks a refund or abatement of all monies paid under the excise tax requirements. *Id.*

Upon a motion from the United States, the Court dismissed King Mountain and Mr. Wheeler from this action for lack of jurisdiction. ECF No. 83. However, the Court held that it has jurisdiction to hear claims brought by the Yakama Nation. ECF No. 83. The Court further ruled that Yakama Nation may press claims on behalf of King Mountain and Delbert Wheeler, because the Yakama Nation's interests as a sovereign are implicated by the imposition of taxes upon its enrolled members. ECF No. 83 at 9-10.

Yakama Nation previously filed a motion for partial summary judgment, ECF No. 52. In ruling on that motion, the Court held that: 1) King Mountain was not exempt from taxation under the General Allotment Act for manufacturing cigarettes and roll-your-own tobacco; and 2) Article II of the 1855 Yakama Treaty did not contain express language exempting the manufacture of tobacco products from federal taxation. ECF No. 103.[1]

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[1] The United States' current motion touches upon some issues already ruled upon by the Court in denying Yakama Nation's previous motion for partial summary judgment. ECF No. 103. However, the Court recognizes that in the instant motion, the United States bears the burden of establishing that it is entitled to summary judgment under Federal Rule of Civil Procedure 56.

The United States now seeks summary judgment, contending that as a matter of law that it is entitled to dismissal of all claims pressed by the remaining plaintiff, Yakama Nation.

## SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A key purpose [*1064] of summary judgment "is to isolate and dispose of factually unsupported claims." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). Summary judgment is "not a disfavored procedural shortcut," but is instead the "principal tool[ ] by which factually insufficient claims or defenses [can] be isolated and prevented from going to trial with the attendant unwarranted consumption of public and private resources." *Celotex*, 477 U.S. at 327.

The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. *See Celotex*, 477 U.S. at 323. The burden then shifts to the non-moving party to "set out 'specific facts showing a genuine issue for trial.'" *Id.* at 324 (quoting Fed. R. Civ. P. 56(e)).

A genuine issue of material fact exists if sufficient evidence supports the claimed factual dispute, requiring "a jury or judge to resolve the parties' differing versions of the truth at trial." *T.W.*

*Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir.1987). At summary judgment, the court draws all reasonable inferences in favor of the nonmoving party. *In re Oracle Corp. Sec. Litig.,* 627 F.3d 376, 387 (9th Cir. 2010) (citing *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 252, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)). The evidence presented by both the moving and non-moving parties must be admissible. Fed. R. Civ. P. 56(e). The court will not presume missing facts, and non-specific facts in affidavits are not sufficient to support or undermine a claim. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888-89, 110 S. Ct. 3177, 111 L. Ed. 2d 695 (1990).

## DISCUSSION

As citizens of the United States, enrolled members of federally recognized Indian tribes are generally liable to pay federal taxes. *See Squire v. Capoeman*, 351 U.S. 1, 6, 76 S. Ct. 611, 100 L. Ed. 883, 1956-1 C.B. 605 (1956). Federal law imposes an excise tax on the manufacturing of tobacco products to be calculated against the manufacturer at the time of the removal of the tobacco products from the manufacturer's facilities. 26 U.S.C. §§ 5701-5703. Yakama Nation contends that their tobacco products are exempt from excise taxes under the General Allotment Act, Articles II and III of the 1855 Yakama Treaty, and Section 4225 of the Internal Revenue Code pertaining to Indian handicrafts.[2]

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[2] Yakama Nation also claimed in its First Amended Complaint that it is entitled to a face-to-face meeting with the President of the United States to resolve any disputes under the 1855

Each of these issues is examined in turn.

General Allotment Act

Under the General Allotment Act, individual Indians were allotted lands to be held in trust by the United States for the benefit of that individual Indian. *Capoeman*, 351 U.S. at 3. After twenty five years, absent extension of the trust period by the President, the land would be conveyed in fee simple to the allottee. *Id.* Part of the Act states:

> [T]he Secretary of the Interior may, in his discretion, and he is authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter *all restrictions as to sale, incumbrance, or taxation of said land shall be removed* and said land shall not be liable [*1065] to the satisfaction of any debt contracted prior to the issuing of such patent . . . .

25 U.S.C. § 349 (emphasis added).

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Yakama Treaty. ECF No. 16 at 52-53. However, Yakama Nation represented at oral argument that a meeting has since occurred between the president and a member of the Yakama Nation's leadership. This claim is therefore moot.

In *Capoeman*, the Supreme Court held that the language "all restrictions as to . . . taxation of said land shall be removed," implied that trust land that was not yet patented in fee was not subject to taxation. 351 U.S. at 8-10. The Supreme Court noted, however, that the restriction on taxation was limited to "the trust and income derived directly therefrom." *Id.* at 9. Income that was not derived directly from trust land but was derived from earlier income from the land, also known as "reinvestment income," was not exempt from taxation. *Id.* (discussing F. Cohen, *Handbook of Federal Indian Law* 265-66 (1942)). In *Capoeman*, the taxes at issue were capital gains assessed as income tax on the sale of timber. *Id.* at 4. The Court held that the income resulting from the sale of the timber was derived directly from the trust land and, therefore, not subject to federal income tax. *Id.* at 9-10.

Cases decided after *Capoeman* have identified sources of income beyond timber that are derived directly from the land and are not subject to income tax. *E.g., Stevens v. Commissioner*, 452 F.2d 741, 747 (9th Cir. 1971) (holding that income derived from ranching and farming operations by an allottee on his allotted land are not taxable); *United States v. Daney*, 370 F.2d 791 (10th Cir. 1996) (holding that bonuses paid to allottee for oil and gas leases to his allotment were not taxable). However, other cases have found that some income-producing activities, despite being sited on allotted or tribal trust land, are subject to federal income taxes. *E.g., Dillon v. United States*, 792 F.2d 849, 856 (9th Cir. 1986) (holding that income from a smoke shop operated on trust land was not "generated principally from the

use of reservation land and resources"); *Critzer v. United States*, 597 F.2d 708, 713-14, 220 Ct. Cl. 43 (Ct. Cl. 1979) (holding that income generated from a motel, a restaurant, a gift shop, and from building rentals, is not derived directly from the land).

This case concerns tobacco products that King Mountain manufactures from a blend of tobacco, some of which was grown on trust land and some of which was grown elsewhere on non-trust land. The unprocessed tobacco grown on trust land is analogous to the timber grown on trust land in *Capoeman*, and any income from the unprocessed tobacco could be deemed as derived directly from the land. *See* 351 U.S. at 8-10.

In this case the United States is not seeking to impose a tax on the income from unprocessed tobacco grown on trust land. The excise tax at issue is assessed on manufactured tobacco products, including cigarettes and roll-your-own tobacco. The manufacturing process is a combination of labor and capital investment, rather than a product derived directly from the land. *See id.; Critzer*, 597 F.2d at 713. Manufacturing tobacco products from unprocessed tobacco grown on trust land is analogous to "income derived from investment of surplus income from the land." *See Capoeman*, 351 U.S. at 9. The excise tax at issue is triggered by the manufacturing process, which is more akin to reinvestment income that is not exempt from taxation. *See Dillon*, 792 F.2d at 855-56.

The Court's decision is consistent with the purposes of the allotment system as expressed in *Capoeman*. In *Capoeman*, the Court recognized that the purpose of the allotment system "was to protect the Indians' interest and to prepare the Indians to take their place as independent qualified members of the modern body politic." *Id.* As such, the Court recognized [*1066] that it is necessary to preserve from taxation all income derived directly from the allotment land, but it is not necessary to preserve reinvestment income. *Id.*

Yakama Nation's right to grow tobacco on its land free from taxation is not at issue in this case. The purposes underlying the allotment system are not undermined when an excise tax is imposed on manufactured tobacco products created by reinvesting unprocessed tobacco into manufactured tobacco products.

In its previous order, the Court referred to the portion of trust land tobacco used to manufacture King Mountain's finished tobacco products to illustrate the limited connection between the unprocessed tobacco that is derived directly from the land and the finished tobacco products. The proportion of trust land grown tobacco used in the finished tobacco products is not determinative. Whether the tobacco used to manufacture the tobacco products is constituted of fifty-five percent trust land grown tobacco or twenty percent trust land grown tobacco does not change the Court's analysis or conclusions. The excise tax at issue is on the manufactured product, not on the tobacco grown on trust land.

Yakama Nation also contends that King Mountain should be entitled to an allocated tax exemption for that portion of its finished tobacco products that were made using tobacco grown on Yakama trust land. The Court rejects Yakama Nation's theory of allocation for the same reasons that it rejects Yakama Nation's argument under *Capoeman*.[3] The United States is imposing an excise tax on the manufactured tobacco products. The excise tax is not imposed on the unprocessed tobacco, some portion of which may be derived directly from the land. Applying a theory of allocation in this case tied to a proportion of the materials that are derived directly from the land would result in an impermissible broadening of the *Capoeman* rule. *See Dillon,* 792 F.2d at 857.

Additionally, the Court notes an alternative basis for granting summary judgment on the Yakama Nation's claim under the General Allotment Act. The Ninth Circuit consistently has held that the tax exemption under *Capoeman* for income derived directly from trust land applies only to income derived from the allottee's own allotment. *United States v. Anderson*, 625 F.2d 910, 914 (9th Cir. 1980). For example, if an allottee earns income from cattle that graze on different allottees' trust land, such income would not be excludable from income tax. *Id.* at 912. The *Anderson* court noted that "*Capoeman's* point was that if an Indian's allotted

[3] The Court notes that Yakama Nation did not cite to a single case where a court applied an allocation theory to the *Capoeman* line of cases.

land (or the income directly derived from it) was taxed, and the tax was not paid, the resulting tax lien on the land would make it impossible for him to receive the land free of 'incumbrance' at the end of the trust period." *Id.* at 914. In contrast, an allottee's failure to pay taxes would not give rise to a tax lien on a different beneficiary's land. *Id.* (quoting *Holt v. Commissioner*, 364 F.2d 38, 41 (8th Cir. 1966)).

In this case, Mr. Wheeler is the allottee, but King Mountain is the tax payer. The tax lien statute applies to the property of the "person liable to pay" the unpaid tax. 26 U.S.C. § 6321. Although the Court is aware that Mr. Wheeler's assets could be subject to a tax lien if King Mountain was found to be Mr. Wheeler's alter ego, *see G. M. Leasing Corp. v. United States*, 429 U.S. 338, 350-51, 97 S. Ct. 619, 50 L. Ed. 2d 530 (1977), the record is devoid of any evidence that King Mountain is Mr. Wheeler's alter ego. Accordingly, any failure [*1067] by King Mountain to pay tax would presumably result in a tax lien on any assets owned by King Mountain. As the trust property is held for the benefit of Mr. Wheeler, it is not King Mountain's asset, and presumably the property would not be subject to a tax lien. Therefore, under the reasoning of *Anderson*, the *Capoeman* exemption would not apply to taxes owed by King Mountain.

Therefore, the Court finds that there is no tax exemption under the General Allotment Act for the manufactured tobacco products.

**Article II of the 1855 Yakama Treaty**

The United States contends that King Mountain is not exempt from taxation for cigarettes and roll-your-own tobacco under Article II of the 1855 Yakama Treaty. Article II of the Treaty describes the land that was reserved to the Yakama Nation and states that the "tract shall be set apart and, so far as necessary, surveyed and marked out, for the exclusive use and benefit of said confederated tribes and bands of Indians . . . ." *Id.* (emphasis added). The Yakama Nation argues that the language "for exclusive use and benefit" evidences an intent by the United States to exclude certain activities, such as the manufacturing of tobacco products, from federal taxation.

As an initial matter, the parties dispute whether the Court is limited to the four corners of the Treaty when determining whether the treaty creates a tax exemption, or if the Court may also consider extrinsic information such as information about the parties' intent during treaty negotiations.

The Ninth Circuit addressed the scope of this inquiry in *Ramsey v. United States*, 302 F.3d 1074 (2002). Kip Ramsey was an enrolled member of the Yakama Nation. *Id.* at 1076. Mr. Ramsey owned a logging company and used diesel trucks exceeding 55,000 pounds of gross weight to haul his lumber. *Id.* Federal law imposed a tax on trucks that exceeded 55,000 pounds. *Id.* (citing 26 U.S.C. § 4481). Mr. Ramsey argued that the truck taxes were preempted

by Article III of the Treaty. *Id.* Article III of the Treaty reads in pertinent part:

> [I]f necessary for the public convenience, roads may be run through the said reservation; and on the other hand, the right of way, with free access from the same to the nearest public highway, is secured to them; as also the right, in common with citizens of the United States, to travel upon all public highways.

*Ramsey*, 302 F.3d at 1076-77 (quoting 12 Stat. at 951-53).

Mr. Ramsey asserted that this language precluded the taxation of enrolled members of the Yakama Nation for using public highways. *Id.* at 1077. As part of his argument, Mr. Ramsey relied on the fact that the Ninth Circuit had held that the Treaty preempted Washington law that taxed heavy vehicles. *Cree v. Flores*, 157 F.3d 762, 771 (9th Cir. 1998). Mr. Ramsey asserted that the holding regarding Washington law applied equally to federal law. *Ramsey*, 302 F.3d at 1077.

The Ninth Circuit declined to extend its holding in *Cree* to preempt federal taxation. The Court drew a distinction between the appropriate canons of construction that applied to preemption of state law with those that applied to federal law. *Id.* at 1078. When state tax law is at issue, "a court determines if there is an express federal law prohibiting the tax."

*Id.* at 1079. Any federal law arguably prohibiting the state tax "must be interpreted in the light most favorable to the Indians, and extrinsic evidence may be used to show the federal government's and Indians' intent." *Id.* However, where federal tax law is at issue, a court must first determine whether the treaty or statute [*1068] contains "express exemptive language." *Id.* at 1078. Only if the treaty or statute contains express exemptive language does the court proceed to determine whether that language could be reasonably construed to support exemption from taxation. *Id.* at 1079.

Because this case concerns federal tax law, the question before this Court is whether Article II contains express exemptive language.[4] In making this inquiry, the Court will not consider evidence extrinsic to the Treaty itself. *See id.* at 1078-79.

The Ninth Circuit construed Article II's "exclusive use and benefit" language in *Hoptowit v. Commissioner*, 709 F.2d 564 (9th Cir. 1983). In *Hoptowit*, an enrolled member of the Yakama Nation sought exemptions from federal income tax for income derived from a smoke shop operated on land

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[4] Yakama Nation takes issue with the "express exemptive language" test and notes that the Third and Eighth Circuits apply a more permissive standard in examining exemptions from federal taxes flowing from Indian treaties. In those circuits, a treaty may be liberally construed to favor the Indians where it "contains language which can reasonably be construed to confer [tax] exemptions." *Lazore v. Commissioner*, 11 F.3d 1180, 1185 (3d Cir. 1993); *Holt v. Commissioner*, 364 F.2d 38, 40 (8th Cir. 1966) (emphasis added). However, this Court is bound to follow Ninth Circuit precedent on the matter.

within the Yakama Nation reservation and for per diem payments received for his work on the Yakama Nation Tribal Council. *Id.* at 565. He asserted that Article II's "exclusive use and benefit" language was the source of the exemption. *Id.* at 565-66.

With regard to the per diem payments, the court noted that it previously had ruled that such payments were not exempt from income tax under the reasoning of *Capoeman*. *Id.* at 566 (citing *Comm'r v. Walker*, 326 F.2d 261 (9th Cir. 1964)). In reviewing the language of Article II, the court noted that language "gives to the Tribe the exclusive use and benefit of the land on which the reservation is located." *Id.* The court concluded that "any tax exemption created by this language is limited to the income derived directly from the land." *Id.* In short, because the per diem payments were not exempt under the reasoning of *Capoeman*, they were similarly not exempt under any exception contained in Article II. If the income at issue is not derived directly from the land for the purposes of *Capoeman*, then it does not arise from the "use and benefit of the land" for the purposes of Article II. *See id.*

This Court has found that there is no exemption from the federal excise tax on manufactured tobacco products under *Capoeman* because the manufactured tobacco products are not derived directly from the land. Under the reasoning of *Hoptowit*, the manufactured tobacco products are not exempt from taxation under Article II of the Yakama Treaty because the excise tax is on the manufacturing of the tobacco products and not on the "use and benefit of the land." *See id.*

**Article III of the 1855 Yakama Treaty**

Yakama Nation argues that, in addition to Article II of the 1855 Yakama Treaty, Article III of the Treaty prohibits application of the excise tax on King Mountain's tobacco products. The United States contends that Yakama Nation's reliance on Article III is precluded by the Ninth Circuit's decision in *Ramsey*, 302 F.3d 1074.

In *Ramsey*, the Ninth Circuit examined the following language in Article III of the Treaty:

> [I]f necessary for the public convenience, roads may be run throughout the said reservation; and on the other hand, the right of way, with free access from the same to the nearest public highway, [*1069] is secured to them; as also the right in common with citizens of the United States, to travel upon all public highways.

*Ramsey*, 302 F.3d at 1076-77 (quoting 12 Stat. at 951-53). The plaintiff in *Ramsey*, a member of the Yakama Indian Tribe, contended that this language exempted him from a heavy vehicle tax and diesel fuel tax assessed by the Internal Revenue Service when Ramsey hauled lumber to off-reservation markets. *Id.* at 1076.

The Ninth Circuit rejected Ramsey's argument, finding that Article III contained no express exemptive language under the standard for exemption from federal taxation. *Id.* at 1080. The

court noted that the only exemptive language in the Treaty "is the 'free access' language," which did not modify the Yakama's right under the Treaty to travel upon the "public highways" any differently from other "citizens of the United States." *Id.* Therefore, Ramsey was subject to taxation on public highways to the same extent as non-Yakama peoples. *Id.*

In this case, the Court similarly holds that the "free access" language is not express exemptive language applicable to King Mountain's manufactured tobacco products. Article III provides "free access" on roads running throughout the reservation to the public highways. King Mountain is not being taxed for using on-reservation roads. It is being taxed for manufacturing tobacco products. Therefore, the only exemptive language in Article III, the "free access" language as recognized in *Ramsey*, does not apply to this case.

Yakama Nation's arguments to the contrary are not persuasive. Yakama Nation argues that *Ramsey* is distinguishable because it involved only a tax on off-reservation activities and not a tax on reservation-produced goods or activities. In support of this argument, Yakama Nation cites to *United States v. Smiskin*, 487 F.3d 1260, 1266-68 (9th Cir. 2007), where the Ninth Circuit relied on the tribe's understanding of the Treaty at the time that the treaty was drafted to hold that application of a state pre-notification requirement to Yakama tribe members violated Article III of the Yakama Treaty. However, *Smiksin* involved a state tax provision rather than a federal tax.

Within the context of federal taxation, express exemptive language must exist in the Treaty before the Court may examine extrinsic evidence, such as how the Yakama tribe members would have understood the Treaty at the time that it was ratified. *See Ramsey*, 302 F.3d at 1078-79. Because no express exemptive language can be found in Article III applying to the manufacture of tobacco products, the United States is entitled to summary judgment on this claim.

**Section 4225 of the Internal Revenue Code**

Yakama Nation claims that King Mountain's tobacco products are exempt from taxation under Section 4225 of the Internal Revenue Code, entitled "Exemption of articles manufactured or produced by Indians." Section 4225 provides that "[n]o tax shall be imposed under this chapter on any article of native Indian handicraft manufactured or produced by Indians on Indian reservations." (Emphasis added.)

Section 4225 is located within Chapter 32 of the Internal Revenue Code. Chapter 32 of the Code contains certain manufacturer excise taxes, including taxes on fishing rods, fishing poles, and bows and arrows. *See, e.g.,* 26 U.S.C. § 4161. Notably, the tobacco excise tax at issue in this case, 26 U.S.C. §5701, is not located within Chapter 32 but rather is found in Chapter 52 of the Code. Thus, Section 4225, on its face, does not apply to the tobacco excise tax.

## [*1070] CONCLUSION

The Court finds no exemption from federal excise taxes on manufactured tobacco products under the General Allotment Act because the finished tobacco products are not derived directly from the land. The Court finds no exemption under either Article II or III of the Yakama Treaty of 1855 because neither Article contains express exemptive language applicable to the manufacture of tobacco products. Finally, the Court finds no exemption under Section 4225 of the Internal Revenue Code because the exemption for Indian handicrafts on its face does not apply to excise taxes for the manufacture of tobacco products. Therefore, the United States is entitled to summary judgment on all claims.

Accordingly, IT IS HEREBY ORDERED that the United States' Motion for Summary Judgment, ECF No. 134, is GRANTED.

The District Court Executive is hereby directed to enter this Order, enter Judgment accordingly, provide copies to counsel, and to close this case.

DATED this 24th day of January 2014.

/s/ Rosanna Malouf Peterson
ROSANNA MALOUF PETERSON
Chief United States District Court Judge

UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT
No. 14-36055
16-35607

FILED: Oct. 22, 2018

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

KING MOUNTAIN TOBACCO COMPANY, INC.,
Defendant-Appellant.

D.C. No. 2:12-cv-03089-RMP, Eastern District of Washington, Spokane

ORDER

Before: FERNANDEZ, McKEOWN, and FUENTES,* Circuit Judges.

The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is denied.

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* The Honorable Julio M. Fuentes, United States Circuit Judge for the U.S. Court of Appeals for the Third Circuit, sitting by designation.

UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT
No. 16-35956

FILED: Oct. 22, 2018

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

KING MOUNTAIN TOBACCO COMPANY, INC.,
Defendant-Appellant.

D.C. No. 1:14-cv-03162-RMP, Eastern District of Washington, Yakima

ORDER

Before: FERNANDEZ, McKEOWN, and FUENTES,* Circuit Judges.

The panel votes to deny the petition for rehearing.

The full court has been advised of the petition for rehearing and rehearing en banc and no judge has

* The Honorable Julio M. Fuentes, United States Circuit Judge for the U.S. Court of Appeals for the Third Circuit, sitting by designation.

requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

**Treaty between the United States and the Yakama Nation of Indians, Concluded at Camp Stevens, Walla-Walla Valley, June 9, 1855.**

**12 Stat. 951**

Ratified by the Senate, March 8, 1859.

Proclaimed by the President of the United States, April 18, 1859.

JAMES BUCHANAN,
PRESIDENT OF THE UNITED STATES,

TO ALL AND SINGULAR TO WHOM THESE PRESENTS SHALL COME, GREETING:

Whereas a treaty was made and concluded at the Treaty Ground, Preamble. Camp Stevens, Walla-Walla Valley, on the ninth day of June, in the year one thousand eight hundred and fifty-five, between Isaac I. Stevens, governor, and superintendent of Indian affairs, for the Territory of Washington, on the part of the United States, and the hereinafter named head chief, chiefs, headmen and delegates of the Yakama, Palouse, Pisquouse, Wenatshapam, Klikatat, Klinquit, Kow-was-say-ee, Li-ay-was, Skin-pah, Wish-ham, Shyiks, Oche-chotes, Kah-milt-pah, and Se-ap-cat, confederate tribes and bands of Indians, occupying lands lying in Washington Territory, who, for the purposes of this treaty, are to be considered as one nation, under the name of "Yakama," with Kamaiakun as its Head Chief, on

behalf of and acting for said bands and tribes, and duly authorized thereto by them; which treaty is in the words and figures following, to wit :

Articles of agreement and convention made and concluded at the treaty ground, Camp Stevens, Wall-Wall Valley, this ninth day of June in the year one thousand eight hundred and Fifty-five, by and between Isaac I. Stevens, Governor and superintendent of Indian Affairs for the Territory of Washington, on the part of the United States, and the undersigned head chiefs, chief, head-men, and delegates of the Yakama Palouis, Pisquouse, Wenatchsahpam, Klikatat, Klingquit, Kow-was-say-ee, Li-was, Skin-pha, Wish-ham, Shyiks, Ocehchotes, Ka-milt-pha, and Se-ap-Cat, confederaetd tribes and bands of Indians, occupying lands hereinafter bounded and described and lying in Washington Territory, who for the purposed of this treaty are to be considered as one nation, under the name of "Yakama," with Kamaiakun as its head chief, on behalf of and acting for said tribes and bans, and being duly authorized thereto by them.

ARTICLE I. The aforesaid confederated tribes and bands of Indians hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the lands and country occupied and claimed by them, and bounded and described as follows; to wit: Commencing at Mount Rainier, thence northerly along the main ridge of the Cascade Mountains to the point where the northern tributaries of Lake Che-lan and the southern tributaries of the Methow River have their rise; thence southeasterly on the divide between the

waters of Lake Che-lan and the Methow River to the Columbia River; thence, crossing the Columbia on a true east course, to a point whose longitude is one hundred and nineteen degrees and ten minutes, (119º 10',) which two latter lines separate the above confederated tribes and bands from the Oakinakane tribe of Indians; thence in a true south course to the forty-seventh (47º) parallel of latitude; thence east on said parallel to the main Palouse River, which two latter lines of boundary separate the above confederated tribes and bands from the Spokanes; thence down the Palouse River to its junction with the Moh-hah-ne-she, or southern tributary of the same; thence in a southeasterly direction, to the Snake River, at the mouth of the Tucannon River, separating the above confederated tribes from the Nez Perce tribe of Indians; thence down the Snake River to its junction with the Columbia River: thence up the Columbia River to the "White Banks" below the Priest's Rapids; thence westerly to a lake called "La Lac;" thence southerly to a point on the Yakama river called Toh-mah-luke; thence, in a southwesterly direction, to the Columbia River, at the western extremity of the "Big Island," between the mouths of the Umatilla River and Butler Creek; all which latter boundaries separate the above confederated tribes and bands from the Walla-Walla, Cayuse, and Umatilla tribes and bands of Indians; thence down the Columbia River to midway between the mouths of White Salmon and Wind Rivers; thence along the divide between said rivers to the main ridge of the Cascade Mountains; and thence along said ridge to the place of beginning.

ARTICLE II. There is, however, reserved, from the lands above ceded for the use and occupation of the aforesaid confederated tribes and bands of Indians, the tract of land included within the following boundaries, to wit:

Commencing on the Yakama River, at the mouth of the Attah-nam River; thence westerly along said Attah-nam River to the forks; thence along the southern tributary to the Cascade Mountains; thence southerly along the main ridge of said mountains, passing south and east of Mount Adams, to the spur whence flows the waters of the Klickatat and Pisco Rivers; thence down said spur to the divide between the waters of said rivers; thence along said divide to the divide separating the waters of the Satass River from those flowing into the Columbia River; thence along said divide to the main Yakama, eight miles below the mouth of the Satass River; and thence up the Yakama River to the place of beginning.

All which tract shall be set apart and, so far as necessary, surveyed and marked out, for the exclusive use and benefit of said confederated tribes and bands of Indians, as an Indian reservation, nor shall any white man, excepting those in the employment of the Indian Department, be permitted to reside upon the said reservation without permission of the tribe and the superintendent and agent. And the said confederated tribes and bands agree to remove to, and settle upon, the same, within one year after the ratification of this treaty. In the mean time it shall be lawful for them to reside upon any ground not in the actual claim and occupation of citizens of the United States; and upon any ground

claimed or occupied, if with the permission of the owner or claimant.

Guaranteeing, however, the right to all citizens of the United States to enter upon and occupy as settlers any lands not actually occupied and cultivated by said Indians at this time, and not included in the reservation above named.

And provided, That any substantial improvements heretofore made by any Indian, such as fields enclosed and cultivated, and houses erected upon the lands hereby ceded, and which he may be compelled to abandon in consequence of this treaty, shall be valued, under the direction of the President of the United States, and payment made therefor in money; or improvements of an equal value made for said Indian upon the reservation. And no Indian will be required to abandon the improvements aforesaid, now occupied by him, until their value in money, or improvements of an equal value shall be furnished him as aforesaid.

ARTICLE III. And provided, That, if necessary for the public convenience, roads may be run through the said reservation; and on the other hand, the right of way, with free access from the same to the nearest public highway, is secured to them; as also the right in common with citizens of the United States, to travel upon all public highways.

The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated

tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with the citizens of the Territory, and of erecting temporary buildings for curing them; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.

ARTICLE IV. In consideration of the above cession, the United States agree to pay to the said confederated tribes and bands of Indians in addition to the goods and provisions distributed to them at the time of signing this treaty, the sum of two hundred thousand dollars, in the following manner, that is to say: Sixty thousand dollars, to be expended under the direction of the President of the United States, the first year after the ratification of this treaty, in providing for their removal to the reservation, breaking up and fencing farms, building houses for them, supplying them with provisions and a suitable outfit, and for such other objects as he may deem necessary, and the remainder in annuities as follows: For the first five years after the ratification of the treaty, ten thousand dollars each year, commencing September first, 1856; for the next five years, eight thousand dollars each year: for the next five years, six thousand dollars per year; and for the next five years, four thousand dollars per year.

All which sums of money shall be applied to the use and benefit of said Indians, under the direction of the President of the United States, who may from time to time determine, at his discretion, upon what beneficial objects to expend the same for them. And

the superintendent of Indian affairs, or other proper officer, shall each year inform the President of the wishes of the Indians in relation thereto.

ARTICLE V. The United States further agree to establish at suitable points within said reservation, within one year after the ratification hereof, two schools, erecting the necessary buildings, keeping them in repair, and providing them with furniture, books and stationery, one of which shall be an agricultural and industrial school, to be located at the agency, and to be free to the children of the said confederated tribes and bands of Indians, and to employ one superintendent of teaching and two teachers; to build two blacksmiths' shops, to one of which shall be attached a tin-shop, and to the other a gunsmith's shop; one carpenter's shop, one wagon and plough maker's shop, and to keep the same in repair and furnished with the necessary tools; to employ one superintendent of farming and two farmers, two blacksmiths, one tinner, one gunsmith, one carpenter, one wagon and plough maker, for the instruction of the Indians in trades and to assist them in the same; to erect one sawmill and one flouring-mill, keeping the same in repair and furnished with the necessary tools and fixtures; to erect a hospital, keeping the same in repair and provided with the necessary medicines and furniture, and to employ a physician; and to erect, keep in repair, and provided with the necessary furniture, the building required for the accommodation of the said employees. The said buildings and establishments to be maintained and kept in repair as aforesaid, and the employees to be kept in service for the period of twenty years.

And in view of the fact that the head chief of the said confederated tribes and bands of Indians is expected, and will be called upon to perform many services of a public character, occupying much of his time, the United States further agree to pay to the said confederated tribes and bands of Indians five hundred dollars per year, for the term of twenty years after the ratification hereof, as a salary for such person as the said confederated tribes and bands of Indians may select to be their head chief, to build for him at a suitable point on the reservation a comfortable house, and properly furnish the same, and to plough and fence ten acres of land. The said salary to be paid to, and the said house to be occupied by, such head chief so long as he may continue to hold that office.

And it is distinctly understood and agreed that at the time of the conclusion of this treaty Kamiakun is the duly elected and authorized head chief of the confederated tribes and bands aforesaid, styled the Yakama Nation, and is recognized as such by them and by the commissioners on the part of the United States holding this treaty; and all the expenditures and expenses contemplated in this article of this treaty shall be defrayed by the United States, and shall not be deducted from the annuities agreed to be paid to said confederated tribes and band of Indians. Nor shall the cost of transporting the goods for the annuity payments be a charge upon the annuities, but shall be defrayed by the United States.

ARTICLE VI. The President may, from time to time, at his discretion, cause the whole or such portions of such reservation as he may think proper, to be surveyed into lots, and assign the same to such individuals or families of the said confederated tribes and bands of Indians as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable.

ARTICLE VII. The annuities of the aforesaid confederated tribes and bands of Indians shall not be taken to pay the debts of individuals.

ARTICLE VIII. The aforesaid confederated tribes and bands of Indians acknowledge their dependence upon the Government of the United States, and promise to be friendly with all citizens thereof, and pledge themselves to commit no depredations upon the property of such citizens.

And should any one or more of them violate this pledge, and the fact be satisfactorily proved before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the Government out of the annuities.

Nor will they make war upon any other tribe, except in self defence, but will submit all matters of difference between them and other Indians to the Government of the United States or its agent for

decision, and abide thereby. And if any of the said Indians commit depredations on any other Indians within the Territory of Washington or Oregon, the same rule shall prevail as that provided in this article in case of depredations against citizens. And the said confederated tribes and bands of Indians agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial.

ARTICLE IX. The said confederated tribes and bands of Indians desire to exclude from their reservation the use of ardent Spirits, and to prevent their people from drinking the same, and, therefore, it is provided that any Indian belonging to said confederated tribes and bands of Indians, who is guilty of bringing liquor into said reservation, or who drinks liquor, may have his or her annuities withheld from him or her for such time as the President may determine.

ARTICLE X. And provided, That there is also reserved and set apart from the lands ceded by not exceeding in quantity one township of six miles square, situated at the forks of the Pisquous or Wanatshapam River, and known as the "Wenatshapam Fishery," which said reservation shall be surveyed and marked out whenever the President may direct, and be subject to the same provisions and restrictions as other Indian reservations.

ARTICLE XI. This treaty shall be obligatory upon the contracting parties as soon as the same

shall be ratified by the President and Senate of the United States.

In testimony thereof, the said Isaac I. Stevens, governor and superintendent of Indian affairs for the Territory of Washington, and the undersigned head chief, chiefs, headmen and delegates of the aforesaid confederated tribes and bands of Indians, have herunto set their hands and seals, at the palce and on the day and year hereinbefore written.

Isaac I. Stevens,

*Governor and Superintendent* [L.S.]

| | | |
|---|---|---|
| KAMAIAKUN, | his x mark, | [L.S.] |
| SKLOOM, | his x mark, | [L.S.] |
| OWHI, | his x mark, | [L.S.] |
| TE-COLE-KUN, | his x mark, | [L.S.] |
| LA-HOOM, | his x mark, | [L.S.] |
| ME-NI-NOCK, | his x mark, | [L.S.] |
| ELIT PALMER, | his x mark, | [L.S.] |
| WISH-OCH-KMPITS | his x mark, | [L.S.] |
| KOO-LAT-TOOSE, | his x mark, | [L.S.] |
| SHEE-AH-COTTE, | his x mark, | [L.S.] |
| TUCK-QUILLE, | his x mark, | [L.S.] |
| SCHA-NOO-A, | his x mark, | [L.S.] |
| SLA-KISH, | his x mark, | [L.S.] |

Signed and sealed in the presence of:

James Doty, *Secretary of Treaties,*

Mie. Cles. Pandosy, *O. M. T.,*

Wm. C. McKay
W. H. Tappan, *Sub Indian Agent, W. T.,*
C. Chirouse, *O. M. T.,*
Patrick McKenzie, *Interpreter,*
A. D. Pamburn, *Interpreter,*
Joel Palmer, *Superintendent Indian affairs, O. T.,*
W. D. Biglow,
D. Pamburn, *Interpreter.*

**Treaty with the Omahas, March 16, 1854.**

**10 Stat. 1043**

Ratified by the Senate, April 17, 1854.

Proclaimed by the President of the United States, June 21, 1854.

FRANKLIN PIERCE,
PRESIDENT OF THE UNITED STATES,

TO ALL AND SINGULAR TO WHOM THESE PRESENTS SHALL COME, GREETING:

WHEREAS, a Treaty was made and concluded at the City of Washington, on the sixteenth day of March, one thousand eight hundred and fifty-four, by George W. Manypenny, as Commissioner on the part of the United States, and the Omaha tribe of Indians, which treaty is in the words following, to wit:

Articles of agreement and convention made and concluded at the city of Washington this sixteenth day of March, one thousand eight hundred and fifty-four, by George W. Manypenny, as commissioner on the part of the United States, and the following-named chiefs of the Omaha tribe of Indians, viz: Shon-ga-ska, or Logan Fontenelle; E-sta-mah-za, or Joseph Le Flesche; Gra-tah-nah-je, or Standing Hawk; Gah-he-ga-gin-gah, or Little Chief; Ta-wah-gah-ha, or Village Maker; Wah-no-ke-ga, or Noise;

So-da-nah-ze, or Yellow Smoke; they being thereto duly authorized by said tribe.

* * * *

ARTICLE 6. The President may, from time to time, at his discretion, cause the whole or such portion of the land hereby reserved, as he may think proper, or of such other land as may be selected in lieu thereof, as provided for in article first, to be surveyed into lots, and to assign to such Indian or Indians of said tribe as are willing to avail of the privilege, and who will locate on the same as a permanent home, if a single person over twenty-one years of age, one-eighth of a section; to each family of two, one quarter section; to each family of three and not exceeding five, one half section; to each family of six and not exceeding ten, one section; and to each family over ten in number, one quarter section for every additional five members. And he may prescribe such rules and regulations as will insure to the family, in case of the death of the head thereof, the possession and enjoyment of such permanent home and the improvements thereon. And the President may, at any time, in his discretion, after such person or family has made a location on the land assigned for a permanent home, issue a patent to such person or family for such assigned land, conditioned that the tract shall not be aliened or leased for a longer term than two years; and shall be exempt from levy, sale, or forfeiture, which conditions shall continue in force, until a State constitution, embracing such lands within its boundaries, shall have been formed, and the legislature of the State shall remove the restrictions.

And if any such person or family shall at any time neglect or refuse to occupy and till a portion of the lands assigned and on which they have located, or shall rove from place to place, the President may, if the patent shall have been issued, cancel the assignment, and may also withhold from such person or family, their proportion of the annuities or other moneys due them, until they shall have returned to such permanent home, and resumed the pursuits of industry; and in default of their return the tract may be declared abandoned, and thereafter assigned to some other person or family of such tribe, or disposed of as is provided for the disposition of the excess of said land. And the residue of the land hereby reserved, or of that which may be selected in lieu thereof, after all of the Indian persons or families shall have had assigned to them permanent homes, may be sold for their benefit, under such laws, rules or regulations, as may hereafter be prescribed by the Congress or President of the United States. No State legislature shall remove the restrictions herein provided for, without the consent of Congress.

* * * *

In testimony whereof, the said George W. Manypenny, commissioner as aforesaid, and the undersigned chiefs, of the Omaha tribe of Indians, have hereunto set their hands and seals, at the place and on the day and year herein before written.

George W. Manypenny, *Comissioner*. [L.S.]

SHON-GA-SKA,
or Logan Fontenelle, his x mark, [L.S.]

E-STA-MAH-ZA,
or Joseph Le Flesche, his x mark, [L.S.]

GRA-TAH-MAH-JE,
or Standing Hawk, his x mark, [L.S.]

GAH-HE-GA-GIN-GAH,
or Little Chief, his x mark, [L.S.]

TAH-WAH-GAH-HA,
or Village Maker, his x mark, [L.S.]

WAH-NO-KE-GA,
or Noise, his x mark, [L.S.]

So-da-nah-ze,
or Yellow Smoke, his x mark, [L.S.]

Executed in the presence of us:
James M. Gatewood, *Indian agent*.
James Goszler.
Charles Calvert.
James D. Kerr.
Henry Beard.
Alfred Chapman.
Lewis saunsoci, *Interpreter.*

# 26 U.S.C. §§ 5701-03

## INTERNAL REVENUE CODE, CHAPTER 52, SUBCHAPTER A (TOBACCO EXCISE TAX)

### 26 U.S.C. § 5701 – Rate of Tax

**(a) Cigars.**

On cigars, manufactured in or imported into the United States, there shall be imposed the following taxes:

**(1) Small cigars.**

On cigars, weighing not more than 3 pounds per thousand, $ 50.33 per thousand;

**(2) Large cigars.**

On cigars weighing more than 3 pounds per thousand, a tax equal to 52.75 percent of the price for which sold but not more than 40.26 cents per cigar.

Cigars not exempt from tax under this chapter which are removed but not intended for sale shall be taxed at the same rate as similar cigars removed for sale.

### (b) Cigarettes.

On cigarettes, manufactured in or imported into the United States, there shall be imposed the following taxes:

#### (1) Small cigarettes.

On cigarettes, weighing not more than 3 pounds per thousand, $ 50.33 per thousand.

#### (2) Large cigarettes.

On cigarettes, weighing more than 3 pounds per thousand, $ 105.69 per thousand; except that, if more than 6 1/2 inches in length, they shall be taxable at the rate prescribed for cigarettes weighing not more than 3 pounds per thousand, counting each 2 3/4 inches, or fraction thereof, of the length of each as one cigarette.

### (c) Cigarette papers.

On cigarette papers, manufactured in or imported into the United States, there shall be imposed a tax of 3.15 cents for each 50 papers or fractional part thereof; except that, if cigarette papers measure more than 6 1/2 inches in length, they shall be taxable at the rate prescribed, counting each 2 3/4 inches, or fraction thereof, of the length of each as one cigarette paper.

### (d) Cigarette tubes.

On cigarette tubes, manufactured in or imported into the United States, there shall be imposed a tax of 6.30 cents for each 50 tubes or fractional part thereof, except that if cigarette tubes measure more than 6 1/2 inches in length, they shall be taxable at the rate prescribed, counting each 2 3/4 inches, or fraction thereof, of the length of each as one cigarette tube.

### (e) Smokeless tobacco.

On smokeless tobacco, manufactured in or imported into the United States, there shall be imposed the following taxes:

#### (1) Snuff.

On snuff, $ 1.51 per pound and a proportionate tax at the like rate on all fractional parts of a pound.

#### (2) Chewing tobacco.

On chewing tobacco, 50.33 cents per pound and a proportionate tax at the like rate on all fractional parts of a pound.

### (f) Pipe tobacco.

On pipe tobacco, manufactured in or imported into the United States, there shall be imposed a tax

of $ 2.8311 cents per pound (and a proportionate tax at the like rate on all fractional parts of a pound).

**(g) Roll-your-own tobacco.**

On roll-your-own tobacco, manufactured in or imported into the United States, there shall be imposed a tax of $ 24.78 per pound (and a proportionate tax at the like rate on all fractional parts of a pound).

**(h) Imported tobacco products and cigarette papers and tubes.**

The taxes imposed by this section on tobacco products and cigarette papers and tubes imported into the United States shall be in addition to any import duties imposed on such articles, unless such import duties are imposed in lieu of internal revenue tax.

## 26 U.S.C. § 5702 – Definitions

When used in this chapter –

### (a) Cigar.

"Cigar" means any roll of tobacco wrapped in leaf tobacco or in any substance containing tobacco (other than any roll of tobacco which is a cigarette within the meaning of subsection (b)(2)).

### (b) Cigarette.

"Cigarette" means--

(1) any roll of tobacco wrapped in paper or in any substance not containing tobacco, and

(2) any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette described in paragraph (1).

### (c) Tobacco products.

"Tobacco products" means cigars, cigarettes, smokeless tobacco, pipe tobacco, and roll-your-own tobacco.

**(d) Manufacturer of tobacco products.**

"Manufacturer of tobacco products" means any person who manufactures cigars, cigarettes, smokeless tobacco, pipe tobacco, or roll-your-own tobacco except that such term shall not include—

(1) a person who produces cigars, cigarettes, smokeless tobacco, pipe tobacco, or roll-your-own tobacco solely for the person's own personal consumption or use, and

(2) a proprietor of a customs bonded manufacturing warehouse with respect to the operation of such warehouse.

Such term shall include any person who for commercial purposes makes available for consumer use (including such consumer's personal consumption or use under paragraph (1)) a machine capable of making cigarettes, cigars, or other tobacco products. A person making such a machine available for consumer use shall be deemed the person making the removal as defined by subsection (j) with respect to any tobacco products manufactured by such machine. A person who sells a machine directly to a consumer at retail for a consumer's personal home use is not making a machine available for commercial purposes if such machine is not used at a retail premises and is designed to produce tobacco products only in personal use quantities.

**(e) Cigarette paper.**

"Cigarette paper" means paper, or any other material except tobacco, prepared for use as a cigarette wrapper.

**(f) Cigarette tube.**

"Cigarette tube" means cigarette paper made into a hollow cylinder for use in making cigarettes.

**(g) Manufacturer of cigarette papers and tubes.**

"Manufacturer of cigarette papers and tubes" means any person who manufactures cigarette paper, or makes up cigarette paper into tubes, except for his own personal use or consumption.

**(h) Export warehouse.**

"Export warehouse" means a bonded internal revenue warehouse for the storage of tobacco products or cigarette papers or tubes or any processed tobacco, upon which the internal revenue tax has not been paid, for subsequent shipment to a foreign country, Puerto Rico, the Virgin Islands, or a possession of the United States, or for consumption beyond the jurisdiction of the internal revenue laws of the United States.

**(i) Export warehouse proprietor.**

"Export warehouse proprietor" means any person who operates an export warehouse.

**(j) Removal or remove.**

"Removal" or "remove" means the removal of tobacco products or cigarette papers or tubes, or any processed tobacco, from the factory or from internal revenue bond under section 5704, as the Secretary shall by regulation prescribe, or release from customs custody, and shall also include the smuggling or other unlawful importation of such articles into the United States.

**(k) Importer.**

"Importer" means any person in the United States to whom nontaxpaid tobacco products or cigarette papers or tubes, or any processed tobacco, manufactured in a foreign country, Puerto Rico, the Virgin Islands, or a possession of the United States are shipped or consigned; any person who removes cigars or cigarettes for sale or consumption in the United States from a customs bonded manufacturing warehouse; and any person who smuggles or otherwise unlawfully brings tobacco products or cigarette papers or tubes, or any processed tobacco, into the United States.

**(l) Determination of price on cigars.**

In determining price for purposes of section 5701(a)(2) –

(1) there shall be included any charge incident to placing the article in condition ready for use,

(2) there shall be excluded –

(A) the amount of the tax imposed by this chapter or section 7652, and

(B) if stated as a separate charge, the amount of any retail sales tax imposed by any State or political subdivision thereof or the District of Columbia, whether the liability for such tax is imposed on the vendor or vendee, and

(3) rules similar to the rules of section 4216(b) shall apply.

**(m) Definitions relating to smokeless tobacco.**

**(1) Smokeless tobacco.**

The term "smokeless tobacco" means any snuff or chewing tobacco.

(2) Snuff.

The term "snuff" means any finely cut, ground, or powdered tobacco that is not intended to be smoked.

(3) Chewing tobacco.

The term "chewing tobacco" means any leaf tobacco that is not intended to be smoked.

(n) Pipe tobacco.

The term "pipe tobacco" means any tobacco which, because of its appearance, type, packaging, or labeling, is suitable for use and likely to be offered to, or purchased by, consumers as tobacco to be smoked in a pipe.

(o) Roll-your-own tobacco.

The term "roll-your-own tobacco" means any tobacco which, because of its appearance, type, packaging, or labeling, is suitable for use and likely to be offered to, or purchased by, consumers as tobacco for making cigarettes or cigars, or for use as wrappers thereof.

(p) Manufacturer of processed tobacco.

(1) In general.

The term "manufacturer of processed tobacco" means any person who processes any tobacco other than tobacco products.

(2) Processed tobacco.

The processing of tobacco shall not include the farming or growing of tobacco or the handling of tobacco solely for sale, shipment, or delivery to a manufacturer of tobacco products or processed tobacco.

## 26 U.S.C. § 5703 – Liability for Tax and Method of Payment

### (a) Liability for tax.

#### (1) Original liability.

The manufacturer or importer of tobacco products and cigarette papers and tubes shall be liable for the taxes imposed thereon by section 5701.

#### (2) Transfer of liability.

When tobacco products and cigarette papers and tubes are transferred, without payment of tax, pursuant to section 5704, the liability for tax shall be transferred in accordance with the provisions of this paragraph. When tobacco products and cigarette papers and tubes are transferred between the bonded premises of manufacturers and export warehouse proprietors, the transferee shall become liable for the tax upon receipt by him of such articles, and the transferor shall thereupon be relieved of his liability for such tax. When tobacco products and cigarette papers and tubes are released in bond from customs custody for transfer to the bonded premises of a manufacturer of tobacco products or cigarette papers and tubes, the transferee shall become liable for the tax on such articles upon release from customs custody, and the importer shall thereupon be relieved of his liability for such tax. All provisions of this chapter applicable

to tobacco products and cigarette papers and tubes in bond shall be applicable to such articles returned to bond upon withdrawal from the market or returned to bond after previous removal for a tax-exempt purpose.

**(b) Method of payment of tax.**

**(1) In general.**

The taxes imposed by section 5701 shall be determined at the time of removal of the tobacco products and cigarette papers and tubes. Such taxes shall be paid on the basis of return. The Secretary shall, by regulations, prescribe the period or the event for which such return shall be made and the information to be furnished on such return. Any postponement under this subsection of the payment of taxes determined at the time of removal shall be conditioned upon the filing of such additional bonds, and upon compliance with such requirements, as the Secretary may prescribe for the protection of the revenue. The Secretary may, by regulations, require payment of tax on the basis of a return prior to removal of the tobacco products and cigarette papers and tubes where a person defaults in the postponed payment of tax on the basis of a return under this subsection or regulations prescribed thereunder. All administrative and penalty provisions of this title, insofar as applicable, shall apply to any tax imposed by section 5701.

(2) Time for payment of taxes.

(A) In general.

Except as otherwise provided in this paragraph, in the case of taxes on tobacco products and cigarette papers and tubes removed during any semimonthly period under bond for deferred payment of tax, the last day for payment of such taxes shall be the 14th day after the last day of such semimonthly period.

(B) Imported articles.

In the case of tobacco products and cigarette papers and tubes which are imported into the United States—

(i) In general.

The last day for payment of tax shall be the 14th day after the last day of the semimonthly period during which the article is entered into the customs territory of the United States.

(ii) Special rule for entry for warehousing.

Except as provided in clause (iv), in the case of an entry for warehousing, the last day for payment of tax shall not

be later than the 14th day after the last day of the semimonthly period during which the article is removed from the 1st such warehouse.

**(iii) Foreign trade zones.**

Except as provided in clause (iv) and in regulations prescribed by the Secretary, articles brought into a foreign trade zone shall, notwithstanding any other provision of law, be treated for purposes of this subsection as if such zone were a single customs warehouse.

**(iv) Exception for articles destined for export.**

Clauses (ii) and (iii) shall not apply to any article which is shown to the satisfaction of the Secretary to be destined for export.

**(C) Tobacco products and cigarette papers and tubes brought into the United States from Puerto Rico.**

In the case of tobacco products and cigarette papers and tubes which are brought into the United States from Puerto Rico, the last day for payment of tax shall be the 14th day after the last day of the

semimonthly period during which the article is brought into the United States.

**(D) Special rule for tax due in September.**

**(i) In general.**

Notwithstanding the preceding provisions of this paragraph, the taxes on tobacco products and cigarette papers and tubes for the period beginning on September 16 and ending on September 26 shall be paid not later than September 29.

**(ii) Safe harbor.**

The requirement of clause (i) shall be treated as met if the amount paid not later than September 29 is not less than 11/15 of the taxes on tobacco products and cigarette papers and tubes for the period beginning on September 1 and ending on September 15.

**(iii) Taxpayers not required to use electronic funds transfer.**

In the case of payments not required to be made by electronic funds transfer, clauses (i) and (ii) shall be applied by substituting "September 25" for

"September 26", "September 28" for "September 29", and "2/3" for "11/15".

**(E) Special rule where due date falls on Saturday, Sunday, or holiday.**

Notwithstanding section 7503, if, but for this subparagraph, the due date under this paragraph would fall on a Saturday, Sunday, or a legal holiday (as defined in section 7503), such due date shall be the immediately preceding day which is not a Saturday, Sunday, or such a holiday (or the immediately following day where the due date described in subparagraph (D) falls on a Sunday).

**(F) Special rule for unlawfully manufactured tobacco products.**

In the case of any tobacco products, cigarette paper, or cigarette tubes manufactured in the United States at any place other than the premises of a manufacturer of tobacco products, cigarette paper, or cigarette tubes that has filed the bond and obtained the permit required under this chapter, tax shall be due and payable immediately upon manufacture.

(3) Payment by electronic fund transfer.

Any person who in any 12-month period, ending December 31, was liable for a gross amount equal to or exceeding $ 5,000,000 in taxes imposed on tobacco products and cigarette papers and tubes by section 5701 (or 7652) shall pay such taxes during the succeeding calendar year by electronic fund transfer (as defined in section 5061(e)(2)) to a Federal Reserve Bank. Rules similar to the rules of section 5061(e)(3) shall apply to the $ 5,000,000 amount specified in the preceding sentence.

(c) Use of government depositaries.

The Secretary may authorize Federal Reserve banks, and incorporated banks or trust companies which are depositaries or financial agents of the United States, to receive any tax imposed by this chapter, in such manner, at such times, and under such conditions as he may prescribe; and he shall prescribe the manner, time, and condition under which the receipt of such tax by such banks and trust companies is to be treated as payment for tax purposes.

(d) Assessment.

Whenever any tax required to be paid by this chapter is not paid in full at the time required for such payment, it shall be the duty of the Secretary, subject to the limitations prescribed in

section 6501, on proof satisfactory to him, to determine the amount of tax which has been omitted to be paid, and to make an assessment therefor against the person liable for the tax. The tax so assessed shall be in addition to the penalties imposed by law for failure to pay such tax when required. Except in cases where delay may jeopardize collection of the tax, or where the amount is nominal or the result of an evident mathematical error, no such assessment shall be made until and after the person liable for the tax has been afforded reasonable notice and opportunity to show cause, in writing, against such assessment.

# 7 U.S.C. § 518d

## FAIR AND EQUITABLE TOBACCO REFORM ACT (FETRA)

### 7 U.S.C. § 518d- Use of assessments as source of funds for payment

#### (a) Definitions.

In this section:

#### (1) Base period.

The term "base period" means the one-year period ending the June 30 before the beginning of a fiscal year.

#### (2) Gross domestic volume.

The term "gross domestic volume" means the volume of tobacco products –

(A) removed (as defined by section 5702 of the Internal Revenue Code of 1986); and

(B) not exempt from tax under chapter 52 of the Internal Revenue Code of 1986 at the time of their removal under that chapter or the Harmonized Tariff Schedule of the United States (19 U.S.C. 1202).

(3) Market share.

The term "market share" means the share of each manufacturer or importer of a class of tobacco product (expressed as a decimal to the fourth place) of the total volume of domestic sales of the class of tobacco product during the base period for a fiscal year for an assessment under this section.

(b) Quarterly assessments.

(1) Imposition of assessment.

The Secretary, acting through the Commodity Credit Corporation, shall impose quarterly assessments during each of fiscal years 2005 through 2014, calculated in accordance with this section, on each tobacco product manufacturer and tobacco product importer that sells tobacco products in domestic commerce in the United States during that fiscal year.

(2) Amounts.

Beginning with the calendar quarter ending on December 31 of each of fiscal years 2005 through 2014, the assessment payments over each four-calendar quarter period shall be sufficient to cover –

(A) the contract payments made under sections 622 and 623 during that period; and

(B) other expenditures from the Tobacco Trust Fund made during the base quarter periods corresponding to the four calendar quarters of that period.

**(3) Deposit.**

Assessments collected under this section shall be deposited in the Tobacco Trust Fund.

**(c) Assessments for classes of tobacco products.**

**(1) Initial allocation.**

The percentage of the total amount required by subsection (b) to be assessed against, and paid by, the manufacturers and importers of each class of tobacco product in fiscal year 2005 shall be as follows:

(A) For cigarette manufacturers and importers, 96.331 percent.

(B) For cigar manufacturers and importers, 2.783 percent.

(C) For snuff manufacturers and importers, 0.539 percent.

(D) For roll-your-own tobacco manufacturers and importers, 0.171 percent.

(E) For chewing tobacco manufacturers and importers, 0.111 percent.

(F) For pipe tobacco manufacturers and importers, 0.066 percent.

**(2) Subsequent allocations.**

For subsequent fiscal years, the Secretary shall periodically adjust the percentage of the total amount required under subsection (b) to be assessed against, and paid by, the manufacturers and importers of each class of tobacco product specified in paragraph (1) to reflect changes in the share of gross domestic volume held by that class of tobacco product.

**(3) Effect of insufficient amounts.**

If the Secretary determines that the assessment imposed under subsection (b) will result in insufficient amounts to carry out this subtitle during a fiscal year, the Secretary shall assess such additional amounts as the Secretary determines to be necessary to carry out this subtitle during that fiscal year. The additional amount shall be allocated to manufacturers and importers of each class of tobacco product specified in paragraph (1) in the same manner and based on the same percentages applicable under paragraph (1) or (2) for that fiscal year.

(d) Notification and timing of assessments.

(1) Notification of assessments.

The Secretary shall provide each manufacturer or importer subject to an assessment under subsection (b) with written notice setting forth the amount to be assessed against the manufacturer or importer for each quarterly payment period. The notice for a quarterly period shall be provided not later than 30 days before the date payment is due under paragraph (3).

(2) Content.

The notice shall include the following information with respect to the quarterly period used by the Secretary in calculating the amount:

(A) The total combined assessment for all manufacturers and importers of tobacco products.

(B) The total assessment with respect to the class of tobacco products manufactured or imported by the manufacturer or importer.

(C) Any adjustments to the percentage allocations among the classes of tobacco products made pursuant to paragraph (2) or (3) of subsection (c).

(D) The volume of gross sales of the applicable class of tobacco product treated as made by the manufacturer or importer for purposes of calculating the manufacturer's or importer's market share under subsection (f).

(E) The total volume of gross sales of the applicable class of tobacco product that the Secretary treated as made by all manufacturers and importers for purposes of calculating the manufacturer's or importer's market share under subsection (f).

(F) The manufacturer's or importer's market share of the applicable class of tobacco product, as determined by the Secretary under subsection (f).

(G) The market share, as determined by the Secretary under subsection (f), of each other manufacturer and importer, for each applicable class of tobacco product.

**(3) Timing of assessment payments.**

**(A) Collection date.**

Assessments shall be collected at the end of each calendar year quarter, except that the Secretary shall ensure that the final assessment due under this section is collected not later than September 30, 2014.

(B) Base period quarter.

The assessment for a calendar year quarter shall correspond to the base period quarter that ended at the end of the preceding calendar year quarter.

(e) Allocation of assessment within each class of tobacco product.

(1) Pro rata basis.

The assessment for each class of tobacco product specified in subsection (c)(1) shall be allocated on a pro rata basis among manufacturers and importers based on each manufacturer's or importer's share of gross domestic volume.

(2) Limitation.

No manufacturer or importer shall be required to pay an assessment that is based on a share that is in excess of the manufacturer's or importer's share of domestic volume.

(f) Allocation of total assessments by market share.

The amount of the assessment for each class of tobacco product specified in subsection (c)(1) to be paid by each manufacturer or importer of that class

of tobacco product shall be determined for each quarterly payment period by multiplying –

(1) the market share of the manufacturer or importer, as calculated with respect to that payment period, of the class of tobacco product; by

(2) the total amount of the assessment for that quarterly payment period under subsection (c), for the class of tobacco product.

**(g) Determination of volume of domestic sales.**

**(1) In general.**

The calculation of the volume of domestic sales of a class of tobacco product by a manufacturer or importer, and by all manufacturers and importers as a group, shall be made by the Secretary based on information provided by the manufacturers and importers pursuant to subsection (h), as well as any other relevant information provided to or obtained by the Secretary.

**(2) Gross domestic volume.**

The volume of domestic sales shall be calculated based on gross domestic volume.

(3) Measurement.

For purposes of the calculations under this subsection and the certifications under subsection (h) by the Secretary, the volumes of domestic sales shall be measured by –

(A) in the case of cigarettes and cigars, the number of cigarettes and cigars; and

(B) in the case of the other classes of tobacco products specified in subsection (c)(1), in terms of number of pounds, or fraction thereof, of those products.

(h) Measurement of volume of domestic sales.

(1) Submission of information.

Each manufacturer and importer of tobacco products shall submit to the Secretary a certified copy of each of the returns or forms described by paragraph (2) that are required to be filed with a Federal agency on the same date that those returns or forms are filed, or required to be filed, with the agency.

(2) Returns and forms.

The returns and forms described by this paragraph are those returns and forms that relate to –

(A) the removal of tobacco products into domestic commerce (as defined by section 5702 of the Internal Revenue Code of 1986); and

(B) the payment of the taxes imposed under charter 52 of the Internal Revenue Code of 1986, including AFT Form 5000.24 and United States Customs Form 7501 under currently applicable regulations.

**(3) Effect of failure to provide required information.**

Any person that knowingly fails to provide information required under this subsection or that provides false information under this subsection shall be subject to the penalties described in section 1003 of title 18, United States Code. The Secretary may also assess against the person a civil penalty in an amount not to exceed two percent of the value of the kind of tobacco products manufactured or imported by the person during the fiscal year in which the violation occurred, as determined by the Secretary.

**(i) Challenge to assessment.**

**(1) Appeal to Secretary.**

A manufacturer or importer subject to this section may contest an assessment imposed on

the manufacturer or importer under this section by notifying the Secretary, not later than 30 business days after receiving the assessment notification required by subsection (d), that the manufacturer or importer intends to contest the assessment.

**(2) Information.**

Not later than 180 days after the date of the enactment of this title [enacted Oct. 22, 2004], the Secretary shall establish by regulation a procedure under which a manufacturer or importer contesting an assessment under this subsection may present information to the Secretary to demonstrate that the assessment applicable to the manufacturer or importer is incorrect. In challenging the assessment, the manufacturer or importer may use any information that is available, including third party data on industry or individual company sales volumes.

**(3) Revision.**

If a manufacturer or importer establishes that the initial determination of the amount of an assessment is incorrect, the Secretary shall revise the amount of the assessment so that the manufacturer or importer is required to pay only the amount correctly determined.

**(4) Time for review.**

Not later than 30 days after receiving notice from a manufacturer or importer under paragraph (1), the Secretary shall –

(A) decide whether the information provided to the Secretary under paragraph (2), and any other information that the Secretary determines is appropriate, is sufficient to establish that the original assessment was incorrect; and

(B) make any revisions necessary to ensure that each manufacturer and importer pays only its correct pro rata share of total gross domestic volume from all sources.

**(5) Immediate payment of undisputed amounts.**

The regulations promulgated by the Secretary under paragraph (2) shall provide for the immediate payment by a manufacturer or importer challenging an assessment of that portion of the assessment that is not in dispute. The manufacturer and importer may place into escrow, in accordance with such regulations, only the portion of the assessment being challenged in good faith pending final determination of the claim.

(j) **Judicial review**.

(1) **In general.**

Any manufacturer or importer aggrieved by a determination of the Secretary with respect to the amount of any assessment may seek review of the determination in the United States District Court for the District of Columbia or for the district in which the manufacturer or importer resides or has its principal place of business at any time following exhaustion of the administrative remedies available under subsection (i).

(2) **Time limits.**

Administrative remedies shall be deemed exhausted if no decision by the Secretary is made within the time limits established under subsection (i)(4).

(3) **Excessive assessments.**

The court shall restrain collection of the excessive portion of any assessment or order a refund of excessive assessments already paid, along with interest calculated at the rate prescribed in section 3717 of title 31, United States Code, if it finds that the Secretary's determination is not supported by a preponderance of the information available to the Secretary.

**(k) Termination date.**

The authority provided by this section to impose assessments terminates on September 30, 2014.