



IN THE SUPREME COURT OF THE STATE OF DELAWARE

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SAYEL GHABAYEN, §  
Defendant below, §  
Appellant, §  
v. §  
STATE OF DELAWARE, §  
Appellee. §

§ No. 526, 2013  
§ Appeal From The Honorable  
§ Eric M. Davis' Opinion And  
§ Order Dated Sept. 3, 2013 and  
§ Final Judgment Entered On  
§ Sept. 27, 2013 Of The Superior  
§ Court of The State Of Delaware  
§ In And For New Castle County  
§ In Case # 1209001881

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**APPELLANT'S AMENDED OPENING BRIEF**

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## **TABLE OF CONTENTS**

	<b><u>PAGE</u></b>
TABLE OF CITATIONS .....	5
NATURE OF THE PROCEEDINGS .....	7
SUMMARY OF ARGUMENT .....	8, 9
STATEMENT OF FACTS .....	10
A.    The Parties .....	10
B.    The Traffic Stop On September 2, 2012 .....	10
C.    Mr. Ghabayen Legally Purchased The Cigarettes And Paid The Virginia Cigarette Tax .....	11
D.    Mr. Ghabayen Is A New York Resident And Has No Nexus To Delaware.....	11
ARGUMENT.....	12
I.    THE DELAWARE TOBACCO TAX SCHEME, AND SPECIFICALLY 30 DEL. C. § 5342, IS UNCONSTITUTIONAL BECAUSE IT FAILS THE <i>Complete Auto Transit</i> ANALYSIS AND CONSTITUTES AN UNDUE BURDEN ON INTERSTATE COMMERCE .....	12
A.    Question Presented .....	12
B.    The Standard And Scope Of Review .....	12
C.    The Superior Court Should Have Analyzed The Delaware Tobacco Taxation Scheme Using the <i>Complete Auto Transit</i> Factors ...	12
(1)    Mr. Ghabayen Did Not Have A “Substantial Nexus” With Delaware .....	15
(2)    The Tobacco Tax Was Unfairly Apportioned .....	19

(3) No Claim Is Made That The Delaware Tobacco Tax Discriminates Against Interstate Commerce .....	24
(4) Delaware's Tobacco Tax Statute Is Only Minimally Related To Delaware Services .....	24
 II. THE SUPERIOR COURT ERRED IN ADOPTING <i>State v. Sedacca</i> BECAUSE THE <i>Sedacca</i> ANALYSIS IS INHERENTLY FLAWED.....	25
A. Question Presented .....	25
B. The Standard And Scope Of Review .....	25
C. <i>State v. Sedacca</i> Incorrectly Relied On <i>Carter v. Commonwealth Of Virginia</i> , Which Applied To A Liquor Regulation, To Hold That The State's Police Power Provided An Independent Basis For Taxing Cigarettes In Interstate Commerce .....	25
1. <i>Sedacca</i> Summarily Dismissed The Dormant Commerce Claim With Insufficient Analysis And Incorrectly Relied On A Prior Liquor Regulation Decision .....	26
2. <i>Sedacca</i> Was Decided Prior To <i>Complete Auto Transit</i> And Is Inadequate To Address The Present Dormant Commerce Clause and Due Process Issues... ....	27
 III. THE <i>Sedacca</i> ANALYSIS IS INAPPOSITE BECAUSE THE MARYLAND AND DELAWARE TAXATION SCHEMES ARE SIGNIFICANTLY DIFFERENT.....	29
A. Question Presented .....	29
B. The Standard And Scope Of Review .....	29
C. Delaware's Limited Exception To The Taxation Scheme Is Insufficient To Permit The Significant Burden On Individuals Participating In Interstate Commerce .....	29

IV. THE TRIAL COURT'S CHARACTERIZATION OF 30 DEL. C. § 5432 AS A "POSSESSION" STATUTE SHOULD NOT HAVE PRECLUDED A MORE MEANINGFUL CONSTITUTIONAL ANALYSIS .....	31
A. Question Presented .....	31
B. Standard and Scope of Review .....	31
C. A Determination Of Whether The Cigarettes Were Subject To Tax Was An Essential Prerequisite For Determining An Element Of The "Possession" Criminal Charge .....	31
CONCLUSION .....	33
TRIAL COURT ORDER .....	EXHIBIT ONE
APPENDIX	

## TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<b>United States Supreme Court</b>	
<i>Braniff Airways v. Nebraska State Bd. of Equalization &amp; Assessment</i> , 347 U.S. 590, 600-0 (1954) .....	18, 19
<i>Carson v. Petroleum Co. v. Vial</i> , 279 U.S. 95 (1929).....	13
<i>Carter v. Commonwealth of Virginia</i> , 321 U.S. 131 (1944) .....	8, 25, 26, 27
<i>Complete Auto Transit, Inc. v. Brady</i> , 430 U.S. 274 (1977) .....	<i>passim</i>
<i>Minnesota v. Blasius</i> , 290 U.S. 1 (1933).....	<i>passim</i>
<i>Oklahoma Tax Comm'n v. Jefferson</i> , 514 U.S. 175 (1995) .....	22, 23
<i>Tyler Pipe Indus. V. Washington State Dept. of Revenue</i> , 483 U.S. 232 (1987) .....	22
<i>Wisconsin v. J.C. Penney</i> , 311 U.S. 435 (1940) .....	16, 18
<b>Circuit Court of Appeals</b>	
<i>Gordon v. Holder</i> , 721 F.3d 638 (D.C. Cir. 2013) .....	16, 17
<b>Delaware Supreme Court</b>	
<i>Abrams v. State</i> , 689 A.2d 1185 (Del. 1997).....	12, 25, 29, 31

<i>Director of Revenue v. Dial Corp.</i> , 2008 WL 5146861 (Del. Dec. 8, 2008) .....	20, 21, 22, 23
<i>Ford Motor Co. v. Director of Revenue</i> , 963 A.2d 115 (Del. 2008).....	15
<i>Lehman Bros. Bank, FSB v. State Bank Comm'r</i> , 937 A.2d 95 (Del. 2007) .....	13, 15
<i>Redden v. State</i> , 281 A.2d 490 (Del. 1971).....	31, 32

### **Delaware Superior Court**

<i>Saudi Refining, Inc. v. Director of Revenue</i> , 715 A.2d 89 (Del. Super. Ct. 1998).....	19, 20, 21, 23, 24
<i>State v. Crane Hook Oil Storage Co.</i> , 2 Terry 194 (Del. Super. Ct. 1941).....	13

### **Maryland Court of Appeals**

<i>State v. Sedacca</i> , 249 A.2d 456 (Md. 1969).....	<i>passim</i>
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### **STATUTES**

#### **Delaware**

30 Del. C. §571.....	<i>passim</i>
30 Del. C. §5305.....	<i>passim</i>
30 Del. C. §5328.....	<i>passim</i>
30 Del. C. §5342(a).....	<i>passim</i>
11 Del. C. §511.....	<i>passim</i>
11 Del. C. §512.....	<i>passim</i>

#### **Maryland**

Md. C. § §12-104, 12-304.....	29, 30
Md. C. §13-1014.....	29, 30

## **NATURE OF THE PROCEEDINGS**

This appeal, filed on October 2, 2013, asks this Court to determine whether Delaware's "Tobacco Tax"<sup>1</sup> scheme as codified in Title 30, Chapter 53 of the Delaware Code unconstitutionally infringes on the freedom of interstate commerce and denies individuals due process by permitting Delaware to locally tax tobacco cigarettes in transit from Virginia to New York.

Superior Court Judge, Eric M. Davis, first heard the issue on April 16, 2013. Judge Davis denied the defendant's Motion to Dismiss after a bench trial and supplemental briefing. The court adopted the analysis of the Maryland Court of Appeals in the case, *State v. Sedacca*.<sup>2</sup> Thereafter, on September 27, 2013, the defendant was convicted of Unlawfully Possessing Untaxed Cigarettes and Conspiracy in the Third Degree. He was sentenced to a fine of \$101.00. The defendant, through counsel, filed a timely Notice of Appeal on October 4, 2013.

This is Mr. Ghabayen's Opening Brief in support of his appeal.

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<sup>1</sup> "Tobacco Tax" refers to 30 Del. C. §§ 30 Del. C. § § 571, 5305, 5328, 5342(a) and 11 Del. C. § § 511, 512

<sup>2</sup> 249 A.2d 456 (Md. 1969).

## **SUMMARY OF ARGUMENT**

1. The trial court committed plain error when it failed to undergo a *Complete Auto Transit* analysis.<sup>3</sup> The Delaware Tobacco Tax scheme impermissibly exacts an unconstitutional tax on cigarettes that 1) has no nexus with the State of Delaware, 2) is unfairly apportioned and 3) is wholly unrelated to services provided by the State.
2. The trial court erred in adopting *State v. Sedacca*.<sup>4</sup> First, the Maryland Court of Appeals summarily dismissed the dormant commerce claim and erroneously relied on the United States Supreme Court liquor decision, *Carter v. Commonwealth of Virginia*.<sup>5</sup> Second, the *Sedacca* decision was decided prior to the promulgation of the *Complete Auto Transit* factors and is an inadequate commerce clause analysis. Consequently, the Superior Court's Order fails to adequately balance the relationship of the goods to the state tax, as required by the *Complete Auto Transit* decision.

3. The Maryland and Delaware statutory schemes significantly differ in the way personal transportation of cigarettes is exempted. Unlike the Maryland tax scheme, Delaware statutes allow less than one carton of cigarettes to be transported without tax stamps. Such a minimal threshold imposes an unduly burden on

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<sup>3</sup> *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977)

<sup>4</sup> 249 A.2d 456 (Md. 1969).

<sup>5</sup> 321 U.S. 131 (1944).

individuals' ability to transport goods throughout and among the states. Therefore, it was impermissible for the Superior court to adopt the *Sedacca* analysis without a more critical review of the Delaware tax scheme.

4. Although 30 Del. C. § 3542 is a “possession” statute, the Superior court failed to undertake a comprehensive constitutional analysis, a prerequisite to a finding that one of the elements of the possession statute was satisfied.

## **STATEMENT OF FACTS**

### **A. The Parties**

Sayal Ghabayen is a New York resident and a passenger in a Jeep Cherokee traveling through Delaware from Virginia on September 2, 2012.

The State of Delaware is acting in its capacity to enforce and interpret tax legislation as codified by the Delaware General Assembly.

### **B. The Traffic Stop On September 2, 2012**

The Appellant, Mr. Ghabayen, and his friend, the driver of the Jeep Cherokee, Mr. Hassan, are New York residents.<sup>6</sup> They were traveling through the Delaware area en route to New York from Virginia.<sup>7</sup> The two friends lawfully purchased a large quantity of cigarettes at various Virginia stores and were transporting them to the New York area.<sup>8</sup>

Shortly after the Jeep proceeded into Delaware and onto Interstate 295, a Delaware River and Bay Authority officer detained Mr. Hassan's vehicle for unlawfully crossing a solid line.<sup>9</sup> During the traffic stop, officers observed plastic bags of cigarettes in the rear of the vehicle.<sup>10</sup> Believing that the two individuals

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<sup>6</sup> A061.

<sup>7</sup> A062.

<sup>8</sup> A051-55.

<sup>9</sup> A039.

were smuggling cigarettes, the officers arrested Mr. Hassan and Mr. Ghabayen for Possession of Untaxed Tobacco Products and other related offenses.

**C. Mr. Ghabayen Legally Purchased The Cigarettes And Paid The Virginia Cigarette Tax**

Mr. Hassan and Mr. Ghabayen provided the State with receipts of their cigarette purchases.<sup>11</sup> Additionally, each cigarette carton displayed a Virginia tax stamp, evidencing payment of the cigarette tax.<sup>12</sup> Consequently, it is uncontested that the cigarettes were both lawfully obtained and in conformance with the Virginia taxation scheme.

**D. Mr. Ghabayen Is A New York Resident And Has No Nexus To Delaware**

At all times pertinent to this litigation, Mr. Ghabayen and Mr. Hassan have been New York residents.<sup>13</sup> They conduct business in New York. They have no connection to the Delaware area except for driving northbound on Interstate 295 on September 2, 2012.

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<sup>10</sup> A050-51.

<sup>11</sup> A051.

<sup>12</sup> A054.

<sup>13</sup> A061.

## **ARGUMENT**

### **I. THE DELAWARE TOBACCO TAX SCHEME, AND SPECIFICALLY 30 DEL. C. § 5342, IS UNCONSTITUTIONAL BECAUSE IT FAILS THE *Complete Auto Transit* ANALYSIS AND CONSTITUTES AN UNDUE BURDEN ON INTERSTATE COMMERCE.**

#### **A. Question Presented**

Whether under the Dormant Commerce Clause and Due Process the State of Delaware may tax cigarettes that are in transit from the state of sale, Virginia, to the state of delivery, New York.<sup>14</sup>

#### **B. The Standard And Scope Of Review**

Issues alleging constitutional errors or misapplication of the law are reviewed *de novo*.<sup>15</sup>

#### **C. The Superior Court Should Have Analyzed The Delaware Taxation Scheme Using the *Complete Auto Transit* Factors.**

The federal government, and not State governments, has the power “[t]o regulate commerce with foreign nations and among the several states...”<sup>16</sup> (hereinafter “commerce clause”). Such powers include the regulation and taxation of goods, both commercial and personal, which are transported throughout and

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<sup>14</sup> The issue was preserved on pages A075-92.

<sup>15</sup> *Abrams v. State*, 689 A.2d 1185, 1187 (Del. 1997).

<sup>16</sup> U.S. Const., art I, § 8

among the states.<sup>17</sup> The negative implication of the federal government's power to regulate commerce, known as the "dormant commerce clause," prohibits states from impermissibly interfering with interstate commerce.<sup>18</sup>

Dormant Commerce Clause jurisprudence initially developed in *Minnesota v. Blasius*<sup>19</sup> and *Carson Petroleum Co. v. Vial*.<sup>20</sup> Those decisions considered whether a good was continuously in transit and therefore immune to state taxation.<sup>21</sup> In *Minnesota v. Blasius*, the Supreme Court held that

"[t]he states may not tax property in transit in interstate commerce. But, by reason of a break in the transit, the property may come to rest within a state and become subject to the power of the state to impose a nondiscriminatory property tax... If the interstate movement has begun, it may be regarded as continuing, so as to maintain the immunity of the property from state taxation, despite temporary interruptions due to the necessities of the journey or for the purpose of safety and convenience in the course of the movement."<sup>22</sup>

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<sup>17</sup> *Minnesota v. Blasius*, 290 U.S. 1, 8-9 (1933) (discussing the parameters of state taxation and the regulation of interstate commerce).

<sup>18</sup> *Lehman Bros. Bank, FSB v. State Bank Comm'r*, 937 A.2d 95, 107 (Del. 2007).

<sup>19</sup> *Minnesota v. Blasius*, 290 U.S. 1, 8-9 (1933).

<sup>20</sup> 279 U.S. 95, 101 (1929) (holding that "[t]he crucial question to be settled in determining whether personal property or merchandise moving in interstate commerce is subject to local taxation is that of its continuity of transit").

<sup>21</sup> *Minnesota v. Blasius*, 290 U.S. 1, 8-9 (1933); The Delaware Superior Court used the "continuity of travel" test in *State v. Crane Hook Oil Storage Co.*, 18 A.2d 427, 429 (Del. Super. Ct. 1941).

<sup>22</sup> 290 U.S. 1, 9 (1933).

In *Blasius*, the Supreme Court determined that goods might be subject to both state and federal taxation even while involved in the flow of interstate commerce.<sup>23</sup> The central question was when the state's power to tax attached.<sup>24</sup> Goods that came to rest in the ultimate state of destination could be reasonably taxed as having become part of that state's "mass of property."<sup>25</sup> In contrast, goods that were continually in transit were immune from local taxation.<sup>26</sup> The continuity of transit analysis was a "practical" determination and mere pauses in transit for purposes of safety or redirection did not suffice to destroy "continuity of travel."<sup>27</sup>

In *Blasius*, the defendant, a livestock trader in St. Paul, Minnesota, bought and sold cattle out of a large stockyard.<sup>28</sup> The Court determined that the cattle, which had arrived at their planned final destination, the stockyard, and which became Mr. Blasius' property at the point of sale, were part of the state's mass of property and subject to local taxation.<sup>29</sup>

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<sup>23</sup> *Id.* at 8.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 10.

<sup>26</sup> *Id.* at 9-10.

<sup>27</sup> *Id.* at 7-10.

<sup>28</sup> *Minnesota v. Blasius*, 290 U.S. 1, 5-6 (1933).

<sup>29</sup> *Id.* at 12.

In the 1977 case, *Complete Auto Transit v. Brady*, The United States Supreme Court modified the Dormant Commerce Clause analysis.<sup>30</sup> The Court determined that goods traveling in interstate commerce were subject to taxation if such tax “(i) is applied to an activity with a substantial nexus with the taxing state, (ii) is fairly apportioned, (iii) does not discriminate against interstate commerce, and (iv) is fairly related to the services provided by the State.”<sup>31</sup> The *Complete Auto Transit v. Brady* test was codified in a multitude of Delaware cases<sup>32</sup> and remains the appropriate analysis for determining whether goods are subject to local Delaware taxation.

The Delaware tobacco tax statute fails to satisfy three of the four *Complete Auto Transit* factors.

**(1) Mr. Ghabayen Did Not Have A “Substantial Nexus” With Delaware**

The “substantial nexus” prong is derived from both due process and commerce clause jurisprudence.<sup>33</sup> In the due process analysis, the question is

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<sup>30</sup> *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977) (holding recognized by the Delaware Supreme Court in *Director of Revenue v. Dial Corp.*, 2008 WL 5146861 (Del. Dec. 8, 2008)).

<sup>31</sup> *Id.*

<sup>32</sup> See, e.g., *Lehman Bros. Bank, FSB v. State Bank Comm'r*, 937 A.2d 95, 111-12 (Del. 2007) (using the *Complete Auto Transit* test to determine whether a bank franchise statute was constitutional); *Ford Motor Co. v. Dir. of Revenue*, 963 A.2d 115, 119 (Del. 2008) (applying the *Complete Auto Transit* factors to determine whether the Wholesaler's Tax was constitutional).

whether there are sufficient minimum contacts with the State to prevent an unfair exaction.<sup>34</sup> In the recent D.C. Circuit Court of Appeals decision, *Gordon v. Holder*, the court identified two issues of first impression regarding the interplay between the Due Process Clause and tobacco statutes.<sup>35</sup> Preliminarily, the *Gordon* Court was tasked with determining whether Mr. Gordon had a significant likelihood of success on the merits of his case.<sup>36</sup>

The Court determined that it was “well-settled” that Due Process requires minimum contacts with the taxing state.<sup>37</sup> The issues in *Gordon* were more complex than the issue in the case *sub judice* because the statute involved two government actors, both the federal and state governments, and a statute that specifically approved of state taxation on out of state goods.<sup>38</sup> Under the PACT Act, the federal government prohibited tobacco sales through the mail and

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<sup>33</sup> *Wisconsin v. J.C. Penney*, 311 U.S. 435, 444-45 (1940) (stating that one of the constitutional requirements of a tax is “whether property was taken without due process of law,” or, restated, “whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state”). *See also Braniff Airways v. Nebraska State Bd. of Equalization & Assessment*, 347 U.S. 590, 600-01 (1954) (holding that an airline had a sufficient nexus with the taxing state when it rented property, bought plane fuel, and made 18 flights a day within the state).

<sup>34</sup> 721 F.3d 638, 648 (2013).

<sup>35</sup> *Id.* at 645.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

obligated those individuals conducting “delivery sales” of tobacco products to pre-pay all relevant state taxes as if the delivery sale had been conducted entirely within each state, even if the business was conducted over the phone without the state.<sup>39</sup> Gordon argued that the federal government’s enforcement of the State’s tax was unconstitutional because he lacked minimum contacts with the state.<sup>40</sup> Because the federal government imposed and enforced the tax, the court assumed, without deciding, that the minimum contacts had been met with the federal government.<sup>41</sup>

Thereafter, the court isolated its analysis to that of due process minimum contacts and not a commerce clause minimum contacts analysis.<sup>42</sup> It stated that a tax without minimum contacts “lacks democratic legitimacy.”<sup>43</sup> The court held that Mr. Gordon’s due process minimum contacts claim was likely to be successful or, at the very least, that it was a close question because he had conducted only one delivery sale to a buyer in the state jurisdiction and by the nature of a “delivery

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<sup>39</sup> *Id.* at 642.

<sup>40</sup> *Id.* at 646.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 646-47.

<sup>43</sup> *Id.* at 648.

sale,” it was conducted wholly out of state.<sup>44</sup>

In the commerce clause analysis, the question to be determined is whether there is a reasonable corollary between the individual to be taxed and the services and benefits provided by the State.<sup>45</sup> In *Braniff Airways*, the Court determined that an airline had a sufficient nexus with Nebraska because it rented property in the state, bought fuel, and made 18 scheduled plane stops a day within the state.<sup>46</sup> Moreover, the airline made a profit from the Nebraska passengers and freight that traveled on its aircraft, and the state made its services available to the airline.<sup>47</sup>

Mr. Ghabayen is, and has been at all times pertinent to the present litigation, a resident of New York. He traveled to Virginia with his friend and co-defendant-below, Mr. Hassan. He visited with a family friend, conducted personal business, purchased cigarettes from Virginia-area convenience stores and then rode with his friend up the I-95 corridor back to New York. Neither individual had any intention of stopping in Delaware or availing themselves of Delaware benefits or services.

It was uncontroverted at the bench trial below that neither defendant had

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<sup>44</sup> *Id.* at 651.

<sup>45</sup> *J.C. Penney*, 311 U.S. at 444-45; *Braniff Airways*, 347 U.S. at 600-01.

<sup>46</sup> *Braniff Airways*, 347 U.S. at 600-01.

<sup>47</sup> *Id.*

personal contacts or professional business in Delaware.<sup>48</sup> The sole reason for Mr. Ghabayen's presence in Delaware was his friend's commission of a traffic violation, which resulted in a traffic stop.<sup>49</sup> Unlike the airline in *Braniff Airways*, the defendant does not receive income from the State of Delaware, he does not make regular stops into the state, and he has no property or other connection with the state. Even more compelling than the purveyor in *Gordon*, Mr. Ghabayen did not initiate a sale or make any profit in Delaware. Consequently, Mr. Ghabayen has no contacts in the state and does not regularly avail himself of the State's services. Thus, Mr. Ghabayen has no nexus to the State of Delaware and cannot be fairly taxed for the fleeting moment that he was within Delaware state lines.

## **(2) The Tobacco Tax Was Unfairly Apportioned**

The State contends that Mr. Ghabayen owed Delaware Tobacco Tax when he possessed cigarettes in Delaware for the time period necessary to administer a traffic ticket. The State's contention is patently unreasonable. A tax must be relative to "that portion of the revenues from interstate activity which reasonably reflects the in-state component of the activity being taxed."<sup>50</sup> A fairly apportioned

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<sup>48</sup> A003-004, A027-028, A062-67.

<sup>49</sup> A062-067.

<sup>50</sup> *Saudi Refining, Inc. v. Director of Revenue*, 715 A.2d 89, 97 (Del. 1998).

tax is one that is “attributable to economic activity *within* the taxing State.”<sup>51</sup>

In *Saudi Refining, Inc. v. Director of Revenue*, the Delaware Supreme Court addressed a similar taxation issue.<sup>52</sup> In *Saudi Refining*, the defendant (“SRI”) was a Delaware corporation with its principle place of business in Houston, Texas.<sup>53</sup> The company had neither offices nor staff in Delaware, but did have a partnership interest in the refining company, Star Enterprises (“Star”), located in Delaware.<sup>54</sup> SRI sold, transferred, and delivered crude oil to Star’s oil refinery location in Delaware City.<sup>55</sup>

The oil delivery was labor intensive and logically complex.<sup>56</sup> When a tanker of oil arrived in the Delaware Bay, a pilot from a Delaware Association boarded the tanker to facilitate safe travel though the Delaware River channel to a site near Milford, Delaware.<sup>57</sup> The oil was then transported via smaller ships to lesson the tanker’s weight and draw, which permitted the tanker to fit through the

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<sup>51</sup> *Director of Revenue v. Dial*, 2008 WL 5146861, at \*2 (Del. Dec. 8 2008) (emphasis added).

<sup>52</sup> 715 A.2d 89 (Del. 1998).

<sup>53</sup> *Id.* at 91.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 92.

<sup>57</sup> *Id.* at 92-93.

channel to the Delaware City docks.<sup>58</sup> The oil was then pumped into storage tanks on a Delaware site.<sup>59</sup> The entire process took up to 82 hours.<sup>60</sup>

SRI alleged that the Delaware Wholesale Gross Receipts Tax was unconstitutional because it failed to satisfy the *Complete Auto Transit* factors.<sup>61</sup> Judge Del Pesco held that the tax was fairly apportioned because it affected only those sales that were “consummated by physical delivery within the state.”<sup>62</sup> The tax did not discriminate “on goods merely passing through the state” because it related to only that portion of goods that were “physically delivered for the purposes of resale...”<sup>63</sup> Additionally, the tax was related to state services because of the extent that environmental, safety, and transportation services were used to distribute the fuel.<sup>64</sup>

In *Director of Revenue v. Dial*, the same wholesale tax was again found constitutional where the defendant actually delivered goods to Delaware

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<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 90-91.

<sup>62</sup> *Id.* at 97.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 98.

customers.<sup>65</sup> Dial Corporation was headquartered in Arizona and sold products to Delaware retail chain stores.<sup>66</sup> The Delaware Supreme Court upheld the tax because the actual delivery process took place in Delaware and only Delaware had the jurisdiction to tax the activity.<sup>67</sup> Therefore, the tax was not “out of all appropriate proportion to the business transacted.”<sup>68</sup>

In *Oklahoma Tax Commission v. Jefferson*, the Supreme Court looked to the “internal” consistency of a state tax on bus ticket sales.<sup>69</sup> “Internal consistency” relates to whether “a tax's identical application by every State would place interstate commerce at a disadvantage as compared with intrastate commerce.”<sup>70</sup> The Oklahoma tax applied to only the actual sale of the ticket in the originating state.<sup>71</sup> Therefore, the tax could not be duplicitous and the internal consistency prong was satisfied.<sup>72</sup>

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<sup>65</sup> 2008 WL 5146861, at \*3.

<sup>66</sup> *Id.* at \*1.

<sup>67</sup> *Id.* at \*3.

<sup>68</sup> *Id.* (citing *Tyler Pipe Indus. v. Washington State Dept. of Revenue*, 483 U.S. 232, 251 (1987) (internal quotations omitted)).

<sup>69</sup> 514 U.S. 175, 175-76 (1995).

<sup>70</sup> *Id.* at 175.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

“External” consistency “looks to the economic justification for the State's claim upon the value taxed to discover whether the tax reaches beyond the portion of value that is fairly attributable to economic activity within the taxing State.”<sup>73</sup> In *Jefferson*, the Court held that external consistency was satisfied because the sale of bus tickets related to contractual agreements, payments, and deliveries made within the taxing state.<sup>74</sup> The connection of the sale was not so attenuated as to deny the state sales tax.

The cigarettes in the case *sub judice* have no relation to any in-state activity, except the momentary use of the interstate highway and police officers. The tax fails the internal consistency test because the exact tax statute applied to every state would result in duplicitous taxing events, causing the goods to be taxed over and over in each state during transit. Unlike in *Jefferson* where the tax related to the actual sale, as opposed to possession, of the bus ticket, travel amongst states is not an isolated tax event. The tobacco tax scheme fails internal consistency because it causes cigarettes to be subject to duplicative taxes.

The Delaware Tobacco Tax scheme also fails external consistency. Unlike the defendants in *Jefferson*, *Dial* and *Saudi Refining*, Mr. Ghabayen had neither contractual relationships nor business purposes in Delaware. Unlike in *Saudi*

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<sup>73</sup> *Id.* at 175-76.

<sup>74</sup> *Id.* at 176.

*Refining*, which employed 82 man-hours of Delaware resources and services, Mr. Ghabayen traveled as a passenger through the state for a few minutes. His use of Delaware resources and services is negligible. Because the cigarettes were never intended for delivery to Delaware and Mr. Ghabayen had no personal or commercial purpose in Delaware, the tax is grossly disproportionate to *any* state activity and fails both the external and internal consistency tests.

**(3) No Claim is Made That Delaware's Tobacco Tax Discriminates Against Interstate Commerce**

30 Del. C. §5342 criminalizes the possession of untaxed cigarettes. The statute applies to all persons except affixing agents or certain exempted individuals.<sup>75</sup> Therefore, Mr. Ghabayen makes no argument that the tobacco tax discriminates amongst in-state and out-of-state individuals.

**(4) Delaware's Tobacco Tax Statute Is Only Minimally Related To Delaware Services**

Unlike in *Saudi Refining, Inc.*, where the defendants in that case used extensive environmental and safety resources including a ship captain, potential environmental precautions, staff, and 82 hours of services, here, Mr. Ghabayen rode in a vehicle on I-295 for less than an hour. His use of state resources is negligible and is accounted for by tolls and other driving fees. Therefore, the tax fails to relate to the provision of state services.

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<sup>75</sup> 30 Del. C. §§ 5342, 5305

## **II. THE SUPERIOR COURT ERRED IN ADOPTING *State v. Sedacca* BECAUSE THE *Sedacca* ANALYSIS IS INHERENTLY FLAWED.**

### **A. Question Presented**

Whether the Superior Court erred in adopting *State v. Sedacca* when determining the constitutionality of the Delaware tobacco tax.<sup>76</sup>

### **B. The Standard And Scope Of Review**

Issues alleging constitutional errors or misapplication of the law are reviewed *de novo*.<sup>77</sup>

### **C. *State v. Sedacca* Incorrectly Relied On *Carter v. Commonwealth of Virginia* To Hold That The State's Police Power Provided An Independent Basis For Taxing Cigarettes in Interstate Commerce**

In *State v. Sedacca*, the Maryland Court of Appeals held that the state had a “vital interest in preventing the diversion of cigarettes into illicit channels of trade in Maryland where the state would be unable to collect *its* tax.”<sup>78</sup> An underlying assumption of the Court’s premise was that the State was entitled to tax the cigarettes at the outset and therefore rationalized the use of police power to prevent diversion or fraud. With very little analysis, the court analogized the State’s

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<sup>76</sup> See A010-11.

<sup>77</sup> *Abrams v. State*, 689 A.2d 1185, 1187 (Del. 1997).

<sup>78</sup> *State v. Sedacca*, 229 A.2d 456, 463 (Md. 1969) (emphasis added).

taxation on cigarettes to a liquor regulation in *Carter v. Commonwealth of Virginia*.<sup>79</sup>

### **1. *Sedacca* Summarily Dismissed The Dormant Commerce Claim With Insufficient Analysis And Incorrectly Relyed On A Prior Supreme Court Decision.**

In *Carter*, the United States Supreme Court determined that states could locally regulate the transportation of liquor without offending commerce clause principles.<sup>80</sup> Notably, the Court broadly interpreted the power to regulate liquor as one borne from not only the Twenty-first Amendment, but also from the state's police power to "safely permit the transportation of liquor."<sup>81</sup> However, in the decision itself and in two concurring opinions, the Court specifically distinguished liquor from other goods in commerce.<sup>82</sup> Even amongst the Court, there was disagreement about whether states had a police power to regulate liquor.<sup>83</sup> The *Carter* decision, while clearly binding on the issue of liquor, fails to adequately

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<sup>79</sup> 321 U.S. 131 (1944).

<sup>80</sup> *Id.* at 135.

<sup>81</sup> *Id.* at 137-38.

<sup>82</sup> Justice Black stated that "[t]he Twenty-first Amendment has placed liquor in a category different from that of other articles of commerce." *Id.* at 138.

<sup>83</sup> Justice Frankfurter stated in his concurrence that the Virginia regulation of liquor *would* offend the commerce clause were it not for the Twenty-first Amendment. *Id.* at 140 (stating that the legislation was valid "solely because the range of State control over liquor has been extended by the Twenty-first Amendment beyond the permissive bounds of the Commerce Clause").

address the reasonableness of tobacco taxation schemes. Thus, the Superior Court erred in relying on it without also undertaking a *Complete Auto Transit* analysis.

The Maryland court spent little analysis determining whether the *Carter* opinion applied to the regulation of cigarettes. Instead, the Court assumed that the regulation of cigarettes was analogous to that of liquor and upheld the regulations, citing the *Carter* decision. The two are simply not analogous. Liquor holds a unique place in United States jurisprudence. It is the topic of both the Eighteenth and Twenty-first Amendments, and has a long legislative and judicial history in the courts. Because liquor and cigarettes are distinct, it was error for the Superior Court to adopt the *Sedacca* opinion without conducting a *Complete Auto Transit* analysis.

## **2. *Sedacca* Was Decided Prior To *Complete Auto Transit* And Is An Insufficient Analysis To Fully Address The Dormant Commerce Clause and Due Process Issues**

While the state's power to tax cigarettes in interstate commerce is uncontroverted,<sup>84</sup> the burden on taxpayers must still satisfy the *Complete Auto Transit* factors, which were promulgated long after the *Carter* and *Sedacca* opinions to pass constitutional muster. Even if the *Sedacca* and Superior courts believed that the taxation scheme was not prohibited by the commerce clause, a

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<sup>84</sup> The federal “Jenkins State Cigarette Taxes Act” was passed in 1949 to assist states in collecting taxes on cigarettes. 15 U.S.C. § 375-78.

state's police power is still subject to the constitutional right of due process. The Superior Court erred in failing to address the *Complete Auto Transit* Factors and its decision must be reversed.

### **III. THE *Sedacca* ANALYSIS IS INAPPOSITE BECAUSE THE MARYLAND AND DELAWARE TAXATION SCHEMES ARE SIGNIFICANTLY DIFFERENT.**

#### **A. Question Presented**

Whether Under The Dormant Commerce Clause The Delaware Tobacco Tax Personal Exemption Places An Undue Burden On Commerce.<sup>85</sup>

#### **B. The Standard And Scope Of Review**

Issues alleging constitutional errors or misapplication of the law are reviewed *de novo*.<sup>86</sup>

#### **C. Delaware's Limited Exception To The Taxation Scheme Is Insufficient To Permit The Significant Burden On Individuals Participating In Interstate Commerce**

Despite many similarities between the Maryland and Delaware Tobacco tax schemes, one difference prevents the Delaware scheme from passing constitutional muster. The Maryland statutes allow for an exception for personal consumers of up to five cartons of cigarettes or a retail value of up to one hundred dollars.<sup>87</sup> In Delaware, personal consumers are criminally liable for having even one carton of cigarettes.<sup>88</sup> Consequently, if a Delaware resident bought a carton of cigarettes at a

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<sup>85</sup> See A090-A091.

<sup>86</sup> *Abrams v. State*, 689 A.2d 1185, 1187 (Del. 1997).

<sup>87</sup> Md. Code § 12-104

location across the state border and then traveled back into the State without a Delaware tax stamp, the resident would be guilty of a misdemeanor. Such a low threshold subjects individuals to an unduly burden when traveling between and amongst states and is patently unreasonable.

As the Superior Court Order correctly observed, other individuals are also exempted from the tobacco tax.<sup>89</sup> For example, commercial delivery services with bills of lading are exempted.<sup>90</sup> But, because personal consumers do not have delivery orders, invoices, or bills of lading, the exemption does not provide any relief to those personal consumers with ten or more packs of cigarettes. So while the Maryland law may be “narrowly tailored and applied in a way [sic] which honest and law abiding citizens can readily comply,”<sup>91</sup> the Delaware scheme subjects individuals to criminal liability for a very low threshold of cigarettes. This is an unreasonable limit on an otherwise legal good in commerce. Thus, the statute is not “narrowly tailored” and constitutes a barrier to interstate commerce.

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<sup>88</sup> The statute permits less than ten cigarette *packs* to be possessed without a tax stamp. 30 Del.C. §5342. Compare with Md. Code § 12-104, which permits consumers to have 5 *cartons* of cigarettes without being subject to tax.

<sup>89</sup> A008, 30 Del. C. §5328.

<sup>90</sup> 30 Del. C. §5328.

<sup>91</sup> A011

## **IV. THE TRIAL COURT'S CHARACTERIZATION OF 30 DEL. C. § 5432 AS A “POSSESSION” STATUTE SHOULD NOT HAVE PRECLUDED A MORE MEANINGFUL CONSTITUTIONAL ANALYSIS**

### **A. Question Presented**

Whether The Court Erred In Failing To Make A Preliminary Determination As To If The “Untaxed” Cigarettes In Question Were Subject To Delaware Taxation.<sup>92</sup>

### **B. Standard and Scope of Review**

Issues alleging constitutional errors or misapplication of the law are reviewed *de novo*.<sup>93</sup>

### **C. A Determination Of Whether Cigarettes Are Constitutionally Subject To Tax Is An Essential Prerequisite In Determining An Element Of The “Possession” Criminal Charge: That The Items Possessed Are Subject To Delaware Tax.**

The State argued and the Superior court held that 30 Del. C. §5342 was merely a “possession” statute and therefore, no meaningful constitutional analysis need be applied.<sup>94</sup> In support of its argument, the Superior Court cited<sup>95</sup> a footnote from a case, *State v. Redden*.<sup>96</sup> In *Redden*, this Court overturned a conviction for

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<sup>92</sup> See A089.

<sup>93</sup> *Abrams v. State*, 689 A.2d 1185, 1187 (Del. 1997).

<sup>94</sup> A085, A009.

<sup>95</sup> A009.

possession of drugs with the intent to sell because the State failed to prove and the statute failed to articulate the requisite standards for determining intent.<sup>97</sup>

In footnote two, this Court suggested that the General Assembly should amend the statute to include such standards.<sup>98</sup> The decision does not, however, analyze or comment on the substance of 30 Del. C. §5342 other than to point out that the statute contains articulable standards for proving intent.<sup>99</sup> Thus, *Redden* is irrelevant when determining whether the Superior Court should have more substantially addressed the constitutionality of the Tobacco Tax statute prior to finding the defendant guilty of possessing untaxed cigarettes.

A successful prosecution of a possession charge, whether drugs or untaxed tobacco, etc., requires proof that the item possessed is the illegal contraband that the State purports it to be. For example, in order to prove that a defendant possessed marijuana, a testing of the substance would need to be performed and a toxicologist would need to testify that the substance is, in fact, marijuana. The analysis is no different with untaxed tobacco.

Although the State contends that the issue does not require constitutional analysis, if the untaxed tobacco is not taxable in Delaware or if it is exempted, the

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<sup>96</sup> 281 A.2d 490, n.2 (Del. 1971).

<sup>97</sup> *Id.* at 490.

<sup>98</sup> 281 A.2d at n.2.

<sup>99</sup> *Id.*

statute does not prohibit its possession.<sup>100</sup> The statute specifically reads,

no person...shall have in such person's possession within this State 10 or more packs or packages (or an equivalent amount unpackaged) of tobacco products upon which the Delaware tobacco product tax has not been paid, or to which Delaware tobacco product tax stamps are not affixed in the amount required.<sup>101</sup>

By its language, the statute only criminalizes the possession of untaxed tobacco products that are subject to the *Delaware* tax. Thus, an initial inquiry into whether the tobacco products are subject to Delaware tax is essential to proving the possession crime. This analysis is akin to testing marijuana to ensure that the substance is in fact what is prohibited.

The court was required to conduct a more searching inquiry and may not ignore the issue, or rely on a sweeping analysis, that the statute was “narrowly tailored,” “applied in a way [*sic*] which honest and law abiding citizens can readily comply,” and “reasonable under the circumstances” without actually balancing the *Complete Auto Transit* factors to make the determination. The failure to do so was error requiring that the Superior Court’s holding be reversed.

## **CONCLUSION**

For the foregoing reasons, the judgment of the Superior Court should be reversed and this Court should enter an order dismissing the charges against the defendant as an unconstitutional use of the State’s taxation power.

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<sup>100</sup> 30 Del. C. § 5342.

<sup>101</sup> *Id.*

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Dated: January 2, 2013

Attorneys for Appellant, Defendant-below

# EXHIBIT

1

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY**

STATE OF DELAWARE, )  
                        )  
                        )  
v.                     )  
                        )  
                        )  
SAYEL GHABAYEN,      ) Case No. 1209001881  
                        )  
                        )  
Defendant,            )  
                        )  
                        )  
and                    )  
                        )  
MARCO S. HASSAN,     ) Case No. 1209001862  
                        )  
                        )  
Defendant.            )

Submitted: May 8, 2013

Decided: September 3, 2013

Upon Defendants' Motion to Dismiss and for Judgment of Acquittal

**DENIED**

Barzilai K. Axelrod, Esquire, Deputy Attorney General, Wilmington, Delaware, *Attorney for State of Delaware.*

Eugene J. Maurer, Esquire, Wilmington, Delaware, *Attorney for Defendant Sayel Ghabayen.*

Robert M. Goff, Jr., Esquire, Wilmington, Delaware, *Attorney for Defendant Marco S. Hassan.*

**DAVIS, J.**

**INTRODUCTION**

Defendants Sayel Ghabayen and Marco S. Hassan were arrested on September 2, 2012 during a routine traffic stop by Officer Neal Strauss of the Delaware River and Bay Authority (“DRBA”). The State subsequently indicted Mr. Ghabayen and Mr. Hassan on

charges of Attempt to Evade or Defeat Tax under 30 Del. C. § 571 (Count I); Conspiracy Second Degree, under 11 Del. C. § 512, as to Attempt to Evade or Defeat Tax charge (Count II); Possession of Untaxed Tobacco Products under 30 Del. C. § 5342(a) (Count III); and Conspiracy Third Degree, under 11 Del. C. § 511, as to Possession of Untaxed Tobacco Products (Count IV). The State also charged Mr. Hassan with Driving a Vehicle While License is Suspended or Revoked under 21 Del. C. § 2756(a).

On April 15, 2013, Mr. Ghabayen moved to dismiss (the “Motion to Dismiss”) the charges pending against him. The Court docketed the Motion to Dismiss on April 16, 2013. Subsequently, Mr. Hassan joined in the Motion to Dismiss. Prior to trial, the State entered *nolle prosequi*s on Counts I and II. The Court held a non-jury trial on Counts III, IV and V on April 16, 2013. At the end of the State’s case, Mr. Hassan and Mr. Ghabayen also moved for a judgment of acquittal (the “Motion for Judgment”).<sup>1</sup>

As the Motion to Dismiss was filed the day before trial, docketed the day of trial and raised issues relating to application of the Commerce Clause of the United States Constitution, the Court allowed the State an opportunity to file a written response to the Motions. The Court also allowed Mr. Hassan and Mr. Ghabayen to file replies to any papers filed by the State. The State filed its State’s Response to Defendants’ Motion to Dismiss (the “Response”) on April 30, 2013. Mr. Hassan filed Defendant Hassan’s Reply to State’s Response to Defendants’ Pre-trial Motion to Dismiss and Defendant Hassan’s Renewed Motion for Judgment of Acquittal on May 7, 2013. Mr. Ghabayen filed a letter in response on May 8, 2013.

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<sup>1</sup> The Motion to Dismiss and the Motion for Judgment will be collectively referred to as the Motions.

After a review of the record, the applicable authorities, and the legal arguments and factual presentation in the papers and at trial, the Court **DENIES** the Motion to Dismiss and the Motion for Judgment.

#### **BACKGROUND**

Through the Motions, Mr. Hassan and Mr. Ghabayen challenge the State's indictment of them under 30 *Del. C.* § 5342(a) ("Section 5342(a)"). The Motions make many arguments but basically assert that, under the circumstances of their arrest on September 2, 2102, application of Section 5342(a) would be an impermissible use of the State's taxation power. The State counters by contending that Section 5342(a) is a possession statute that works in conjunction with other provisions to aid in the enforcement of Delaware's tobacco product tax, and that the evidence is clear that Mr. Hassan and Mr. Ghabayen possessed contraband tobacco products in violation of the statute.

The Court held a hearing on the Motions and a trial on April 16, 2013. The State called only one witness, Officer Strauss of DRBA. Mr. Hassan and Mr. Ghabayen did not call any witnesses but did cross-examine Officer Strauss. The facts contained in this Opinion come from the testimony provided by Officer Strauss and the exhibits admitted into evidence at trial. As an initial determination, the Court finds Officer Strauss to be a credible witness.

On September 2, 2012, Officer Strauss was positioned northbound on Interstate 295 when he observed a gray 2002 Jeep Cherokee. Officer Strauss was in his patrol car, which patrol car was equipped with an in-car video recording system or MVR.<sup>2</sup> The Jeep Cherokee had Virginia license plates. Officer Strauss observed the Jeep Cherokee make

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<sup>2</sup> State Exhibit 2.

a lane change across a solid line at the base of a ramp on I-295. Officer Strauss pulled the Jeep Cherokee over for this traffic offense.

Upon approaching the Jeep Cherokee, Officer Strauss observed two large square objects covered with black plastic on the backseat. Officer Strauss also observed several supermarket plastic bags on the floor containing cartons of cigarettes. Officer Strauss testified that he noticed the smell of tobacco when he was interviewing Mr. Hassan and Mr. Ghabayen during the traffic stop.

Mr. Hassan and Mr. Ghabayen were the two occupants in the Jeep Cherokee. Mr. Hassan was the driver and Mr. Ghabayen was the front seat passenger. Officer Strauss asked Mr. Hassan to produce his license, registration and proof of insurance. Mr. Hassan produced an expired New York State learners permit<sup>3</sup> and a military identification card. During the stop, Mr. Hassan stated that, other than the expired learner's permit, he did not have a driver's license from any other state. According to evidence produced at trial, Mr. Hassan's New York driving record indicates that Mr. Hassan's New York license is currently listed as revoked.<sup>4</sup> Mr. Hassan produced valid registration and proof of insurance.<sup>5</sup> The registration and proof of insurance indicated that Mr. Hassan is the owner of the Jeep Cherokee. Mr. Hassan told Officer Strauss that he was coming from Virginia with his destination being New York.

The Jeep Cherokee contained 276 cartons of tobacco cigarettes (the "Cartons"). The Cartons were all over the vehicle. Officer Strauss testified, and exhibits demonstrated, that the Cartons were placed in such a manner and covered such that the

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<sup>3</sup> State Exhibit 10.

<sup>4</sup> State Exhibit 1.

<sup>5</sup> State Exhibit 11.

Cartons did not create a visible profile above the windows such that these cartons could be observed by other drivers.<sup>6</sup>

The Cartons did not have Delaware tax stamps on them. Instead, the Cartons were only affixed with Virginia tax stamps. Mr. Hassan and Mr. Ghabayen did not have any invoice or delivery tickets or purchase orders in their possession. Mr. Ghabayen did have \$4,503.00 USD in his possession.

While Officer Strauss did not find any invoices, delivery tickets or purchase orders relating to the Cartons, Officer Strauss found additional documents in the vehicle. Officer Strauss found a handwritten list containing cigarette carton orders<sup>7</sup> and several receipts from different stores in Virginia that detailed purchases of the Cartons on September 2, 2012.<sup>8</sup> The receipts indicate that five Cartons were the maximum number purchased at any given location. Officer Strauss testified that vendors will cap their sales to five cartons of tobacco cigarettes to avoid aiding potential interstate traffickers.

Officer Strauss also testified that, in Delaware, tobacco products will only have one tax stamp affixed which stamp corresponds to the destination use or sale state. Officer Strauss then testified that no tobacco carton or package would have stamps from two states. Officer Strauss stated that Delaware allows a personal use exemption for possession of ten packs or less of cigarettes (a carton contains twelve packs of cigarettes) upon which: (i) no Delaware tobacco product tax has been paid, or (ii) no Delaware tax stamp has been affixed.

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<sup>6</sup> State Exhibit 3-6.

<sup>7</sup> State Exhibit 8.

<sup>8</sup> State Exhibit 12.

## APPLICABLE STANDARD

Although not expressly stated, the Motion to Dismiss seeks relief under Rule 12 (b) of the Superior Court Rules of Criminal Procedure (“Criminal Rule \_\_\_\_”). Criminal Rule 12(b)(1) states that a defendant may move to dismiss a criminal matter prior to trial by raising any defense, objection or request to the institution of the prosecution which is capable of determination without the trial of the general issue.<sup>9</sup> Mr. Hassan and Mr. Ghabayen moved to dismiss their criminal cases prior to the April 16, 2013 trial. The Court heard arguments but reserved decision because of the timing of the Motion to Dismiss, and the fact that the trial was to be a non-jury trial and all parties and witnesses were already present.

The Motion for Judgment is based, in part, on Criminal Rule 12 and also on Criminal Rule 29(a). Criminal Rule 29(a), in relevant part, provides

... The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses.<sup>10</sup>

For purposes of a motion under Criminal Rule 29(a), the Court views the evidence submitted at trial in a light most favorable to the State.<sup>11</sup> Unlike Criminal Rule 12, a motion under Criminal Rule 29(a) is made after the presentation of the evidence.<sup>12</sup> Mr. Hassan moved for a judgment of acquittal at the end of the presentation of the State’s case at trial on April 16, 2013. The Court denied that motion, in part, holding that Section 5342(a) did provide for criminal prosecution because 30 Del. C. § 5343 provides

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<sup>9</sup> Del. Super. R. Crim. P. 12(b)(1).

<sup>10</sup> Del. Super. R. Crim. P. 29(a).

<sup>11</sup> See, e.g., *Vouras v. State*, 452 A.2d 1165, 1169 (Del. 1982).

<sup>12</sup> *State v. Crawford*, 297 A.2d 55 (Del. Super. 1972).

a penalty for violations of Section 5342(a). The Motion for Judgment renews in part the motion for judgment of acquittal.

## ANALYSIS

### **Parties Contentions**

The Motions contend that the Court should dismiss or enter judgment in favor of Mr. Hassan and Mr. Ghabayen. The main argument in the Motions is that the State's use of Section 5342(a) in this prosecution violates the Commerce Clause contained at Article 1, Section 8 of the United States Constitution. The Motions contend that Section 5342(a) is, in essence, a taxation statute and, when applied to the events involving Mr. Hassan and Mr. Ghabayen, impermissibly discriminates against interstate commerce. Secondarily, the Motions contend the State failed to demonstrate that the Cartons were subject to a Delaware tobacco product tax.

The State contends that Section 5342(a) is not a tax statute but, rather, a possession statute. The State asserts Section 5342(a) is designed to criminalize possession of contraband – ten or more packs of tobacco products upon which the Delaware tobacco product tax has not been paid, or to which Delaware tobacco product tax stamps are not affixed.

### **Legal Analysis**

Section 5342(a) provides:

Except as authorized by this chapter, no person, not being an affixing agent or not holding an unexpired exemption certificate, shall have in such person's possession within this State 10 or more packs or packages (or an equivalent amount unpackaged) of tobacco products upon which the Delaware tobacco product tax has not been paid, or to which Delaware tobacco product tax stamps are not affixed in the amount required.<sup>13</sup>

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<sup>13</sup> 30 Del. C. §5342(a).

The State enacted Section 5342(a) in 1953 and made a minor change to this section in 2010.<sup>14</sup>

Not all persons who possess ten or more packs of tobacco products upon which the Delaware stamp is not affixed or the Delaware tobacco product tax has not been paid are subject to Section 5342(a). Section 5328 of Title 30, Chapter 53 of the Delaware Code (“Section 5328”) provides:

Every person who shall possess or transport 10 or more packs or packages (or an equivalent amount unpackaged) of unstamped tobacco products upon the public highways, roads or streets of this State for the purpose of delivery, sale or disposition shall be required to have in such person's possession invoices or delivery tickets and purchase orders for such tobacco products which shall show the true name and complete and exact address of the consignor or seller, the true name and complete and exact address of the person transporting the tobacco products, the quantity and brand of the tobacco products transported and the true name and complete and exact address of the person who has been licensed to assume the payment of the Delaware tax or the tax, if any, of the state or foreign country at the point of ultimate destination; provided, that any common carrier which has issued a bill of lading for shipment of tobacco products and is without notice to itself or to any of its agents or employees that the tobacco products are not stamped as required by this chapter shall be deemed to have complied with this chapter. *The absence of such proper invoices or delivery tickets and purchase orders shall be prima facie evidence that such person is in violation of this chapter and subject to the penalties of this chapter.*<sup>15</sup>

Section 5328, as stated, allows the transport of unstamped packs of tobacco products if the person moving the product has certain documentation (possession invoices or delivery tickets and purchase orders, etc.). Section 5328 also provides that the absence of the appropriate documentation constitutes *prima facie* evidence that a person is in violation of Delaware tobacco product tax chapter. Therefore, Section 5342 is part of a police regulatory scheme that allows for enforcement against those possessing contraband

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<sup>14</sup> The change made was to add the introductory clause “[e]xcept as authorized by this chapter” to the first sentence of Section 5342(a).

<sup>15</sup> 30 Del. C. §5328 (emphasis added).

tobacco products, and Section 5328 creates, in part, a “safe harbor” for those legally transporting tobacco products in interstate commerce.

The Motions and the Response do not refer the Court to any controlling Delaware precedent with respect to the applications of Sections 5342 and 5328 in a criminal prosecution. Instead, both parties rely on decisions from other jurisdictions and analogous statutes.

The Court has found one Delaware case that references Section 5342(a) -- *Redden v. State*.<sup>16</sup> The Supreme Court’s brief discussion of Section 5342(a) in *Redden* seems to support the State’s position that this section is a possession statute. None of the parties refer to or discuss this case but it appears helpful here. *Redden* involves a situation where a defendant, Justin Redden, was convicted before this Court of possession with intent to sell dangerous drugs. Mr. Redden appealed. In overturning Mr. Redden’s conviction, the Supreme Court held that the fact that three plastic envelopes containing about 12 ounces of marijuana, 29 small sealed manila packets containing marijuana and 84 empty packets were found in defendant’s possession was insufficient evidence, under the particular criminal statute, of possession with intent to sell. In so holding, the Supreme Court noted that nothing in the particular criminal statute provided a statutory standard or guideline from which an inference or presumption of intent to sell may arise. The Supreme Court contrasted the relevant drug possession statute in *Redden* with the statutes relating to unlawful intent to sell contraband cigarettes, 30 Del. C. § 5342(a), and unlawful intent to sell alcoholic liquor, 4 Del. C. § 722(5).<sup>17</sup>

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<sup>16</sup> 281 A.2d 490 (Del. 1971).

<sup>17</sup> *Id.* at 491 n. 2.

From this passage in *Redden*, it appears to this Court that Section 5342(a) relates to illegal possession of contraband – possession of unstamped or untaxed cigarettes with the unlawful intent to sell such cigarettes. While not a “simple” possession statute, Section 5342(a) clearly criminalizes possession of cigarettes in certain circumstances regarding taxed tobacco products.

The parties have ably provided this Court with a vast number of cases relating to the criminal prosecution of possession of untaxed or, for lack of a better term, other state tax stamped cigarette packages. All of these cases are helpful, but the Court believes the Maryland Court of Appeals, in *State v. Sedacca*<sup>18</sup> and *Chen v. State*,<sup>19</sup> has articulated the most well-reason approach to the issue presented to this Court. The Maryland Court of Appeals cases are more recent and factually similar to the cases involving Mr. Hassan and Mr. Ghabayen than the other ones relied upon by the parties. The Court recognizes that Maryland’s tobacco product tax laws are in some ways different than those in Delaware but not in such a manner as to make the reasoning, analysis and holdings of the Maryland Court of Appeals invalid here.

In *Sedacca*, the Maryland Court of Appeals held police regulation statutes, like Delaware’s Section 5342(a) and Section 5328, contained in the tobacco product tax laws are necessary for safeguarding a state’s vital interest in preventing the diversion of cigarettes into illicit channels of trade where the state would be unable to collect its tax. Moreover, these regulations are reasonable, are ones with which honest and law abiding citizens can readily comply and are no impediment to the free flow of trade and

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<sup>18</sup> 249 A.2d 456 (Md. 1969).

<sup>19</sup> 803 A.2d 518 (Md. 2002).

commerce between the several States.<sup>20</sup> The Maryland Court of Appeals therefore concluded that use of these statutes would not be a violation of the Commerce Clause.

The Maryland Court of Appeal in *Chen* affirmed a conviction of a defendant with facts eerily similar to those present in these criminal actions – 7,190 packs of cigarettes bearing Virginia tax stamps, that the defendant was travelling from Virginia to a state other than Maryland when stopped in Maryland, and at no time were the cigarettes intended for use, distribution or sale into or within the state of Maryland.<sup>21</sup> Relying on *Sedacca*, the Maryland Court of Appeals once again held that the prohibitions concerning the possession and transportation of unstamped or untaxed cigarettes did not violate the United States Constitution’s Commerce Clause, and were otherwise clear and accessible by persons of common intelligence.<sup>22</sup>

Like the Court of Appeals, this Court holds that Sections 5342(a) and 5328 applied in the criminal actions against Mr. Hassan and Mr. Ghabayen do not violate the Commerce Clause of the United States Constitution. These statutes are narrowly tailored and applied in a way which honest and law abiding citizens can readily comply. Moreover, these statutes are reasonable under the circumstances and do not place an undue burden on interstate commerce.

The Court has also reviewed and finds unpersuasive the argument that Section 5342(a) does not criminalize the conduct of Mr. Hassan and Mr. Ghabayen. Section

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<sup>20</sup> 249 A.2d at 217.

<sup>21</sup> 803 A.2d at 518-522.

<sup>22</sup> *Id.* at 527. Other State courts have come to similar conclusions under facts similar to the one here and involving statutes almost identical to those contained in the Delaware Code. See, e.g., *O’Leary v. Allphin*, 357 N.E.2d 491, 495 (Ill. 1976); *People v. Locricchio*, 69 N.W.2d 723 (Mich. 1955); *State v. Gilman*, 273 A.2d 617 (N.J. Super. 1971).

5342(a) does not provide for a particular sanction or penalty but 30 *Del. C.* §5343 (“Section 5343”) does. Section 5343 provides:

Whoever violates any provision of this chapter for which a specific penalty is not otherwise provided, and whoever violates any regulation promulgated pursuant to this chapter, shall be fined not less than \$100 nor more than \$1,000, or imprisoned not more than 90 days, or both.

Section 5343 clearly criminalizes a violation of Section 5342(a). Section 5342(a) does not have a specific penalty but is contained in Chapter 30 (the “this chapter” referred to in Section 5343). As such, Section 5343 applies when a person is found guilty of violating Section 5342(a).

Moreover, the Court rejects the argument in the Motion for Judgment that the State failed to produce evidence on whether the Cartons were tobacco products upon which the Delaware tobacco product tax has not been paid, or to which Delaware tobacco product tax stamps are not affixed in the amount required. Officer Strauss testified that the Cartons bore only Virginia stamps and that if a tax is paid in Delaware then a Delaware tax stamp would be affixed. The other evidence presented at trial showed that Mr. Hassan and Mr. Ghabayen purchased the Cartons on September 2, 2012 in Virginia and otherwise did not stop in Delaware until pulled over by Officer Strauss. Absent any other evidence on the issue, the Court makes the proper inference that the State demonstrated that the Cartons did not bear Delaware tax stamps and the Delaware tax was not otherwise paid, in the amount required, with respect to the Cartons.

Mr. Hassan and Mr. Ghabayen drove from New York to Virginia and purchased the Cartons. The Cartons bear only Virginia stamps. Mr. Hassan and Mr. Ghabayen were stopped in Delaware and were in possession of the Cartons. The Cartons contain more than ten packages of tobacco products that do not bear the Delaware tobacco

product stamps (in any amount) and for which no Delaware tobacco product tax has been paid. Finally, neither Mr. Hassan nor Mr. Ghabayen possess the types of invoices or delivery tickets and purchase orders necessary under Section 5328. Accordingly, the Court finds Mr. Hassan and Mr. Ghabayen violated the Section 5342(a).

### **CONCLUSION**

For the reasons stated in this opinion, the Court **DENIES** the Motions.

The Prothonotary shall set these criminal matters for a hearing to address any additional outstanding matters and at which the Court can render its verdict on Counts III, IV and V.

**IT IS SO ORDERED.**



Eric M. Davis  
Judge

A handwritten signature of "Eric M. Davis" is enclosed in a large oval. Below the oval, the name "Eric M. Davis" is printed in a standard font, with "Judge" printed directly underneath it.