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COURT OF APPEALS
STATE OF NEW YORK

WHITE,

Appellant,

-against-

No. 59

SCHNEIDERMAN,

Respondent.

20 Eagle Street
Albany, New York
April 25, 2018

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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Official Court Transcribe



1 CHIEF JUDGE DIFIORE: The first matter on this
2 afternoon's calendar is appeal number 59, White v.
3 Schneiderman.

4 Counsel.

5 MR. CAMBRIA: Yes, good afternoon, Your Honor.
6 May I reserve - - - reserve two minutes for rebuttal?

7 CHIEF JUDGE DIFIORE: You may, sir.

8 MR. CAMBRIA: For over a hundred years, there's
9 been no taxation on the Seneca Nation. In 2010, Section
10 471 was enacted - - -

11 JUDGE GARCIA: Counsel, you're not saying that
12 this is a direct tax on the Indian Reservation, right? I
13 mean as I understand your argument, that argument's been
14 rejected by the circuit. I think it's been rejected by
15 this court in Snyder. So your argument is that the tax - -
16 - the collection of the tax on the non-Indian sales let's
17 call them somehow violates the specific language of the
18 treaty and Article 6 of the Indian Law.

19 MR. CAMBRIA: It - - - it specifically violates
20 Article 6 because Article 6 prevents the mere assessment of
21 a tax. It doesn't require payment by Indians. I cited The
22 New York Indians case which was the United States Supreme
23 Court. That was this case reviewed by them. In that case,
24 the tax was a possible future tax on a white man named
25 Fellows who would have a future interest, and the court



1 said that that's - - - that at that time violated the
2 treaty.

3 JUDGE GARCIA: As I under - - -

4 JUDGE STEIN: Go ahead.

5 JUDGE GARCIA: I'm sorry. As I understand New
6 York Indians and also Treaty of 1842 and the laws that
7 ultimately became Section 6 it was all over an assessment
8 on the property that was the reservation property in order
9 to make improvements, bridges, roads, on the reservations
10 which they contemplated under an 1838 Treaty were going to
11 be transferred to Fellows and Ogden and Fellows. And all
12 of that language and all of that litigation is aimed at
13 that taxing of the land.

14 MR. CAMBRIA: Not true. It wasn't taxing of the
15 land as to the Indians because the specific provision of
16 the statute was that the Indians would not be disturbed in
17 their - - - in their enjoyment. So - - -

18 JUDGE GARCIA: But that all of that was in the
19 context of an original treaty that was going to give four
20 of these reservations - - - or transfer ultimately in five
21 years four reservations from the position of the Seneca to
22 Ogden and Fellows. And in contemplation of that transfer,
23 the State started to do all of these things, which then
24 they got called for which led to the 1842 Treaty which
25 gives two of the reservations back or keeps them with the



1 Seneca Indians and leads to an objection by the
2 Commissioner of Indian Affairs. But it's all over that
3 assessment being done.

4 MR. CAMBRIA: But it's the mere assessment, which
5 is exactly what Section 6 prohibits because it wasn't a tax
6 on the Indians.

7 JUDGE GARCIA: But it's a tax assessment in the
8 sense of my property's assessed. It's a tax assessment in
9 terms of they give you the value of my property and then
10 they give me a tax bill for it.

11 MR. CAMBRIA: But it wasn't an ad valorem tax at
12 all. It was a tax for repairs of bridges, building of
13 bridges.

14 JUDGE GARCIA: Right, right.

15 MR. CAMBRIA: It wasn't value of property - - -

16 JUDGE GARCIA: Based on - - -

17 MR. CAMBRIA: - - - at all. It was a - - - it
18 was a future possible tax on a non-Indian if - - - if the
19 Senecas sold their land to that white person. And so it is
20 simply an assessment. That's all it was back then. And
21 acting only on treaties the United States Supreme Court
22 said that couldn't happen. Since that time in 1909,
23 Section 6 was enacted. If we apply the construction rules
24 that say all doubts are to be resolved in favor of the
25 Indians, how can we say - - -



1 JUDGE GARCIA: But 1909 that statute wasn't
2 enacted. That statute was enacted in 1857, applied to the
3 Seneca Nation over this dispute, and in - - - later in 1992
4 actually the language that's in - - - exactly in the 1909
5 statute comes into play, and they just extend it to all
6 reservations. So it almost seems to me those provisions in
7 our law are kind of an accident over what happened with
8 these reservations. But the real governing law for who
9 gets taxed on what is federal, constitutional or treaty or
10 federal statutes. And this regime has been upheld under
11 all of those tests.

12 MR. CAMBRIA: All right. First of all, this
13 court in the Cayuga Indians case through Judge Graffeo said
14 that all the federal cases that they cited, including
15 Milhelm v. Attea and so on, had no impact on the Indians,
16 did not in any way consider their interests. So the
17 federal cases are totally irrelevant to Section 6. Section
18 6 is an enactment specifically by the State, and that
19 enactment specifically says no taxes for any purpose
20 whatever on Indian reservation land.

21 JUDGE FEINMAN: Well, so if Tax Law 471 is
22 inconsistent with Indian Law Section 6, then why - - -

23 MR. CAMBRIA: I don't think it is.

24 JUDGE FEINMAN: So you don't think it is.

25 MR. CAMBRIA: I don't.



1 JUDGE FEINMAN: But if it is inconsistent can it
2 not be deemed as a repeal of Indian Law Section 6 to the
3 extent that it's inconsistent?

4 MR. CAMBRIA: Two things. First, it's not
5 inconsistent. And this is the reason why, 471, the very
6 first line says this can't be - - - it says, "Except that
7 no tax shall be imposed on cigarettes sold under such
8 circumstances that this State is without the power to
9 impose that tax," which is Section 6. The next part of
10 that, though, is this, this Court said in Ball that a sub
11 silentio repeal is absolutely a - - - a forbidden thing.
12 It's not a matter of presumption here that because there is
13 another statute that the first one was repealed if there's
14 no mention of it. And we can - - - we can harmonize these
15 statutes because 471 has an exception - - -

16 JUDGE RIVERA: So - - - so - - - excuse me. So
17 if instead the - - - the legislature had drafted it to read
18 notwithstanding Section 6 - - -

19 MR. CAMBRIA: That's right because it has - - -

20 JUDGE RIVERA: - - - could you have - - - could
21 you then impose this tax?

22 MR. CAMBRIA: No, there is - - -

23 JUDGE RIVERA: If it just said that?

24 MR. CAMBRIA: No, there's - - -

25 JUDGE RIVERA: Why not?



1 MR. CAMBRIA: There's an exception in 471 that
2 says where the law doesn't allow them to apply the tax. I
3 - - -

4 JUDGE RIVERA: But - - - but if it then had the
5 words "notwithstanding Section 6," isn't that the
6 legislature - - -

7 MR. CAMBRIA: It doesn't - - - it - - -

8 JUDGE RIVERA: - - - indicating that - - - that
9 indeed it intends 471 - - -

10 MR. CAMBRIA: It doesn't mention - - -

11 JUDGE RIVERA: - - - to supersede?

12 MR. CAMBRIA: - - - Section 6 at all.

13 JUDGE RIVERA: I understand that.

14 MR. CAMBRIA: Yeah.

15 JUDGE RIVERA: My question is if they had drafted
16 it to say notwithstanding Section 6 or despite or
17 regardless of the provisions - - - of the language
18 contained in Section 6.

19 MR. CAMBRIA: I - - - but it - - - it in no way
20 repeals Section 6, doesn't mention Section 6. If - - - if
21 we go back - - -

22 JUDGE RIVERA: Do you concede that they could?

23 MR. CAMBRIA: They could have, of course.

24 JUDGE RIVERA: They could?

25 MR. CAMBRIA: Oh, absolutely. They could have



1 and should have if they meant to repeal it. As a matter of
2 fact, there's a presumption - - -

3 JUDGE RIVERA: So if they repeal - - - if the
4 legislature repeals Section 6 expressly could they then
5 impose this tax?

6 MR. CAMBRIA: That - - -

7 JUDGE RIVERA: Or is there some other barrier to
8 this tax?

9 MR. CAMBRIA: Well, that is a - - - that is a
10 good question. I would say that there are other barriers,
11 and they're listed in The New York Indians case. Because
12 that case said no assessment, and that's all there was was
13 an assessment. And it was on a non - - - it was on a non-
14 Indian, and they said in that case no assessment. And they
15 did it based on the treaties and they said it was on
16 treaties. Then Section 6 was passed. And if I might say
17 this, supposedly any Indian statutes that's passed is
18 supposed to be in some way interpreted to the benefit - - -
19 with all benefits of the doubt going to the Indians. How -
20 - - how do you - - -

21 JUDGE STEIN: Well - - - well, let me ask you
22 this. You - - - you I think concede that - - - that the
23 State can have non-Indian retailers on the reservation
24 required to collect the tax from non-Indian purchasers.

25 MR. CAMBRIA: Yes, happens all the time.



1 JUDGE STEIN: Okay. So - - - so how does that
2 square with your argument that - - - or maybe it does that
3 - that the Government - - - that the State can't impose any
4 tax within the borders of the reservation?

5 MR. CAMBRIA: Yeah, except as the law's been
6 established. And already there is, for example, on the
7 Salamanca Reservation, ninety percent of those places are
8 leased out. And a majority of them are non-natives, and
9 they all pay taxes. Once they lease it out - - -

10 JUDGE STEIN: No, I'm not asking about who pays
11 the taxes because - - -

12 MR. CAMBRIA: The individuals, not the - - - not
13 the Indians.

14 JUDGE STEIN: Right.

15 MR. CAMBRIA: Right.

16 JUDGE STEIN: Under no circumstance are the
17 Indians whether they're the sellers or the purchasers
18 paying any taxes, correct?

19 MR. CAMBRIA: Right.

20 JUDGE STEIN: And - - - and in Moe, in fact, the
21 court said there really is no tax imposed here at all. It
22 says - - -

23 MR. CAMBRIA: Well, that's exactly the situation
24 in New York Indians. There was no tax imposed there
25 either. What I'm saying is the law has been established -



1 - -

2 JUDGE RIVERA: But - - - I'm sorry. But doesn't
3 the retailer pay up front to have the - - - the - - -
4 whatever that stamp is put on - - -

5 MR. CAMBRIA: There is - - - there is that in
6 place, and what we're saying is the statute is clear. It
7 says no assessment. That is any kind of calculation or
8 what have you.

9 JUDGE RIVERA: Let me ask you a different
10 question. So if a retailer buys these - - - prepays for
11 the stamps, right - - - and maybe this is not the case,
12 you'll tell me. If they don't sell all those cigarettes is
13 there a mechanism by which they can get reimbursed, or are
14 they on the hook for the money they paid out?

15 MR. CAMBRIA: That - - - that suggests that it
16 hasn't been enacted, but my - - - my position is this.
17 Section 6 is - - -

18 JUDGE RIVERA: No, but your understanding if - -
19 - if the law is put into place, is there a mechanism by
20 statute or some regulation to get reimbursed should you not
21 be able to sell the cigarettes?

22 MR. CAMBRIA: Not with Section 6. It can't be
23 assessed in the first place. If we're honest to the
24 construction rules and we resolve any and all doubts in
25 favor of the Indians as the law requires, this statute is



1 not just limited to real estate.

2 JUDGE FAHEY: So, Mr. Cambria, one of the - - - I
3 thought the strongest part of your argument, the weakest
4 part of the State argument, is the Section 6 argument. But
5 the history of it gives me pause because Section 6 was
6 enacted historically in the fashion that Judge Garcia
7 described. And at that time, the only forms of taxation
8 were either - - - I think either excise taxes or property
9 taxes. And - - - let me finish - - -

10 MR. CAMBRIA: Yeah.

11 JUDGE FAHEY: - - - before you're shaking your
12 head. And so that being the case, there was no sales tax.
13 There was no sales tax in - - - in New York state until
14 1965. There was no income tax. There was no income tax
15 until 1919 in New York. Now - - - so that being the case,
16 and we're talking about exemption of reservation lands from
17 taxation, is there a type of taxation that's historically
18 equivalent - - - in other words, to the period that Article
19 6 was passed that's equivalent to the sales tax?

20 MR. CAMBRIA: Yeah, we gave examples in our
21 brief. There were taxes on dogs. There were taxes on all
22 sorts of goods. There were all sorts of excise taxes. In
23 other words, taxes that weren't value of property taxes.
24 There were many of those.

25 JUDGE FAHEY: There was no sales tax, though?



1 MR. CAMBRIA: There was no sales tax.

2 JUDGE FAHEY: Yeah.

3 MR. CAMBRIA: But the - - - the fix there would
4 be the - - - would be the legislature. It isn't for the
5 court to say we're going to adopt the title. That's how
6 the two divisions below us did it, by adopting the title in
7 violation of 123 of the Statute - - - Statute Law in the
8 State of New York.

9 CHIEF JUDGE DIFIORE: Thank you.

10 JUDGE GARCIA: Chief, I'm sorry. May I ask one
11 follow up?

12 CHIEF JUDGE DIFIORE: Yes.

13 JUDGE GARCIA: Just going back to Judge Stein's
14 point and I think - - - I'm not sure you had an opportunity
15 to fully answer it. I think her point was if you're
16 contending that the prohibition is on the reservation
17 itself and there is a prohibition against collecting taxes
18 on that reservation even through this mechanism, how can
19 you concede that a non-Indian seller would have to do that?
20 If, as I understand and I think what Judge Stein was
21 getting at, is the prohibition in the statute is in the - -
22 - collecting in the place not directed against the Indians.

23 MR. CAMBRIA: Well, at the moment that's exactly
24 what's been happening. As soon as they lease the land to a
25 non-native they don't have the protection of the Indian



1 Law, and they are taxed.

2 JUDGE GARCIA: Where is that? Where do you get
3 that?

4 MR. CAMBRIA: It happens - - - it happens each
5 and every day. It happens each and every day.

6 JUDGE GARCIA: No, but where are you finding the
7 law that they don't get the protection?

8 MR. CAMBRIA: As we cited in our - - - in our
9 Supreme Court decisions in our brief - - - and I've just
10 forgotten which case, Supreme Court decisions in our brief
11 where as soon as they leased property out they lost the tax
12 exemption. And so what I'm saying is that's how it
13 harmonizes here. There's an exception in the statute of
14 the Tax Statute, and then it can be imposed on non-native
15 retailers who lease. And then it is not imposed on the
16 "reservation" so to speak.

17 JUDGE RIVERA: But under the leases, it's still
18 native land or a reservation - - - I'm not sure if there's
19 a difference. I'm going to ask your opponent about that.

20 MR. CAMBRIA: My - - - all I can say, Your Honor,
21 is that that tax has been upheld once they lease. Once
22 they lease they've lost the - - - they've lost the
23 elimination - - -

24 CHIEF JUDGE DIFIORE: Thank you, counsel.

25 MR. CAMBRIA: - - - of the tax.



1 CHIEF JUDGE DIFIORE: Counsel.

2 MR. BING: Good afternoon, Your Honors.

3 CHIEF JUDGE DIFIORE: Good afternoon.

4 MR. BING: May it please the court.

5 CHIEF JUDGE DIFIORE: Counsel, what's the current
6 status of your enforcement efforts, the State's enforcement
7 efforts?

8 MR. BING: The State is - - - is enforcing
9 Section 471 and Section 471-e. And as - - - my
10 understanding is that - - -

11 CHIEF JUDGE DIFIORE: There's no forbearance
12 policy in place?

13 MR. BING: No, the forbearance - - - oh, I'm
14 sorry.

15 CHIEF JUDGE DIFIORE: Go ahead.

16 MR. BING: The forbearance policy was rescinded
17 by Governor Paterson early in 2010 just before the 2010
18 amendments to 471 and 471-e were adopted. And those - - -
19 when those amendments were adopted the State moved
20 successfully to vacate the [inaudible] injunction, and the
21 Seneca Nation and four other of the New York Nations sued
22 in federal court in the Northern and Western Districts.
23 Ultimately, the case was decided at the preliminary
24 injunction stage by the Second Circuit which upheld Section
25 471 and 471-e and all the 2010 amendments against



1 challenges under federal law based on the - - - the
2 precedence that you - - -

3 CHIEF JUDGE DIFIORE: So there's a full
4 enforcement initiative in place?

5 MR. BING: Yes.

6 CHIEF JUDGE DIFIORE: Thank you.

7 JUDGE WILSON: Is there any enforcement against
8 Mr. White?

9 MR. BING: Yes, there - - - there was a - - -
10 there's pending in the Division of Tax Appeals a cigarette
11 seizure penalty case. The ALJ ruled against Mr. White, and
12 that case has been - - - he's appealed to the Tax Appeals
13 Tribunal.

14 JUDGE WILSON: And where were the cigarettes
15 seized?

16 MR. BING: It was an off-reservation seizure. I
17 don't remember exact - - - the exact location.

18 JUDGE RIVERA: So let me - - - let me ask you.
19 So under this statutory regulatory scheme - - - and maybe
20 it never happens, but if the retailer prepays and doesn't
21 sell the cigarettes is there a mechanism to be reimbursed?

22 MR. BING: There's a mechanism in Section 476 of
23 the Tax Law for a credit for cigarettes that have basically
24 gone bad, gone stale which I guess can happen at some
25 point.



1 JUDGE RIVERA: What does that mean, a credit?

2 MR. BING: That - - - that to the extent that the
3 retailer or the wholesaler is left with cigarettes on which
4 the tax has been paid but which now can't be sold, if the
5 retailer or wholesaler complies with the requirements of
6 Section 476, they can receive a credit or a refund on the
7 tax that was paid.

8 CHIEF JUDGE DIFIORE: And what exactly does the
9 retailer, the Native retailer, have to do to comply with
10 the regulatory scheme?

11 MR. BING: Well, the - - - the regulatory scheme
12 was designed to focus on off-reservation activity as much
13 as possible, so the - - - the wholesaler and stamping
14 agent, which are all in fact off-reservation entities, are
15 the ones who actually pay the tax to the Tax Department by
16 purchasing tax stamps which they then affix. They have to
17 affix them promptly to the cigarettes, so and then they
18 sell them to retailers at a tax-inclusive price which
19 includes the - - - the price they've paid. I mean they
20 certainly have every economic incentive to do that since
21 it's in addition to the cost of the cigarettes. And in
22 fact, the Tax Law requires them to do that. And then so
23 retailers like the plaintiffs here would pay a tax-
24 inclusive price when they purchase cigarettes from the
25 wholesaler. And again, they have an economic incentive and



1 - - - and required according to the Tax Law - - -

2 CHIEF JUDGE DIFIORE: Is there any paperwork and
3 filing requirements or anything of that nature?

4 MR. BING: The State imposes various registration
5 require - - - and filing requirements on - - - on retailers
6 who are licensed by it, but I don't believe there are any
7 State-licensed retailers on the reservation. At least when
8 I asked the Tax Department that recently they - - - they
9 weren't aware of any. It's not - - - they don't categorize
10 them that way, so - - - but they don't have any knowledge
11 of a reservation address that they're certain of for any of
12 their licensed retailers.

13 JUDGE RIVERA: What - - - what if any legal
14 difference or significance is there between the phrase
15 reservation land, Indian land, Native or Nation land? Is
16 there any meaning or - - -

17 MR. BING: I - - -

18 JUDGE RIVERA: - - - significance that's the
19 difference across these various phrases that we find in the
20 statutes?

21 MR. BING: I think that question - - - I - - - if
22 I may, Your Honor, I'd like to focus that question on - - -
23 on the way those terms are used here. I think that the tax
24 exemption was - - - had its genesis in the 1842 Treaty, the
25 Article 9, and - - - and that tax exemption by its terms



1 was, "To protect such of the lands of the Seneca Indian - -
2 - Indians and shall remain in their possession from all
3 taxes and assessments until they relinquish possession." I
4 mean the language of that is - - - is focused very much on
5 real property.

6 JUDGE GARCIA: Counsel, just - - - I hate to
7 interrupt you, but just on that timeline, there was some
8 discussion with your adversary here about what were the
9 taxes the State was trying to impose in the interim between
10 the 1838 Treaty and the 1842, and I think there were a
11 number of years where they allowed counties to assess
12 certain taxes for improvements. What types of taxes were
13 those?

14 MR. BING: There was - - - well, I - - - I
15 believe that Your Honor's has correctly stated - - - I mean
16 they were - - - they were taxes on the real estate to pay
17 for the improvements that the State was coming onto the
18 reservations to - - -

19 JUDGE GARCIA: What else could they have been
20 taxing?

21 MR. BING: The - - - it's not clear. I think
22 counsel referred to taxes on dogs, mills, and - - -

23 JUDGE GARCIA: No, but in 1840 and 1841 on the
24 reservations I don't think they were taxing dogs, right, in
25 those assessments. So what were they assessing then?



1 Because that's the big controversy.

2 MR. BING: Right, I mean they were assessing the
3 land on the - - - on the reservation. That's all there - -
4 - there was to assess I think is - - - is correct. I think
5 - - -

6 JUDGE FAHEY: So - - - so the - - - as I said to
7 your opponent it seems to me the weakest part of your
8 argument is the actual plain language of Section 6, not the
9 title of Section 6, but the actual plain language itself.
10 Would you agree with that?

11 MR. BING: No, Your Honor.

12 JUDGE FAHEY: Why not?

13 MR. BING: I don't. I think that - - - that
14 Section - - -

15 JUDGE FAHEY: I guess what - - - I guess I'd ask
16 you to point to me where in Section 6 it supports your
17 position.

18 MR. BING: Well, again, you discarded the title
19 but the title is relevant. I mean not if it conflicts, but
20 here it doesn't. It's relevant, and it also again - - -
21 step back for a moment and point to the - - - the history
22 of the evolution of this provision which - - - which is
23 directly traceable to the 1842 provision which doesn't use
24 the word reservation at all. It just says "lands."

25 JUDGE STEIN: But they're - - -



1 MR. BING: And - - -

2 JUDGE STEIN: - - - arguing that if there's any
3 ambiguity in this, and you're talking about look at the
4 title, look at the history and all that, but - - - but that
5 ambiguity has to be resolved in favor of - - - of the
6 Natives. So how - - - what is your response to that?

7 MR. BING: Well, my response to that is it
8 doesn't really matter what Section 6 says ultimately
9 because, in fact, Section 471 is now the current statement
10 of the legislature's intent with respect to collecting
11 taxes on plaintiff's sales to their non-Indian customers of
12 cigarettes. So if there is any ambiguity in Section 6 or
13 even if - - - even if the court thinks that - - - that
14 plaintiff has the better of Section 6's interpretation,
15 which we certainly do - - - do not agree with, it doesn't
16 matter. Section 471 makes crystal clear what the current
17 legislative intent with respect to this issue is. The tax
18 imposed by this section is imposed on all cigarettes sold
19 on an Indian reservation to non-members of the Indian
20 Nation or tribe and to non-Indians. I mean the legislature
21 made - - -

22 JUDGE RIVERA: Okay. Can - - - can you now go
23 back to my prior question? Because I really didn't get an
24 answer. Is there some legal difference or significance
25 between the use of the word reservation and - - - and land?



1 MR. BING: Not in this case, Your Honor.

2 JUDGE RIVERA: Okay.

3 MR. BING: They are - - - they - - -

4 JUDGE RIVERA: Is there somewhere where it makes
5 a difference?

6 MR. BING: There - - - there can be. In - - - in
7 federal law, I think reservation is - - - is one of the
8 prongs of the federal law definition of "Indian Country"
9 which is - - - is set forth in 18 U.S.C. 1151. I think
10 that's the - - -

11 JUDGE RIVERA: Is the point of that that Nation
12 can only land that's not part of a reservation - - -

13 MR. BING: I - - - I - - -

14 JUDGE RIVERA: - - - even though it might be
15 Indian land? Is that the point of that? I'm - - - I'm
16 still not understanding.

17 MR. BING: I - - - I think it's true that - - -
18 that the Nation can own land that's not part of a
19 reservation. It's also true I think that - - - that non-
20 Indians can own land within reservation boundaries.

21 JUDGE RIVERA: So let me ask you this. What - -
22 - what's the boundary of their sovereignty? So is - - -
23 where Mr. White has - - - well, at least plaintiffs are
24 located, Mr. White has - - - has that store, is that
25 considered part - - - that land, that property considered



1 part of New York state?

2 MR. BING: Oh, absolutely, Your Honor. The - - -
3 the idea that - - -

4 JUDGE RIVERA: What - - - what does it mean then
5 for the Nation to have sovereignty?

6 MR. BING: Well, the Supreme Court has said that
7 whatever federal law principle - - - whether it's relying
8 on sovereignty, the right of the tribe to govern itself, or
9 preemption, the states have the power to do what New York
10 has done here. There is no federal Indian law - - -

11 JUDGE RIVERA: So sovereignty is about
12 governance, is that what you mean?

13 MR. BING: Yes.

14 JUDGE RIVERA: As opposed to seeing a sovereign
15 Nation as in not part of the United States? Is that what
16 you're saying?

17 MR. BING: Well, they're certainly - - - they're
18 - - - they're part of the United States and they're part of
19 the state of New York. The Supreme Court has held that
20 Indian - - -

21 JUDGE RIVERA: And what's that - - - what's that
22 relationship? What's that part?

23 MR. BING: Well, the - - - the - - - they're
24 included within the state for purposes of - - - the State
25 can exercise certain governmental authority over, for



1 example, non-Indians engaging in transactions on the
2 reservation with Indians. So to the extent that the Seneca
3 Reservations are located in New York, the Allegheny and
4 Cattaraugus Reservations, the - - - the State can exercise
5 its sovereign authority to require reservation retailers to
6 collect sales and excise taxes on their cigarette sales to
7 non-tribe members. So they're part of New York to that
8 extent. And to - - - to potentially other extents as well.
9 There is no per se bar on the exercise of State authority
10 on an Indian reservation.

11 JUDGE RIVERA: If - - - if Mr. White never pays
12 these taxes, what - - - is there some criminal prosecution
13 that New York State can indeed commence against him?

14 MR. BING: Well - - -

15 JUDGE RIVERA: I thought you said there was some
16 tax - - -

17 MR. BING: Your Honor, the tax is actually paid -
18 - -

19 JUDGE RIVERA: - - - procedure now.

20 MR. BING: - - - before the cigarettes.

21 JUDGE RIVERA: Has he prepaid them?

22 MR. BING: Well, he doesn't - - - I mean the
23 actual outlay is made by the stamping agent with - - -

24 JUDGE RIVERA: The wholesaler?

25 MR. BING: The - - - usually the wholesaler, yes.



1 The person who puts the stamps on.

2 JUDGE RIVERA: But then he has to pay for them,
3 right?

4 MR. BING: Pardon?

5 JUDGE RIVERA: Doesn't he then - - - he's the
6 retailer. Doesn't he then buy it from the wholesaler?

7 MR. BING: That's correct.

8 JUDGE RIVERA: And doesn't he then at that point
9 pay that tax - - -

10 MR. BING: He pays the wholesaler a price which
11 includes - - -

12 JUDGE RIVERA: - - - because you've got to pay
13 the whole the price?

14 MR. BING: Yes, he pays - - -

15 JUDGE RIVERA: So he's paying for it.

16 MR. BING: He's paying it, yes.

17 JUDGE RIVERA: Right.

18 MR. BING: He's paying a - - -

19 JUDGE RIVERA: So - - - so I'm sorry. So then
20 what's the tax collection? I missed that. What - - -

21 MR. BING: Well, I - - -

22 JUDGE RIVERA: In response to Judge Wilson, what
23 was that tax proceeding you were talking about?

24 MR. BING: That was the seizure of unstamped
25 cigarettes that had - - - were being delivered.



1 JUDGE RIVERA: Okay.

2 JUDGE WILSON: But you said it was off-
3 reservation. And at least as I understand Mr. White's
4 argument, the title doesn't pass to him until actual
5 delivery on reservation land, so these are really not his
6 cigarettes that are being seized in the first place. Is
7 that right?

8 MR. BING: I'm not sure if - - - you know, that's
9 his particular argument with respect to that seizure. I
10 guess I just want to - - -

11 JUDGE RIVERA: You're saying he purchased them
12 and you seized them before they were delivered or before he
13 was able to pick them up?

14 MR. BING: Before they were delivered while they
15 were en route to - - - to their destination off - - - off
16 the reservation. That's right.

17 JUDGE WILSON: And there are separate portions of
18 the tax code that allow for that seizure?

19 MR. BING: Yes. That's correct. Again - - -

20 JUDGE RIVERA: So - - - but - - - I'm sorry. But
21 then New York State says he owes something to the State.

22 MR. BING: Well, there was a penalty assessed
23 because the cigarettes were all unstamped.

24 JUDGE RIVERA: Okay. And if he doesn't pay that
25 is he subject to some kind of criminal prosecution?



1 MR. BING: The penalty is a civil penalty, Your
2 Honor. So I'm not sure there's a criminal proceeding
3 associated - - -

4 JUDGE RIVERA: Okay.

5 JUDGE WILSON: Do you know why - - -

6 MR. BING: - - - with that.

7 JUDGE WILSON: - - - the penalty is assessed on
8 him instead of the wholesaler?

9 MR. BING: I'm sorry?

10 JUDGE WILSON: Do you know why the penalty is
11 assessed on him instead of the wholesaler if the wholesaler
12 - - - if he hasn't taken title yet?

13 MR. BING: Well, the tax law, you know, talks
14 about possession, and I think anyone in possession of
15 unstamped cigarettes is potentially liable for penalties
16 under the Tax Law.

17 JUDGE RIVERA: But I thought they hadn't been
18 delivered to him?

19 MR. BING: He was in possession of them I think a
20 the - - - at the time. I - - -

21 JUDGE RIVERA: Okay.

22 CHIEF JUDGE DIFIORE: Thank you, counsel.
23 Counsel.

24 MR. CAMBRIA: The issue we're reviewing is
25 whether or not the Third and Fourth Department were correct



1 in limiting this to real estate. We've cited in our brief,
 2 and so did the amicus brief, example after example of when
 3 the legislature meant land and real estate the use the
 4 terms "property" and "land." When they meant
 5 jurisdictionally the used the term "upon the reservation."
 6 We cited Section 18, Section 46, Section 114, all of which
 7 referred to on the reservation and dealt with activity. We
 8 - - -

9 JUDGE WILSON: But the tax here is not being
 10 levied on the reservation, right? It's being levied on - -
 11 -

12 MR. CAMBRIA: I'm sorry?

13 JUDGE WILSON: The tax here is not being levied
 14 on the reservation. It's not being paid on the
 15 reservation. It's being - - -

16 MR. CAMBRIA: Being assessed.

17 JUDGE WILSON: - - - paid and assessed on the
 18 wholesaler.

19 MR. CAMBRIA: The statute says "assessed" which
 20 means calculated, paid, whatever - - - whatever kind of
 21 action you can think of would be assessment if you look at
 22 - - -

23 JUDGE WILSON: Oh, so the - - -

24 MR. CAMBRIA: - - - that definition is broad and
 25 that's what it says - - -



1 JUDGE WILSON: So the tax on - - - so the tax on
2 the - - - on the land in North Carolina that's used to
3 produce the tobacco is also an assessment?

4 MR. CAMBRIA: No, what happens on the reservation
5 is - - - if it's - - - if it's any kind of calculation or
6 payment or what have you, collection, it's assessment. And
7 it - - -

8 JUDGE WILSON: Let's just - - -

9 MR. CAMBRIA: And it comes within the plain
10 language of this statute, and that's the point here. The
11 plain language of the statute. The question is can you - -
12 - can you do what the Third and Fourth Department did and
13 limit this just to real estate when if - - - at - - - at
14 best it's ambiguous and you would have to say that it's in
15 favor of the Indians. But it's not ambiguous. We've
16 demonstrated statute after statute which says on
17 reservation - - -

18 JUDGE FAHEY: Mr. Cambria - - -

19 MR. CAMBRIA: - - - is jurisdictional.

20 JUDGE FAHEY: Mr. Cambria they say two things.
21 Number one, Article 6, its title, and any ambiguity was
22 cleared up by 471.

23 MR. CAMBRIA: No, because you can't even refer to
24 the title under Section 123 of our statutory construction
25 law if the language is clear. And the language - - -



1 JUDGE GARCIA: Let me ask you this - - -

2 MR. CAMBRIA: - - - is clear. It says no tax - -
3 -

4 JUDGE GARCIA: I'm sorry, counsel - - -

5 JUDGE FAHEY: All right. And what about 471
6 clearing up any ambiguity?

7 MR. CAMBRIA: 471 - - - in this court in the Cimo
8 case, the court said that if the statute's not referred to
9 in a subsequent statute there's a presumption that it's not
10 repealed. And there is no sub silentio appeal here. If
11 we're going to be honest with the Native Americans we have
12 a statute that clearly says what it says, and they should
13 be given the benefit of it and not play games with titles
14 and other things that our laws don't let us do.

15 JUDGE GARCIA: One - - - one last question, if I
16 may. So I - - - I'm still having some difficulty here. If
17 the statute is ambiguous - - - let's say the statute's
18 ambiguous. And ordinarily in interpreting - - - just
19 assume for present purposes it's ambiguous. Ordinarily for
20 our purposes we would then look at legislative history.
21 You're saying we should just resolve the ambiguity in favor
22 of the Indians under this rule of construction. What if we
23 have a statute - - - and I'm not - - - this is just
24 hypothetical - - - an ambiguous statute where the
25 legislative history is crystal clear as to what the



1 legislature intended, but if we read it in favor of the - -
2 - an ambiguity in favor of the Indians we would come out
3 the other way? What trumps?

4 MR. CAMBRIA: We'd have another case, not this
5 one.

6 JUDGE GARCIA: Understood. What's the answer to
7 my hypothetical?

8 MR. CAMBRIA: This case is clear that the statute
9 isn't ambiguous. No tax for any purposes whatever. How
10 could that be ambiguous? No tax for any purpose whatever -
11 - -

12 JUDGE GARCIA: So what was - - -

13 MR. CAMBRIA: And the second part on the
14 reservation.

15 JUDGE GARCIA: - - - the answer to my question,
16 though? What would be the answer to my question?

17 MR. CAMBRIA: The answer would be that the
18 federal law with regard to interpreting statutes for the
19 benefit of Indians prevails, and it says all ambiguities in
20 their favor. And it also says that the statute should be
21 looked at as the Indians would have looked at it. And
22 believe me, they would not say, oh, yeah, this was just
23 real estate tax. It would be no, this is what it says in
24 the statute, no tax for any purpose whatever.

25 CHIEF JUDGE DIFIORE: Thank you, counsel.



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MR. CAMBRIA: That's what it says.

CHIEF JUDGE DIFIORE: Thank you.

MR. CAMBRIA: Thank you.

(Court is adjourned)



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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of White v. Schneiderman, No. 59 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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