



IN THE SUPREME COURT OF THE STATE OF DELAWARE

SAYEL GHABAYEN,)
)
 Defendant Below,)
 Appellant)
) No. 526, 2013
 v.)
)
 STATE OF DELAWARE,) On Appeal from the Superior Court
) of the State of Delaware in and for
 Plaintiff Below,) New Castle County
 Appellee)
)

STATE'S ANSWERING BRIEF

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NATURE OF PROCEEDINGS

The Appellant, Sayel Ghabayen, and his co-defendant-below Marco Hassan, were arrested on September 2, 2012, during a routine traffic stop by Officer Neal Strauss of the Delaware River and Bay Authority. (A1-2). In the vehicle, Officer Strauss discovered 276 cartons of contraband tobacco cigarettes (55,200 individual cigarettes) that did not have Delaware tax stamps affixed as required by Delaware law. The State thereafter indicted the pair, *inter alia*, on charges of Possession of Untaxed Tobacco Products (DEL. CODE ANN. tit. 30, § 5342(a)) and of Conspiracy Third Degree. (DEL. CODE ANN. tit. 11, § 511). On April 15, 2013, Ghabayen, through counsel, moved the Superior Court to dismiss; co-defendant Hassan, through separate counsel, joined that motion. The Superior Court conducted a non-jury trial on April 16, 2013, and received post-trial supplemental memoranda. (A2). In a well-reasoned thirteen-page decision, the Superior Court denied the motions to dismiss and rejected Commerce Clause challenges to Section 5342(a). (A1-13). On September 27, 2013, the Superior Court imposed a sentence limited to a fine of \$101 on each charge (A14-21), and Ghabayen appealed. This is the State's Answering Brief.

SUMMARY OF ARGUMENT

I. Appellant's Arguments I, II, III, and IV are denied. In a well-reasoned thirteen-page decision, the Superior Court properly rejected Ghabayen's Commerce Clause challenge to prosecution under DEL. CODE ANN. tit. 30, § 5342(a) for his possession of 276 cartons of contraband cigarettes. (A1-13). Congress has expressly authorized states, including Delaware, to enforce their own cigarette laws, including confiscation and other penalties provided. To that end, just as the Trafficking in Contraband Cigarettes and Smokeless Tobacco law (18 U.S.C. §§ 2341-46) governs Federal violations, DEL. CODE ANN. tit. 30, Chapter 53 governs Delaware violations.

Section 5342(a) is a possession statute and not a tax statute. As explained by the Superior Court, Section 5342(a) is part of Delaware's regulatory scheme, which permits enforcement against those who possess contraband tobacco products and carves out a safe harbor for those who legally transport tobacco products in interstate commerce. (A8-9). As evidenced by the consequences contemplated by Title 30, Chapter 53, Ghabayen could not have remedied his transgression by remitting taxes, because he was not licensed to do so and because the statutory scheme calls for seizure and destruction of the contraband. DEL. CODE ANN. tit. 30, § 5351.

Here, the *Complete Auto Transit* test urged by Ghabayen is inapplicable. Section 5342(a), by its terms, is not a taxation statute and those engaged in legitimate transport of tobacco products in interstate commerce can do so provided they follow well-established regulations at both the state and federal levels by maintaining proper documentation such as a bill of lading.

Ghabayen's challenge to the Superior Court's reliance on Maryland Court of Appeals decisional authority is unpersuasive. The Superior Court properly determined that the Maryland precedents "articulated the most well-reason[ed] approach to the issue presented to [the] Court." (A10). The Superior Court recognized that Maryland tax laws may vary in some ways from those in Delaware, "but not in such a manner as to make the reasoning, analysis and holdings of the Maryland Court of Appeals invalid" in this case. *Id.*

Ghabayen's suggestion that there was insufficient evidence presented for the Superior Court to find that the 276 cartons of seized cigarettes were subject to Delaware taxation and therefore that they were contraband tobacco is unsustainable. Officer Strauss testified that the seized products were indeed contraband cigarettes with only Virginia tobacco tax stamps affixed and without Delaware tobacco tax stamps. The evidence also included receipts in the co-defendants' possession for the contraband cigarettes as purchased from retail outlets in Virginia on September 2, 2012, the day of the traffic stop in this case.

However, these receipts are not proper invoices, delivery tickets, or purchase orders as required for the safe harbor afforded to transporters. As the Superior Court explained, there was ample evidence from which to determine that the cartons were tobacco products on which no Delaware tobacco tax had been paid and on which no Delaware tax stamps had been affixed. (A12).

STATEMENT OF FACTS¹

On the evening of Sunday, September 2, 2012, Appellant Sayel Ghabayen was the front seat passenger in a vehicle owned and driven by his co-defendant Marco S. Hassan. The co-defendants were traveling northbound on Interstate 295 (I-295) in Delaware and were transporting 276 cartons of contraband tobacco cigarettes (55,200 individual cigarettes)² ostensibly from Virginia for distribution and resale in New York City. It is not disputed that the seized tobacco product did not have Delaware tax stamps on them. Instead, the contraband cigarettes were only affixed with Virginia tax stamps. Neither Ghabayen nor Hassan had any invoice, delivery tickets, or purchase orders in their possession.

Officer Neal Strauss of the Delaware River and Bay Authority (DRBA) was the only witness at the co-defendants' ensuing Superior Court joint bench trial. Officer Strauss testified that he was northbound on I-295 at Route 9 in his patrol vehicle on the evening of September 2, 2012, when he observed Hassan's vehicle, a gray 2002 Jeep Cherokee with Virginia registration. The Jeep had merged onto the interstate from the northbound Route 9 on-ramp and cut across the solid line from the acceleration lane onto I-295 northbound at the base of the ramp. (A39-

¹ The Statement of Facts is taken substantially from the Superior Court's findings as set forth in A3-5.

² Each of the 276 cartons contained 10 packs of cigarettes and each pack contained 20 cigarettes. The breakdown of the cartons was: 4 Capri Menthol Super Slim, 113 Newport Menthol, 20 Marlboro, 5 Camel, 5 Winston, 25 Marlboro Gold, 10 Marlboro 100's, 5 Marlboro Gold 100's, 10 Marlboro Gold Menthol, 69 Newport Menthol 100's, and 10 Newport Menthol Gold 100's. See A52-54.

40). Officer Strauss pulled the Jeep over for the traffic offense, and the ensuing interaction was video recorded by an in-car video recording system (MVR).

Upon approaching the vehicle, Officer Strauss observed two large square objects covered with black plastic on the backseat and several supermarket plastic bags on the floor containing cartons of cigarettes. The vehicle smelled of tobacco. Upon request for his license, registration, and proof of insurance, Hassan provided a New York State learner's permit (expired) and a military I.D., and reported that he only had the expired permit from New York and did not have a license from any other state. The registration and insurance cards presented by Hassan, as well as his on-scene statements, indicated that he was the owner of the Jeep. The registration and insurance card were both valid.

Hassan indicated that the pair was traveling from Virginia to New York City. Officer Strauss observed the packages of contraband cigarettes all over the vehicle, and he indicated that there was no way to miss them or their odor. Officer Strauss also explained that the placement in the vehicle of the contraband packages of cigarettes was significant, based on his 27 years of training and experience as a police officer (A38), in that they did not create a visible profile above the windows for others to see. In addition to the 276 cartons of contraband cigarettes, a later search also revealed that Ghabayen had \$4,503.00 in United States Currency in his pockets.

It is undisputed that neither co-defendant is licensed in Delaware in any capacity, including for Title 30 tobacco regulatory purposes. It is also undisputed that neither of the defendants had any invoice, delivery tickets, bills of lading or purchase orders in their possession. Additional documents found within the vehicle included a handwritten list containing cigarette carton orders and several receipts from different stores in Virginia detailing purchases of the cartons of cigarettes on September 2, 2013, the day of the vehicle stop. Each of the receipts indicated that the maximum number of cartons purchased at any given location was five cartons. Officer Strauss testified that vendors will cap their sales at five cartons to avoid aiding potential interstate contraband cigarette traffickers.

Officer Strauss also explained that, in Delaware, only a single tax stamp will be affixed to a legitimate pack of cigarettes, corresponding to the destination use or sale state. Therefore, as a practical matter, no package of cigarettes would be stamped by two or more states' stamps (*e.g.*, tobacco with both Virginia and Delaware taxes or ultimately double paying by having both Virginia and New York tax stamps affixed). He also explained that Delaware law permits a personal use exemption for non-taxed tobacco product of less than ten packs (one carton), which would be the case of someone bringing in tobacco from another state (because if it was sold in Delaware, it would already have a Delaware tax stamp on it).

ARGUMENT

I. THE SUPERIOR COURT PROPERLY REJECTED GHABAYEN'S DORMANT COMMERCE CLAUSE CHALLENGE TO HIS CONVICTION FOR VIOLATING DEL. CODE ANN. tit. 30, § 5342(a) (POSSESSION OF UNTAXED TOBACCO PRODUCTS).

A. **Question Presented**

Whether the Superior Court properly rejected Ghabayen's dormant Commerce Clause challenge in convicting Ghabayen for a violation of DEL. CODE ANN. tit. 30, § 5342(a) (Possession of Untaxed Tobacco Products) because he, together with co-defendant Hassan, while in Delaware, jointly possessed 276 cartons of contraband tobacco cigarettes (55,200 individual cigarettes) that did not have Delaware tax stamps affixed as required by Section 5342(a).

B. **Standard and Scope of Review**

The standard and scope of review applicable to a constitutional claim is *de novo*. *Thomas v. State*, 725 A.2d 242, 427 (Del. 1999).

C. **Analysis**

It can hardly be denied that human consumption of tobacco products presents "serious public health concerns to the State and to the citizens of the State." DEL. CODE ANN. tit. 29, § 6080(a). Cigarette smoking causes lung cancer, heart disease and other serious diseases and, in turn, hundreds of thousands of tobacco related deaths each year in the United States. "The World Health

Organization, the United States Surgeon General's Office, the Delaware Department of Health and Social Services, the American Medical Association, and numerous other governmental, medical, and public health entities recognize that tobacco is both harmful to the user's health, harmful to non-users breathing second-hand smoke, and addictive." *Republic of Panama v. American Tobacco Co.*, 2006 WL 1933740 at *1 (Del. Super. Jun 23, 2006), *aff'd*, 919 A.2d 1116 (Del. 2007). Thus, it is an understatement to conclude that "[c]igarette smoking also presents serious financial concerns for the State." DEL. CODE ANN. tit. 29, § 6080(b).

Against such a backdrop, it is not surprising that the State of Delaware has in place a comprehensive statutory regulatory scheme concerning the manufacture, distribution, marketing, sale, possession, and consumption of tobacco products. *See, e.g.*, DEL. CODE ANN. tit. 30, §§ 5301-69 (tobacco product retail and wholesale licensing and taxation; internet sales ban); DEL. CODE ANN. tit. 29, §§ 6080-89 (Delaware Tobacco Settlement Act of 1999 and complementary legislation); DEL. CODE ANN. tit. 16, §§ 2901-07 (Clean Indoor Air Act); DEL. CODE ANN. tit. 16, §§ 7116-25 (Reduced Ignition Propensity Cigarettes/Fire Standards Compliant); DEL. CODE ANN. tit. 11, §§ 1115-27, 1330 (sales to minors; age verification; minimum pack size; prohibition on vending machines; retail

inspections; smoking on buses); DEL. CODE ANN. tit. 6, §§ 2601-08 (Unfair Cigarette Sales Act).

Federal Law Does Not Preclude Delaware From Enforcing Its Own Contraband Cigarette Laws

Ghabayen's dormant Commerce Clause challenge fails on a number of fronts. In the first instance, a state law is immune from attack under the Commerce Clause where Congress authorizes states to impose restrictions that the dormant Commerce Clause might otherwise forbid. *Mabey Bridge and Shore, Inc. v. Schoch*, 666 F.3d 862, 871 (3d Cir. 2012). Here, Congress has addressed the issue of multi-state trafficking of contraband cigarettes. *See generally* 18 U.S.C. §§ 2341-46 ("Trafficking in Contraband Cigarettes and Smokeless Tobacco"). The Federal law, *inter alia*, defines the term contraband cigarettes and provides exemptions for common carriers transporting cigarettes under a proper bill of lading or freight bill which indicates quantity, source and destination. 18 U.S.C. § 2341(2). The law also exempts a person, licensed by the state where contraband cigarettes are found, to account for and pay applicable state taxes. *Id.* In analyzing whether Congress has given consent for a state to legislate in a manner which may be otherwise impermissible under the Commerce Clause, a court looks first to the text of the federal statute purportedly authorizing the state action. *Norfolk Southern Corp. v. Oberly*, 632 F. Supp. 1225, 1244 (D. Del. 1986) (citing *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408 (1946)).

As the Superior Court properly held, Delaware’s regulatory framework applicable to the manufacture, distribution, marketing, sale, possession, and consumption of tobacco products does not implicate Commerce Clause concerns. The federal Trafficking in Contraband Cigarettes and Smokeless Tobacco law, however, makes the point express:

Effect on State and local law: Nothing in this chapter shall be construed to affect the concurrent jurisdiction of a State or local government to enact and enforce its own cigarette tax laws, to provide for the confiscation of cigarettes or smokeless tobacco and other property seized for violation of such laws, and to provide for penalties for the violation of such laws.

18 U.S.C. § 2345(a). The text of the federal statute authorizes Delaware to enforce its own contraband cigarette laws and the penalty provided for the violation of those laws, including the confiscation of contraband cigarettes. Perforce, Ghabayen’s Commerce Clause challenge fails.

Possession of Untaxed Tobacco Products is a Crime within Delaware’s Purview, as a Sovereign, to Enact and Prosecute

The language of the federal Trafficking in Contraband Cigarettes and Smokeless Tobacco law reflects Congress’s intent to not infringe upon the jurisdiction of Delaware’s sovereignty for the enactment and enforcements of its own tobacco laws. The United States Supreme Court has held that “[t]he dual sovereignty doctrine is founded on the common-law conception of crime as an

offense against the sovereignty of the government.” *Heath v. Alabama*, 474 U.S. 82, 88 (1985). Thus, when a defendant in a single act violates the “peace and dignity” of two sovereigns by breaking the laws of each, he has committed two distinct offenses. *Id.* Just as “the States are separate sovereigns with respect to the Federal Government because each State’s power to prosecute is derived from its own ‘inherent sovereignty,’ not from the Federal Government” so are the States with respect to each other. *Id.* at 89. Each State’s “powers to undertake criminal prosecution derive from separate and independent sources of power and authority originally belonging to them before admission to the Union and preserved to them by the Tenth Amendment.” *Id.*

Under the federal Trafficking in Contraband Cigarettes and Smokeless Tobacco law, “contraband cigarettes” are defined by the requirements of tax stamps as they pertain to the particular location where the cigarettes are found. 18 U.S.C. § 2342(b).³ Delaware, as its own sovereign, is also legally and constitutionally allowed to impose its own criminal offense for a crime of that nature. Delaware opts by statute to establish a personal use exemption threshold of ten packs of cigarettes.

³ Section 2342(b) criminalizes possession of “contraband cigarettes,” which is defined in Section 2341(2) to be in excess of 10,000 cigarettes which bear no evidence of the payment of applicable State or local cigarette taxes in the State or locality where such cigarettes are found, if the State or local government requires a stamp, impression, or other indication to be placed on packages or other containers of cigarettes to evidence payment of cigarette taxes, and which are in the possession of another person other than someone with a permit or who is a transporter with a proper bill of lading or freight bill.

Similarly, neighboring states that find themselves in the lucrative Virginia to New York cigarette smuggling corridor (*see* A 131-33) have their own incarnation of Delaware’s Section 5342(a).⁴ In Virginia, state taxes are 30 cents, while in New York they are \$4.35. And that differential amount increases to \$5.85 in New York City. (A131-33). The arbitrage point between the two states is enormous. Delaware’s current cigarette excise tax on one pack (20 cigarettes) is \$1.60. (A133-39). Tobacco is a comprehensively regulated product both in Delaware and throughout the nation. Delaware statutory scheme set forth in DEL. CODE ANN. tit. 30, §§ 5301-5369, like those of other states, contemplate complete regulatory control over the licensing, flow, distribution, marketing, and possession of tobacco products in the State. To that end, the State employs a detailed multi-faceted approach including requirements as to reporting, sales, storage, transportation documents, age verification, time allotments windows for taxation, prohibitions on direct sales from tax affixers to individuals, inspections, licensure, tax stamps as indicia of proof of compliance, and the list goes on. In order for tobacco to be legally either in the State or headed for the State, assuming it does not fall within

⁴ *See* D.C. CODE § 2403; MD. CODE ANN., Tax-General §§ 12-103, 12-104, 12-305; MD. CODE ANN., Tax-General §§ 13-1014, 13-1014; N.J. Stat. Ann §§ 54:40A-28.1, 54:40A-32 (New Jersey, in addition to criminal penalty categorized as a “disorderly person” level offense, also make the person liable to “a penalty equal to the amount of tax due on any unstamped cigarettes transported by him.” New Jersey’s additional tax liability is an inherent difference in its statutory scheme which makes any case law from the jurisdiction distinguishable from Delaware); N.Y. Tax Law §§ 471, 481, 1814; 72 PA. STAT. ANN. § 8273; VA. CODE ANN § 58.1-1017.1; W. VA. CODE § 11-17-19a.

the personal use or legitimized transporter safe harbors, each unit must be known, measured, and taxes assessed upon it.

Notable too is the implication of Virginia statutory law on Ghabayen's arguments. *See* VA. CODE ANN § 58.1-1017.1. In one respect, the Virginia tax code establishes a limit on possession of contraband cigarettes comparable to Section 5342(a): any individual in Virginia possessing more than three or more cartons (30 packs) of non-Virginia tax stamped cigarettes is in violation of Virginia law. The Virginia statute, however, goes further. Any non-licensed individual possessing more than 25 cartons of *Virginia tax stamped cigarettes* in Virginia with the intent to distribute is in violation of Virginia law. In other words, Ghabayen's conduct of possessing 276 cartons of Virginia tax-stamped cigarettes would be illegal in Virginia as well as Delaware. Like Section 5342(a), the Virginia statute on its face is a possession statute and not merely a taxation statute. Thus, Ghabayen's claim that his possession of 276 cartons of contraband cigarettes "were both lawfully obtained and in conformance with the Virginia taxation scheme" (Op. Br. at 11) is incorrect.

In sum, Section 5342(a) serves as a crucial part of the State's regulatory scheme and is designed to interdict contraband tobacco products which were not accounted for in the legitimate and licensed stream of commerce. It serves as a criminal deterrent to the introduction of foreign tobacco beyond that allowed for

personal use and what is otherwise lawfully allowed within its borders. Equally as important, it serves to provide a means by which Delaware can seize, count, and control large batches of tobacco products that would otherwise not fall within the regulatory scheme, having not been processed through legitimate avenues of commerce.⁵

**DEL. CODE ANN. tit. 30, § 5342(a):
Possession of Untaxed Tobacco Products**

Delaware’s valid statutory regulatory scheme includes well-settled guidelines for the retail and wholesale licensing, possession, and distribution of tobacco products. *See* DEL. CODE ANN. tit. 30, §§ 5301-69. Delaware levies a tax on the sale or use of tobacco products as evidenced by a tobacco product tax stamp on packages of cigarettes. (A54-56). Tobacco product wholesalers and retailers are required to obtain an appropriate license. DEL. CODE ANN. tit. 30, § 5308. And by statute, only licensed affixing agents may affix tobacco product tax stamps, which evidence payment of the applicable tax imposed. This tax must be paid, and

⁵ *See O’Leary v. Allphin*, 357 N.E.2d 491, 495 (Ill. 1976)(transporter provisions do not “in themselves impose a tax but rather are intended as an aid to the enforcement of the Cigarette Tax Act. Similar Statues requiring persons who desire to transport untaxed cigarettes within a State to obtain a permit or have specified documents in their possession have been upheld in other jurisdictions over various constitutional objections, including the contention that such statutes are a burden on interstate commerce”) (citing *People v. Asta*, 60 N.W.2d 472, 480 (Mich. 1953) (“requirement with reference to the transporter’s permit is designed to promote the enforcement of the cigarette tax act and to assist officers charged with duties in that respect in detecting violations of the law. So viewed, it may not be regarded as an undue burden on interstate commerce”); *People v. Locricchio*, 69 N.W.2d 723 (Mich. 1955); *State v. Sedacca*, 249 A.2d 456 (Md. 1969); *State v. Gilman*, 273 A.2d 617 (N.J. Super. 1971)).

the tax stamp affixed, by the first person who has possession of the tobacco product in Delaware. DEL. CODE ANN. tit. 30, § 5306. Similarly, any person transporting ten or more packs of unstamped cigarettes upon the public highways or roads of this State for the purpose of delivery, sale, or disposition must possess invoices or delivery tickets and purchases orders containing detailed information regarding the seller, person transporting the tobacco products, the quantity and brand of tobacco products, the person licensed to assume the payment of Delaware tax, or of the tax due at the point of destination. DEL. CODE ANN. tit. 30, § 5328. A common carrier that has issued an appropriate bill of lading is deemed compliant and within the safe harbor provisions provided by statute. Of note, the absence of such proper invoices or delivery tickets and purchase orders is deemed to be “prima facie evidence that such person is in violation of this chapter and that such person is subject to the penalties of this chapter.” *Id.*

Pursuant to Section 5342(a),

[e]xcept 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.

DEL. CODE ANN. tit. 30, § 5342(a). A violation of that statute constitutes a criminal offense. Any person who violates Section 5342(a) “shall be fined not less

than \$100 nor more than \$1,000, or imprisoned not more than 90 days, or both,” as set forth in the Chapter’s catchall penalty provision codified in Section 5343. Chapter 53 of Title 30 of the Delaware Code recognizes various excepted circumstances when possession of ten or more packs would not violate the statute. Specifically, if the tobacco is:

- a. Found at the place of business of a dealer and is designated as having been received within 72 hours (DEL. CODE ANN. tit. 30, § 5342(b));
- b. Found at the place of business of the affixing agent, as defined in DEL. CODE ANN. tit. 30, § 5301(a), and is designated as having been received within 72 hours (DEL. CODE ANN. tit. 30, § 5317);
- c. Possessed or transported upon Delaware’s public highways for the purpose of delivery, sale or disposition and the person who possesses or transports it also possesses invoices or delivery tickets and purchase orders for the tobacco products with information pertaining to who has been licensed to assume payment of Delaware tax or the tax of any other destination’s sovereign (DEL. CODE ANN. tit. 30, § 5328);
- d. Itself is somehow prohibited from being taxed by the State under the Constitution or statutes of the United States (DEL. CODE ANN. tit. 30, § 5305(d)), or other particularity of the package itself (DEL. CODE ANN. tit. 30, § 5346(a));
- e. The Department of Finance has a registered exemption certificate for a seller and purchaser as related to an approved veterans’ organizations or the Veterans’ Administration Hospital (DEL. CODE ANN. tit. 30, § 5305(e)).

In addition to the above exceptions, by definition, the other inherent defense to the charge of Possession of Untaxed Tobacco under Delaware law exists if a person possesses no more than ten unstamped packs or packages, *i.e.*, a personal use

exception. Therefore, absent a recognized exception, whether the packs contain a foreign jurisdiction's stamp or any affixed stamp at all is of no moment, the relevant inquiry is the presence of Delaware taxation stamps upon the tobacco.

In the present case, neither defendant had a "place of business" in Delaware, as a dealer or affixing agent. *See* DEL. CODE ANN. tit. 30, § 5301(8). Nor did either possess the requisite invoices or delivery tickets and purchase orders permitting possession or transport in the state, and they did not have an approved exemption certificate for possession related to veterans' purposes. Further, there are no constitutional, statutory, or other packaging prohibitions on taxing the tobacco they possessed.

Possession Defined

As to the statute *sub judice*, which is analogous to a drug possession case or that of a possession of a deadly weapon by a person prohibited, it is the possession of the contraband (*i.e.*, "10 or more packs or packages . . . of tobacco products upon which the Delaware tobacco product tax has not been paid."), *per se*, actual or constructive, that is prohibited. DEL. CODE ANN. tit. 30, § 5342(a); *Mack v. State*, 312 A.2d 319, 322 (Del. 1973) (referencing "the general 'dominion, control, and authority' definition of 'possession' used in drug cases") (citing *Jackson v. State*, 254 A.2d 852 (Del. 1969); *Holden v. State*, 305 A.2d 320 (Del. 1973)). Further, the "proximity of the contraband, and immediate control thereof, is not an

essential element of [the] definition.” *Lecates v. State*, 987 A.2d 413, 419 (Del. 2009) (citing *Mack*, 312 A.2d at 322); *Maddrey v. State*, 975 A.2d 772, 779 (Del. 2009). Pursuant to DEL. CODE ANN. tit. 16, § 4701(34), “‘possession,’ in addition to its ordinary meaning, includes location in or about the defendant’s person, premises, belongings, vehicle or otherwise within the defendant’s reasonable control.” DEL. CODE ANN. tit. 16 § 4701(34); see *Lecates*, 987 A.2d at 425 (citing *Thomas v. State*, 2005 WL 3031636, at *2 (Del. Nov. 10, 2005) (this definition merely allows for constructive possession in addition to actual possession (possession’s ‘ordinary meaning’) and does not create a *per se* rule of possession. Instead, it remains within the factfinder’s province to decide whether a defendant constructively possessed contraband)).

Actual possession occurs when a person has “conscious dominion, control and authority” over an object. *Lecates*, 987 A.2d at 425 (citing *Thomas*, 2005 WL 3031636, at *2). It requires “direct physical control.” Constructive possession occurs “when a person ‘has *both the power and the intention* at a given time to *exercise control* over [an object].” *Id.* at 426. This Court has reaffirmed a three-part analytical framework for determining constructive possession. *White v. State*, 906 A.2d 82, 86 (Del. 2006) (citing *Hoey v. State*, 689 A.2d 1177, 1181 (Del. 1997)). To establish constructive possession, the evidence must demonstrate that a person: 1) had knowledge of the location of the object; 2) had the ability to

exercise dominion and control over the object; and 3) intended to guide the destiny of the object. *Id.* Lastly, “[a]lthough ‘mere proximity to, or awareness of [contraband] is not sufficient to establish constructive possession,’ it is well established that circumstantial evidence may prove constructive possession.” *Lecates*, 987 A.2d at 426 (citing *White*, 906 A.2d at 86).

Further, “[t]he requirement that possession must be ‘exclusive’, in order to incriminate, does not mean that the possession must necessarily be separate from all others. An ‘exclusive possession’ may be the joint possession of two or more acting in concert.” *Lecates*, 987 A.2d at 423 (citing *Flamer v. State*, 227 A.2d 123, 126 (Del. 1967)). However, “there must be substantial proof that the defendant acted in concert with others in joint possession before the presumption of guilt may arise from the joint possession.” *Id.*

In the present case, the presence of the strong odor of tobacco and of the large volume of tobacco products themselves, when coupled with both defendants’ shared travel plans, mutual awareness of the contraband, and pooling of resources (money on Ghabayen, list of cigarettes and receipts in the vehicle, and the use of Hassan’s vehicle to transport), the Superior Court could correctly conclude that Ghabayen and Hassan jointly possessed the tobacco within the meaning of Delaware law.

Possession of Untaxed Tobacco Products is Not a Tax Statute

The statute, as discussed above, places restrictions on actual or constructive possession of *per se* contraband. That the underlying defining parameter in determining the existence of *per se* contraband is laid forth in Section 5342(a) as the absence of indicia of Delaware taxation stamps on ten or more packs or packages of tobacco products, does not make this a taxation statute.

Of course, the codified location of the statute is Title 30 (State Taxes): Commodity Taxes: Chapter 53 (Tobacco Product Tax): Subchapter IV (Penalties and Enforcement), and its captions are related as to the overall subject of tobacco and taxation. Nevertheless, taxation results do not flow from the penalties imposed by the statute itself. Instead, the language of Section 5342(a), when coupled with the catchall penalty provision provided in Section 5343, evinces a clear legislative intent to create a crime that is punishable by fines and/or incarceration; it does not create a civil penalty or otherwise require tendering payment of unremitted taxes for the contraband.

Section 5342(a), on its face, is thus a possession statute and not a tax statute. As explained by the Superior Court, Section 5342(a) is part “of a regulatory scheme that allows for enforcement against those possessing contraband, and Section 5328 creates, in part, a ‘safe harbor’ for those legally transporting tobacco

products in interstate commerce.” (A8-9). As evidenced by the consequences contemplated by Title 30, Ghabayen could not have remedied his transgression even by offering to remit taxes on the contraband cigarettes because not only is he not licensed to do so, but also because the statutory scheme calls for seizure and destruction of the contraband. 30 DEL. CODE. ANN. tit. 30, §§ 5351(a), (b).

In contrast, the penalties of Section 5342(a) can be readily compared with those contemplated in DEL. CODE ANN. tit. 30, § 5128 (*i.e.*, Title 30 (State Taxes): Commodity Taxes; Chapter 51 (Motor Fuel Tax): Subchapter I (Gasoline); § 5128 (Penalties)), which is a statute also codified in Title 30 and whose companion statutes in Chapter 51 set forth a similar and highly regulatory structure comparable to that found in Chapter 53 for tobacco. The penalties detailed in the two regulatory schemes provide for different results. Pursuant to Section 5128(a),

Whoever violates any provision of this chapter, a penalty for which is not otherwise provided, or fails or refuses to pay the tax imposed by this chapter, or engages in business in this State as a distributor or retailer without being the holder of an uncancelled license to engage in such business, or makes any false statement in any application, report or statement required by this chapter, or refuses to permit the Department of Transportation or any deputy to examine records as provided by this chapter, or fails to keep proper records of quantities of gasoline received, produced, refined, manufactured, compounded, sold, used and/or delivered in this State as required by this chapter, or collects or causes to be repaid to any person any tax not being entitled to the same under the provisions of this chapter shall, for the first offense, be fined not more than \$500, or imprisoned not more than 6 months, or both, and for a second and any subsequent offense shall be fined not more than \$1,000, or imprisoned not more than 1 year, or both. In addition to the penalty imposed in conformity to the above,

the defendant shall be required to pay all taxes and penalties due the State under this chapter and/or pay to the State any other moneys wrongfully withheld or illegally refunded. Each day or part thereof during which any person shall engage in business as a distributor or retailer without being the holder of an uncanceled license shall constitute a separate offense within the meaning of this section.

DEL. CODE ANN. tit. 30, § 5128 (emphasis added). Under this penalty structure, a hybrid result is obtained. Not only is there a punitive fine and incarceration period, but there is also a requirement to make the State whole for any taxes that it otherwise would have been due had the crime not occurred. Section 5342(a) does not do that, and instead, its sole focus is on criminal punishment for possession and does not levy a discrete penalty premised on uncollected taxes.

The language of the unlawful possession statute in Delaware should be construed in light of the acts that are prohibited. The operative statutory language does not define the unlawful act as the failure to pay tax, rather, it is the possession of tobacco upon which Delaware tax has not been paid. *See Iowa v. Messer*, 822 N.W.2d 116, 120 (Iowa 2012) (while the thrust of the statutory chapter may be to enforce payment of cigarette taxes, that rationale does not alter the analysis. The unambiguous statutory language defines the possession of unstamped cigarettes to be the fraudulent practice).

Federal and State Laws Prohibit Possession of Contraband Cigarettes

As outlined above, in the first instance, Ghabayen's argument to the effect that Section 5342(a) somehow infringes on the Commerce Clause is patently

unsustainable in light of the presence of unlawful possession of contraband or untaxed tobacco laws both at the federal level (which cross reference an individual State's own requirements) and at the state level. In the second instance, the cases primarily relied on by Ghabayen in support of his Commerce Clause argument relate either to goods that really were in transit (and based on the way that cigarette tax stamps are affixed with a final destination in mind, that could never be the case with the facts *sub judice*), that in some manner the original goods were recombined at a storage facility for later distribution, or that a portion of the total goods in transit was siphoned off and used in a given State. Here, there is no claim that any of the goods were used in Delaware. The analysis suggested by *Minnesota v. Blasius*, 290 U.S. 1 (1933), as to whether there exists a "continuity of transit," is thus of no moment to the facts of this case. Similarly, *State v. Crane Hook Oil Storage Co.*, 18 A.2d 427 (Del. Super. Ct. 1941), addresses goods in transit. Here, the contraband cigarettes were not in transit because the existence of affixed Virginia tax stamps meant that the tobacco products could not be transported elsewhere in the quantity in which they were found (276 cartons). Once the cigarettes hit the Delaware border, they required Delaware tax stamps, or the cigarettes required the statutorily mandated documentation detailed in Section 5328, because of the amount of cigarettes possessed. Notably, Ghabayen simply ignores the fact that no Delaware tax stamp need be affixed to cigarettes that are

appropriately and legitimately placed in the stream of interstate commerce. The nexus to Delaware is that they are in Delaware unaccounted for by the well-established comprehensive regulatory structure in place.

The Superior Court properly relied on a pair of analytically comparable Maryland Court of Appeals cases that are of significant relevance in providing a lens by which to view Delaware's statute. Maryland's statutory scheme includes statutes analogous to DEL. CODE ANN. tit. 30, § 5328,⁶ which permits transportation through Delaware of unstamped cigarettes if the person moving the product has an invoice or delivery ticket, and DEL. CODE ANN. tit. 30, § 5342(a),⁷ which allows for the personal use quota.⁸ In *State v. Sedacca*, 249 A.2d 456, 463 (Md. 1969), the Court of Appeals of Maryland held that:

[t]he police regulation in Section 455 [since recodified into Tax-General Article] requiring the possession of the prescribed documents by interstate transporters of cigarettes was necessary for the safeguarding of the State's 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. The police regulation is a reasonable one, is one with which honest and law abiding citizens can readily comply and is no impediment to the free flow of trade and commerce between the several States.

⁶ See MD. CODE ANN., Tax-General §12-104(b)(c)(ii)(possessor is exempt if has requisite Business Regulation Article for transport)).

⁷ See MD. CODE ANN., Tax-General §12-305(a)(person may not possess unstamped cigarettes beyond exemptions).

⁸ See MD. CODE ANN., Tax-General §12-104(b)(c)(i)(1)(nonresident consumer traveling through State may have up to 1 carton of cigarettes).

Accordingly, the court properly rejected the defendant's Commerce Clause challenge in that case.

In *Chen v. State*, 803 A.2d 518, 520 (Md. 2002), the same Court of Appeals reviewed a case in which the defendant was travelling through the State of Maryland on his way to another state when he was stopped. Further, at no time were the 7,190 packs of cigarettes intended for use, distribution, or sale into or within the State of Maryland. The petitioner argued that the particular section does not contain a penalty provision, and that there can be no crime where there is no punishment.⁹ Relying on their ruling in *Sedacca* that the prohibitions concerning the possession and transportation of unstamped cigarettes were clear and accessible by persons of common intelligence, and constitutional, the *Chen* court concluded that the penalty provision applied. Thus, the court held that any knowing possession or transportation of unstamped cigarettes was considered a violation of Maryland law – without regard to an individual's familiarity with the text of the law. *Chen*, 803 A.2d at 527.

The Superior Court properly concluded that *Sedacca* and *Chen* articulated the most well-reasoned approach to the Commerce Clause challenge under review. The Superior Court highlighted that the cases represented the most recent decisional authority cited to the court and were factually similar to the instant

⁹ Hassan presented a comparable claim which the Superior Court rejected. (A11-12).

matter. The Superior Court observed that there may be nuanced differences between Delaware and Maryland tobacco product tax laws, but not to the degree which would make “the reasoning, analysis and holdings of the Maryland Court of Appeals invalid here.” (A10). Ghabayen’s suggestion that the threshold amount of contraband, Delaware’s ten packs versus Maryland’s fifty packs (Op. Br. At 29-30), is at all relevant to the present inquiry ignores the plain interpretation of the federal Trafficking in Contraband Cigarettes and Smokeless Tobacco law, the concept of dual sovereignty, the presence of parallel laws in numerous sister states, and the role that Section 5342(a) plays Delaware’s own comprehensive regulatory scheme. In turn, as the above discussion demonstrates, Ghabayen’s continued reliance on *Complete Auto Transport, Inc. v. Brady*, 430 U.S. 274 (1977), is simply misplaced.

Comparable to provisions in the federal Trafficking in Contraband Cigarette and Smokeless Tobacco law, Section 5342(a) is a possession statute that does not require intent to distribute or otherwise sell in the in the host state. There is no conflict between the Federal law and Delaware law. In this case, Delaware is granted concurrent jurisdiction over the offense of possession of contraband cigarettes. Congress, like Delaware, has provided legitimate means for legally transporting tobacco products in interstate commerce. In that sense, Delaware law does not place any additional burden on legitimate interstate commerce, because

Ghabayen's conduct also ran afoul of Federal law and the laws of any other state to which he would have traveled after exiting Virginia.

The Cigarettes Seized are Contraband Tobacco Products

Ghabayen also suggests that the possession charge required proof that “the item possessed is the illegal contraband that the State purports it to be.” (Op. Br. at 32). Section 5301(2) of Title 30 of the Delaware Code defines “cigarette” as follows:

Cigarette means any roll for smoking made wholly or in part of tobacco, irrespective of size or shape, and irrespective of the tobacco being flavored, adulterated or mixed with any other ingredient, the wrapper or cover of which is made of paper or any other substance except tobacco.

DEL. CODE ANN. tit. 30, § 5301(2). Counsel for Ghabayen in Superior Court repeatedly referred to the seized contraband as cigarettes and does so again in the Opening Brief. Ghabayen challenges the State's proof that he possessed tobacco that was subject to Delaware taxation and which was, in his view, therefore contraband.

Officer Strauss testified that the seized product was indeed contraband cigarettes and provided a detailed report regarding the specific brand makeup of the 276 cartons of contraband cigarettes. It is self-evident that 276 cartons are greater than the 1 carton allowed pursuant to the personal use exemption. Further, the contraband cigarettes had Virginia tax stamps affixed, but did not have

Delaware tax stamps affixed. The evidence at trial included receipts in the co-defendants' possession for the contraband cigarettes as purchased from retail outlets in Virginia on September 2, 2012, the day of the traffic stop in this case. Neither Ghabayen nor Hassan possessed proper invoices, delivery tickets, or purchase orders as required for the safe harbor afforded to transporters. In sum, the Superior Court properly concluded that the State presented sufficient evidence for the court to conclude that Ghabayen possessed contraband cigarettes for purposes of a conviction under § 5342(a). (A12).

CONCLUSION

For the reasons expressed and upon the authorities cited, the State respectfully requests this Honorable Court affirm the judgment below.

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CERTIFICATE OF SERVICE

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