

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

SENECA NATION OF INDIANS

Plaintiff,

Civil Action No. 10-cv-00687-RJA

v.

DAVID PATERSON, Governor of the
State of New York, JAMIE WOODWARD,
Acting Commissioner, New York State
Department of Taxation and Finance,
WILLIAM COMISKEY, Deputy
Commissioner, Office of Tax Enforcement,
New York State Department of Taxation and
Finance, JOHN MELVILLE, Acting
Superintendent, New York State Police, each
in his or her official capacity,

Defendants.

DANIEL SMIRLOCK, an attorney admitted to practice in the courts of New York State, hereby affirms under penalties of perjury that the following is true:

1. Since April 2007, I have served as Deputy Commissioner and Counsel of the New York State Department of Taxation and Finance (the Department).
2. I am familiar with the history of the Department's efforts to ensure that tax is collected on all taxable sales of cigarettes. I am also familiar with the provisions of the Tax Law, departmental regulations, published guidance, and policies that underlie and explain these efforts.
3. I make this affirmation in opposition to the motion for a temporary restraining order and a preliminary injunction filed by the Seneca Nation of Indians.
4. As explained below and in the accompanying affirmation of Jamie Woodward, on June 21, 2010, the State Legislature passed Part D of Chapter 134 of the Laws of 2010 (Exhibit A), as well as the subsequent amendment in Chapter 136 of the Laws of 2010 (Exhibit B), establishing that the New York State Legislature intends that collection and enforcement of the cigarette excise and sales taxes on reservation sales to non-tribal members (including non-Indians) begin on September 1, 2010.

Article 20 of the Tax Law

5. Article 20 of the New York Tax Law imposes an excise tax on cigarettes and tobacco. Under Article 20, the ultimate incidence of the cigarette excise tax is on the consumer. The chain of taxation, however, begins with cigarette stamping agents, who purchase cigarettes from manufacturers. Agents advance the tax by purchasing cigarette excise tax stamps, which they affix to each pack of cigarettes as evidence that the tax has been paid. Sometimes agents act as wholesale dealers and sell cigarettes directly to retailers. Sometimes agents sell to wholesale dealers, who then sell to retailers. Either way, the tax is eventually passed through to the

consumer as part of the cost of cigarettes. Prepaid sales taxes are also reflected in the tax stamp, as required by Tax Law section 1103, and are passed through to the consumer in the same manner.

6. Tax Law section 471, contained in Article 20, imposes an excise tax on all cigarettes possessed in New York by any person for sale, except that no tax is imposed on cigarettes sold where New York does not have power to tax. It is well-established that New York has no power to tax on-reservation sales by reservation cigarette sellers to members of the same tribe, but also beyond dispute that New York is fully empowered to tax on-reservation sales by Indian sellers to non-tribal members (including non-Indians).
7. The issues in enforcing cigarette excise taxes on sales by reservation cigarette sellers to non-Indians have a decades-long history. *New York Ass'n of Convenience Stores v. Urbach*, 92 N.Y.2d 204 (1998); *Cayuga Indian Nation of New York v. Gould*, 14 N.Y.3d 614 (2010). The Department's policy of forbearance was partially in response to threats to public safety and order. See *New York Ass'n of Convenience Stores v. Urbach*, 181 Misc.2d 589 (Sup. Ct., Albany Cty., July 9, 1999) (Exhibit C). The Department officially lifted the policy of forbearance on February 23, 2010. See ¶ 4, Acting Commissioner Woodward's Affirmation.

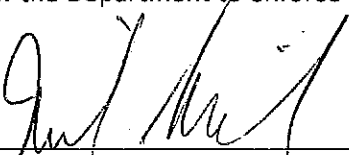
New Legislation: The Coupon/Prior-Approval System

8. On June 21, 2010, the New York State Legislature enacted legislation implementing the new dual system of the Indian tax exemption coupon system and the prior approval system indicating its insistence that the Tax Law be enforced as of September 1, 2010 with respect to taxable on-reservation cigarette sales. Part D of Chapter 134 of the Laws of 2010 (Exhibit A), enacted on June 21, 2010 and applicable to quarters beginning September 1, 2010, amended Tax Law sections 471 and 471-e. On June 22, 2010, Chapter 136 of the Laws of 2010 made an amendment to Part D (Exhibit B). This amendment extended the Legislature's directive to act, within 60 days of the effective date of section 11 of Part D, to promulgate rules and regulations and to take any other actions necessary to the prior approval system.
9. In Part D, the New York State Legislature amended the Tax Law to clarify that the excise tax is applicable to on-reservation cigarette sales to non-Indians and non-members of the nation or tribe that occupies that reservation, and that this tax is imposed by Tax Law section 471. The legislation also makes clear that the Indian tax exemption coupon system established by Tax Law section 471-e is just one mechanism for the delivery of quantities of tax-exempt cigarettes to Indian nations or tribes for personal use and consumption.
10. Part D also establishes that all cigarettes sold by agents and wholesale dealers to an Indian reservation must bear a tax stamp, regardless of who is purchasing or will purchase the cigarettes.
11. The focus of the Tax Law, as amended to include the dual system, is on the State-licensed cigarette wholesalers. It requires the State-licensed cigarette wholesalers to sell only stamped cigarettes to reservation cigarette sellers, while ensuring an adequate quantity of tax-free cigarettes to the reservation. The law does not affect the relationship between the State-licensed cigarette wholesalers and the reservation cigarette sellers. It may affect the volume of sales.

12. Part D and the amendment made by Chapter 136 of the Laws of 2010 require that, within 60 days of the effective date of section 11 of Part D—that is, by August 20, 2010—the Department “promulgate any rules and regulations and take any other actions necessary to fully implement” the coupon and prior approval systems, including “the establishment, issuance, and provision of Indian tax exemption coupons.”
13. Part D also changed the role of the coupon system, permitting an Indian nation or tribe to elect to participate in the Indian tax exemption coupon system rather than mandating participation. A nation or tribe that elects to participate will receive from the Department coupons that it can use or distribute to reservation cigarette sellers in order to obtain tax-exempt cigarettes. The amount of coupons provided to each Indian nation or tribe is determined by the probable demand of the nation or tribe for the year, but coupons will be distributed each quarter. When an agent or wholesale dealer receives the coupons from a nation or tribe or reservation cigarette seller, the agent or wholesale dealer can sell to that nation or tribe or reservation cigarette seller stamped cigarettes in the amount represented by that quantity of coupons without collecting the tax. The seller would sell the stamped product at an untaxed rate, take the coupon(s) from the reservation retailer, and then submit the coupon(s) to the Department for an expedited refund of the tax paid by the agent or wholesaler for the stamps affixed on the cigarettes that were sold tax free using the coupons.
14. As an alternative to the coupon system for sales to nations or tribes that do not elect to use coupons, Part D also created a prior approval system. Thus, under new subdivision 5 of Tax Law section 471, when a nation or tribe does not choose to participate in the coupon system, an agent or wholesale dealer can obtain from the Department prior approval to sell stamped tax-exempt product to the nation or tribe or a reservation cigarette seller in an amount up to the probable demand for that Indian nation or tribe. The prior approval system, like the coupon system, requires that all cigarettes sold by agents and wholesale dealers to an Indian reservation bear a tax stamp regardless of who is purchasing the cigarettes. The Department is charged with establishing by regulation the manner and form of the prior approval system.
15. Part D makes clear in new subdivision 6 of Tax Law section 471 that, as was already established in Tax Law section 471-e, an Indian nation or tribe can also enter into an agreement with New York State to address these issues.

WHEREFORE, This Court should not grant the plaintiff's motion for a temporary restraining order and a preliminary injunction, and instead should allow the Department to enforce the law.

DATED: August 25, 2010
Albany, New York



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Taxation and Finance, JOHN MELVILLE, Acting Superintendent,
New York State Police, each in his or her official capacity,

Defendants.

CERTIFICATE OF SERVICE

I hereby certify that on August 25, 2010, I electronically filed the foregoing with the Clerk of the District Court using its CM/ECF system, which will forward the papers electronically to:

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