

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.

JAMIE WOODWARD, 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 June 2009, I have served as the Acting Commissioner of the State Department of Taxation and Finance (the Department). Before that, I served as Executive Deputy Commissioner. I have been employed by the Department for almost thirty years, much of that in various managerial positions.
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. On March 16, 2006, the Department issued Advisory Opinion TSB-A-06(2)M (Exhibit A) that stated that if the Department decided to change its policy of allowing agents to sell untaxed cigarettes without restriction to recognized Indian Nations and reservation-based retailers (the policy of forbearance), it would provide notice to that effect. On February 23, 2010, the Department administratively revoked this opinion and provided such notification. (Exhibit B)
5. 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. See ¶ 8, Deputy Commissioner and Counsel Smirlock's Affirmation.
6. The New York State Legislature directed that the Department begin collecting the taxes on taxable reservation cigarette sales on September 1, 2010. In order to meet this statutory deadline, the Department was required to implement the collection procedures described in

this affidavit before September 1, 2010. As part of this, the Legislature required the Department to promulgate within 60 days of the act's effective date (i.e., by August 20, 2010) any regulations necessary to fully implement the dual system.

7. On June 22, 2010, I adopted an emergency rule providing regulations to supplement the terms of the statute. This rule became effective that day upon filing with the New York State Department of State. Under section 202(6) of the State Administrative Procedure Act, the emergency rule is effective for 90 days, until September 19, 2010. Copies of the rule were sent to the Indian nations and tribes on June 22, 2010. On August 11, 2010, I proposed this rule as a permanent rule. I also intend to readopt the emergency rule to extend it another sixty days, in order to ensure that it remains in effect until the proposed rule can be adopted as a permanent rule.
8. The rule adds new section 74.6 (Exhibit C), Taxes Imposed on Qualified Reservations, to Title 20 of the NYCRR. That section details the dual statutory system to provide an adequate quantity of tax free cigarettes to Indian reservations, as well as detailing the agent certification system. It is designed to ensure that adequate quantities of stamped tax-exempt cigarettes will be available to Indian nations or tribes for their use and use by their members in quantities based on their probable demand. The rule details how the two systems will operate. It sets forth the annual schedule according to which an Indian nation or tribe can seek reconsideration of its probable demand figure prior to its applicability and opt to participate in the Indian tax exemption coupon system. It establishes specific methods and procedures that the Department will use to calculate probable demand under both the coupon and prior-approval systems.
9. The rule allows an Indian nation or tribe that believes that the probable demand calculated by the Department for a given year is inaccurate to contact the Department explaining why it believes the calculation is inaccurate. The Department will consider any evidence submitted by July 31 in determining the probable demand for the ensuing twelve-month period beginning September 1.
10. The governing body of the Seneca Nation of Indians did not submit (timely or otherwise) any evidence related to the probable demand of its members or to the amount needed for the nation's official use.
11. The rule also gives Indian nations and tribes until August 15 each year to elect to participate in the Indian tax exemption coupon system. This election is made for the twelve-month period beginning September 1 and ending August 31.
12. The governing body of the Seneca Nation of Indians did not elect (timely or otherwise) to participate in the Indian tax exemption coupon system.
13. To provide further guidance on the implementation of Part D and the emergency regulations, the Department issued (Exhibit D) a technical memorandum (TSB-M) on the Indian tax exemption coupon and prior approval systems on July 29, 2010 and posted it on the Department's website. A TSB-M is an informational statement explaining existing Department policies and/or outlining changes in the law, regulations, or Department policies. Each Indian nation or tribe, cigarette manufacturer, agent and wholesaler was sent the TSB-M on July 29, 2010.

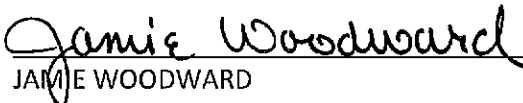
14. In addition, on July 29, 2010, the Department issued a TSB-M on the agent certification procedures (Exhibit E). The Department also issued the agent certification form and instructions on July 29, 2010 (Exhibit F). These documents are posted on the Department's website. Each cigarette manufacturer and agent was sent the TSB-M on July 29, 2010 and each agent was sent the certification form and instructions on August 11, 2010.
15. The Department has developed and revised forms to reflect the new law, and has created an online system to implement the prior approval system. The online system is secure. Only State licensed cigarette wholesalers will have access to the prior approval system and only State licensed cigarette wholesalers will be issued approvals to sell stamped, but tax-free cigarettes to Indian nations or tribes and reservation cigarette sellers. State licensed wholesalers who receive prior approvals will be required to report on where the tax-free cigarettes have been delivered. The Department will ensure the system is used properly and that no unauthorized person or entity will be able to obtain an approval from the online system.
16. As required by statute, in accordance with the New York State Legislature's directive, the Department has taken all steps necessary for the Indian tax exemption coupon and prior approval systems to be implemented and operational as of September 1, 2010.
17. On August 17, 2006, the complaint in *Day Wholesale, Inc. v. State of New York* was filed by Day Wholesale, a New York State licensed stamping agent and wholesale dealer, and Scott B. Maybee, an enrolled member of the Seneca Nation of Indians, who purportedly owns and operates wholesale and retail tobacco businesses on the Seneca Nation reservations. The State of New York, its Attorney General, and Weinstein were named as defendants. The complaint alleged three causes of action: (1) that section 471-e was not in effect because the Department had not taken the necessary steps to implement it, including distribution of Indian tax exemption coupons; (2) that defendants had deprived Day of the full use of its licenses without due process of law; and (3) that without distribution of the coupons, nation or tribal members cannot purchase cigarettes free of state taxes, and that the "pre-collection" of taxes on these sales violates the Indian Commerce Clause. The plaintiffs obtained injunctive relief.
18. On August 6, 2010, the State made a motion to vacate the preliminary injunctions issued by the Supreme Court, Erie County, and entered on February 20, 2007 and January 27, 2009 in *Day Wholesale Inc. v. State of New York*. The rules and regulations implementing the Indian tax exemption coupon system have been adopted, and, pursuant to those rules, coupons would have been issued no later than September 1, 2010 to all nations and tribes electing to use them. It is the State's position in *Day Wholesale* that the statutory, administrative and regulatory developments since the issuance of these preliminary injunctions obviate the terms of the injunctions. The motion is returnable before Justice Donna M. Siwek on August 30, 2010.
19. The Department, in accordance with the statute and regulation, calculated the Seneca Nation of Indians' quarterly probable demand for cigarettes to be 168,600 packs (16,860 cartons). This figure was determined using population data from the 2000 U.S. Census and annual per capita consumption data from the U.S. Department of Agriculture. In 2000, the reported population for the Seneca Nation of Indians was 7,243. For the probable demand estimate, the Census population figure was adjusted upward by 10 percent to 7,967 for the Seneca Nation of Indians to account for possible Census undercounting and use or consumption by the nation. The Seneca Nation of Indians' probable demand was calculated by multiplying this population figure (which includes children as well as adults) by an annual per capita amount of 84.6 packs as estimated using the most recent Department of Agriculture data. The resulting figure was then

divided by 4 and rounded upward to the nearest carton to arrive at the quarterly figure. The Seneca nation of Indians has not objected to this estimate of probably demand of its members.

20. New York State licensed cigarette agents reported to the Department that the total annual cigarette sales for 2009 to the Seneca Nation of Indians were 10,256,765 cartons. New York State licensed cigarette agents reported that the total cigarette sales in 2010, as of June, to the Seneca Nation of Indians were 5,379,215 cartons.
21. According to reports filed with the Department by State licensed cigarettes agents, approximately 50 Seneca reservation cigarette sellers receive cigarettes from our State licensed cigarette agents.
22. To my knowledge, no New York State licensed cigarette stamping agents or cigarette wholesalers are located on an Indian reservation.
23. Implementation of this taxation and collection scheme is important to the State's fiscal situation. The State financial plan provides for anticipated revenues in the amount of \$110 million as a result of taxes collected pursuant to Tax Law sections 471 and 471-e during the current fiscal year (SFY 2010-11). The majority of this revenue (75%) is dedicated revenue that supports important health care programs that benefit all residents of the State.
24. Implementation of this cigarette distribution scheme is also crucial to effectuate the State's efforts to protect the public health of its citizens by curbing cigarette consumption by limiting and controlling the supply of cheap cigarettes available for sale to non-Indians in New York. Implementation is also important to the State's efforts to end unfair competition among those who sell cigarettes at retail in New York to non-Indians.

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

DATED: August 25, 2010
Albany, New York


JAMIE WOODWARD
Acting Commissioner
NYS Department of Taxation and Finance

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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.

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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