EXHIBIT D

FROM :CAPITAL HILL MCT TO : 5184322695 1 .08-15 09:47 #403 P.03/05

STATE OF NEW YORK
DEPARTMENT OF TAXATION AND FINANCE
W. A. Harriman Campus
Albany, NY 12227

MICHAEL H. URBACH
COMMISSIONER OF TAXATION AND FINANCE

March 27, 1995

Honorable William R. Sears
New York State Senate
Room 905
Legislative Office Building
Albany, New York 12247

Honorable Jess J. Present
New York State Senate
Room 503
State Capitol
Albany, New York 12247

Dear Senators Sears and Present:

This is in response to your request for additional information concerning the possibility of further litigation of Indian/State taxation issues in light of the United States Supreme Court's recent favorable decision in the Department v Milhelm Attea and Brothers, Inc., __ US __, 129 L Ed 2d 52 (June 13, 1994). As was noted during our discussion on March 9, 1995, although that victory makes it possible for the Department to attempt to implement its regulatory excise tax collection system with respect to reservation sales ultimately made to non-Indians, it is likely that the Attea decision will not be the last challenge to the State's excise tax jurisdiction on Indian reservations.

In Attea, the U.S. Supreme Court specifically limited its decision to the question of the facial validity of the State's regulatory excise tax collection system because the regulatory system at issue had never been implemented due to State court injunctions obtained by the federally licensed Indian traders/wholesale suppliers (Milhem Attea & Bros. and Elias H. Attea Jr.). The Supreme Court decision, therefore, emphatically noted that the Court assumed that the Department, in implementing the challenged system, will do so in a reasonable manner so as to ensure that a sufficient supply of tax-free product will be permitted to be sold by suppliers to reservation retailers, for ultimate resale to reservation Indian consumers.

Further, it should be noted that of the four classes affected by the proposed regulatory system -- Indian traders/wholesale suppliers, reservation retailers,

Exhibit A - Letter

reservation Indian consumers and the Indian Nation governments -- the parties to the Altea case were Indian traders/wholesale suppliers of reservation businesses. Hence the Altea Court reviewed the regulatory system with a view towards its impact on the rights of Indian traders/wholesale suppliers -- not those of reservation retailers or of the Indian Nations. Potentially, a retailer or Nation could challenge the Department's implementation of the regulations because that implementation could take place in a manner that is allegedly arbitrary, or that allegedly fails to sufficiently protect the rights of reservation retailers and/or the Nation, itself, to engage in tax-free commerce with reservation Indian consumers. For example, the amount that the Department allocates to a particular reservation, or to a particular retailer, could be the subject of such a challenge.

Moreover, in the last footnote of its decision in Altea (129 L Ed 2d 52, at 66), the United States Supreme Court specifically refused to consider the new argument raised by the Seneca Nation of Indians in its "amicus curiae" brief (i.e. a brief filed as a "friend of the court"), that the Department's regulations are preempted by the Nation's treaties with the United States. The Court noted that this argument differs considerably from that of the parties to the action (i.e. the Alteas), and that the argument was not raised before the N.Y. Court of Appeals. However, by not considering the validity of that argument, the Supreme Court also preserved the right of the Seneca Nation to seek its own injunction of the regulations based upon infringement of any treaty rights it has.

For your convenience, I have included a copy of the amicus brief filed by the Seneca Nation of Indians in Altea. That brief, at pp. 18-26, sets out the Seneca Nation treaty rights argument. The Department, on its part, believes that this argument lacks merit. Further, in its amicus brief on behalf of the United States, the U. S. Solicitor General also found the Seneca treaty rights argument to be without merit (see attached copy of pp. 21-24 of its brief). Nonetheless, since the New York Court of Appeals recently refused to consider a similar Seneca treaty rights argument raised by a former President of the Seneca Nation in a separate lawsuit [Snyder v Wetzler, __NY2d __ (1994)], we cannot state for certain how this argument would be viewed by a State court.

Governor Pataki and I share your concern for the serious revenue loss associated with on-reservation sales of cigarettes and motor fuel to non-Indians. Our most recent estimate is that the identifiable State revenue loss is approximately $102 million in sales and excise taxes on cigarettes and motor fuel. I would caution, however, that the eventual collection of this revenue may be contingent on the successful resolution of any future litigation. Moreover, in my opinion, an extended period of vigorous enforcement of the law and regulations (to which I am committed) will

Exhibit A - Letter

be necessary, in order to begin collecting the tax revenue that previously went uncollected due to reservation-based evasion.

In closing, let me note my appreciation for your questions and comments. I especially appreciate hearing your views, and that of your constituents, regarding the difficult and complicated issues involving the respective taxing jurisdictions of the State and the New York Indian Nations.

Sincerely,

Michael H. Urbach
Commissioner

Att.
cc: Ms. Judith Hard
Mr. Abraham Lackman