

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

SENECA NATION OF INDIANS

Plaintiffs.

Civil Action No. 10-cv-00687-RJA

v.

AFFIRMATION
OF
PETER J. KIERNAN,

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

Defendants.

PETER J. KIERNAN, an attorney admitted to practice in the courts of New York State, hereby affirms under penalties of perjury that the following is true:

1. I am the Counsel to the Governor of New York State.
2. I am fully familiar with Governor Paterson's efforts to ensure that applicable taxation is collected on taxable sales of cigarettes in New York State (the "State"). I also am familiar with the Governor's efforts to negotiate with the Seneca Nation of Indians (the "Seneca") and the other sovereign Indian nations and tribes located in the State with respect to cigarette taxation.
3. I submit this affirmation in support of defendants' memorandum of law opposing plaintiff's motion for a preliminary injunction. More specifically, the Seneca have stated that the statutes and regulations at issue were enacted in a "truncated manner" and in a "very short timeframe." See Plaintiff's Ex. D at 1. This affirmation describes the State's efforts to engage the Seneca and other New York Indian nations and tribes in a deliberate and purposeful manner, respectful of the sovereignty of the Seneca and other nations throughout the legislative and regulatory process, and to refute the assertion that these efforts were truncated and short lived.
4. Primarily through my office, the Governor has made it a priority that issues of mutual concern between the State and the Seneca (and all other New York State Indian nations and tribes) be resolved by respectful and informed dialogue.

5. On December 5, 2008, the Governor met with Seneca President Barry Snyder and other elected Seneca officials in the Governor's New York City Office to discuss a bill that had passed the Legislature that would prohibit manufacturers from selling unstamped packages of cigarettes to any licensed stamping agent unless the agent certifies that it will not resell the cigarettes in violation of Article 20 of the Tax Law (A.11258-A/S.8146-B). President Snyder expressed the Seneca's opposition to the bill and asked the Governor to veto it.
6. The Governor decided that it was in the best interest of the State to sign the bill and did so on December 15, 2008 as Chapter 642 of the Laws of 2008, adding a new subdivision 4 to Tax Law § 471 (the "Certification Statute"). Section 471(4) became effective on February 13, 2009. However, in his approval message, the Governor reiterated his "... belief that the right approach to these issues in the first instance is to attempt to resolve them ... through negotiation."
7. On March 4, 2009, during a trip to Western New York, the Governor met with the Seneca Foreign Relations Committee in Niagara County to discuss the sale on Seneca territory of untaxed cigarettes to non-Indians.
8. On October 27, 2009, I testified on behalf of the Governor at a hearing of the State Senate Committee on Investigations and Government Operations (the "Committee") in New York City which was investigating the policy of the State with respect to cigarette taxes from sales on Indian reservations. I stated that the Administration did not embrace the policy of forbearance previously established by the Pataki Administration and advised that the Administration was pursuing active negotiation and litigation in an effort to resolve the issues.
9. At said hearing, I stated the Governor's preference to achieve cigarette price equality through negotiated agreements and how that might be accomplished. A large delegation of Seneca was present including Robert Porter, Senior Policy Advisor and Counsel to the Seneca, who also testified. The following day, I received an e-mail from Mr. Porter thanking me for my "thoughtful testimony" and indicating an interest in learning more about the concepts I had discussed about price equality and the State's ongoing negotiations with the other nations.
10. On January 19, 2010, the Governor released his 2010-11 Executive Budget. It included a \$1.00 per pack increase in the cigarette tax. At the same time, the Governor announced that he was directing the Department of Taxation and Finance (the "Department") to withdraw its 2006 Advisory Opinion regarding the Department's policy of forbearance of enforcement of the tax laws with respect to sales by agents of unstamped product to Indian retailers. The Governor also instructed the Department to promulgate regulations for public comment to implement the certification system he signed into law as Chapter 642 of the Laws of 2008, noting that this regulatory process would take approximately six months and would allow time to negotiate settlements.

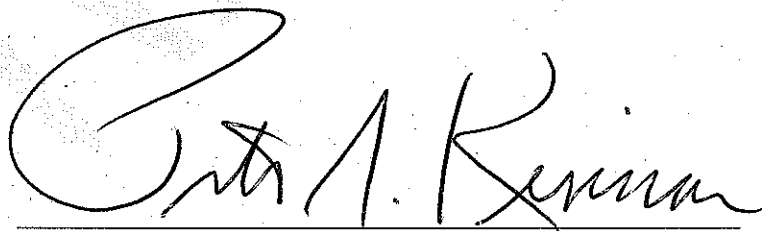
11. On January 18, 2010, prior to the Governor's budget address, my colleague David Rose, Assistant Counsel to the Governor, and I telephoned every Indian nation head of state or representative to inform them of the Governor's budget intentions and to reiterate the Governor's desire to reach negotiated settlements with each nation or tribe. On that evening we spoke to this effect to Seneca President Snyder.
12. On January 19, 2010, Robert Porter sent me an e-mail indicating his concern over the way in which the Department was going to withdraw its 2006 Advisory Opinion TSB-A-06(2)M and the impact that could have on litigation surrounding cigarette taxation of sales by Indian retailers to non-Indians. As a result of my communications with Mr. Porter, the Advisory Opinion notice made by the Department to stamping agents, wholesalers and Indian retailers was revised to indicate that, notwithstanding the revocation of the policy of forbearance, "[c]urrent judicial injunctions that prevent the Department from enforcing the tax laws as they relate to sales by stamping agents to reservation sellers and reservation sales to non-Indians remain in place."
13. On January 26, 2010, I met with Robert Porter and Seneca Foreign Relations Committee members to discuss the issue of cigarette taxes by Seneca reservation retailers to non-Indians. I was informed that the Seneca believed it was necessary first to resolve outstanding issues related to the 1976 Memorandum of Understanding (MOU) between the State Department of Transportation and the Seneca related to the Southern Tier Expressway.
14. On February 16, 2010, Mr. Porter e-mailed me proposed settlement terms to resolve the 1976 MOU issues.
15. On February 23, 2010, the Department proposed regulations to limit the quantity of tax-free cigarettes that may be legally supplied to the Indian nations or tribes through the implementation of the certification statute under Tax Law § 471(4). The Department invited public comment from any interested party during the ensuing 45 days. Concurrently, the Department administratively revoked Advisory Opinion TSB-A-06(2)M.
16. On February 23, 2010, I met again with Mr. Porter and Seneca Foreign Relations Committee Members to discuss the proposed MOU settlement.
17. On March 4, 2010, Mr. Porter sent me an e-mail supporting Milhelm Attea & Bros., Inc.'s petition for an Advisory Opinion by the Department to address potential tax liability stemming from the revoked 2006 forbearance policy Advisory Opinion.
18. On March 23, 2010, the Governor publicly introduced Program Bill 229RR to reinforce that the cigarette tax for cigarettes sold on Indian reservations to non-members of the Indian nation or tribe is imposed by Tax law § 471(1) and to clarify that the agent certification provisions in Tax Law § 471 could be enforced independently of Tax Law § 471-e (the "Coupon Statute").

19. Also on March 23, 2010, I met again with Mr. Porter and members of the Seneca Foreign Relations Committee. In part, we discussed S.6985-A and S.3896-A, bills that had been introduced in the Legislature that would direct all cigarette wholesalers to sell only tax-stamped cigarettes unless presented with an Indian tax exemption coupon. I related the Governor's concern with those bills due to their reliance on the issuance of coupons and that the Governor had introduced his own Program Bill that would be less intrusive than a coupon system. Richard Nephew, a member of the Seneca Foreign Relations Committee, argued that the Seneca import/export law was a good model. Mr. Porter told me he would provide me with further information on the Seneca import/export law and that we should explore a co-regulation. I indicated that I would welcome such a dialogue, but I have never received any additional information from Mr. Porter.
20. On April 13, 2010, May 4, 2010, May 11, 2010 and June 9, 2010, Mr. Porter and members of the Seneca Foreign Relations Committee met with members of the Administration.
21. On April 23, 2010, the Seneca timely submitted comments to the Department on the proposed agent certification regulations. (The Seneca also submitted comments to the State Commissioner of Labor, the Commissioner of Economic Development and the Governor's Office of Regulatory Reform.)
22. On June 16, 2010, Mr. Porter and members of the Seneca Foreign Relations Committee met with David Rose to discuss their concern that the Governor would be introducing an emergency budget extender bill that would include a provision modifying the coupon system and providing that the Tax Law be enforced with respect to taxable on-reservation cigarette sales. This was to be an amended version of the Governor's Program Bill previously mentioned. Mr. Porter and others in the Seneca delegation expressed surprise that the Governor was taking this action. Mr. Rose reminded them of the nearly five months of dialogue and action related to this topic and reiterated that the Seneca refused to talk about cigarette tax issues until the 1976 MOU was resolved.
23. On June 21, 2010, Part D of Chapter 134 of the Laws of 2010 was enacted amending Tax Law §§ 471 and 471-e, effective September 1, 2010 (the "Certification/Prior Approval and Coupon Statutes"). The Legislature, knowing the Governor was actively involved in negotiations with at least three Indian nations, made the effective date September 1, 2010 specifically to allow additional time to consummate negotiations. Part D of Chapter 134 includes a provision that provides that an agreement between an Indian nation or tribe and the State, either with legislative approval, or pursuant to a federal court approval of an agreement as part of a stipulation and order, would supersede the requirements of the statute.
24. The Certification/Prior Approval and Coupon Statutes establish that the 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.

25. On August 17, 2010, Seneca President Snyder sent a letter to Governor Paterson and Attorney General Cuomo discussing the "highly truncated" legislative and regulatory process and the "very short timeframe" before the September 1, 2010 effective date of the relevant provisions. He proposed that the date of enforcement be delayed and warned that an attempt to enforce the laws on September 1 would result in "chaos and conflict."
26. On August 20, 2010, I participated in a conference call with Governor Paterson, President Snyder and Mr. Porter. President Snyder requested that enforcement of the Certification/Prior Approval and Coupon Statutes be delayed to permit time for the courts (including State Supreme Court, Erie County) to resolve the issues of cigarette taxation and regulation. The Governor said he was bound by law to seek timely implementation but again pledged to negotiate in good faith to reach an agreement. I noted that it was August 20 and we were prepared to meet at anytime prior to September 1.
27. The significance of the foregoing detail is that the Seneca and other Indian nations and tribes have been fully aware since at least October 2009, and certainly since January 2010, of the State's intention to implement the Certification/Prior Approval and Coupon Statutes. The Seneca engaged in discussions with the State on a regular basis. The Seneca provided written comments on the proposed regulations of the Department. The Seneca actively lobbied against various legislation introduced by the Legislature early in the Legislative Session, as well as against the legislation that was enacted in June. And, reportedly, the Seneca have convened at least two meetings of the other New York Indian nations and tribes to discuss litigation strategy.
28. It is disingenuous for the Seneca to suggest that the State's actions are abrupt, that the processes have been truncated, and that implementation of the law should be delayed.

WHEREFORE, this Court should deny plaintiff's motion for preliminary injunction.

DATED: August 24, 2010
Albany, New York



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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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