UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

SENECA NATION OF INDIANS,

Plaintiff,

CAYUGA INDIAN NATION,

Plaintiff-Intervenor,

Civil Action
No. 10-cv-00687

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.

UNKECHAUGE INDIAN NATION,

Plaintiff,

v.

Civil Action
No. 10-cv-711

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.

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ST. REGIS MOHAWK TRIBE,

Plaintiff,

v.

DAVID A. PATERSON, Governor, State of New York; JAMIE WOODWARD, Acting Commissioner, New York State Department of Taxation and Finance; and WILLIAM COMISKEY, Deputy Commissioner, Office of Tax Enforcement, New York State Department of Taxation and Finance, each in his or her official capacity,

Defendants.

Civil Action
No. 10-cv-811

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

In this litigation, four Indian nations—the Seneca Nation of Indians, the Cayuga Indian Nation, the Unkechauge Indian Nation, and the St. Regis Mohawk Tribe (collectively, "Plaintiffs")—filed pre-enforcement challenges to recent amendments to the New York Tax Law governing the collection of cigarette taxes from sales to non-tribal members on Indian reservations. This Court previously found that all of the Plaintiffs' claims were meritless. The U.S. Court of Appeals for the Second Circuit agreed. Because there can no longer be any dispute that the Plaintiffs' claims fail as a matter of law, this Court should grant State defendants' motion for summary judgment.

ISSUES PRESENTED

1. Whether the 2010 amendments to the Tax Law violate tribal sovereignty.

2. Whether the 2010 amendments to the Tax Law improperly burden out-of-state sales.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

1. New York's Cigarette Taxes

Cigarettes enter the New York market when manufacturers sell cigarettes to state-licensed stamping agents, which are the only entities permitted to place cigarettes into commerce in the State. *See* 20 N.Y.C.R.R. § 74.3(a)(1)(iii). Stamping agents (which may also be wholesalers) sell cigarettes to other wholesalers and/or retailers, and the retailers sell them to the ultimate consumers (Smirlock Aff. ¶ 3, *Unkechauge Indian Nation* (No. 10-cv-00711), Dkt. # 24).

Tax Law § 471(1) imposes an excise tax on all taxable cigarettes sold in New York. Tax Law § 471(2) provides that the ultimate incidence of and liability for the cigarette excise tax is on the cigarette consumer. But the chain of taxation begins with stamping agents, which are required to pay the excise tax (in addition to a prepaid sales tax) "prior to the time such cigarettes are offered for sale" in New York. 20 N.Y.C.R.R. § 74.3(a)(2). Agents pay these cigarette taxes by purchasing tax stamps that they affix to each pack of cigarettes as evidence that the taxes have

been paid. The cost of the taxes is then passed on through subsequent purchasers and eventually borne by the ultimate consumers. *Id.* § 74.1(b)(1).

2. New York's Attempts to Tax Reservation Cigarette Sales Before 2010

Under federal law, reservation Indians are exempt from the State's cigarette taxes for cigarettes that they purchase on their reservations for their personal consumption. But the State has undisputed authority to tax "[o]n-reservation cigarette sales to persons other than reservation Indians." *Dep't of Taxation & Finance of N.Y. v. Milhelm Attea & Bros.*, 512 U.S. 61, 64 (1994) [hereinafter "*Attea*"].

The 2010 amendments at issue in this case represent New York's most recent effort to collect cigarette taxes on Indian reservations. In 1988, the New York State Department of Taxation and Finance (the "Department") adopted regulations that in several respects paralleled the key features of the 2010 amendments. The regulations acknowledged that qualified Indians had the right to purchase cigarettes without the payment of state tax. *See* 20 N.Y.C.R.R. § 336.6(a) (1990) (repealed) (Defendants' Mem., Exh. L). To ensure that only qualified Indians would be so exempted, however, the regulations restricted each nation or tribe's supply of tax-free cigarettes to a quantity "related to the probable demand of qualified Indian consumers in the trade territory of the exempt Indian nation or tribe." *Id.* § 336.7(d)(1) (1990) (repealed) (Defendants' Mem., Exh. M). The Department calculated each nation or tribe's probable demand based on data about per capita

cigarette consumption and member populations. *See id.* § 336.7(d)(2)(ii) (1990) (repealed) (Defendants' Mem., Exh. M).

Under these earlier regulations, an agent seeking to sell tax-free cigarettes to a reservation cigarette seller or other qualified purchaser was required to obtain the Department's prior approval before completing any such sale. *See id.* § 336.7(c)(2) (1990) (repealed) (Defendants' Mem., Exh. M). The Department implemented this preapproval requirement through a coupon system under which it sent reservation cigarette sellers a certain number of coupons each month "entitling them to receive a predetermined quantity of tax free product." Brief for Petitioner, 1993 WL 664655, at *12, *Dep't of Taxation & Finance of N.Y. v. Milhelm Attea & Bros.*, 512 U.S. 61 (1994) (No. 93-377). An agent could sell tax-free cigarettes to a reservation cigarette seller only if the agent received coupons from the seller and turned them in to the Department. *See id.* at *13.

Before these regulations could come into effect, several wholesalers sued the Department to permanently enjoin the regulations. In the 1994 case *Attea*, the Supreme Court upheld the regulations, specifically approving both the probable-demand limitations and "[t]he associated requirement that the Department preapprove deliveries of tax-exempt cigarettes." 512 U.S. at 75-76.

In 1997, New York began implementation of the *Attea* regulations, but the State suspended its collection efforts following "civil unrest, personal injuries and significant interference with public transportation on the State highways" caused by protesting nation and tribal members. *N.Y. Ass'n of Convenience Stores v.*

Urbach, 275 A.D.2d 520, 522-23 (3d Dep't 2000). The Department announced that it would forbear from collecting and repealed the regulations in 1998. *See Cayuga Indian Nation of N.Y. v. Gould*, 14 N.Y.3d 614, 625-26 (2010), *cert. denied*, 131 S. Ct. 353 (2010).

Over the next several years, New York and the Indian nations and tribes were unable to reach agreement regarding cigarette-tax-collection issues. In 2003 and again in 2005, the Legislature amended the Tax Law to direct the collection of cigarette taxes, but the Department continued to forbear. *See id.* at 627-28. The state courts held that the Department's forbearance prevented the Legislature's 2005 amendments from coming into effect. *See id.* at 649-50; *Day Wholesale, Inc. v. State*, 51 A.D.3d 383, 388-89 (4th Dep't 2008).

In February 2010, the Department formally revoked the forbearance policy (Smirlock Aff. ¶ 6, *Unkechauge Indian Nation* (No. 10-cv-00711), Dkt. # 24). On June 21, 2010, the Legislature enacted the amendments that are at issue in these appeals (Defendants' Mem., Exh. J-K). One day later, the Department issued an emergency rule in connection with the statute's implementation (Smirlock Aff. ¶ 15, *Unkechauge Indian Nation* (No. 10-cv-00711), Dkt. # 24). Final regulations were promulgated on October 22, 2010. *See* 20 N.Y.C.R.R. § 74.6.

In light of the amended Tax Law and the Department's new regulations, the State immediately took steps to implement the 2010 amendments. In particular, the State moved to vacate two state-court preliminary injunctions that were based on statutes superseded by the 2010 amendments (Woodward Aff. ¶ 18, *Seneca*

Nation of Indians (No. 10-cv-00687), Dkt. # 13). State Supreme Court granted the State's motion, and on September 14, 2010, the Appellate Division, Fourth Department agreed that the 2010 amendments could be implemented (Simermeyer Decl. Ex. 1, *Unkechauge Indian Nation* (No. 10-cv-00711), Dkt. # 6-2).

3. The 2010 Amendments

The New York State Legislature amended the Tax Law in June 2010 to facilitate the collection of the cigarette tax, including the tax due from sales on Indian reservations to nonmembers. The Legislature provided that the amendments apply beginning September 1, 2010, and established a timetable for preparations designed to meet that deadline. Laws of 2010, Ch. 134. (Defendants' Mem., Exh. J); Laws of 2010, Ch. 136 (Defendants' Mem., Exh. K).

With limited exceptions not applicable here, the 2010 amendments require stamping agents to prepay the tax and affix tax stamps on *all* cigarette packs sold in New York, including those intended for resale to qualified Indians on the reservation. *See* Tax Law § 471(2). However, two key features of the 2010 amendments—both patterned on the *Attea* regulations—ensure that Indian nations and tribes will have access to enough tax-free cigarettes to meet the demands of tribal governments and their members for consumption.

First, as the *Attea* regulations did, the 2010 amendments allocate to each nation or tribe a quantity of tax-free cigarettes equivalent to the "probable demand" of the nations or tribes' members for personal consumption. The Department's method for calculating each nation or tribe's probable demand ensures that a

generous amount of tax-exempt cigarettes will be available for tribal members. The Department's calculations begin with each nation or tribe's *entire* population, including children—a figure that the Department increases by an additional 10% to ensure the adequacy of its calculation. The enhanced population figure is then multiplied by the United States' statistic for average annual cigarette consumption per capita for persons over 18. Finally, the Department considers any evidence of probable demand submitted by nations or tribes, such as prior sales data or other statistics. The Department recalculates each nation or tribe's probable demand amount annually. *See* Tax Law § 471-e(2)(b); 20 N.Y.C.R.R. § 74.6(e).

Second, the 2010 amendments provide two alternative mechanisms by which Indian nations or tribes can make this tax-exempt supply available to their members: a coupon system, and a prior approval system. The regulations provide that the nations or tribes may elect to use the coupon system each year by August 15, and if a nation or tribe does not make this election, the prior approval system applies. *See* 20 N.Y.C.R.R. § 74.6(b). The Department has provided by regulation that it will also permit late elections of the coupon system. *See id.* § 74.6(b)(1)(ii).

Under the coupon system, the Department distributes tax-exemption coupons each quarter to a tribal government in an amount reflecting the nation or tribe's probable demand. *See* Tax Law § 471-e(2)(a). The tribal government may retain any coupons necessary for its own purposes and is then expected to distribute the remaining coupons among reservation cigarette sellers, including those owned by the nation or tribe itself. A reservation cigarette seller can present the coupons to a

wholesaler or stamping agent in order to purchase stamped cigarettes without paying the cost of the tax; the reservation retailer can then sell those cigarettes tax-free to members for their consumption. *Id.* The wholesaler or stamping agent, in turn, can submit the tax-exemption coupons to the Department to obtain a refund of the tax that it prepaid (but did not collect) on these cigarettes. *Id.* § 471-e(4).

For any nation or tribe that does not elect the coupon system, the alternative prior approval system applies instead. *See* Tax Law § 471(5)(a); 20 N.Y.C.R.R. § 74.6(b)(3). Under that system, no coupons are distributed, and tribal governments are not involved in the distribution of tax-free cigarettes on the reservation. Instead, as under the *Attea* regulations, when a wholesaler or agent intends to sell stamped cigarettes within the probable-demand amount to an Indian nation or tribe or reservation cigarette seller without the collection of tax, it must first obtain the Department's approval for that particular sale. *See* 20 N.Y.C.R.R. § 74.6(d)(3). The Department has set up a website through which wholesalers and agents can request approval. Upon receiving the Department's approval, the wholesaler or agent must complete the tax-free sale and report its details to the Department within 48 hours. If it does so, then the number of cigarettes sold is subtracted from the relevant nation or tribe's total allotment of tax-free cigarettes. In the aggregate, all such sales in a quarter cannot exceed the nation or tribe's quarterly probable-demand amount. (TSB-M-10(6)M at 5-6, *Seneca Nation of Indians* (No. 10-cv-00687), Dkt. # 4-6.)

B. Factual Background

The four Plaintiffs in this litigation are the Seneca Nation of Indians ("SNI"), the Cayuga Indian Nation ("CIN"), the Unkechauge Indian Nation ("UIN"), and the St. Regis Mohawk Tribe ("Mohawk Tribe"). Cigarette sales constitute a significant part of the economies of all four Plaintiffs, but the Plaintiffs do not all have the same relationship to the cigarette trade (SNI Compl. ¶ 46; CIN Compl. ¶ 16; UIN Compl. ¶ 51; Mitchell Decl. ¶ 6, Schmidt Aff. in Support of Motion for Temporary Restraining Order Exh. 14, *St. Regis Mohawk* (No. 10-cv-00811), Dkt. # 9).

One of the Plaintiffs (the CIN) is the sole cigarette retailer on its lands. Through two retail stores owned and operated by the CIN, the CIN directly purchases cigarettes from wholesalers and maintains inventories for sale to both members and nonmembers (CIN Complaint, ¶¶14-16). Under the 2010 amendments, the CIN, like all other cigarette retailers, would purchase cigarettes for resale to nonmembers at a price that includes the prepaid cigarette tax and recoup the cost of the cigarettes, including the prepaid tax component, when it ultimately completes a retail sale.

By contrast, the remaining Plaintiffs (the SNI, UIN, and Mohawk Tribe) assert that they function primarily as regulators of independent reservation cigarette sellers, although each nation or tribe also retails some cigarettes itself (*e.g.*, Preliminary Injunction Hearing Tr., vol. 1, at 95, *Seneca Nation of Indians* (No. 10-cv-00687), Dkt. # 79). All three of these Plaintiffs have adopted comprehensive and detailed regulatory schemes under which they oversee cigarette

retailers on their territories (Porter Decl. ¶¶ 6-7 & Exh. A, *Seneca Nation of Indians* (No. 10-cv-00687), Dkt. # 4-3, 4-4; Wallace Aff. ¶¶ 9-13, *Unkechauge Indian Nation* (No. 10-cv-00711), Dkt. # 6-3); Lazore Decl. Exh. A, *St. Regis Mohawk* (No. 10-cv-00811), Dkt. # 9-8). These regulatory regimes typically include, among other things, licensing, regular inspections, price and quantity restrictions, and prohibitions on contraband cigarettes.

Whatever their differences, the Plaintiffs are identical in one key respect: they all tolerate and even encourage a vast quantity of tax-free cigarette sales to nonmembers. In 2009, for example, New York-licensed wholesalers reported selling over ten million cartons of untaxed cigarettes to the SNI, even though the probable demand of the SNI's eight thousand members is less than 70,000 cartons per year (Woodward Aff. ¶¶ 19-20, *Seneca Nation of Indians* (No. 10-cv-00687), Dkt. # 13).[1] The population of the Mohawk Tribe is 13,784, for a probable demand of 117,000 cartons per year, but the Department's data show that over one million cartons of untaxed cigarettes are currently sold every year by Mohawk Tribe reservation sellers (Plattner Aff. ¶¶ 19-20, *St. Regis Mohawk* (No. 10-cv-00811), Dkt. # 32-5). Finally, the UIN—with a population of under 400 and an annual probable demand of only 3,240 cartons—sold over five million cartons of untaxed cigarettes in 2009,

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[1] Some portion of the SNI's cigarette sales are to out-of-state customers and are thus properly exempt from state taxation. *See* Tax Law § 476. But it is undisputed that at least half of the SNI's untaxed sales—at least five million cartons or more per year—are to nonmembers in New York (Decision and Order Denying Motion for Preliminary Injunction at 24, *Seneca Nation of Indians* (No. 10-cv-00687), Dkt. # 87).

and nearly 3.5 million cartons only halfway through 2010 (Smirlock Aff. ¶¶ 28-29, *Unkechauge Indian Nation* (No. 10-cv-00711), Dkt. # 24). Given these numbers, it is apparent that the vast majority of the Plaintiffs' cigarette economies—indeed, over 99% of their overall cigarette trade—currently consists of sales of unstamped, untaxed cigarettes to nonmembers of the Plaintiffs. *See also City of N.Y. v. Golden Feather Smoke Shop, Inc.*, No. 08-CV-3966, 2010 WL 2653369, at *8-*20 (E.D.N.Y. June 25, 2010) (finding that UIN cigarette sellers engaged in massive bootlegging of untaxed cigarettes into New York City).

After the passage of the 2010 amendments, all of the Plaintiffs either declined to present evidence of their probable demand or withdrew any objections to the Department's calculations. In addition, none of the Plaintiffs elected into the coupon system. (Woodward Aff. ¶¶ 10, 12, *Seneca Nation of Indians* (No. 10-cv-00687), Dkt. # 13; Smirlock Aff. ¶¶ 18, 20, *Unkechauge Indian Nation* (No. 10-cv-00711), Dkt. # 24; Plattner Aff. ¶¶ 10, 12, *St. Regis Mohawk* (No. 10-cv-00811), Dkt. # 32-5.)

C. Procedural Background

On August 17, 2010, before the 2010 amendments came into effect, the SNI commenced its action for declaratory and injunctive relief in this Court (SNI Compl., *Seneca Nation of Indians* (No. 10-cv-00687), Dkt. # 1). The CIN was granted permission to intervene in the SNI's lawsuit (*Seneca Nation of Indians* (No. 10-cv-00687), Dkt. # 30). Separately, the UIN filed its lawsuit in this Court on August 27 (*Unkechauge Indian Nation* (No. 10-cv-00711), Dkt. # 1). The Mohawk

Tribe initially brought suit in the U.S. District Court for the Northern District of New York, but on October 7 its case was transferred to this Court and consolidated with the UIN's lawsuit (Decision and Order Transferring Case, *St. Regis Mohawk* (No. 10-cv-00811), Dkt. # 48). In all of these lawsuits, the Plaintiffs' principal argument was that the cigarette tax scheme unconstitutionally burdened their tribal sovereignty rights.

After holding a preliminary injunction hearing on September 14-15, 2010, this Court denied the SNI's and CIN's motions for a preliminary injunction on October 14, holding that those Plaintiffs had "failed to demonstrate a likelihood of success on their claim that the tax law amendments unconstitutionally burdened their right of tribal sovereignty" (Decision and Order Denying Motion for Preliminary Injunction at 2, *Seneca Nation of Indians* (No. 10-cv-00687), Dkt. # 87 ["*SNI* PI Decision"]). For similar reasons, this Court on November 9 likewise rejected the UIN's and Mohawk Tribe's preliminary injunction motions (Decision and Order, *Unkechauge Indian Nation* (No. 10-cv-00711), Dkt. # 49). The Court granted Plaintiffs "a stay of enforcement of the New York tax law amendments pending appeal" (Decision and Order Granting Stay Pending Appeal, *Seneca Nation of Indians* (No. 10-cv-00687), Dkt. # 88; Decision and Order at 12-13, *Unkechauge Indian Nation* (No. 10-cv-00711), Dkt. # 49).

On appeal, the Second Circuit consolidated the Plaintiffs' cases with a separate litigation by the Oneida Nation of New York in the Northern District, which had granted that nation's request for a preliminary injunction. *See Oneida*

Nation of New York v. Paterson, No. 6:10-CV-1071, 2010 WL 4053080, at *13 (N.D.N.Y. Oct. 14, 2010). On May 9, 2011, the Second Circuit issued a decision affirming this Court's denial of preliminary injunctions and vacating the Northern District's grant of a preliminary injunction. *Oneida Nation of New York, et al. v. Paterson, et al.,* 2011 WL 1745005 (2d Cir. 2011) (Defendants' Mem., Exh. A). The Second Circuit agreed with this Court that the Plaintiffs had failed to demonstrate a likelihood of success on the merits of any of their federal claims (*id.* at 52). On May 16, 2011, the Court ordered that the mandate issue forthwith (Defendants' Mem., Exhs. B, C).

D. Subsequent State Court Litigation

On February 10, 2011, before the Second Circuit's decision in these cases, the SNI filed a new action in New York Supreme Court, Erie County, alleging that the Department had failed to substantially comply with the State Administrative Procedure Act in promulgating a regulation pursuant to the 2010 amendments. The day after the Second Circuit's decision, Supreme Court issued a temporary restraining order against the implementation of the 2010 amendments (Defendants' Mem., Exh. D). On June 8, 2011, however, the trial court rejected the SNI's administrative claims on the merits and granted summary judgment in favor of State defendants (Defendants' Mem., Exh. E).

The SNI immediately appealed that decision to the Appellate Division, Fourth Department and moved for a preliminary injunction as well as interim relief pending the injunction determination. A single justice of the Appellate Division

granted the temporary injunction (Defendants' Mem., Exh. G). But after considering the parties' briefs, the Appellate Division denied the SNI's motion for a preliminary injunction and vacated the temporary injunction on June 21, 2011 (Defendants' Mem., Exh. H).

That decision lifted the last barrier to State defendants' authority to implement the 2010 amendments.[2] As a result, the Department has been implementing the 2010 amendments since June 21, 2011.

ARGUMENT

Summary judgment is appropriate where the record "show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Here, the Plaintiffs' complaints raise a purely legal claim: they allege, under various headings, that the 2010 amendments impose excessive burdens on their tribal sovereignty, including burdens on Indian retailers and the Plaintiffs' right to tax-free commerce (SNI Compl. ¶¶ 50-63; CIN Compl. ¶¶ 38-57; UIN Compl. ¶¶ 56-73; Mohawk Tribe Compl. ¶¶ 23-43). Some Plaintiffs also contend that the 2010 amendments improperly burden out-of-state sales (SNI Compl. ¶¶ 64-70; UIN Compl. ¶¶ 74-82). Both this Court and the Second Circuit have already concluded that these claims

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[2] The SNI also sought temporary relief from a Judge of the New York Court of Appeals, but that request was swiftly denied (Defendants' Mem., Exh. I). The SNI's motion for leave to appeal to the Court of Appeals from the Appellate Division's denial of the SNI's motion for an injunction pending appeal, and for a stay pending the Court's consideration of its motion for leave, was returnable in the Court of Appeals on July 5, 2011, and is awaiting decision.

are meritless. Accordingly, this Court should grant defendants' motion for summary judgment dismissing the complaints in their entirety.

POINT I

THE 2010 AMENDMENTS DO NOT VIOLATE TRIBAL SOVEREIGNTY

A. New York May Precollect the Tax on Cigarettes Destined for Sale to Nonmembers.

New York collects the cigarette tax at the start of the distribution chain, from the non-Indian stamping agents that import cigarettes into the State. The tax is then included in the price of cigarettes destined for nontribal member consumption until ultimately the nontribal consumer pays the tax. *See* Tax Law § 471(2); 20 N.Y.C.R.R. § 74.1.

The CIN has contended that the precollection of the tax violates its tribal sovereignty by unduly burdening its nonmember sales. Both this Court and the Second Circuit rejected this claim. As this Court recognized, "[t]he Supreme Court has repeatedly upheld state taxing schemes that impose prepayment obligations like the one at issue in this case" (*SNI* PI Decision at 21). And the Second Circuit likewise concluded that "New York's precollection scheme is materially indistinguishable from those upheld in" *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976), and *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 156 (1980) (Defendants' Mem., Exh. A at 34). Accordingly, the CIN's challenge to the precollection of the cigarette tax fails as a matter of law.

B. The Coupon and Prior Approval Systems Are Permissible Means of Allocating the Probable-Demand Amount on the Reservation.

The coupon and prior approval systems are New York's alternative mechanisms for ensuring that a quantity of tax-exempt cigarettes sufficient to meet probable demand is available to the nations or tribes and their members. Where the two systems differ is in the manner by which they allocate this tax-exempt quantity to member Indians. Under the coupon system, tribal governments may determine how the tax-exempt quantity is allocated among the nation or tribe and its reservation cigarette sellers. Under the prior approval system, the tax-exempt quantity is allocated pursuant to a market-based system without tribal governments' direct involvement.

As the Second Circuit recognized, "the main features of the amended tax law's probable demand and allocation mechanisms are substantially similar to those of the 1988 version upheld against a preemption challenge in" *Attea*, 512 U.S. at 64 (Defendants' Mem., Exh. A at 37). As both that court and this Court also held, the 2010 amendments' allocation systems properly respect tribal sovereignty and reasonably provide qualified Indians with access to tax-free cigarettes.

1. Coupon System

Under the coupon system, the Department provides each Indian nation or tribe with coupons up to the nation or tribe's quarterly allocation of its probable-demand amount. The coupon system imposes no further requirements on tribal governments. Instead, it leaves to the governing bodies of each nation or tribe the

sovereign decision of how to distribute these tax-exemption coupons to their members and businesses.

For the CIN, which operates its own cigarette retail businesses, "implementation of the coupon system would impose only a minimal burden," as this Court previously concluded (*SNI* PI Decision at 26). The Second Circuit agreed that "the coupon system does not impose allocation burdens on the Cayuga Nation because its government owns and operates the Nation's two cigarette retailers" (Defendants' Mem., Exh. A at 40).

For the Plaintiffs that principally regulate reservation retailers rather than operating their own stores (the SNI, UIN, and Mohawk Tribe), the coupon system is also not unduly burdensome because the 2010 amendments do not force the coupon system on any tribal government. Instead, as the Second Circuit found, the Plaintiffs "are free to decide whether involvement in the allocation of their respective cigarette allotments is in the members' best interests. If a tribal government chooses the coupon system, then it likewise accepts the correlated responsibility to design an effective allocation system, if necessary" (Defendants' Mem., Exh. A at 41).

The Plaintiffs' challenges to the coupon system thus fail as a matter of law.

2. Prior Approval System

Under the prior approval system, wholesalers and agents are responsible for obtaining the Department's approval before making any tax-free sale to a nation or tribe or reservation cigarette seller. *See* Tax Law § 471(5). "As written, the prior

approval system imposes no regulatory burdens on [the Plaintiffs] or their retailers. It operates entirely off-reservation and involves only wholesalers and the Department" (Defendants' Mem., Exh. A at 42).

For the CIN, which operates its own cigarette retail businesses, "the prior approval system imposes no more than a minimal burden," as this Court previously concluded (*SNI* PI Decision at 30). The CIN can simply continue its previous practice of purchasing cigarettes from wholesalers; so long as it has not exhausted its probable-demand supply in any quarter, it can buy tax-free cigarettes without doing anything beyond simply making its normal purchases.

For the remaining Plaintiffs, which principally regulate retailers, the prior approval system is equally non-intrusive. As this Court recognized, "the prior approval system can operate without [those Plaintiffs] becoming involved in allocating cigarettes" (*SNI* PI Decision at 29), since even in the absence of tribal action the "free market economy"—specifically, the interactions between stamping agents, wholesalers, and reservation retailers—will "govern the supply and distribution of the tax-free cigarettes" (*SNI* PI Decision at 31). *See Attea*, 512 U.S. at 76 (upholding New York's earlier preapproval scheme, under which, as here, the Department "preapprove[d] deliveries of tax-exempt cigarettes in order to ensure compliance with" the probable-demand limitation); *United States v. Baker*, 63 F.3d 1478, 1490 n.15 (9th Cir. 1995) (holding that nearly identical prior approval system "actually does not burden Indian tribes at all").

The Plaintiffs' complaints nonetheless assert that the prior approval system is unduly burdensome because it "*might* have the effect of denying tribal members access to tax-free cigarettes and disrupting the current functioning of [the Plaintiffs'] tobacco economies" (Defendants' Mem., Exh. A at 42). The Plaintiffs' complaints allege, for example, that the prior approval system may lead to "severe market distortions" (SNI Compl. ¶ 43; UIN Compl. ¶ 48) due to "a potential for manipulation of the system" by unscrupulous wholesalers and stamping agents (Mohawk Tribe ¶ 18). As this Court found, however, these concerns "are speculative" (*SNI* PI Decision at 33).

The Second Circuit agreed in affirming this Court's decision. In particular, the Second Circuit found that the Plaintiffs' conjectures about the potential behavior of agents and wholesalers improperly ignored the likely effect of several factors that would ameliorate and even eliminate the posited harms. First, "the broader legal framework within which wholesalers and tribal retailers operate . . . . discourages wholesalers from abusing the prior approval system" (Defendants' Mem., Exh. A at 47), since both state and federal authorities may penalize abusive behavior. *See, e.g.*, 25 C.F.R. § 140.22 ("It is the duty of the superintendent to see that the prices charged by licensed traders are fair and reasonable."); *Ashcroft v. U.S. Dep't of Interior*, 679 F.2d 196, 198 (9th Cir. 1982) (recognizing that federal government may intervene "to protect the Indians from unethical traders' exploitation of an essentially captive consumer market"). Second, "if wholesalers disregard the legal risks of monopolistic behavior, the Department has the

flexibility to modify the prior approval system to deter such behavior" (Defendants' Mem., Exh. A at 48). Third, the Plaintiffs "may foreclose the uncertainty associated with the prior approval system by entering formal agreements with the Department" (Defendants' Mem., Exh. A at 49). And finally, the Plaintiffs may act to prevent abusive practices by regulating (as they already do) both their own reservation cigarette sellers and the State-licensed agents and wholesalers that operate on the reservation (Defendants' Mem., Exh. A at 48 n.22).

In short, the Second Circuit concluded, the Plaintiffs "ultimately request that the tax law be enjoined prior to its implementation on the basis of hypothetical private behavior and the assumption that there will be no Department response. This kind of speculation cannot support a pre-enforcement injunction of a state taxation scheme that is valid as written" (Defendants' Mem., Exh. A at 49-50). The hypothetical possibility that concerns about the 2010 amendments' implementation may arise in the future does not justify keeping *this* action alive.

Finally, even assuming that the abuses postulated by the Plaintiffs actually occurred, they would result from the behavior of private parties in the free market, not "by virtue of conduct by the State" or from the language of the statute, as this Court recognized (*SNI* PI Decision at 32). In addition, the mere fact that the Plaintiffs may feel obligated to respond to such abuses "does not mean that the prior approval system is unconstitutional. It is important to remember that nothing about the prior approval system actually *mandates* the [Plaintiffs] to become involved in the allocation of the tax-exempt cigarettes. While the [Plaintiffs] may

find it *prudent* to act under the prior approval system . . . [they are] not actually *compelled* to do so" (*SNI* PI Decision at 31).

Accordingly, the Plaintiffs' claims against the prior approval system also fail as a matter of law.

POINT II

NEW YORK LAW ADEQUATELY EXEMPTS OUT-OF-STATE CIGARETTE SALES FROM TAXATION

The only other claim raised in the Plaintiffs' complaints is that the 2010 amendments prevent tax-free cigarette sales to out-of-state customers, in violation of the Interstate Commerce Clause and the Internet Tax Freedom Act (SNI Compl. ¶¶ 64-70; UIN Compl. ¶¶ 74-82). As this Court found, however, "an entirely separate provision of the New York Tax Law provides a mechanism for cigarette retailers to obtain a refund for cigarette sales made to out-of-state purchasers" (*SNI* PI Decision at 24). Specifically, Tax Law § 476 and 20 N.Y.C.R.R. §§ 76.3 and 77.1 permit any cigarette dealer, including a reservation cigarette seller, to obtain a refund of any prepaid tax for cigarettes that it sells outside of New York. "Under this refund provision, the [Plaintiffs'] retailers will be treated the same as all other cigarette retailers who ship cigarettes out of state. This refund provision represents a legitimate, nondiscriminatory state law that applies equally to reservation and non-reservation cigarette sellers operating in New York" (*SNI* PI Decision at 24). Accordingly, the Plaintiffs' claims based on out-of-state sales fail as a matter of law.

CONCLUSION

Defendants' motion for summary judgment should be granted.

Dated: Buffalo, NY
July 13, 2011

Respectfully submitted,

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EXHIBIT A

EXHIBIT A

10-4265(L)
Oneida Nation of New York v. Cuomo

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2010

(Argued: March 15, 2011 Decided: May 9, 2011)

Docket Nos. 10-4265(L); 10-4272(con); 10-4598(con); 10-4758(con); 10-4477(XAP); 10-4976(XAP); 10-4981(XAP)

ONEIDA NATION OF NEW YORK,

Plaintiff-Appellee,

SENECA NATION OF INDIANS, ST. REGIS MOHAWK TRIBE, UNKECHAUGE INDIAN NATION,

Plaintiffs-Appellees-Cross-Appellants,

–v.–

ANDREW M. CUOMO, in his official capacity as Governor of New York, THOMAS H. MATTOX, in his official capacity as Acting Commissioner of the N.Y. Department of Taxation & Finance, RICHARD ERNST, in his official capacity as Deputy Commissioner for the Office of Tax Enforcement for the N.Y. Department of Taxation & Finance,

Defendants-Appellants,

JOHN MELVILLE, in his official capacity as Acting Superintendent, New York State Police,

Defendant-Appellant-Cross-Appellee,

CAYUGA INDIAN NATION OF NEW YORK,

Intervenor-Appellant.

Before: WESLEY, CHIN, and LOHIER, *Circuit Judges*.

Consolidated and expedited appeals from three district court proceedings in which Plaintiffs sought to enjoin enforcement of 2010 amendments to New York's tax law: (1) Plaintiff Seneca Nation of Indians and Intervenor Cayuga Indian Nation of New York appeal from an order of the United States District Court for the Western District of New York (Arcara, *J.*), which denied their motion for a preliminary injunction; (2) Plaintiffs St. Regis Mohawk Tribe and Unkechauge Indian Nation appeal from an order of the United States District Court for the Western District of New York (Arcara, J.), which denied their motion for a preliminary injunction; and (3) New York State Defendants appeal from an order of the United States District Court for the Northern District of New York (Hurd, *J.*), which granted plaintiff Oneida Nation of New York's motion for a preliminary injunction.

Plaintiffs all argue that New York's amended tax law interferes with their tribal sovereignty and violates their immunity from state taxation. We conclude that none of the Plaintiffs has demonstrated a likelihood of success on the merits. Thus, we hold that the Northern District abused its discretion in granting the Oneida Nation an injunction and the Western District properly denied injunctions to the Seneca Nation, Cayuga Nation, Unkechauge Nation, and Mohawk Tribe.

The order of the Northern District is VACATED. The two orders of the Western District are AFFIRMED. All stays pending appeal are VACATED and the cases are REMANDED.

RIYAZ A. KANJI (Cory J. Albright, Zach Welcker, Kanji & Katzen, PLLC; Christopher Karns, Owen Herne, Seneca Nation of Indians Department of Justice, Salamanca, NY; Carol E. Heckman, Jeffrey A. Wadsworth, David T. Archer, Harter Secrest & Emery LLP, Buffalo, NY, *on the brief*), Kanji & Katzen, PLLC, Ann Arbor, MI, *for Plaintiff-Appellee-Cross-Appellant Seneca Nation of Indians*.

DAVID W. DEBRUIN (Scott B. Wilkens, Joshua M. Segal, Jenner & Block, LLP; Daniel French, Lee Alcott, French-Alcott, PLLC, Syracuse, NY, *on the brief*), Jenner & Block, LLP, Washington, D.C., *for Intervenor-Appellant Cayuga Indian Nation of New York.*

JAMES M. WICKS (George C. Pratt, Hillary A. Frommer, Farrell Fritz, P.C.; James F. Simermeyer, New York, NY, *on the brief*), Farrell Fritz, P.C., Uniondale, NY, *for Plaintiff-Appellee-Cross-Appellant Unkechauge Indian Nation.*

MICHAEL L. ROY (Marsha K. Schmidt, *on the brief*), Hobbs, Straus, Dean & Walker, LLP, Washington, D.C., *for Plaintiff-Appellee-Cross-Appellant St. Regis Mohawk Tribe.*

MICHAEL R. SMITH (R. Miles Clark, Zuckerman Spaeder, LLP; Peter D. Carmen, Meghan Murphy Beakman, Oneida Nation Legal Department, Verona, NY; Daniel F. Katz, Dennis M. Black, Williams & Connolly, LLP, Washington D.C., *on the brief*), Zuckerman Spaeder LLP, Washington, D.C., *for Plaintiff-Appellee Oneida Nation of New York*.

ANDREW D. BING (Eric T. Schneiderman, Attorney General of the State of New York, Barbara D. Underwood, Solicitor General, Alison J. Nathan, Special Counsel to the Solicitor General, Steven C. Wu, Assistant Solicitor General, *on the brief)*, Deputy Solicitor General, *for Defendants-Appellants Andrew M. Cuomo, Thomas H. Mattox, Richard Ernst, and Defendant-Appellant-Cross-Appellee John Melville.*

MICHAEL T. FEELEY (Lisa A. Coppola, *on the brief*), Rupp, Baase, Pfalzgraf, Cunningham & Coppola LLC, Buffalo, NY, *for Amicus Curiae Akwesasne Convenience Store Association.*

MICHAEL A. CARDOZO (Eric Proshansky, Aaron M. Bloom, William H. Miller, *on the brief*), Corporation Counsel of the City of New York, New York, NY, *for Amicus Curiae the City of New York.*

RICHARD T. SULLIVAN, Harris Beach PLLC, Buffalo, NY, *for Amicus Curiae New York Association of Convenience Stores.*

THOMAS G. JACKSON (Meagan A. Zapotocky, *on the brief*), Phillips Nizer, LLP, New York, NY, *for Amicus Curiae New York State Association of Tobacco and Candy Distributors, Inc.*[*]

WESLEY, *Circuit Judge*:

The Seneca Nation of Indians ("Seneca Nation"), Unkechauge Indian Nation ("Unkechauge Nation"), St. Regis Mohawk Tribe ("Mohawk Tribe"), Cayuga Indian Nation of New York ("Cayuga Nation"), and Oneida Nation of New York ("Oneida Nation") (collectively "Plaintiffs") seek to enjoin amendments to New York's tax law, which are designed to tax on-reservation cigarette sales to non-member purchasers. Plaintiffs argue that the amended tax law interferes with their tribal sovereignty and fails to ensure their access to tax-free cigarettes for personal use. In three separate

[*] We grant the outstanding motion of New York State Association of Tobacco and Candy Distributors, Inc. for leave to file an amicus brief. We have received and considered the brief in the disposition of this appeal.

district court proceedings, Plaintiffs moved to enjoin New York officials ("State Defendants") from implementing the amended tax law. The Western District denied the preliminary injunction motions of the Seneca and Cayuga Nations (Arcara, *J.*) as well as the Unkechauge Nation and Mohawk Tribe (Arcara, *J.*) but stayed implementation of the amended tax law pending appeal. The Northern District (Hurd, *J.*) granted the Oneida Nation's motion for a preliminary injunction. We conclude that none of the Plaintiffs has demonstrated a likelihood of success on the merits. Thus, we hold that the Northern District abused its discretion in granting the Oneida Nation a preliminary injunction. We also hold that the Western District properly denied injunctions to the Seneca Nation, Cayuga Nation, Unkechauge Nation, and Mohawk Tribe. We therefore vacate the order of the Northern District and affirm the two orders of the Western District. We vacate all stays and remand the cases.

BACKGROUND

I. New York Tax Law

New York currently imposes a $4.35 per pack excise tax on all non-exempt cigarettes sold in the State. N.Y. Tax Law § 471(1) (McKinney 2010). The consumer bears the

"ultimate incidence of and liability for the tax," *id*. § 471(2), and willful evasion of the tax is a misdemeanor, *id.* § 1814(f).[1] New York's Department of Taxation and Finance ("Department") "precollects" the tax from a limited number of state-licensed stamping agents, *see id.* § 471(2), and mandates that these agents be the only entry point for cigarettes into New York's stream of commerce, N.Y. Comp. Codes R. & Regs. tit. 20, § 74.3(a)(1)(iii) (2010). Stamping agents, often wholesalers themselves,[2] purchase tax stamps from the State and cigarettes from manufacturers. Before selling the cigarettes to other wholesalers or retailers, agents must affix a stamp to each pack of cigarettes to demonstrate payment of the tax. *Id*. § 74.3(a)(2). Agents incorporate the cost of the stamp into the pack's price and pass the cost along the distribution chain to the consumer. N.Y. Tax Law §§ 471(2),(3).

[1] "Within twenty-four hours after liability for the tax accrues, each such person shall file with the commissioner a return in such form as the commissioner may prescribe together with a remittance of the tax shown to be due thereon." N.Y. Tax Law § 471-a.

[2] Not all cigarette wholesalers are stamping agents. In describing the amended tax law, however, we use the terms interchangeably.

II. Cigarette Sales on Indian Reservations

Federal law prohibits New York from taxing cigarette sales to enrolled tribal members on their own reservations for personal use. *See Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 475–81 (1976). New York may, however, tax "[o]n-reservation cigarette sales to persons other than reservation Indians." *Dep't of Taxation & Fin. of N.Y. v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 64 (1994) (citing *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134, 160–61 (1980)). The on-reservation sale of both taxable and tax-free cigarettes and New York's limited on-reservation taxing authority complicate collection and enforcement.

In the late 1980s, the Department determined that the volume of untaxed cigarettes that reservation retailers sold "would, if consumed exclusively by tax-immune Indians, correspond to a consumption rate 20 times higher than that of the average New York resident." *Id.* at 65. A substantial number of non-Indian New Yorkers clearly purchased their cigarettes from reservation retailers without paying the tax to either the retailer or the Department. The Department estimated the tax evasion to cost New York $65 million annually. *Id*.

The Department first attempted to collect these taxes in 1988 by promulgating regulations similar to those Plaintiffs now challenge.[3] The Supreme Court upheld the 1988 regulations, and the scheme appeared ready for implementation. *See id.* at 78. The Department never implemented the regulations, however, due to additional litigation, civil unrest, and failed negotiations between the State and individual nations and tribes.[4] Consequently, the Department repealed the regulations in 1998. Despite the New York Legislature's repeated efforts to the contrary, the Department adopted a "forbearance" policy and allowed wholesalers to sell untaxed cigarettes to recognized tribes and reservation retailers without restriction.

Under the forbearance policy, non-member evasion of the cigarette tax proliferated. For example, the Unkechauge Nation has an estimated 376 enrolled members and yearly

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[3] *Cayuga Indian Nation of N.Y. v. Gould*, 14 N.Y.3d 614, 622–29, *cert. denied*, 131 S. Ct. 353 (2010), contains a political and regulatory history of New York's prior attempts to tax on-reservation cigarette sales to non-member purchasers. *See also* Note, *A Tale of Three Sovereigns: The Nebulous Boundaries of the Federal Government, New York State, and the Seneca Nation of Indians Concerning State Taxation of Indian Reservation Cigarette Sales to Non-Indians*, 79 Fordham L. Rev. 2301, 2338-40 (2011).

[4] The issues in this appeal do not turn on the distinction between the title of "nation" or "tribe." For ease of exposition, when describing the amended tax law we use "tribe" to mean "nation and/or tribe." When referring to Plaintiffs, we adhere to their titles of Nation or Tribe.

probable demand[5] of 3,240 cigarette cartons (10 packs per carton). Unkechauge retailers purchased approximately 5 million untaxed cigarette cartons from state-licensed stamping agents in 2009 and 3.5 million untaxed cartons from January through June 2010. If only Unkechauge members had consumed these cigarettes, every man, woman, and child would have smoked 364 packs per day in 2009. State Defendants present similar figures for the other Plaintiffs.[6]

The Department estimates that curbing tax evasion on reservations will generate approximately $110 million in annual tax revenue. Accordingly, New York once again seeks to collect taxes on non-member, on-reservation cigarette sales. The Department revoked its "forbearance" policy in February 2010. In June 2010, the New York Legislature amended New York Tax Law §§ 471 and 471-e, and the

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[5] As discussed in more detail below, the Department calculates each tribe's yearly probable demand based upon population statistics for each tribe and per-capita smoking statistics released by the federal government, along with consideration of evidence of past consumption. *See* N.Y. Comp. Codes R. & Regs. tit. 20, § 74.6(e).

[6] The Seneca Nation has an estimated 7,967 members and yearly probable demand of 67,440 cartons. It purchased 10 million untaxed cartons in 2009 from state-licensed distributors. It sold approximately half of those cigarettes tax-free to out-of-state purchasers. The Mohawk Tribe has an estimated 13,784 members and yearly probable demand of 116,640 cartons. It purchased over 1 million untaxed cartons in 2009. The Oneida Nation has an estimated 1,473 members and a yearly probable demand of 12,480 cartons. It purchased 1.5 million untaxed cartons in 2009. The Department did not present these figures for the Cayuga Nation.

Department adopted regulations to implement the tax on reservation sales.[7] The Department also issued a "Technical Memorandum" explaining certain aspects of the tax scheme. *See* Amendments to the Tax Law Related to Sales of Cigarettes on Indian Reservations Beginning September 1, 2010, TSB-M-10(6)M, (8)S (July 29, 2010) [hereinafter "Technical Memorandum"]. Together, the 2010 amendments, new regulations, and Technical Memorandum (collectively "amended tax law" or "amendments") create a system to collect the excise tax on cigarette sales to non-members while exempting sales to tribal members for personal use. The amendments were scheduled to take effect September 1, 2010, but enforcement has been stayed due to the Northern District's preliminary injunction and the Western District's stays pending appeal.

III. Amended Tax Law

The amended tax law requires state-licensed stamping agents (*i.e.* wholesalers) to prepay the tax and affix tax stamps on all cigarette packs, including those intended for resale to tax-exempt Indians. *See* N.Y. Tax Law § 471(2);

[7] The Seneca Nation challenged the validity of the Department's regulations under New York's Administrative Procedure Act ("SAPA"). *See Seneca Nation of Indians v. New York*, No. 2011-000714 (N.Y. Sup. Ct. Erie Cnty.). As of this time, the Seneca Nation intends to seek an injunction against implementation of the regulations based on the Department's purported failure to comply with SAPA.

N.Y. Comp. Codes R. & Regs. tit. 20, §§ 74.6(a)(2),(3). To account for tribal tax immunity, the amendments distinguish between taxable and tax-free cigarettes sold to tribes or reservation retailers. The tax applies to all cigarettes sold "on an Indian reservation to non-members of the Indian nation or tribe." N.Y. Tax Law § 471(1). Thus, when purchasing inventory of taxable cigarettes, tribes or reservation retailers must prepay the tax to wholesalers. Because the tax does not apply to cigarettes sold "to qualified Indians for their own use and consumption on their nations' or tribes' qualified reservation," *id.* § 471(1),[8] tribes or reservation retailers may purchase a limited quantity of cigarettes without prepaying the tax to wholesalers. Wholesalers, in turn, are entitled to refunds of taxes prepaid on cigarettes eventually sold tax-free. *See id.* §§ 471(5)(b), 471-e(4).

To prevent non-exempt purchasers from evading the tax, the amendments limit the quantity of untaxed cigarettes wholesalers may sell to tribes or tribal retailers. This limitation mirrors each tribe's "probable demand." *See id.* § 471-e(2)(b); N.Y. Comp. Codes R. & Regs. tit. 20, §

[8] Whether taxable or tax-free, all cigarettes must bear a tax stamp. Thus, tribal members will purchase stamped, albeit tax-free, cigarettes for personal use. N.Y. Tax Law § 471(2).

74.6(e). To calculate probable demand, the Department analyzes a tribe's population and per-capita smoking statistics. *See* N.Y. Comp. Codes R. & Regs. tit. 20, § 74.6.[9] Additionally, tribes may submit evidence of prior consumption for the Department's consideration. *Id*. In this appeal, Plaintiffs do not challenge the Department's probable demand figures.

The amendments offer two mechanisms by which tribes and reservation retailers may obtain tax-free cigarettes: (1) an "Indian tax exemption coupon system" and (2) a "prior approval" system. *See* N.Y. Tax Law § 471(1); N.Y. Comp. Codes R. & Regs. tit. 20, § 74.6(a)(4).[10]

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[9] "The annual amount of stamped untaxed packages of cigarettes will be determined using a probable demand methodology as follows: (A) the most recent U.S. Census data available on tribal populations in New York State is obtained and then increased by ten percent for each Indian nation or tribe to allow for potential undercounting in Census enumeration and for nation or tribal use and (B) each Indian nation's or tribe's adjusted population is then multiplied by average annual per capita consumption amounts, as produced annually by the federal government, for cigarettes. The estimated annual consumption amounts for each Indian nation or tribe are then prorated to quarterly periods for each of the four quarters . . . . [T]hese amounts are subject to adjustment based on evidence provided by the Indian nations or tribes as to their actual consumption amounts for these periods." N.Y. Comp. Codes R. & Regs. tit. 20, § 74.6(e)(1).

[10] The amendments also provide a third option – private agreement between an individual tribe and New York State:

> If an Indian nation or tribe enters into an agreement with the state and the legislature approves such agreement or if an Indian nation or tribe enters into an agreement with the state that is part of a stipulation and order approved by a federal court of competent jurisdiction regarding the sale and distribution of

A. Coupon System

The "recognized governing body of an Indian . . . tribe may annually elect to participate in the Indian tax exemption coupon system for that year." N.Y. Tax Law § 471-e(1)(b). No Plaintiff has elected the coupon system.[11] If a tribal governing body elects the coupon system, the Department provides the tribal government a quantity of tax exemption coupons each quarter that corresponds to the tribe's probable demand. *See id*. § 471-e(2)(a). The tribal government may use all or part of the coupons itself or distribute them to its reservation retailers. Although neither the statute nor the regulations require tribal governments to distribute coupons among private retailers, the State expressly "intend[s] that the Indian . . . tribes will retain the amount of Indian tax exemption coupons they

> cigarettes on the nation's or tribe's qualified reservation, the terms of such agreement shall take precedence over the provisions of this article and exempt sales to non-members of the tribe or nation and non-Indians by such nation from such taxes to the extent that such taxes are specifically referred to in the agreement, and the sale or distribution, including transportation, of any cigarettes to the nation's or tribe's qualified reservation shall be in accordance with the provisions of such agreement.

N.Y. Tax Law § 471(6). No agreements have been reached.

[11] Typically, a tribal government must elect to participate in the coupon system by August 15. N.Y. Comp. Codes R. & Regs. tit. 20, § 74.6(b)(1). The Department, however, may allow late election, which it has done here due to the litigation delays. *See id.* § 74.6(b)(1)(ii).

need each quarter . . . , and will distribute the remaining Indian tax exemption coupons to reservation cigarette sellers on such . . . tribe's qualified reservations." *Id.* Tribes or reservation retailers then exchange the coupons with wholesalers to purchase cigarettes without paying the cost of the excise tax. *Id*. Tribal members may purchase these cigarettes tax-free. Wholesalers, in turn, submit the coupons to the Department for a refund of prepaid taxes. *Id.* § 471-e(4).

B. Prior Approval System

Where a tribal government does not elect to participate in the coupon system, the prior approval system governs by default. *Id*. § 471(5)(a). Under this system, wholesalers must obtain the Department's approval *before* selling cigarettes tax-free to a tribal government or retailer. *Id.* § 471(5)(b). Wholesalers who sell cigarettes to a tribe or reservation retailer tax-free without the Department's prior approval violate the "terms of Article 20 of the Tax Law," N.Y. Comp. Codes R. & Regs. tit. 20, § 74.6(d)(3), and face sanctions, *see* N.Y. Tax Law § 484(5). Moreover, without prior approval and proof of a legitimate tax-free sale, wholesalers cannot recoup prepaid taxes.

Both the statute and regulations authorize the

Department to determine the "manner and form" by which it grants prior approval. *See* N.Y. Tax Law § 471(5)(b); N.Y. Comp. Codes R. & Regs. tit. 20, § 74.6(d)(3). The Department has provided a "general description" of the prior approval system's intended operation. *See* Technical Memorandum 5.[12] According to the Department, a website will display each tribe's quarterly tax-exempt allotment. The Department contemplates that "[u]pon receipt of a purchase request from a . . . tribe or reservation cigarette seller," a wholesaler will sign into the website, check the tribe's available allotment, and request approval to sell all or part of that allotment. *Id*. at 5–6. Once the request is submitted, "the remaining quantity available [on the website] will be reduced." *Id.* at 6. The wholesaler then has forty-eight hours from the time of prior approval to sell the tax-exempt quantity to the applicable tribe or retailer and confirm the sale with the Department. *Id.* The Department expedites refunds for confirmed tax-exempt sales. N.Y. Tax Law § 471(5)(b). If the wholesaler does not

[12] The Technical Memorandum contains the following statement: "A [Technical Memorandum] is an informational statement of changes to the law, regulations, or Department policies. It is accurate on the date issued. Subsequent changes in the law or regulations, judicial decisions, Tax Appeals Tribunal decisions, or changes in Department policies could affect the validity of the information presented in a [Technical Memorandum]." Technical Memorandum 8.

confirm the sale within forty-eight hours, then "the balance of the quantity not reported as sold will be added back to the quantity available for Indian tax-exempt sales." Technical Memorandum 6. The website may be modified by the Department in response to evidence that the prior approval system operates to prevent tribal members from receiving an adequate supply of tax-free cigarettes for personal and tribal use.

IV. Plaintiffs' Tobacco Economies

The Seneca Nation has licensed approximately 172 tobacco retailers and twenty-eight wholesalers. Seneca members own and operate the wholesale and retail entities. The Seneca Nation's government regulates its private tobacco economy under the tribal Import-Export Law and accompanying regulations. It assesses a $0.75 per carton tax on all cigarettes imported onto Seneca property.

The Unkechauge Nation has licensed approximately twenty-five cigarette retailers. Unkechauge members own and operate the retail entities. The Unkechauge Nation's governing Tribal Council regulates its tobacco economy "through a strict licensing regime and tribal resolutions." Unkechauge Br. 8. The Council licenses member retailers and approves which wholesalers may sell cigarettes to Unkechauge

retailers. Under this regime, the "[Unkechauge] Nation purchases cigarettes from only two State licensed wholesalers, who are themselves licensed by the Tribal Council." *Id.* Additionally, under tribal resolutions, the Tribal Council limits the number of cartons each retailer may purchase from wholesalers, fixes the price of tobacco products, and levies a $1 per carton fee on retail sales. *Id.* at 9.

The Mohawk Tribe has licensed approximately thirty cigarette retailers. Mohawk members own and operate the retail entities. The Mohawk Tribe imposes a tobacco price floor and licenses tribal wholesalers and retailers. Non-tribal entities seeking to do business with Mohawk entities must obtain a "Tribal Vendors Permit" from the Tribal Council. The Council also assesses a "Tribal Tobacco Fee" on all tobacco products.

Unlike the Seneca Nation, Unkechauge Nation, and Mohawk Tribe, the governing bodies of the Cayuga and Oneida Nations centralize tobacco retail within their respective territories. Cayuga and Oneida members do not own independent stores, and the tribal governments do not tax or regulate their tobacco economies. The Cayuga Nation owns and operates two retail stores that sell cigarettes to both

members and non-members. The record does not reflect the number of retail stores the Oneida Nation operates. The Oneida Nation indicates, however, that it keeps 80,000 cigarette cartons in inventory at nearly all times for sale to non-member purchasers from Oneida-owned stores.

V. Procedural Posture

This consolidated appeal arises from three separate district court proceedings: (1) Seneca Nation and Cayuga Nation in the Western District, *see Seneca Nation of Indians v. Paterson*, No. 10-CV-687A, 2010 WL 4027796 (W.D.N.Y. Oct. 14, 2010) (Arcara, *J.*); (2) Unkechauge Nation and Mohawk Tribe in the Western District, *see Unkechauge Indian Nation v. Paterson*, Nos. 10-CV-711A, 10-CV-811A, 2010 WL 4486565 (W.D.N.Y. Nov. 9, 2010) (Arcara, *J.*); and (3) Oneida Nation in the Northern District, *see Oneida Nation of N.Y. v. Paterson*, No. 6:10-CV-1071, 2010 WL 4053080 (N.D.N.Y Oct. 14, 2010) (Hurd, *J.*).

In their respective suits, all Plaintiffs moved for preliminary injunctions and raised similar arguments. The Western District denied preliminary injunctions in both proceedings, concluding that the Seneca Nation, Cayuga Nation, Unkechauge Nation, and Mohawk Tribe each failed to demonstrate a likelihood of success on the merits. *See*

Seneca Nation, 2010 WL 4027796, at *9; *Unkechauge Indian Nation*, 2010 WL 4486565, at *6. However, the court granted stays in both proceedings pending this interlocutory appeal. State Defendants appealed both stays, and the Nations and Tribe cross-appealed the denial of the injunctions. By contrast, the Northern District granted the Oneida Nation's motion for a preliminary injunction. *Oneida Nation*, 2010 WL 4053080, at *8–9. State Defendants appealed.[13]

On appeal, the Oneida, Cayuga, and Unkechauge Nations argue that the precollection mechanism either imposes an impermissible direct tax on tribal retailers, or alternatively, imposes an undue and unnecessary economic burden on tribal retailers. Additionally, all Plaintiffs argue that the amended tax law's dual allocation mechanisms — the coupon and prior approval systems — interfere with their right of self-government, unduly burden tribal retailers, and fail to adequately ensure members' access to tax-free cigarettes. At this stage in the litigation, Plaintiffs have not demonstrated that they are likely to

[13] A motions panel of this Court consolidated and expedited the appeals. It also denied State Defendants' motion to stay the Northern District's preliminary injunction and to vacate the Western District's stays pending appeal.

prevail on any of these arguments.[14]

DISCUSSION

I. Standard of Review

The fundamental question presented in these cases is whether Plaintiffs presented evidence that would justify a preliminary injunction prohibiting enforcement of the amended tax law. We review a district court's decision to grant or deny a preliminary injunction for abuse of discretion. *SEC v. Dorozhko*, 574 F.3d 42, 45 (2d Cir. 2009). An abuse of discretion occurs if the district court "(1) based its ruling on an erroneous view of the law, (2) made a clearly erroneous assessment of the evidence, or (3) rendered a decision that cannot be located within the range of permissible decisions." *Lynch v. City of New York*, 589 F.3d 94, 99 (2d Cir. 2009) (internal quotation marks omitted). Under abuse of discretion review, the factual

[14] The Mohawk Tribe abandoned the argument raised below that the amended tax law violates Equal Protection. Likewise, the Seneca Nation has abandoned its argument that the amended tax law is unduly burdensome because it fails to account for reservation sales to out-of-state purchasers. The Unkechauge Nation raises five arguments not made by the other Plaintiffs: (1) the prior approval system violates the Indian Trader Statutes; (2) the precollection mechanism violates "the Takings Clause of the Fifth and Fourteenth Amendments, and the New York State Constitution;" (3) the Western District abused its discretion by denying a preliminary injunction without holding an evidentiary hearing; (4) the Western District abused its discretion in denying a motion for mediation; and (5) this Court should certify certain questions to the New York Court of Appeals. We have considered each of these arguments and find them to be without merit.

findings and legal conclusions underlying the district court's decision are "evaluated under the clearly erroneous and *de novo* standards, respectively." *Garcia v. Yonkers Sch. Dist.*, 561 F.3d 97, 103 (2d Cir. 2009) (citation and brackets omitted).

Generally, a party seeking a preliminary injunction must establish "(1) irreparable harm and (2) either (a) a likelihood of success on the merits, or (b) sufficiently serious questions going to the merits of its claims to make them fair ground for litigation, plus a balance of the hardships tipping decidedly in favor of the moving party." *Monserrate v. N.Y. State Senate*, 599 F.3d 148, 154 (2d Cir. 2010) (quoting *Lynch*, 589 F.3d at 98). Additionally, the moving party must show that a preliminary injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, __, 129 S. Ct. 365, 374 (2008).

A party seeking to enjoin "governmental action taken in the public interest pursuant to a statutory or regulatory scheme" cannot rely on the "fair ground for litigation" alternative even if that party seeks to vindicate a sovereign or public interest. *Monserrate,* 599 F.3d at 154 (internal quotation marks omitted). Thus, to succeed in the present appeal, Plaintiffs must establish a likelihood of

success on the merits. Because we conclude that Plaintiffs have failed to satisfy this burden, there is no need to address the other prongs of the analysis. *See id.* at 154 & n.3.

II. Likelihood of Success on the Merits

A. Applicable Law

The Supreme Court has long recognized that Indian tribes possess "attributes of sovereignty over both their members and their territory." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980) (internal quotation marks omitted). The "semi-autonomous status of Indians living on tribal reservations," *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 165 (1973), vests tribes and their enrolled members with the federally protected right "to make their own laws and be ruled by them," *Williams v. Lee*, 358 U.S. 217, 220 (1959). Among other things, tribes have authority to prescribe the conduct of their members, *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332 (1983), create economic policies, and tax economic activities within their territories, *see, e.g., Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137–39 (1982).

"The Constitution vests the Federal Government with exclusive authority over relations with Indian Tribes."

Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 764 (1985) (citing U.S. Const. art. I, § 8, cl. 3). "As a corollary of this authority, and in recognition of the sovereignty retained by Indian tribes . . . , Indian tribes and individuals generally are exempt from state taxation within their own territory." *Id*. Consequently, absent Congressional authorization, "[s]tates are categorically barred from placing the legal incidence of an excise tax *on a tribe or on tribal members* for sales made *inside Indian country*." *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 101-02 (2005) (internal quotation marks and citation omitted).

The situation is different, however, when a state seeks to tax non-members who engage in economic transactions on Indian reservations. *See Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 459 (1995). Here, courts must subject a state tax scheme over on-reservation, non-member activities to "a particularized inquiry into the nature of the state, federal, and tribal interests at stake." *Bracker*, 448 U.S. at 145. Eschewing "mechanical or absolute conceptions of state or tribal sovereignty," this interests-balancing analysis instead "determine[s] whether, in the specific context, the exercise of state authority would

violate federal law." *Id.*

In the context of cigarette sales, the balancing of state and tribal interests is informed by two judgments that are well-established in the caselaw. First, non-Indian purchasers are consistently willing and able to evade state cigarette taxes by purchasing their cigarettes from reservation retailers. *Cf. Colville*, 447 U.S. at 145. Second, the revenue tribes and retailers gain from cigarette sales to non-members derives from the marketing of a tax exemption, not from value "generated on the reservations by activities in which the [t]ribes have a significant interest." *Id.* at 155.

In recognition of the foregoing, the Supreme Court has stated that "principles of federal Indian law, whether stated in terms of pre-emption, tribal self-government, or otherwise, [do not] authorize Indian tribes . . . to market an exemption from state taxation to persons who would normally do their business elsewhere." *Id.* at 155. That is so because "[s]tates have a valid interest in ensuring compliance with lawful taxes that might easily be evaded through purchases of tax-exempt cigarettes on reservations; that interest outweighs tribes' modest interest in offering a tax exemption to customers who would ordinarily shop

elsewhere." *Milhelm Attea*, 512 U.S. at 73. A state's interest in ensuring the collection of taxes on cigarette sales to non-Indians continues to outweigh a tribe's countervailing interests even when collection of an excise tax "seriously disadvantages or eliminates the Indian retailer's [cigarette] business with non-Indians." *Colville*, 447 U.S. at 151.

Furthermore, tribes do not oust a state's taxing authority merely by collecting tribal taxes on reservation cigarette sales and regulating their cigarette economies. *See id*. at 158–59. A state "does not interfere with the [t]ribes' power to regulate tribal enterprises" simply by imposing its tax on sales to non-members. *Id.* at 159. In fact, the balance of interests favors state taxation of cigarette sales to non-members even where collection of the state tax deprives tribes of their own tax revenues. *Id.* at 156.

In light of this balance of interests, the Supreme Court has determined that to enforce valid state taxation of on-reservation cigarette sales, states may impose "on reservation retailers minimal burdens reasonably tailored to the collection of valid taxes from non-Indians." *Milhelm Attea*, 512 U.S. at 73. As a result, a party challenging a

state cigarette tax must establish that a state's collection mechanism is unduly burdensome and not reasonably tailored to collection of the taxes. *See Colville*, 447 U.S. at 160. On several occasions, the Supreme Court has found collection mechanisms similar to those at issue in this appeal to be consistent with principles of federal Indian law.

1. Law Regarding Precollection of the Tax

In *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, the Court upheld a Montana tax law that required the cigarette seller to prepay the tax and add the tax to the cigarette's retail price. 425 U.S. 463, 483 (1976); *see also Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 392 F. Supp. 1297, 1308 (D. Mont. 1974) (describing the tax "as an advance payment [which] shall be added to the price of the cigarettes and recovered from the ultimate consumer or user.") (internal quotation marks omitted). There, like here, the tribe argued that precollection of the tax infringed tribal sovereignty because the tribal retailer "has been taxed, and . . . has suffered a measurable out-of-pocket loss." *Moe*, 425 U.S. at 481. The Court rejected this argument because the legal incidence of the tax fell upon non-member purchasers. *Id.* at 481–82. The Court reasoned that

prepayment was "not, strictly speaking, a tax at all," but rather constituted the "simpl[e]" requirement that "the Indian proprietor . . . add the tax to the sales price and thereby aid the State's collection" effort. *Id*. at 483. Consequently, the Court held that Montana's "requirement that the Indian tribal seller collect a tax validly imposed on non-Indians is a minimal burden designed to avoid the likelihood that in its absence non-Indians purchasing from the tribal seller will avoid payment of a concededly lawful tax." *Id*.

Similarly, in *Colville,* the Court upheld a Washington precollection scheme that required retailers to either purchase prestamped cigarettes from wholesalers or purchase tax stamps directly from the state and affix them to cigarette packs before sale. *Colville*, 447 U.S. at 141–42; *see also Confederated Tribes of Colville Indian Reservation v. Washington*, 446 F. Supp. 1339, 1346 (E.D. Wash. 1978) (describing the precollection mechanism). As in *Moe,* the Court characterized precollection as a "simple collection burden imposed . . . on tribal smokeshops" and held that Washington "may validly require the tribal smokeshops to affix tax stamps purchased from the State to individual packages of cigarettes prior to the time of sale to

nonmembers of the Tribe." *Colville*, 447 U.S. at 159.[15]

2. Law Regarding Allocation of Tax-Free Cigarettes

In *Milhelm Attea*, the Supreme Court analyzed the 1988 version of New York's tax law. *Milhelm Attea*, 512 U.S. at 78. As the Western District correctly noted, the general features of the 1988 version – precollection, probable demand limitations, allocation through the use of coupons and prior approval – were similar to the main features of the amended tax law. *See Seneca Nation*, 2010 WL 4027796, at *9–10 & *14 (comparing the amended tax law and 1988 version). In *Milhelm Attea*, wholesalers that were federally licensed to sell cigarettes to reservation Indians challenged the 1988 regulations as being preempted by the Indian Trader Statutes. Under the Indian Trader Statutes, the Commissioner of Indian Affairs has sole authority to "make such rules and regulations . . . specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians." 25 U.S.C. § 261. The wholesalers argued that the federal government's authority to regulate Indian Traders precluded New York from both

[15] Though less relevant to the present case, *Colville* also upheld Washington's requirement that tribal retailers keep extensive records concerning both taxable and nontaxable transactions. *Colville*, 447 U.S. at 159–60.

limiting the quantity of tax-free cigarettes wholesalers could sell to reservation retailers and requiring wholesalers to obtain approval before making tax-free sales. The Court disagreed.

Relying on *Moe* and *Colville*, the Court recognized New York's valid interest "in ensuring compliance with lawful taxes that might easily be evaded through purchases of tax-exempt cigarettes on reservations," and concluded that the "balance of state, federal, and tribal interests" left appreciable room for state regulation of on-reservation cigarettes sales to non-member purchasers. *Milhelm Attea*, 512 U.S. at 73. Congress enacted the Indian Trader Statutes to protect reservation Indians who do business with non-Indians. Thus, the Court reasoned, it would be "anomalous" to forbid states from imposing on non-Indian wholesalers the same tax collection and bookkeeping burdens that, under *Moe* and *Colville*, states could validly impose on reservation retailers. *Id*. at 74. "Just as tribal sovereignty does not completely preclude States from enlisting tribal retailers to assist enforcement of valid state taxes, the Indian Trader Statutes do not bar the States from imposing reasonable regulatory burdens upon Indian traders for the same purpose." *Id*.

The Court also rejected the argument that the tax-free allotments and prior approval requirement imposed excessive regulatory burdens on wholesalers or Indian trading. Specifically, the Court held that the probable demand mechanism validly related to "New York's decision to stanch the illicit flow of tax-free cigarettes early in the distribution stream" and constituted a "reasonably necessary method of preventing fraudulent transactions, . . . without unnecessarily intruding on core tribal interests." *Id*. at 75 (internal quotation marks omitted). The Court observed that "[i]f the Department's 'probable demand' calculations are adequate, tax-immune Indians will not have to pay New York cigarette taxes . . . ." *Id*. Finally, it held that "[t]he associated requirement that the Department preapprove deliveries of tax-exempt cigarettes in order to ensure compliance with the quotas does not render the scheme facially invalid." *Id*. at 76.

Importantly, in analyzing the 1988 regulations, the Court construed the wholesalers' preemption challenge as "essentially a facial one." *Id.* at 69. Accordingly, the Court declined to "rest [its] decision on consequences that, while possible, are by no means predictable," and limited its analysis "to those alleged defects that inhere in the

regulations as written." *Id.* Regarding the probable demand mechanism, for example, the Court noted that "[w]hile the possibility of an inadequate quota may provide the basis for a future challenge to the *application* of the regulations, [it was] unwilling to assume in the absence of any such showing by respondents, that New York will underestimate the legitimate demand for tax-free cigarettes." *Id.* at 75–76. The prior approval requirement, the Court observed, "should not prove unduly burdensome absent wrongful withholding or delay of approval — problems that can be addressed if and when they arise." *Id*. at 76. The Court added that "[a]greements between the Department and individual tribes might avoid or resolve problems that are now purely hypothetical." *Id*. at 77.

B. Analysis

In the present case, Plaintiffs challenge the amended tax law's precollection requirement as well as the amended tax law's dual mechanisms for allocating each tribe's limited quantity of tax-free cigarettes.

1. Precollection of the Tax

Under the amended tax law's precollection scheme, the wholesale price of taxable cigarettes includes the cost of the tax. Tribal retailers, like other New York retailers,

pay the tax to wholesalers when purchasing inventory and recoup the tax by adding it to the retail price. The Oneida and Cayuga Nations argue that this prepayment obligation is, in effect, a categorically impermissible direct tax on tribal retailers. We disagree.

As we have already explained, it is only the *legal* burden of a tax — as opposed to its practical economic burden — that a state is categorically barred by federal law from imposing on tribes or tribal members. *See Chickasaw Nation*, 515 U.S. at 460 (rejecting "economic reality" as an unworkable measure of the scope of state taxation authority). Focusing on the economic impact of precollection, the Northern District concluded that the amended tax law "in effect [impermissibly] requires the Oneida Nation to pay the tax." *Oneida Nation*, 2010 WL 4053080, at *8. This finding is not relevant, however, because the express language of New York's tax law places the legal incidence on the consumer, not the wholesaler or retailer. N.Y. Tax Law § 471(2) ("It is intended that the ultimate incidence of and liability for the tax shall be upon the consumer."). In fact, the statute contains mandatory "pass-through provisions" that require wholesalers and retailers to pass on the tax to the consumer. *Id.*

("[A]ny agent or dealer who shall pay the tax to the commissioner shall collect the tax from the purchaser or consumer."); *id*. § 471(3) ("The amount of taxes advanced and paid by the agent . . . shall be added to and collected as part of the sales price of the cigarettes."). The Supreme Court has "suggested that such 'dispositive language' from the state legislature is determinative of who bears the legal incidence of a state excise tax." *Wagnon*, 546 U.S. at 102 (citing *Chickasaw Nation*, 515 U.S. at 461).[16] The statement of legislative intent and the mandatory pass-through provisions establish that the legal incidence of New York's tax falls on non-Indian consumers. Accordingly, whatever its economic impact, the tax is not categorically barred.

The Oneida, Cayuga, and Unkechauge Nations argue that precollection, if not categorically barred, nonetheless places an undue and unnecessary economic burden on tribal retailers. For example, the Oneida Nation estimates that upon implementation of the precollection mechanism, it will

[16] "In the absence of such dispositive language, the [legal incidence] question is one of 'fair interpretation of the taxing statute as written and applied.'" *Chickasaw Nation*, 515 U.S. at 461 (quoting *Cal. Bd. of Equalization v. Chemehuevi Tribe*, 474 U.S. 9, 11 (1985) (per curiam)). Here, the "fair interpretation" analysis is unnecessary.

need to front an additional $3.5 million per year to prepay the tax and spend over $200,000 per year to finance that increased cost in order to maintain its current cigarette inventory levels (approximately 80,000 cartons per year at all times). The Northern District concluded that these financing costs imposed an impermissible burden on tribal sovereignty. We disagree for two reasons.

First, the precollection mechanism will undoubtedly impose an increased economic cost on tribal retailers who continue to market taxable cigarettes to non-member purchasers. But those costs result from the retailer's decision to participate in the taxable cigarette market, a market in which Plaintiffs and their members have "no vested right to a certain volume of sales to non-Indians, or indeed to any such sales at all." *Colville*, 447 U.S. at 151 n.27.

Second, New York's precollection scheme is materially indistinguishable from those upheld in *Moe* and *Colville*. Here, State Defendants have presented evidence of non-member tax evasion occurring through on-reservation cigarette purchases. Thus, as in *Moe* and *Colville*, the amended tax law's precollection mechanism constitutes a minimal tax collection burden that is "reasonably necessary" to prevent

"wholesale evasion of [New York's] own valid taxes without unnecessarily intruding on core tribal interests." *Milhelm Attea*, 512 U.S. at 75 (brackets in original) (quoting *Colville*, 447 U.S. at 160, 162).

The Cayuga, Oneida, and Unkechauge Nations seek to distinguish *Moe* and *Colville* by pointing out that when those cases were decided Washington imposed a $1.60 per carton tax, *see Colville*, 447 U.S. at 141, and Montana a $1.20 per carton tax, *see Moe*, 392 F. Supp. at 1313, whereas New York currently imposes a $43.50 per carton tax. The three Nations argue, and the Northern District agreed, that the significantly greater economic burden imposed by New York's tax distinguishes the precollection schemes upheld in *Moe* and *Colville*, and renders New York's unduly burdensome. Contrary to the Nations' arguments, it was the demonstrated need to prevent tax evasion by non-Indian purchasers, not the low cost of the state tax, that justified precollection in *Moe* and *Colville*. That justification remains valid even where the excise tax is high; the higher the tax rate, the greater the economic incentive to avoid it.

The Nations also contend that precollection is not "reasonably tailored" to New York's tax collection interest

because there are other less burdensome alternatives. The Northern District agreed with the Oneida Nation's argument that precollection is unnecessary to enforce payment of the cigarette tax because New York Tax Law § 471-a already requires each individual cigarette purchaser to remit the tax to the State within twenty-four hours of when liability for the tax accrued. *See Oneida Nation*, 2010 WL 4053080, at *9 (citing N.Y. Tax Law § 471-a). However, the New York legislature has reasonably determined that collection of the cigarette excise tax through efforts directed at individual buyers is impractical, and that, if it is to be collected at all, the tax must be precollected when cigarettes enter the stream of commerce. The Oneida Nation, for example, purchased 1.5 million untaxed cartons of cigarettes in 2009, despite having only 1,473 members. The legislature was entitled to conclude on the basis of this and other evidence that collection of the tax through efforts directed at individual purchasers is ineffective and unworkable. *Cf. Milhelm Attea*, 512 U.S. at 75 (upholding "New York's decision to stanch the illicit flow of tax-free cigarettes early in the distribution stream as a reasonably necessary method of preventing fraudulent transactions.") (internal

quotation marks omitted).[17]

Therefore, the Oneida, Cayuga, and Unkechauge Nations have failed to demonstrate a likelihood of success on the merits of their arguments against precollection of the tax.

2. Allocation of Tax-Free Cigarettes

Plaintiffs argue that the amended tax law's dual allocation mechanisms — the coupon and prior approval systems — fail to adequately ensure members' access to tax-free cigarettes, unduly burden tribal retailers, and threaten tribal self-government.

a. Applicability of *Milhelm Attea*

Initially, we reiterate that the main features of the amended tax law's probable demand and allocation mechanisms are substantially similar to those of the 1988 version upheld against a preemption challenge in *Milhelm Attea*. Like the 1988 version, the amended tax law limits the tax-free cigarettes that wholesalers may sell according to each

[17] The three Nations cite other examples of plausibly less burdensome collection mechanisms. For example, they contend that tribal retailers could obtain sufficient cash flow to meet future prior approval payments if the State waived precollection for the first year. Whatever the practical merit of their suggestions, states are not required to adopt the least burdensome collection mechanism imaginable. Provided the State's mechanism is *reasonably* tailored to its collection effort — and here the Nations have not demonstrated the contrary — the State's chosen mechanism does not infringe tribal sovereignty merely because there are conceivably less burdensome alternatives.

tribe's probable demand. New York's legitimate interest in avoiding tax evasion by non-Indian consumers justifies these probable demand limitations. *See Milhelm Attea*, 512 U.S. at 75. Further, like in the 1988 version, through the alternative coupon and prior approval systems, the State meets its obligation to make available to tribal members a tax-free quantity of cigarettes sufficient to "satisfy the legitimate demands of those reservation Indians who smoke[.]" *Id.* at 69. Thus, under the reasoning of *Milhelm Attea*, the main features of the amended tax law's quota and allocation mechanisms, as written, do not unduly burden tribal retailers or infringe tribal self-government.

In an effort to distinguish *Milhelm Attea*, Plaintiffs argue that its rationale applies only to preemption challenges, whereas the present dispute concerns tribal sovereignty. They note that *Milhelm Attea* expressly declined to "assess for all purposes each feature of New York's tax enforcement scheme that might affect tribal self-government or federal authority over Indian affairs." *Id.* at 69.

Contrary to Plaintiffs' argument, *Milhelm Attea's* reasoning is applicable here because federal preemption over

the regulation of Indian tribes is closely related to federal recognition and protection of tribal sovereignty. Preemption and tribal sovereignty are two "independent but related barriers to the assertion of state regulatory authority over tribal reservations and members." *Bracker*, 448 U.S. at 142. "[P]rinciples of federal Indian law, whether stated in terms of preemption, tribal self-government, or otherwise," *Colville*, 447 U.S. at 155, ultimately measure the scope of a state's regulatory authority through "a particularized inquiry into the nature of the state, federal, and tribal interests at stake," *Bracker*, 448 U.S. at 145.

Indeed, *Milhelm Attea's* reasoning demonstrates the relationship between the preemption and tribal sovereignty analyses within federal Indian law. The Court stated that "[a]lthough *Moe* and *Colville* dealt most directly with claims of interference with tribal sovereignty, the reasoning of those decisions requires rejection of the submission that 25 U.S.C. § 261 bars any and all state-imposed burdens on Indian traders." *Milhelm Attea*, 512 U.S. at 74. Accordingly, *Milhelm Attea's* analysis is relevant to the issues in this appeal, and to the extent the general

features of the amended tax law's quota and allocation schemes mirror those in the 1988 version, *Milhelm Attea* undermines the likelihood of Plaintiffs' success on this pre-enforcement challenge to the amended tax law's validity.

b. Coupon System

The Cayuga Nation, Seneca Nation, Unkechauge Nation, and Mohawk Tribe argue that the coupon system interferes with their tribal self-rule because it would require tribal governments to either retain coupons for distribution by the government or allocate coupons among reservation retailers.[18] We agree with the Western District that the coupon system does not impose allocation burdens on the Cayuga Nation because its government owns and operates the Nation's two cigarette retailers. The Nation may elect the coupon system, use the coupons to purchase tax-free inventory, and sell that inventory to members from its

[18] *Milhelm Attea* does not specifically bear on our analysis of the amended tax law's coupon system because the present coupon system functions differently than it did in the 1988 version. Under the 1988 version, the tax-exempt coupons and prior approval requirement were not alternative systems, but rather, functioned together. The Department would approve every tax-exempt sale *and* distribute coupons directly to reservation retailers, "entitling them to their monthly allotment of tax-exempt cigarettes." *Milhelm Attea*, 512 U.S. at 66. Under the amended tax law, by contrast, the coupon system and prior approval system operate independently. Moreover, if a tribe elects the coupon system, the Department distributes tax-exempt coupons to tribal governments, not reservation retailers.

stores. Therefore, the Cayuga Nation is unlikely to prevail on the merits of its argument that the coupon system infringes its right of self-government.

The Seneca Nation, Unkechauge Nation, and Mohawk Tribe, which have regulated, market-based tobacco economies, argue that under the coupon system, tribal governments must distribute a limited number of coupons among their member-owned and -operated reservation retailers. They argue that creation of a tribal allocation system would involve political decisions and require the enactment and enforcement of new tribal regulations. They contend that because the coupon system would require these governmental actions, it interferes with their right of self-rule. Because the coupon system is optional, we disagree.

Consistent with the right to "make their own laws and be ruled by them," *Williams*, 358 U.S. at 220, the Seneca, Unkechauge, and Mohawk governments are free to decide whether involvement in the allocation of their respective cigarette allotments is in the members' best interests. If a tribal government chooses the coupon system, then it likewise accepts the correlated responsibility to design an effective allocation system, if necessary. New York has not

foisted that requirement upon the tribal government.

c. Prior Approval System

As written, the prior approval system imposes no regulatory burdens on Plaintiffs or their retailers. It operates entirely off-reservation and involves only wholesalers and the Department. If prior approval does not unduly burden federally licensed Indian traders by requiring them to obtain the Department's approval before making tax-free sales, *see Milhelm Attea*, 512 U.S. at 75–76, this same mechanism certainly does not burden tribes or tribal retailers that play no role in the prior approval system whatsoever, *see United States v. Baker*, 63 F.3d 1478, 1489 (9th Cir. 1995) (holding that Washington's prior approval scheme did not impermissibly burden tribal sovereignty because the "entire regulatory program [was] accomplished off-reservation").

Plaintiffs vigorously argue, however, that the prior approval system *might* have the effect of denying tribal members access to tax-free cigarettes and disrupting the current functioning of Plaintiffs' tobacco economies. Specifically, Plaintiffs point out that under the 1988 regulations, prior approval was "based upon evidence of

valid purchase orders received" by the wholesaler and presented to the Department. *See Milhelm Attea*, 512 U.S. at 66 (quoting N.Y. Comp. Codes R. & Regs. tit. 20, §§ 336.7(d)(1), (d)(2)(ii) (1992) (repealed)). The amended tax law does not contain this purchase order requirement.

Plaintiffs contend that without this requirement, any state-licensed wholesaler might preemptively lock up a tribe's entire quarterly allotment. Although approval automatically expires after forty-eight hours without confirmation of the sale, Plaintiffs predict that the same wholesaler might immediately re-request prior approval and do so indefinitely. Thus, a wholesaler could leverage this forty-eight hour long monopoly position to charge premium prices, force tribal retailers to purchase exclusively from that wholesaler, or sell exclusively to favored tribal retailers. Plaintiffs contend that a market-dominant wholesaler could ultimately deprive tribal members of access to tax-free cigarettes and disrupt their tobacco economies. In response, tribal governments would either have to enact new tribal laws to police against monopolistic wholesalers or elect the coupon system. Plaintiffs view both situations as interfering with their rights of self-government.

To support its view, the Seneca Nation submitted an affidavit from Peter Day, a state-licensed wholesaler and federally-licensed Indian Trader.[19] Day stated that upon implementation of the tax law he "intends to purchase the entire tax-exempt allocation for each qualified Indian reservation unless it has already been acquired by another agent and that quantity will be made available only to my customers." He further stated that given the limited quantity and high demand for tax-exempt cigarettes, "tribal members can expect to pay higher prices" for those cigarettes.

The tax law does not explicitly prohibit a single wholesaler from obtaining approval over a tribe's entire allotment, and the regulations do not explicitly prohibit a wholesaler from selling that entire allotment to only one retailer. The Western District concluded that "there is a

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[19] Prior to enactment of the amended tax law, Peter Day, along with an individual member of the Seneca Nation, sought to enjoin the State from collecting cigarette taxes on Indian reservations under the tax law regime currently in effect at that time. *See Day Wholesale, Inc. v. New York*, No. 2006/7668 (N.Y. Sup. Ct. Erie Cnty.). Erie County Supreme Court granted two preliminary injunctions, the first of which was affirmed by the Appellate Division. *See Day Wholesale, Inc. v. New York*, 51 A.D.3d 383 (4th Dep't 2008). Following enactment of the amended tax law, the State successfully moved to vacate the two *Day Wholesale* preliminary injunctions. *See Day Wholesale, Inc.*, No. 2006/7668 (N.Y. Sup. Ct. Erie Cnty., Aug. 31, 2010). On August 31, 2010, plaintiffs, joined by intervenor Seneca Nation, appealed to the Appellate Division, Fourth Department. That appeal remains pending.

very realistic possibility that the scenario presaged by Day will occur." *Seneca Nation*, 2010 WL 4027796, at *16. Though without the benefit of Day's affidavit, the Northern District likewise concluded that the prior approval system is "ripe for manipulation by wholesalers, and actually incentivizes wholesalers" to monopolize the Oneida Nation's quota. *Oneida Nation*, 2010 WL 4053080, at *9.

Plaintiffs, particularly the Seneca Nation, argue that they have demonstrated significant implementation problems that will plague the prior approval system. They claim that because the problems are specific to each tribe's distinct tobacco economy, they have established that they are likely to prevail on the "as-applied" challenges that the Court in *Milhelm Attea* left for "some future proceeding." *Milhelm Attea*, 512 U.S. at 77. Again we disagree.

Even if we accept, which we do not, that Plaintiffs have properly classified their challenges as "as-applied,"[20]

[20] Plaintiffs and State Defendants hotly dispute whether the present challenge is properly classified as facial or as-applied. This classification, they assume, determines whether we consider Plaintiffs' hypothetical scenarios. Though the Constitution vests the federal government with the exclusive power to regulate Indian tribes (and therefore direct state taxation of Indian tribes, absent Congressional approval, is constitutionally barred), tribal sovereignty challenges are not, strictly speaking, constitutional challenges. *Cf. Colville,* 447 U.S. at 167–68 (Brennan, *J.*, concurring in part and dissenting in part). Thus, the familiar facial/as-applied distinction only relates to this case by rough analogy. Regardless of

nothing requires us to assume that a monopoly in tax-free cigarettes will occur and to evaluate the prior approval system under that assumption. Like the wholesalers in *Milhelm Attea*, Plaintiffs seek to enjoin the amended tax law before it is implemented; like the Court in *Milhelm Attea*, we decline to base our decision on "consequences that, while possible, are by no means predictable." *Id.* at 69.

The Department anticipates that "[u]pon receipt of a purchase request from a [tribe or reservation retailer]" a wholesaler will request approval from the Department to sell that quantity of cigarettes. Technical Memorandum 5. Under the Department's "general understanding" of the prior approval system, wholesalers will only seek prior approval if the wholesaler has a legitimate tribal buyer. Plaintiffs contend that the prior approval system will not function as the Department intends.[21] For at least two reasons, on this

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how the challenge is classified, the fact remains that no version of New York's collection scheme has ever been implemented. Lacking evidence of its actual operation, Plaintiffs argue that the amended tax law fails to foreclose one scenario that *might* arise upon implementation. But under the statute, regulations, and the Technical Memorandum, that scenario is by no means certain to occur. The system's actual operation remains largely uncertain. At this pre-enforcement stage, and on this record, such speculation cannot support a preliminary injunction of a state taxation scheme that is valid as written.

[21] As the Technical Memorandum indicates, the Department intends that wholesalers will only seek prior approval after obtaining a purchase order. The Technical Memorandum is an informational

record we cannot say which understanding will prove correct.

First, Plaintiffs' predictions ignore the broader legal framework within which wholesalers and tribal retailers operate. That legal framework discourages wholesalers from abusing the prior approval system. To sell cigarettes to tribes or their retailers, a wholesaler must be a state-licensed distributor, *see* N.Y. Tax Law § 480, and a federally-licensed Indian Trader, *see* 25 U.S.C. § 262. Under New York law, the Tax Commissioner may cancel or suspend a wholesaler's state license for, among other things, "commit[ing] fraud or deceit in his . . . operations as a wholesale dealer." N.Y. Tax Law § 480(3)(b)(i); *see also* N.Y. Comp. Codes R. & Regs. tit. 20, §§ 71.6(b)(2), 72.3(b)(2). Under federal law, the Superintendent of the Bureau of Indian Affairs must "see that the prices charged by licensed [Indian] traders are fair and reasonable." 25 C.F.R. § 140.22. Wholesalers, like Peter Day, who intend to abuse the prior approval system risk losing their New York and federal licenses. A rational wholesaler must weigh the

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statement that provides the Department's "general understanding" of the prior approval system. Notwithstanding the Department's intent, two State witnesses admitted that the monopoly scenario is possible under the prior approval system. These concessions do not render the system invalid. They merely confirm that both fair dealing and opportunism are possible under the prior approval system. The system's actual operation, however, is speculative.

potential short-term financial benefits of gaming the prior approval system against the potential long-term financial loss caused by the suspension or revocation of necessary licenses.[22]

Second, if wholesalers disregard the legal risks of monopolistic behavior, the Department has the flexibility to modify the prior approval system to deter such behavior. The Department enjoys discretion to set and amend the conditions for prior approval. N.Y. Tax Law § 471(5)(b) ("The department shall grant agents and wholesalers prior approval in a manner and form to be determined by the department and as *may* be prescribed by regulation.") (emphasis added); N.Y. Comp. Codes R. & Regs. tit. 20, § 74.6(d)(3) ("The manner and form of prior approval will be determined by the department, and may include the use of an interactive Web application."). Thus, modification of the prior approval system's mechanics does not require amending the statute or promulgating new regulations. Presently,

[22] The Seneca Nation, Unkechauge Nation, and Mohawk Tribe argue that some of their own reservation retailers might collude with wholesalers to obtain monopoly positions within their reservations. Tribal sovereignty, however, vests tribes with the power to regulate the conduct of their own members, *see Mescalero Apache Tribe*, 462 U.S. at 332, and all three Plaintiffs in fact heavily regulate their retailers. Indeed, the Unkechauge Nation already restricts the quantity of cigarettes its reservation retailers may purchase from wholesalers. *See* Unkechauge Br. 8.

however, the record of the Department's effectiveness in adapting the prior approval system is nonexistent because, as a result of the injunctions or stays that were granted, wholesalers have not been required to use the prior approval system.

Moreover, any of the Plaintiffs may foreclose the uncertainty associated with the prior approval system by entering formal agreements with the Department. As the Supreme Court observed in *Milhelm Attea*, "[a]greements between the Department and individual tribes might avoid or resolve problems that are now purely hypothetical." *Milhelm Attea*, 512 U.S. at 77. Upon approval from the New York Legislature or a federal court, the collection and allocation mechanism contained in the agreement would supersede the statutory allocation mechanisms and eliminate the uncertainty of private behavior. *See* N.Y. Tax Law § 471(6).

At this pre-enforcement stage, Plaintiffs have not demonstrated that they are likely to prevail on their claim that the amended tax law infringes tribal sovereignty or unduly burdens tribal retailers. Plaintiffs ultimately request that the tax law be enjoined prior to its

implementation on the basis of hypothetical private behavior and the assumption that there will be no Department response. This kind of speculation cannot support a pre-enforcement injunction of a state taxation scheme that is valid as written.[23]

Finally, the Seneca Nation, Unkechauge Nation, and Mohawk Tribe argue that flaws in the prior approval system will disrupt the current state of their tobacco economies. Specifically, they argue that certain tribal retailers might be unable to obtain a sufficient quantity of tax-exempt cigarettes and their businesses will suffer. The three Plaintiffs argue that this anticipated disruption will undermine the federal interest in promoting and protecting tribal economic self-sufficiency and burden tribal members' ability to engage in tax-free commerce with one another.

Previously, all cigarettes sold to tribes and reservation retailers were untaxed. Reservation retailers sold approximately ninety-nine percent of those untaxed cigarettes to non-members. But there was no practical distinction between a reservation retailer's member and non-

[23] Because we reject Plaintiffs' contentions that they are entitled to a preliminary injunction enjoining the prior approval system, we do not address the severability argument of the Unkechauge Nation and Mohawk Tribe.

member cigarette markets. Plaintiffs' current tobacco economies developed under this system. For example, the mass quantity of available untaxed cigarettes allowed members of the Seneca Nation to open over 170 tobacco stores. Members could access tax-free cigarettes at any of these stores.

New York's decision to limit the quantity of tax-free cigarettes sold to reservation retailers will undoubtedly disrupt the status quo, regardless of how the Department allocates the untaxed cigarettes. Yet in limiting the availability of tax-free cigarettes, the State does not have to ensure that each reservation retailer obtains its pre-amendment supply. Nor must the State ensure that tribal members continue to enjoy the same easy access to tax-free cigarettes. The Northern District erred in concluding at this pre-enforcement stage that the prior approval system "burdens [the Oneida Nation] by not protecting the right to have available tax-free cigarettes for members and itself, as required by law." *Oneida Nation*, 2010 WL 4053080, at *9. As written, the prior approval system makes tax-free cigarettes available to member purchasers. Actual problems of implementation "can be addressed if and when they arise."

Milhelm Attea, 512 U.S. at 76.[24]

CONCLUSION

Plaintiffs have failed to demonstrate a likelihood of success on the merits of their claims that (1) the precollection scheme impermissibly imposes a direct tax on tribal retailers, or alternatively, imposes an undue and unnecessary economic burden on tribal retailers; and (2) the coupon and prior approval systems interfere with their rights of self-government and rights to purchase cigarettes free from state taxation. The Northern District committed legal error in determining that both of these arguments were likely to succeed, and thus abused its discretion in granting the Oneida Nation's motion for preliminary injunction. The Western District correctly rejected these arguments and properly denied the Seneca Nation's, Cayuga Nation's, Unkechauge Nation's, and Mohawk Tribe's motions for preliminary injunctions.

The Western District's two orders of October 14, 2010 and November 9, 2010 are **AFFIRMED**. The Northern District's order of October 14, 2010 is **VACATED**. All stays pending

[24] Unlike the Western District, we express no opinion on whether the monopoly scenario, if it occurred, would constitute state infringement of tribal sovereignty. *See Seneca Nation*, 2010 WL 4027796, at *16–17.

appeal are **VACATED**. The cases are **REMANDED** for further proceedings consistent with this opinion.

EXHIBIT B

EXHIBIT B

United States Court of Appeals

FOR THE

SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 13th day of May, two thousand eleven,

Present:

Richard C. Wesley,
Denny Chin,
Raymond J. Lohier, Jr.,
Circuit Judges.

Oneida Nation of New York,

Plaintiff-Appellee,

10-4265 (L); 10-4272 (Con); 10-4598 (Con); 10-4758 (Con); 10-4477 (XAP); 10-4976 (XAP); 10-4981 (XAP)

Seneca Nation of Indians, St. Regis Mohawk Tribe, Unkechauge Indian Nation,

Plaintiffs-Appellees-Cross-Appellants,

–v.–

Andrew M. Cuomo, in his official capacity as Governor of New York, Thomas H. Mattox, in his official capacity as Acting Commissioner of the N.Y. Department of Taxation & Finance, Richard Ernst, in his official capacity as Deputy Commissioner for the Office of Tax Enforcement for the N.Y. Department of Taxation & Finance,

Defendants-Appellants,

John Melville, in his official capacity as Acting Superintendent, New York State Police,

Defendant-Appellant-Cross-Appellee,

Cayuga Indian Nation of New York,

Intervenor-Appellant.

The Seneca Nation of Indians, Unkechauge Indian Nation, St. Regis Mohawk Tribe, Cayuga Indian Nation of New York, and Oneida Nation of New York move for clarification of the effective date of this Court's May 9, 2011 opinion. *See Oneida Nation of New York v. Cuomo*, No. 10-4265(L) (2d Cir. May 9, 2011), ECF No. 224.

Our May 9, 2011 opinion is effective upon issuance of the mandate, not before. *See Bridge C.A.T. Scan Associates v. Technicare Corp.*, 710 F.2d 940, 947 (2d Cir. 1983); *see also* Hon. Jon O. Newman, *Decretal Language: Last Words of an Appellate Opinion*, 70 Brook. L. Rev. 727, 736 (2005). Thus, the two stays pending appeal issued by the Western District and the preliminary injunction issued by the Northern District remain in effect until the date the mandate issues. Fed. R. App. P. 41(c).

Now, upon due consideration, it is hereby ORDERED that, with respect to the May 9, 2011 opinion, the mandate shall issue forthwith.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

EXHIBIT C

EXHIBIT C

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 9th day of May, two thousand eleven.

Before: RICHARD C. WESLEY,
DENNY CHIN,
RAYMOND J. LOHIER, JR.,
Circuit Judges.

ONEIDA NATION OF NEW YORK,

Plaintiff-Appellee,

v.

SENECA NATION OF INDIANS, ST. REGIS MOHAWK TRIBE, UNKECHAUGE INDIAN NATION,

Plaintiffs -Appellees-Cross-Appellants,

v.

ANDREW M. CUOMO, in his official capacity as Governor of New York, THOMAS H. MATTOX, in his official capacity as Acting Commissioner of N.Y. Department of Taxation & Finance, RICHARD ERNST, in his official capacity as Deputy Commissioner for the Office of Tax Enforcement for the N.Y. Department of Taxation & Finance,

Defendants-Appellants,

JOHN MANVILLE, in his official capacity as Acting Superintendent, New York State Police,

Defendant-Appellant-Cross-Appellee,

JUDGMENT

Docket Nos. 10-4265 (L); 10-4272 (con); 10-4598 (con); 10-4758 (con) ; 10-4477 (XAP) 10-4976 (XAP); 10-4981 (XAP)

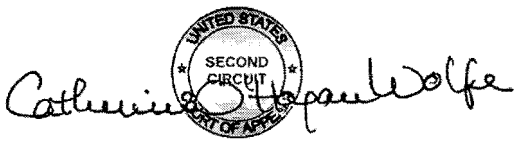
CAYUGA INDIAN NATION OF NEW YORK,

Intervenor-Appellant.

The consolidated and expedited appeals in the above-captioned cases from three district court proceedings were argued on the District Courts' records and the parties' brief. Upon consideration thereof,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Western District's two orders of October 14, 2010 and November 9, 2010 are AFFIRMED. The Northern District's order of October 14, 2010 is VACATED. All stays pending appeal are VACATED. The cases are REMANDED for further proceedings in accordance with the opinion of this court.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, Clerk



A True Copy
Catherine O'Hagan Wolfe, Clerk
United States Court of Appeals, Second Circuit

EXHIBIT D

EXHIBIT D

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

SENECA NATION OF INDIANS,

PLAINTIFF,

v.

ORDER TO SHOW CAUSE

INDEX NO. 2011-000714

THE STATE OF NEW YORK,
THE NEW YORK STATE DEPARTMENT OF
TAXATION AND FINANCE,
THOMAS H. MATTOX,
ACTING COMMISSIONER OF THE
DEPARTMENT OF TAXATION
AND FINANCE, ERIC T. SCHNEIDERMAN,
NEW YORK STATE ATTORNEY GENERAL,

DEFENDANTS.

PRESENT: Hon. Donna M. Siwek, Justice of the Supreme Court.

UPON the annexed Affirmation of Christopher L. Karns, dated May 10, 2011; and the Memorandum of Law submitted herewith; together with all prior pleadings and proceedings had herein, it is hereby:

ORDERED that Defendants the State of New York, the New York State Department of Taxation and Finance, Thomas H. Mattox, acting Commissioner of the Department of Taxation and Finance, and Eric T. Schneiderman, New York State Attorney General ("Defendants"), Show Cause before a Special Term of the Supreme Court of the State of New York, County of Erie, to be held in Part 29, Eighth Floor, 50 Delaware Avenue, Buffalo, New York, 14202, on the 1st day of ~~May~~ June, 2011 at 2 o'clock in the afternoon of that day, or as soon thereafter as counsel may be heard, why an Order should not be made and entered pursuant to CPLR § 6301 granting Plaintiff Seneca Nation of Indians ("the Nation") the following relief pending final

disposition of this action:

(A) enjoining Defendants from implementing or enforcing regulations adopted by the Department of Taxation and Finance on November 10, 2010, 20 N.Y.C.R.R. § 74.6, during the pendency of this litigation;

(B) enjoining Defendants from implementing or enforcing the June 2010 amendments to sections 471 and 471-e of the New York Tax Law related to the taxation of cigarettes on Indian territory in the absence of validly promulgated regulations during the pendency of this litigation; and

(C) awarding Plaintiff such other and further relief as to the Court may seem just and proper; and it is hereby

ORDERED, that until the final determination of Plaintiff's application for an Injunction, the Defendants, along with their agents, employees and all other persons acting in concert or cooperation therewith, are temporarily restrained and enjoined from implementing, administering, and enforcing N.Y. Tax Law §§471(l), (2), (5) related to the taxation of cigarettes on Indian territory, N.Y. Tax Law §47 1-e, and 20 N.Y.C.R.R. §74.6, pending further order of this Court,

TRO

SUFFICIENT REASON APPEARING THEREFOR, let service of a copy of this Order and of the above-listed papers upon which the same is granted, made upon counsel for Defendants by hand-delivery, fax, **or** e-mail, on or before May 11, 2011, be deemed good and sufficient service; and it is further

ORDERED, that any responsive papers shall be filed with the Court and delivered to counsel for the Plaintiff no later than May 20, 2011, and it is further

ORDERED, that Plaintiff's reply papers, if any, shall be filed with the Court and delivered to counsel for the Defendants no later than May 27, 2011.

HON. DONNA M. SIWEK, J.S.C.

Hon. Donna M. Siwek, J.S.C.

ENTER: _____

GRANTED

MAY 10 2011

BY JOAN AQUILA
JOAN AQUILA
COURT CLERK

EXHIBIT E

EXHIBIT E

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

SENECA NATION OF INDIANS,

Plaintiff,

v. Index No. 2011-000714

THE STATE OF NEW YORK,
THE NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE,
THOMAS H. MATTOX,
ACTING COMMISSIONER OF THE DEPARTMENT OF TAXATION AND FINANCE,
ERIC T. SCHNEIDERMAN, NEW YORK STATE ATTORNEY GENERAL,

Defendants,

Carol E. Heckman, Esq.
David T. Archer, Esq.
Harter Secrest & Emery, LLP
Twelve Fountain Plaza, Suite 400
Buffalo, New York 14202-2293
Attorneys for Plaintiff

Andrew D. Bing, Deputy Solicitor General
Darren Longo, Assistant Attorney General
Main Place Tower, 350 Main Street, Suite 350A
Buffalo, New York 14202
Attorneys for Defendants

SIWEK, J.,

MEMORANDUM DECISION

This Memorandum Decision addresses the Seneca Nation of Indians' ("SNI") motion for summary judgment filed April 25, 2011 and defendants, State of New York, the New York State Department of Taxation and Finance, Thomas H. Mattox, Acting Commissioner of the New

York State Department of Taxation and Finance, and Eric T. Schneiderman, New York State Attorney General's ("State") cross motion for summary judgment filed May 20, 2011.

Procedural Background

The SNI commenced this action for declaratory and injunctive relief against the State on February 10, 2011. The defendants filed their answer on February 28, 2011, and issue was joined.

A temporary restraining order of this court dated May 10, 2011 restrains and enjoins implementation and enforcement of N.Y. Tax Law §471(1)(2)(5) and 20 N.Y.C.R.R. §74.6 which relate to the taxation of cigarettes on Indian territory.

The parties have stipulated that for completeness, the defendants' Answer shall be incorporated into the submitted papers for consideration by this court.

Dispute

In this action for declaratory and injunctive relief, SNI seeks to enjoin the State from enforcing permanent Rule 20 N.Y.C.R.R. §74.6 (the "Rule") published in the State Register and effective on November 10, 2010, which implements amendments of Tax Law §§471 and 471-e (the "2010 Amendments"). SNI contends that the New York State Department of Taxation and Finance ("DTF") violated certain procedural requirements of the State Administrative Procedure Act ("SAPA") rendering the Rule invalid as a matter of law, and further in the absence of a validly adopted rule, the amended tax law cannot be enforced.

The State contends that DTF has substantially complied with the procedural requirements

of SAPA in enacting the Rule and further contends that SNI's challenge to the permanent Rule is essentially identical to the challenge SNI brought before this court last year. *Day Wholesale, Inc. v. State of New York*, I2006-7668 (N.Y. Sup. Ct. August 30, 2010). In *Day Wholesale*, SNI as an intervenor-plaintiff was unsuccessful in its challenge to the SAPA procedures followed by DTF in promulgating Emergency Rule 20 N.Y.C.R.R. §74.6 published on July 7, 2010. As such, the State cross-moves for summary judgment.

The parties agree that the permanent Rule 74.6 published November 10, 2010 is essentially identical to the Emergency Rule published on July 7, 2010.

Statutory Background

On June 21, 2010, the New York Legislature amended Tax Law §§471 and 471-e regarding the distribution and sale of cigarettes to Indian nations and tribes and on qualified reservations. The statute provides a mechanism for collecting tax on all cigarettes sold on an Indian reservation to non-members and non-Indians while still providing for a sufficient quantity of tax-free cigarettes for tribal-member consumption.

The statute requires stamping agents to pre-pay the tax and affix stamps on all cigarette packs sold in New York, including those intended for re-sale to qualified Indians on the reservations. *See,* Tax Law §471(2). However, to ensure the availability of a sufficient quantity of tax-free cigarettes for tribal consumption, the statute allocates to each tribe a quantity of tax-free cigarettes equivalent to the "probable demand" of the tribes' members for personal consumption. *See,* Tax Law §§471(5)(d) and 471-e(2)(b). It further prescribes how the probable demand is to be calculated. *See*, Tax Law §§471-e(2)(b)(i) and (ii). The statute sets

forth two alternative methods for Nations and members to obtain tax exempt (albeit stamped) cigarettes limited to the tribes' probable demand for its own use and members' consumption: a coupon system and a prior approval system.

Tribes can elect to use the coupon system which requires the DTF to distribute tax-exempt coupons each quarter for the tribal government to control and allocate. *See*, N.Y. Tax Law §471-e(2)(a)-(b). If the tribes do not elect to use the coupon system, the statute requires agents and wholesalers to use the prior-approval system. Under the prior approval system, stamping agents and cigarette wholesalers secure DTF approval to sell tax-exempt cigarettes to Indian tribes or retailers within the probable demand amount allocated to a tribe. The cigarettes must be stamped, but the seller can secure a refund of the tax paid through the stamp. *See,* N.Y. Tax Law §471-e.

The statute instructs DTF to grant agents and wholesalers prior approval in "a manner and form" to be determined by the Department and as may be prescribed by regulation. *See,* Tax Law §471(5)(b). The 2010 Amendments also instruct DTF to promulgate rules and regulations and to take any other actions necessary to implement the new law within 60 days after enactment. The statute required that the new system was to take effect September 1, 2010.

Since the enactment of the 2010 amendments, there have been legal challenges in both federal and state courts to both the Tax Law and the regulations promulgated by DTF in response to the Legislature's statutory directive[1]. On August 30, 2010, this court was called upon to rule on the validity of Emergency Rule 74.6 promulgated by DTF in response to the legislative

[1]See, e.g. *Seneca Nation of Indians v Cuomo*, ___ F.3d ___, 2011 W.L. 1745008 (2d Cir. May 9, 2011)

amendments. In *Day Wholesale, Inc. v. State of New York*, this court found that DTF properly invoked the Emergency Rule-making provisions of SAPA and substantially complied with the procedural requirements of SAPA. *Day Wholesale, Inc. v. State of New York*, 2006-7668 (N.Y.Sup. Ct. August 30, 2010).

Contentions

In seeking a declaration that the permanent Rule violates the procedural mandates of SAPA, SNI contends that DTF (1)failed to prepare any Job Impact Statement; (2)failed to prepare a sufficient Regulatory Impact Statement; and (3)failed to prepare a sufficient Regulatory Flexibility Analysis. Therefore, SNI asserts that DTF failed to substantially comply with SAPA and seeks to be excused from that compliance by asserting that it is the legislation rather than the rule which has an impact. SNI argues that SAPA and the case law interpreting it do not provide for such an exception. The State counters that the legislation, not the Rule, is the focus of SNI's complaints and that it substantially complied with SAPA in the adoption of the Rule.

As it did with its challenges to the Emergency Rule and in their formal comments submitted in response to the proposed permanent Rule, SNI maintains that DTF violated SAPA in failing to prepare a Job Impact Statement which addressed the devastating employment, economic and regulatory effects of the Rule on Indian Nations, reservations and related businesses. SAPA §201-a(2)(b) mandates "[w]hen it is apparent from the nature and purpose of the rule that it may have a substantial adverse impact on jobs or employment opportunities, the agency shall issue a job impact statement...".

Here, SNI argues that it is the agency's discretionary implementation of a particular

manner and form of prior approval and the mechanics of the interactive Web application which will have an adverse impact on jobs and employment opportunities for Indian Nations, reservations and related businesses. They argue that the Rule creates adverse impacts, including a potential for both monopolization of the quota allotment and inflated prices. SNI concludes that by failing to include a Job Income Statement, the regulation was adopted in violation of SAPA and is, therefore, invalid, null and void and further that in the absence of a validly adopted regulation, the amendments to the Tax Law cannot be enforced. *Medical Soc. of the State of N.Y. v. Levin*, 185 Misc. 2d 536 (Sup. Ct. N.Y. Cty., 2000) aff'd. 280 A.D.2d 309 (1st Dept. 2001); *Long Island College Hosp. v. New York State Dept. of Health*, 203 A.D.2d 292 (2d Dept. 1994) (improperly promulgated rule is ineffective)

In response, the State contends that DTF determined that the Rule would not have a substantial adverse impact on jobs and employment opportunities and as such, complied with SAPA §201-a(a)(2) by including in the Notice of Proposed Rule Making the following: "A Job Impact Statement is not being submitted with the rule because it is evident from the subject matter of the rule that it could have no impact on jobs and employment opportunities". It is the State's position that it is the Tax Law itself that is responsible for any job impacts since the Rule's limited function is to provide specifics to "flesh out" the statute, and thus, no Job Impact Statement is required. See, *Industrial Liaison Committee of Niagara Falls Chamber of Commerce v. Williams*, 131 A.D.2d 205 (3d Dept. 1987) (agency analysis unnecessary when statute as opposed to Rule has the ultimate impact).

SNI's second SAPA challenge is the failure of DTF to prepare an adequate Regulatory Impact Statement. SAPA §202-a(1) required DTF, to the extent consistent with the amended

Tax Law, to consider approaches designed to avoid undue deleterious economic effects or overly burdensome impacts upon persons directly or indirectly affected by the Rule or upon the economy or administration of state or local governmental agencies.

SNI contends the strict quota system imposed by the Rule will adversely affect 200 Seneca businesses, their 3,000 employees and the Western New York regional economy. *Medical Soc. of the State of N.Y. v. Levin*, 185 Misc. 2d 536 (Sup. Ct. N.Y. Cty., 2000) aff'd. 280 A.D.2d 309 (1st Dept. 2001) SNI claims that DTF failed to provide a Regulatory Impact Statement detailing the proposed costs for implementation of, and compliance with, the Rule to regulated persons, as well the agency, and state and local governments as required by SAPA §202-a(3)(c)(i)-(ii). SNI further faults the Regulatory Impact Statement for failing to include alternative approaches. *See,* SAPA §202-a(3)(g).

The State counters this challenge by stating that it prepared a lengthy Regulatory Impact Statement and further that the SNI's complaint about the strict quota system is not related to the Rule but is imposed by the amended Tax Law. DTF argues that Tax Law §471(5)(b) and §471(e)(2)(b) dictate the probable demand quota and how it is to be calculated. The State argues that the Tax Law gave DTF no opportunity to consider any significant alternative to that system. DTF contends that what SNI seeks is consideration of alternatives which are inapposite to the 2010 Amendments. Any attempt by DTF to modify the strict quota system would be inconsistent with the legislative directive.

Finally, SNI challenges DTF's failure to prepare an adequate Regulatory Flexibility Analysis. In developing the Rule under SAPA §202-b(1), DTF was required to consider utilizing approaches that will accomplish the objectives of the applicable statutes while minimizing

adverse economic impact of the Rule on small businesses and local governments. SNI contends that DTF's Regulatory Flexibility Analysis lacks any details as to how this Rule will impact the Indian businesses and the 28 Nation licensed wholesalers and the 172 Nation licensed retailers on the Seneca territories, or for that matter, on the retailers on territories of other Indian nations across the State.

The State contends that SNI's complaints relate to the underlying statutory scheme, not the proposed Rule. The Rule at issue here involves a repetition of a specific statutory standard, which is factually distinguished from the cases cited by SNI. *Industrial Liaison Comm. v. Williams*, 131 A.D.2d 205, aff'd 72 N.Y.2d 137, 145; *Matter of Medicon Diag. Labs, Inc. v. Perales*, 145 A.D.2d 167 (3d Dept. 1989). DTF was not required to evaluate the effect of the underlying legislation. Furthermore, SAPA only requires that a Regulatory Flexibility Analysis consider those persons and entities that are directly affected by the Rule, not on all small businesses that might experience some indirect economic effect of the Rule because of the application of the Rule to others. See, *Pacific Salmon Unlimited v. New York State Department of Environmental Conservation*, 208 A.D.2d 241 (3d Dept. 1995). The State contends that the Rule directly impacts only State-licensed agents and wholesalers, and imposes no burden on Indian tribes or retailers.

Decision

The legal battle over the State's attempts to collect tax on reservation sales to non-Indians dates back to 1988. The taxing policy of the State is required to strike the difficult balance between the State's objectives with regard to the sovereignty of Indian nations and the general

welfare of the People of the State of New York. The State has encountered significant difficulty in implementing a taxing policy which meets these dual objectives. An excise tax on cigarettes purports to serve two purposes: (1) to promote the public health at large and (2) to collect tax revenue. It is estimated that the State loses approximately $110 million per year in uncollected sales tax revenue for on-reservation sales to non-Indians.

Over the years, there have been significant court battles waged, both in state and federal courts. The Second Circuit Court of Appeals recently lifted preliminary injunctions precluding the State from implementing and enforcing the amended Tax Law. The scope of this court's involvement is limited to the question of whether or not the Department of Taxation and Finance substantially complied with the State's Administrative Procedure Act. The standard of review is one of substantial compliance. SAPA §202(8); *Matter of Med. Soc. of the State of N.Y. v. Serio*, 100 N.Y.2d 854 (2003). In our review, we are required to give deference to agency findings. *Pacific Salmon Unlimited, supra.* If the State has substantially complied with the State's Administrative Procedure Act, the Rule must stand.

The 2010 Amended Tax Law sets forth in significant detail the means and methodology by which the State shall collect taxes on Native American cigarette sales to non-members. The significant detail and directive in the legislation left DTF with little flexibility or discretion, and DTF adopted regulations that in our view, involved interstitial rule making.

In preparing its Job Impact Statement, Regulatory Impact Statement and Regulatory Flexibility Analysis, the Department of Taxation and Finance was only required to analyze the impact of the Rule and not the statute. We believe the Department of Taxation and Finance substantially complied with the requirements of the State Administrative Procedure Act, as it did

at the time of the Emergency Rule Making. The negative impacts cited by the Seneca Nation of Indians are directly related to, and flow from, the 2010 Legislative Amendments to the Tax Law. The New York State Legislature declared and dictated this taxing scheme, not the Department.

Based on the foregoing, the Seneca Nation of Indians' motion for summary judgment is denied and the defendants' cross motion for summary judgment is granted. The Seneca Nation's request for injunctive relief is mooted by this Decision, and the Temporary Restraining Order of May 10, 2011 is hereby lifted.

This is the Decision of the Court. Submit Order and Judgment.

Hon. Donna M. Siwek
Justice of the Supreme Court

Dated: June 8, 2011

EXHIBIT F

EXHIBIT F

At a Special Term of the
Supreme Court, County of Erie,
Part 29, State of New York on the
1st day of June, 2011

Present: Hon. Donna M. Siwek, J.S.C.

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

SENECA NATION OF INDIANS

PLAINTIFF,

v.

Index No. 11-714
Hon. Donna M. Siwek, J.S.C.

THE STATE OF NEW YORK,
THE NEW YORK STATE DEPARTMENT OF
TAXATION AND FINANCE,
THOMAS H. MATTOX,
ACTING COMMISSIONER OF THE
DEPARTMENT OF TAXATION
AND FINANCE, ERIC T. SCHNEIDERMAN,
NEW YORK STATE ATTORNEY GENERAL,

DEFENDANTS.

ORDER

NOW, the plaintiff, the Seneca Nation of Indians ("Plaintiff"), having moved this Court for an order: 1) granting its Motion for Summary Judgment, pursuant to Rule 3212 of the New York Civil Practice and Rules; 2) granting its Motion for a Preliminary Injunction, pursuant to CPLR 6301; and Defendants the State of New York, the New York State Department of Taxation and Finance, Thomas H. Mattox, acting Commissioner of the Department of Taxation and Finance, and Eric T. Schneiderman, New York State Attorney General (collectively, "Defendants") having opposed both motions; and Defendants having Cross-Moved for Summary Judgment, pursuant to CPLR 3212;

UPON reading the Notice of Motion for Summary Judgment, dated April 25, 2011; the Affidavit of Christopher Karns, with attached exhibits, sworn to April 21, 2011, all in support of the Nation's Motion for Summary Judgment; and the ~~Notice of Motion for Preliminary Injunction~~ Order to Show Cause, ~~dated~~ granted May 10, 2011; and the Affidavit of Christopher Karns, with attached exhibits, sworn to May 10, 2011, all in support of Plaintiff's Motion for Preliminary Injunction; and

UPON reading the Notice of Cross-Motion for Summary Judgment, dated May 19, 2011; the Affirmation of Andrew D. Bing, with attached exhibits, dated May 19, 2011; the Affirmation of Robert D. Plattner, with attached exhibits, dated May 18, 2011, all in opposition to Plaintiff's Motions for Summary Judgment and Preliminary Injunction, and in support of Defendants' Cross-Motion for Summary Judgment;

AND, this matter having come on to be heard on June 1, 2011, and Harter Secrest & Emery LLP (Carol E. Heckman, of counsel) having appeared for the Seneca Nation of Indians and the Attorney General of the State of New York (Andrew D. Bing, ~~assistant~~ Deputy Solicitor General, ERIC T SCHNEIDERMAN, of Counsel having appeared for Defendants; it is hereby

ORDERED, that Plaintiff's Motion for Summary Judgment is denied; and it is further

ORDERED, that Defendants' Cross-Motion for Summary Judgment is granted; and it is further,

ORDERED, that Plaintiff's Motion for Preliminary Injunction is denied as moot, and it is further ordered, that the Temporary Restraining order of May 10, 2011, is hereby lifted.

HON. DONNA M. SIWEK, J.S.C.

Hon. Donna M. Siwek, J.S.C.

GRANTED

JUN 08 2011

BY JOAN AQUILA
JOAN AQUILA
COURT CLERK

EXHIBIT G

EXHIBIT G

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION FOURTH DEPARTMENT

SENECA NATION OF INDIANS,

PLAINTIFF,

v.

THE STATE OF NEW YORK,
THE NEW YORK STATE DEPARTMENT OF
TAXATION AND FINANCE,
THOMAS H. MATTOX,
ACTING COMMISSIONER OF THE
DEPARTMENT OF TAXATION
AND FINANCE, ERIC T. SCHNEIDERMAN,
NEW YORK STATE ATTORNEY GENERAL,

DEFENDANTS.

Amended

ORDER TO SHOW CAUSE

ERIE COUNTY INDEX NO.
2011-000714

PRESENT: Hon. JEROME GORSKI Justice of the Supreme Court, Appellate Division for the Fourth Judicial Department.

UPON the annexed Affirmation of Carol E. Heckman, Esq., with exhibits, dated June 8, 2011 and submitted by Plaintiff-Appellant the Seneca Nation of Indians ("the Nation" or "Plaintiff"), it is hereby

ORDERED that Defendants-Respondents THE STATE OF NEW YORK, THE NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, THOMAS H. MATTOX, Acting Commissioner of the Department of Taxation and Finance, and ERIC T. SCHNEIDERMAN, New York State Attorney General, ("Defendants") shall **SHOW CAUSE** before a Special Term of the Supreme Court of the State of New York, Appellate Division, Fourth Department, to be held at the M. Dolores Denman Courthouse, 50 East Avenue, Rochester, New York on the 20 day of June, 2011 at 10:00 o'clock in the fore noon of that day, ~~or as soon thereafter as counsel may be heard~~, why an Order should not be made and entered pursuant to CPLR § 5518, granting Plaintiff's motion for a preliminary injunction pending the appeal of the order of Hon. Donna M. Siwek, J.S.C., dated

June 8, 2011, denying the Nation's Motion for Summary Judgment; finding that the Nation's Motion for Preliminary Injunction enjoining Defendants from implementing, administering, or enforcing N.Y. Tax Law §§471(l), (2), (5) related to the taxation of cigarettes on Indian territory, N.Y. Tax Law §47 1-e, and 20 N.Y.C.R.R. §74.6 was moot; and granting Defendants' Cross-Motion for Summary Judgment; and it is hereby

ORDERED, that pending a hearing on this order to show cause, and until further order of this Court, Defendants are temporarily restrained and enjoined from implementing, administering, and enforcing N.Y. Tax Law §§471(l), (2), (5) related to the taxation of cigarettes on Indian territory, N.Y. Tax Law §47 1-e, and 20 N.Y.C.R.R. §74.6, pending further order of this Court,

SUFFICIENT REASON APPEARING THEREFOR, let service of a copy of this Order and of the above-listed papers upon which the same is granted, made upon counsel for the Defendants, Darren Longo, Esq., by hand-delivery, fax, or e-mail, on or before the 10 day of June, 2011 at 5:00 o'clock in the afternoon, be deemed good and sufficient service; and it is further

ORDERED, that any responsive papers shall be filed with the Court and delivered to counsel for the Plaintiff no later than the 14 day of June, 2011 at 5:00 o'clock in the afternoon, and Plaintiff's reply papers, if any, shall be filed with the Court and delivered to counsel for Defendants no later than the 16 day of June, 2011 at 5:00 o'clock in the afternoon.

Hon. _____, J.S.C.

ENTER: 6/9/11

6/10/11

EXHIBIT H

EXHIBIT H

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

DOCKET NO. CA 11-01193

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, PERADOTTO, AND GORSKI, JJ.

SENECA NATION OF INDIANS, PLAINTIFF-APPELLANT,

V

STATE OF NEW YORK, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, THOMAS H. MATTOX, ACTING COMMISSIONER OF THE DEPARTMENT OF TAXATION AND FINANCE, AND ERIC T. SCHNEIDERMAN, NEW YORK STATE ATTORNEY GENERAL, DEFENDANTS-RESPONDENTS.

Appellant having moved, upon the return of an order to show cause dated June 9, 2011, and an amended order to show cause dated June 10, 2011, granted by the Honorable Jerome C. Gorski, for a preliminary injunction pending this Court's determination of the appeal taken herein from an order of the Supreme Court entered in the Office of the Clerk of the County of Erie on June 9, 2011,

Now, upon reading and filing the affirmation of Carol E. Heckman, Esq. dated June 8, 2011, said show cause orders with proof of service thereof, the affirmation of Andrew D. Bing, Esq. dated June 13, 2011, the affirmation of Robert D. Plattner, Esq. dated June 13, 2011, the memoranda of appellant and respondents, and the briefs amicus curiae of New York Association of Convenience Stores, New York State Association of Tobacco and Candy Distributors, Inc., and St. Regis Mohawk Tribe, and due deliberation having been had thereon,

It is hereby ORDERED that the motion is denied, and

It is further ORDERED that the temporary restraining orders contained in the show cause orders granted by the Honorable Jerome C. Gorski are hereby vacated.

Entered: June 21, 2011 **PATRICIA L. MORGAN, Clerk**

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

DOCKET NO. CA 11-01193

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, PERADOTTO, AND GORSKI, JJ.

SENECA NATION OF INDIANS, PLAINTIFF-APPELLANT,

V

STATE OF NEW YORK, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, THOMAS H. MATTOX, ACTING COMMISSIONER OF THE DEPARTMENT OF TAXATION AND FINANCE, AND ERIC T. SCHNEIDERMAN, NEW YORK STATE ATTORNEY GENERAL, DEFENDANTS-RESPONDENTS.

St. Regis Mohawk Tribe having moved for permission to file a brief amicus curiae on a motion for preliminary injunction filed on the appeal taken herein from an order of the Supreme Court entered in the Office of the Clerk of the County of Erie on June 9, 2011,

Now, upon reading and filing the affirmation of Margaret A. Murphy, Esq. dated June 14, 2011, the notice of motion with proof of service thereof, and the memorandum of Andrew D. Bing, Esq. dated June 17, 2011, and due deliberation having been had thereon,

It is hereby ORDERED that the motion is granted and the Clerk is directed to accept the brief for filing.

Entered: June 21, 2011 **PATRICIA L. MORGAN, Clerk**

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

DOCKET NO. CA 11-01193

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, PERADOTTO, AND GORSKI, JJ.

SENECA NATION OF INDIANS, PLAINTIFF-APPELLANT,

V

STATE OF NEW YORK, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, THOMAS H. MATTOX, ACTING COMMISSIONER OF THE DEPARTMENT OF TAXATION AND FINANCE, AND ERIC T. SCHNEIDERMAN, NEW YORK STATE ATTORNEY GENERAL, DEFENDANTS-RESPONDENTS.

New York State Association of Tobacco and Candy Distributors, Inc. having moved for permission to file a brief amicus curiae on a motion for preliminary injunction filed on the appeal taken herein from an order of the Supreme Court entered in the Office of the Clerk of the County of Erie on June 9, 2011,

Now, upon reading and filing the affirmation of Thomas G. Jackson, Esq. dated June 13, 2011, the notice of motion with proof of service thereof, and due deliberation having been had thereon,

It is hereby ORDERED that the motion is granted and the Clerk is directed to accept the brief for filing.

Entered: June 21, 2011 **PATRICIA L. MORGAN, Clerk**

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

DOCKET NO. CA 11-01193

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, PERADOTTO, AND GORSKI, JJ.

SENECA NATION OF INDIANS, PLAINTIFF-APPELLANT,

V

STATE OF NEW YORK, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, THOMAS H. MATTOX, ACTING COMMISSIONER OF THE DEPARTMENT OF TAXATION AND FINANCE, AND ERIC T. SCHNEIDERMAN, NEW YORK STATE ATTORNEY GENERAL, DEFENDANTS-RESPONDENTS.

New York Association of Convenience Stores having moved for permission to file a brief amicus curiae on a motion for preliminary injunction filed on the appeal taken herein from an order of the Supreme Court entered in the Office of the Clerk of the County of Erie on June 9, 2011.

Now, upon reading and filing the affirmation of Richard T. Sullivan, Esq. dated June 14, 2011, the notice of motion with proof of service thereof, and due deliberation having been had thereon,

It is hereby ORDERED that the motion is granted and the Clerk is directed to accept the brief for filing.

Entered: June 21, 2011 **PATRICIA L. MORGAN, Clerk**

Supreme Court
APPELLATE DIVISION
Fourth Judicial Department
Clerk's Office, Rochester, N.Y.

I, **PATRICIA L. MORGAN**, *Clerk of the Appellate Division of the Supreme Court in the Fourth Judicial Department, do hereby certify that this is a true copy of the original order, now on file in this office.*

SUPREME COURT APPELLATE DIVISION · FOURTH DEPARTMENT ·

IN WITNESS WHEREOF*, I have hereunto set my hand and affixed the seal of said Court at the City of Rochester, New York, this* JUN 20 2011

Patricia L. Morgan
Clerk

Supreme Court
APPELLATE DIVISION
Fourth Judicial Department
Clerk's Office, Rochester, N.Y.

I, **PATRICIA L. MORGAN**, *Clerk of the Appellate Division of the Supreme Court in the Fourth Judicial Department, do hereby certify that this is a true copy of the original order, now on file in this office.*

SUPREME COURT APPELLATE DIVISION · FOURTH DEPARTMENT ·

IN WITNESS WHEREOF*, I have hereunto set my hand and affixed the seal of said Court at the City of Rochester, New York, this*

JUN 21 2011

Patricia L. Morgan
Clerk

EXHIBIT I

EXHIBIT I

State of New York
Court of Appeals

Andrew W. Klein
Clerk of the Court

Clerk's Office
Albany, New York 12207-1095

June 23, 2011

Harter Secrest and Emery LLP
Attn: Carol E. Heckman, Esq. & David Archer, Esq.
Twelve Fountain Plaza
Ste. 400
Buffalo, NY 14202

Re: Seneca Nation v State of New York
Mo. No. 2011-723

Dear Counselors:

This letter confirms the telephone notification that your proposed order to show cause was reviewed by Judge Susan Phillips Read and that Judge Read declined to sign the order.

Your motion seeking leave to appeal and a stay in the above-entitled matter will be submitted to the Court on July 5, 2011. Any papers opposing the motion must be served and filed no later than July 5, 2011.

Very truly yours,

Andrew W. Klein

Andrew W. Klein

HD:

cc: Hon. Susan Phillips Read
Steven C. Wu, Esq.

EXHIBIT J

EXHIBIT J

LAWS OF NEW YORK, 2010

CHAPTER 134

AN ACT to amend chapter 405 of the laws of 1999 amending the real property tax law relating to improving the administration of the school tax relief (STAR) program, in relation to the lottery game of Quick Draw (Part A); to amend chapter 349 of the laws of 1982 amending the multiple dwelling law relating to legalization of interim multiple dwellings in cities over one million, in relation to the effectiveness thereof; to amend the multiple dwelling law, in relation to owner obligations (Part B); to amend the racing, pari-mutuel wagering and breeding law, in relation to licenses for simulcast facilities, sums relating to track simulcast, simulcast of out-of-state thoroughbred races, simulcasting of races run by out-of-state harness tracks and distributions of wagers; to amend chapter 281 of the laws of 1994 amending the racing, pari-mutuel wagering and breeding law and other laws relating to simulcasting and to amend chapter 346 of the laws of 1990 amending the racing, pari-mutuel wagering and breeding law and other laws relating to simulcasting and the imposition of certain taxes, in relation to extending certain provisions thereof; and to amend the racing, pari-mutuel wagering and breeding law, in relation to extending certain provisions thereof (Part C); and to amend the tax law, in relation to the cigarette tax rate and sales of cigarettes to Indian nations or tribes, and in relation to the tax on tobacco products, snuff and little cigars; to amend the administrative code of the city of New York and chapter 235 of the laws of 1952 relating to enabling any city of the state having a population of one million or more to adopt, and amend local laws, imposing certain specified types of taxes on cigarettes, cigars and smoking tobacco which the legislature has or would have power and authority to impose, to provide for the review of such taxes, and to limit the application of such local laws, in relation to the definition of cigarettes (Part D)

Became a law June 21, 2010, with the approval of the Governor. Passed on message of necessity pursuant to Article III, section 14 and Article VII, section 5 of the Constitution, by a two-thirds vote.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. This act enacts into law major components of legislation which are necessary to implement the state fiscal plan for the 2010-2011 state fiscal year. Each component is wholly contained within a Part identified as Parts A through D. The effective date for each particular provision contained within such Part is set forth in the last section of such Part. Any provision in any section contained within a Part, including the effective date of the Part, which makes reference to a section "of this act", when used in connection with that particular component, shall be deemed to mean and refer to the corresponding section of the Part in which it is found. Section three of this act sets forth the general effective date of this act.

EXPLANATION--Matter in *italics* is new; matter in brackets [-] is old law to be omitted.

PART A

Section 1. Section 1 of part J of chapter 405 of the laws of 1999, amending the real property tax law relating to improving the administration of the school tax relief (STAR) program, as amended by section 1 of part I of chapter 111 of the laws of 2010, is amended to read as follows:

Section 1. Notwithstanding the provisions of article 5 of the general construction law, the provisions of the tax law amended by sections 94-a, 94-d and 94-g of chapter 2 of the laws of 1995 are hereby revived and shall continue in full force and effect as they existed on March 31, 1999 through [~~June 25~~] July 2, 2010, when upon such date they shall expire and be repealed. Sections 1, 2, 3, 4, and 5, and such part of section 10 of chapter 336 of the laws of 1999 as relates to providing for the effectiveness of such sections 1, 2, 3, 4 and 5 shall be nullified in effect on the effective date of this section, except that the amendments made to: paragraph (2) of subdivision a of section 1612 of the tax law by such section 1; and subdivision b of section 1612 of the tax law by such section 2; and the repeal of section 152 of chapter 166 of the laws of 1991 made by such section 5 shall continue to remain in effect.

§ 2. This act shall take effect immediately.

PART B

Section 1. Section 3 of chapter 349 of the laws of 1982, amending the multiple dwelling law relating to the legalization of interim multiple dwellings in cities over one million, as amended by section 1 of part J of chapter 111 of the laws of 2010, is amended to read as follows:

§ 3. Effective date and termination. This act shall take effect immediately. The provisions of this act and all regulations, orders and requirements thereunder shall terminate at the close of the calendar day [~~June 25~~] July 2, 2010.

§ 2. Paragraph (v) of subdivision 1 of section 284 of the multiple dwelling law, as amended by section 2 of part J of chapter 111 of the laws of 2010, is amended to read as follows:

(v) An owner of an interim multiple dwelling who has not complied with the requirements of paragraph (i), (ii), (iii) or (iv) of this subdivision by the effective date of this paragraph as provided in chapter eighty-five of the laws of two thousand two shall hereafter be deemed in compliance with this subdivision provided that such owner filed an alteration application by September first, nineteen hundred ninety-nine, took all reasonable and necessary action to obtain an approved alteration permit by March first, two thousand, achieves compliance with the standards of safety and fire protection set forth in article seven-B of this chapter for the residential portions of the building by June first, two thousand ten or within twelve months from obtaining an approved alteration permit whichever is later, and takes all reasonable and necessary action to obtain a certificate of occupancy as a class A multiple dwelling for the residential portions of the building or structure by [~~June twenty fifth~~] July second, two thousand ten or within one month from achieving compliance with the aforementioned standards for the residential portions of the building, whichever is later.

§ 3. This act shall take effect immediately; provided however, that the amendments to paragraph (v) of subdivision 1 of section 284 of the multiple dwelling law made by section two of this act shall not affect

the repeal of such section and shall be deemed repealed therewith, pursuant to section 3 of chapter 349 of the laws of 1982, as amended.

PART C

Section 1. Paragraph (a) of subdivision 1 of section 1003 of the racing, pari-mutuel wagering and breeding law, as amended by section 1 of part L-1 of chapter 57 of the laws of 2009, is amended to read as follows:

(a) Any racing association or corporation or regional off-track betting corporation, authorized to conduct pari-mutuel wagering under this chapter, desiring to display the simulcast of horse races on which pari-mutuel betting shall be permitted in the manner and subject to the conditions provided for in this article may apply to the board for a license so to do. Applications for licenses shall be in such form as may be prescribed by the board and shall contain such information or other material or evidence as the board may require. No license shall be issued by the board authorizing the simulcast transmission of thoroughbred races from a track located in Suffolk county. The fee for such licenses shall be five hundred dollars per simulcast facility per year payable by the licensee to the board for deposit into the general fund. Except as provided herein, the board shall not approve any application to conduct simulcasting into individual or group residences, homes or other areas for the purposes of or in connection with pari-mutuel wagering. The board may approve simulcasting into residences, homes or other areas to be conducted jointly by one or more regional off-track betting corporations and one or more of the following: a franchised corporation, thoroughbred racing corporation or a harness racing corporation or association; provided (i) the simulcasting consists only of those races on which pari-mutuel betting is authorized by this chapter at one or more simulcast facilities for each of the contracting off-track betting corporations which shall include wagers made in accordance with section one thousand fifteen, one thousand sixteen and one thousand seventeen of this article; provided further that the contract provisions or other simulcast arrangements for such simulcast facility shall be no less favorable than those in effect on January first, two thousand five; (ii) that each off-track betting corporation having within its geographic boundaries such residences, homes or other areas technically capable of receiving the simulcast signal shall be a contracting party; (iii) the distribution of revenues shall be subject to contractual agreement of the parties except that statutory payments to non-contracting parties, if any, may not be reduced; provided, however, that nothing herein to the contrary shall prevent a track from televising its races on an irregular basis primarily for promotional or marketing purposes as found by the board. For purposes of this paragraph, the provisions of section one thousand thirteen of this article shall not apply. Any agreement authorizing an in-home simulcasting experiment commencing prior to May fifteenth, nineteen hundred ninety-five, may, and all its terms, be extended until June thirtieth, two thousand [~~ten~~] **eleven**; provided, however, that any party to such agreement may elect to terminate such agreement upon conveying written notice to all other parties of such agreement at least forty-five days prior to the effective date of the termination, via registered mail. Any party to an agreement receiving such notice of an intent to terminate, may request the board to mediate between the parties new terms and conditions in a replacement agreement between the parties as will permit continuation of an in-home experiment

until June thirtieth, two thousand [~~ten~~] **eleven**; and (iv) no in-home simulcasting in the thoroughbred special betting district shall occur without the approval of the regional thoroughbred track.

§ 2. Subparagraph (iii) of paragraph d of subdivision 3 of section 1007 of the racing, pari-mutuel wagering and breeding law, as amended by section 2 of part L-1 of chapter 57 of the laws of 2009, is amended to read as follows:

(iii) Of the sums retained by a receiving track located in Westchester county on races received from a franchised corporation, for the period commencing January first, two thousand eight and continuing through June thirtieth, two thousand [~~ten~~] **eleven**, the amount used exclusively for purses to be awarded at races conducted by such receiving track shall be computed as follows: of the sums so retained, two and one-half percent of the total pools. Such amount shall be increased or decreased in the amount of fifty percent of the difference in total commissions determined by comparing the total commissions available after July twenty-first, nineteen hundred ninety-five to the total commissions that would have been available to such track prior to July twenty-first, nineteen hundred ninety-five.

§ 3. The opening paragraph of subdivision 1 of section 1014 of the racing, pari-mutuel wagering and breeding law, as amended by section 3 of part L-1 of chapter 57 of the laws of 2009, is amended to read as follows:

The provisions of this section shall govern the simulcasting of races conducted at thoroughbred tracks located in another state or country on any day during which a franchised corporation is conducting a race meeting in Saratoga county at Saratoga thoroughbred racetrack until June thirtieth, two thousand [~~ten~~] **eleven** and on any day regardless of whether or not a franchised corporation is conducting a race meeting in Saratoga county at Saratoga thoroughbred racetrack after June thirtieth, two thousand [~~ten~~] **eleven**. On any day on which a franchised corporation has not scheduled a racing program but a thoroughbred racing corporation located within the state is conducting racing, every off-track betting corporation branch office and every simulcasting facility licensed in accordance with section one thousand seven (that have entered into a written agreement with such facility's representative horsemen's organization, as approved by the board), one thousand eight, or one thousand nine of this article shall be authorized to accept wagers and display the live simulcast signal from thoroughbred tracks located in another state or foreign country subject to the following provisions:

§ 4. Subdivision 1 of section 1015 of the racing, pari-mutuel wagering and breeding law, as amended by section 4 of part L-1 of chapter 57 of the laws of 2009, is amended to read as follows:

1. The provisions of this section shall govern the simulcasting of races conducted at harness tracks located in another state or country during the period July first, nineteen hundred ninety-four through June thirtieth, two thousand [~~ten~~] **eleven**. This section shall supersede all inconsistent provisions of this chapter.

§ 5. The opening paragraph of subdivision 1 of section 1016 of the racing, pari-mutuel wagering and breeding law, as amended by section 5 of part L-1 of chapter 57 of the laws of 2009, is amended to read as follows:

The provisions of this section shall govern the simulcasting of races conducted at thoroughbred tracks located in another state or country on any day during which a franchised corporation is not conducting a race meeting in Saratoga county at Saratoga thoroughbred racetrack until June

thirtieth, two thousand [~~ten~~] **eleven**. Every off-track betting corporation branch office and every simulcasting facility licensed in accordance with section one thousand seven that have entered into a written agreement with such facility's representative horsemen's organization as approved by the board, one thousand eight or one thousand nine of this article shall be authorized to accept wagers and display the live full-card simulcast signal of thoroughbred tracks (which may include quarter horse or mixed meetings provided that all such wagering on such races shall be construed to be thoroughbred races) located in another state or foreign country, subject to the following provisions; provided, however, no such written agreement shall be required of a franchised corporation licensed in accordance with section one thousand seven of this article:

§ 6. The opening paragraph of section 1018 of the racing, pari-mutuel wagering and breeding law, as amended by section 6 of part L-1 of chapter 57 of the laws of 2009, is amended to read as follows:

Notwithstanding any other provision of this chapter, for the period July twenty-fifth, two thousand one through September eighth, two thousand [~~nine~~] **ten**, when a franchised corporation is conducting a race meeting within the state at Saratoga Race Course, every off-track betting corporation branch office and every simulcasting facility licensed in accordance with section one thousand seven (that has entered into a written agreement with such facility's representative horsemen's organization as approved by the board), one thousand eight or one thousand nine of this article shall be authorized to accept wagers and display the live simulcast signal from thoroughbred tracks located in another state, provided that such facility shall accept wagers on races run at all in-state thoroughbred tracks which are conducting racing programs subject to the following provisions; provided, however, no such written agreement shall be required of a franchised corporation licensed in accordance with section one thousand seven of this article.

§ 7. Section 32 of chapter 281 of the laws of 1994, amending the racing, pari-mutuel wagering and breeding law and other laws relating to simulcasting, as amended by section 7 of part L-1 of chapter 57 of the laws of 2009, is amended to read as follows:

§ 32. This act shall take effect immediately and the pari-mutuel tax reductions in section six of this act shall expire and be deemed repealed on July 1, [~~2010~~] **2011**; provided, however, that nothing contained herein shall be deemed to affect the application, qualification, expiration, or repeal of any provision of law amended by any section of this act, and such provisions shall be applied or qualified or shall expire or be deemed repealed in the same manner, to the same extent and on the same date as the case may be as otherwise provided by law; provided further, however, that sections twenty-three and twenty-five of this act shall remain in full force and effect only until May 1, 1997 and at such time shall be deemed to be repealed.

§ 8. Section 54 of chapter 346 of the laws of 1990, amending the racing, pari-mutuel wagering and breeding law and other laws relating to simulcasting and the imposition of certain taxes, as amended by section 8 of part L-1 of chapter 57 of the laws of 2009, is amended to read as follows:

§ 54. This act shall take effect immediately; provided, however, sections three through twelve of this act shall take effect on January 1, 1991, and section 1013 of the racing, pari-mutuel wagering and breeding law, as added by section thirty-eight of this act, shall expire and be deemed repealed on July 1, [~~2010~~] **2011**; and section eighteen of this act shall take effect on July 1, 2008 and sections fifty-one and fifty-

two of this act shall take effect as of the same date as chapter 772 of the laws of 1989 took effect.

§ 9. Paragraph (a) of subdivision 1 of section 238 of the racing, pari-mutuel wagering and breeding law, as amended by section 9 of part L-1 of chapter 57 of the laws of 2009, is amended to read as follows:

(a) The franchised corporation authorized under this chapter to conduct pari-mutuel betting at a race meeting or races run thereat shall distribute all sums deposited in any pari-mutuel pool to the holders of winning tickets therein, provided such tickets be presented for payment before April first of the year following the year of their purchase, less an amount which shall be established and retained by such franchised corporation of between sixteen to seventeen per centum of the total deposits in pools resulting from on-track regular bets, and eighteen and one-half to twenty-one per centum of the total deposits in pools resulting from on-track multiple bets and twenty-six per centum of the total deposits in pools resulting from on-track exotic bets and sixteen to thirty-six per centum of the total deposits in pools resulting from on-track super exotic bets, and twenty-six to thirty-six per centum when such on-track super exotic betting pools are carried forward, plus the breaks. The retention rate to be established is subject to the prior approval of the racing and wagering board. Such rate may not be changed more than once per calendar quarter to be effective on the first day of the calendar quarter. "Exotic bets" and "multiple bets" shall have the meanings set forth in section five hundred nineteen of this chapter. "Super exotic bets" shall have the meaning set forth in section three hundred one of this chapter. For purposes of this section, a "pick six bet" shall mean a single bet or wager on the outcomes of six races. The breaks are hereby defined as the odd cents over any multiple of five for payoffs greater than one dollar five cents but less than five dollars, over any multiple of ten for payoffs greater than five dollars but less than twenty-five dollars, over any multiple of twenty-five for payoffs greater than twenty-five dollars but less than two hundred fifty dollars, or over any multiple of fifty for payoffs over two hundred fifty dollars. Out of the amount so retained there shall be paid by such franchised corporation to the commissioner of taxation and finance, as a reasonable tax by the state for the privilege of conducting pari-mutuel betting on the races run at the race meetings held by such franchised corporation, the following percentages of the total pool for regular and multiple bets five per centum of regular bets and four per centum of multiple bets plus twenty per centum of the breaks; for exotic wagers seven and one-half per centum plus twenty per centum of the breaks, and for super exotic bets seven and one-half per centum plus fifty per centum of the breaks. For the period June first, nineteen hundred ninety-five through September ninth, nineteen hundred ninety-nine, such tax on regular wagers shall be three per centum and such tax on multiple wagers shall be two and one-half per centum, plus twenty per centum of the breaks. For the period September tenth, nineteen hundred ninety-nine through March thirty-first, two thousand one, such tax on all wagers shall be two and six-tenths per centum and for the period April first, two thousand one through December thirty-first, two thousand [~~ten~~] **eleven**, such tax on all wagers shall be one and six-tenths per centum, plus, in each such period, twenty per centum of the breaks. Payment to the New York state thoroughbred breeding and development fund by such franchised corporation shall be one-half of one per centum of total daily on-track pari-mutuel pools resulting from regular, multiple and exotic bets and three

per centum of super exotic bets provided, however, that for the period September tenth, nineteen hundred ninety-nine through March thirty-first, two thousand one, such payment shall be six-tenths of one per centum of regular, multiple and exotic pools and for the period April first, two thousand one through December thirty-first, two thousand [~~ten~~] **eleven**, such payment shall be seven-tenths of one per centum of such pools.

§ 10. Paragraph (a) of subdivision 1 of section 238 of the racing, pari-mutuel wagering and breeding law, as amended by section 10 of part L-1 of chapter 57 of the laws of 2009, is amended to read as follows:

(a) The franchised corporation authorized under this chapter to conduct pari-mutuel betting at a race meeting or races run thereat shall distribute all sums deposited in any pari-mutuel pool to the holders of winning tickets therein, provided such tickets be presented for payment before April first of the year following the year of their purchase, less an amount which shall be established and retained by such franchised corporation of between twelve to seventeen per centum of the total deposits in pools resulting from on-track regular bets, and fourteen to twenty-one per centum of the total deposits in pools resulting from on-track multiple bets and fifteen to twenty-five per centum of the total deposits in pools resulting from on-track exotic bets and fifteen to thirty-six per centum of the total deposits in pools resulting from on-track super exotic bets, plus the breaks. The retention rate to be established is subject to the prior approval of the racing and wagering board. Such rate may not be changed more than once per calendar quarter to be effective on the first day of the calendar quarter. "Exotic bets" and "multiple bets" shall have the meanings set forth in section five hundred nineteen of this chapter. "Super exotic bets" shall have the meaning set forth in section three hundred one of this chapter. For purposes of this section, a "pick six bet" shall mean a single bet or wager on the outcomes of six races. The breaks are hereby defined as the odd cents over any multiple of five for payoffs greater than one dollar five cents but less than five dollars, over any multiple of ten for payoffs greater than five dollars but less than twenty-five dollars, over any multiple of twenty-five for payoffs greater than twenty-five dollars but less than two hundred fifty dollars, or over any multiple of fifty for payoffs over two hundred fifty dollars. Out of the amount so retained there shall be paid by such franchised corporation to the commissioner of taxation and finance, as a reasonable tax by the state for the privilege of conducting pari-mutuel betting on the races run at the race meetings held by such franchised corporation, the following percentages of the total pool for regular and multiple bets five per centum of regular bets and four per centum of multiple bets plus twenty per centum of the breaks; for exotic wagers seven and one-half per centum plus twenty per centum of the breaks, and for super exotic bets seven and one-half per centum plus fifty per centum of the breaks. For the period June first, nineteen hundred ninety-five through September ninth, nineteen hundred ninety-nine, such tax on regular wagers shall be three per centum and such tax on multiple wagers shall be two and one-half per centum, plus twenty per centum of the breaks. For the period September tenth, nineteen hundred ninety-nine through March thirty-first, two thousand one, such tax on all wagers shall be two and six-tenths per centum and for the period April first, two thousand one through December thirty-first, two thousand [~~ten~~] **eleven**, such tax on all wagers shall be one and six-tenths per centum, plus, in each such period, twenty per centum of the breaks. Payment to the New York state

thoroughbred breeding and development fund by such franchised corporation shall be one-half of one per centum of total daily on-track pari-mutuel pools resulting from regular, multiple and exotic bets and three per centum of super exotic bets provided, however, that for the period September tenth, nineteen hundred ninety-nine through March thirty-first, two thousand one, such payment shall be six-tenths of one per centum of regular, multiple and exotic pools and for the period April first, two thousand one through December thirty-first, two thousand [~~ten~~] **eleven**, such payment shall be seven-tenths of one per centum of such pools.

§ 11. Subdivision 5 of section 1012 of the racing, pari-mutuel wagering and breeding law, as amended by section 11 of part L-1 of chapter 57 of the laws of 2009, is amended to read as follows:

5. The provisions of this section shall expire and be of no further force and effect after June thirtieth, two thousand [~~ten~~] **eleven**.

§ 12. This act shall take effect immediately, provided that the amendments to paragraph (a) of subdivision 1 of section 238 of the racing, pari-mutuel wagering and breeding law made by section nine of this act shall be subject to the expiration and reversion of such paragraph pursuant to section 32 of chapter 115 of the laws of 2008, as amended, when upon such date the provisions of section ten of this act shall take effect.

PART D

Section 1. Subdivision 1 of section 471 of the tax law, as amended by section 1 of part RR-1 of chapter 57 of the laws of 2008, is amended to read as follows:

1. There is hereby imposed and shall be paid a tax on all cigarettes possessed in the state by any person for sale, except that no tax shall be imposed on cigarettes sold under such circumstances that this state is without power to impose such tax**, including sales to qualified Indians for their own use and consumption on their nations' or tribes' qualified reservation,** or sold to the United States or sold to or by a voluntary unincorporated organization of the armed forces of the United States operating a place for the sale of goods pursuant to regulations promulgated by the appropriate executive agency of the United States, to the extent provided in such regulations and policy statements of such an agency applicable to such sales. **The tax imposed by this section is imposed on all cigarettes sold on an Indian reservation to non-members of the Indian nation or tribe and to non-Indians and evidence of such tax shall be by means of an affixed cigarette tax stamp. Indian nations or tribes may elect to participate in the Indian tax exemption coupon system established in section four hundred seventy-one-e of this article which provides a mechanism for the collection of the tax imposed by this section on cigarette sales on qualified reservations to such non-members and non-Indians and for the delivery of quantities of tax-exempt cigarettes to Indian nations or tribes for the personal use and consumption of qualified members of the Indian nation or tribe. If an Indian nation or tribe does not elect to participate in the Indian tax exemption coupon system, the prior approval system shall be the mechanism for the delivery of quantities of tax-exempt cigarettes to Indian nations or tribes for the personal use and consumption of qualified members of the Indian nation or tribe as provided for in paragraph (b) of subdivision five of this section.** Such tax on cigarettes shall be at the rate of [~~two~~] **four** dollars and [~~seventy-five~~] **thirty-five** cents for each twenty

cigarettes or fraction thereof, provided, however, that if a package of cigarettes contains more than twenty cigarettes, the rate of tax on the cigarettes in such package in excess of twenty shall be [~~sixty eight~~] **one dollar and eight** and three-quarters cents for each five cigarettes or fraction thereof. Such tax is intended to be imposed upon only one sale of the same package of cigarettes. It shall be presumed that all cigarettes within the state are subject to tax until the contrary is established, and the burden of proof that any cigarettes are not taxable hereunder shall be upon the person in possession thereof.

§ 2. Subdivision 2 of section 471 of the tax law, as amended by chapter 6 of the laws of 1961, is amended to read as follows:

2. It is intended that the ultimate incidence of and liability for the tax shall be upon the consumer, and that any agent or dealer who shall pay the tax to the [~~tax commission~~] **commissioner** shall collect the tax from the purchaser or consumer. Except as hereinafter provided, the tax shall be advanced and paid by the agent. The agent shall be liable for the collection and payment of the tax on cigarettes imposed by this article and shall pay the tax to the [~~tax commission~~] **commissioner** by purchasing, under such regulations as [~~it~~] **he or she** shall prescribe, adhesive stamps of such designs and denominations as [~~it~~] **he or she** shall prescribe. The tax on cigarettes may also be paid by or through the use of metering machines if the [~~tax commission~~] **commissioner** so prescribes. Agents, located within or without the state, shall purchase stamps and affix such stamps in the manner prescribed to packages of cigarettes to be sold within the state, in which case any dealer subsequently receiving such stamped packages of cigarettes will not be required to purchase and affix stamps on such packages of cigarettes. [~~Notwithstanding any other provision of this article, the tax commission may by regulation provide that the tax on cigarettes imposed by this article shall be collected without the use of stamps~~] **All cigarettes sold by agents and wholesalers to Indian nations or tribes or reservation cigarette sellers located on an Indian reservation must bear a tax stamp**.

§ 3. Section 471 of the tax law is amended by adding a new subdivision 5 to read as follows:

5. Prior approval system. (a) For any year that the recognized governing body of an Indian nation or tribe has not elected to participate in the Indian tax exemption coupon system established in section four hundred seventy-one-e of this article, paragraph (b) of this subdivision provides for the prior approval system to be the mechanism as to how Indian nations or tribes or reservation cigarette sellers can purchase adequate quantities of tax-exempt cigarettes for the personal use and consumption of qualified members of the Indian nation or tribe on their nations' or tribes' qualified reservation.

(b) If an Indian nation or tribe does not elect to participate in the Indian tax exemption coupon system, Indian nations or tribes or reservation cigarette sellers may purchase from New York state licensed cigarette stamping agents and wholesalers an adequate quantity of tax-exempt cigarettes based on probable demand on their nations' or tribes' qualified reservation for official nation or tribal or qualified Indian use or consumption from agents and wholesalers who have received prior approval from the department. All such pre-approved tax exempt cigarettes shall nonetheless bear a tax stamp. The department shall grant agents and wholesalers prior approval in a manner and form to be determined by the department and as may be prescribed by regulation. The department shall issue expedited refunds or credits to agents whenever

the department grants such prior approvals. Probable demand shall be determined as provided by subdivision two of section four hundred seventy-one-e of this article and as may be prescribed by regulation.

§ 4. Section 471 of the tax law is amended by adding a new subdivision 6 to read as follows:

6. Tax agreements with Indian nations or tribes. If an Indian nation or tribe enters into an agreement with the state and the legislature approves such agreement or if an Indian nation or tribe enters into an agreement with the state that is part of a stipulation and order approved by a federal court of competent jurisdiction regarding the sale and distribution of cigarettes on the nation's or tribe's qualified reservation, the terms of such agreement shall take precedence over the provisions of this article and exempt sales to non-members of the tribe or nation and non-Indians by such nation from such taxes to the extent that such taxes are specifically referred to in the agreement, and the sale or distribution, including transportation, of any cigarettes to the nation's or tribe's qualified reservation shall be in accordance with the provisions of such agreement.

§ 5. Section 471-a of the tax law, as amended by section 2 of part RR-1 of chapter 57 of the laws of 2008, is amended to read as follows:

§ 471-a. Use tax on cigarettes. There is hereby imposed and shall be paid a tax on all cigarettes used in the state by any person, except that no tax shall be imposed (1) if the tax provided in section four hundred seventy-one of this article is paid, (2) on the use of cigarettes which are exempt from the tax imposed by said section, or (3) on the use of four hundred or less cigarettes, brought into the state on, or in the possession of, any person. Such tax on cigarettes shall be at the rate of [~~two~~] **four** dollars and [~~seventy five~~] **thirty-five** cents for each twenty cigarettes or fraction thereof, provided, however, that if a package of cigarettes contains more than twenty cigarettes, the rate of tax on the cigarettes in such package in excess of twenty shall be [~~sixty eight~~] **one dollar and eight** and three-quarters cents for each five cigarettes or fraction thereof. Within twenty-four hours after liability for the tax accrues, each such person shall file with the commissioner a return in such form as the commissioner may prescribe together with a remittance of the tax shown to be due thereon. For purposes of this article, the word "use" means the exercise of any right or power actual or constructive and shall include but is not limited to the receipt, storage or any keeping or retention for any length of time, but shall not include possession for sale. All other provisions of this article if not inconsistent shall apply to the administration and enforcement of the tax imposed by this section in the same manner as if the language of said provisions had been incorporated in full into this section.

§ 6. Subdivision 1 of section 471-e of the tax law, as added by section 2 of part K of chapter 61 of the laws of 2005, is amended to read as follows:

1. [~~General~~] **Indian tax exemption coupon system**. (a) Notwithstanding any provision of this article to the contrary qualified Indians may purchase cigarettes for such qualified Indians' own use or consumption exempt from cigarette tax on their nations' or tribes' qualified reservations. However, such qualified Indians purchasing cigarettes off their reservations or on another nation's or tribe's reservation, and non-Indians making cigarette purchases on an Indian reservation shall not be exempt from paying the cigarette tax when purchasing cigarettes within this state. Accordingly, all cigarettes sold on an Indian reservation to

non-members of the nation or tribe or to non-Indians shall be taxed, and evidence of such tax will be by means of an affixed cigarette tax stamp.

(b) In order to ensure an adequate quantity of cigarettes on Indian reservations which may be purchased by qualified Indians exempt from the cigarette tax, the **recognized governing body of an Indian nation or tribe may annually elect to participate in the Indian tax exemption coupon system for that year. If the recognized governing body of an Indian nation or tribe elects within the time specified by the department to participate in the Indian tax exemption coupon system for that year, the** department shall provide **the** Indian [~~nations and tribes within this state~~] **nation or tribe** with Indian tax exemption coupons as set forth in this section. [~~A~~] **If the recognized governing body of an Indian nation or tribe does not elect to participate in the Indian tax exemption coupon system for that year or does not make this election for that year within the time specified by the department, no Indian tax exemption coupons will be provided to that Indian nation or tribe for that year. Instead, for that year, the prior approval system set forth in paragraph (b) of subdivision five of section four hundred seventy-one of this article shall be used. When the recognized governing body of an Indian nation or tribe elects to use the Indian tax exemption coupon system for a year, an Indian nation or tribe and a** reservation cigarette seller shall be able to present such Indian tax exemption coupons to a wholesale dealer licensed pursuant to this article in order to purchase stamped cigarettes exempt from the imposition of the cigarette tax. Qualified Indians may purchase cigarettes from a reservation cigarette seller exempt from the cigarette tax even though such cigarettes will have an affixed cigarette tax stamp.

§ 7. Paragraph (a) of subdivision 2 of section 471-e of the tax law, as added by section 2 of part K of chapter 61 of the laws of 2005, is amended to read as follows:

(a) **If the recognized governing body of an Indian nation or tribe timely elects to participate in the Indian tax exemption coupon system for that year,** Indian tax exemption coupons shall be provided to the recognized governing body of [~~each~~] **such** Indian nation or tribe to ensure that [~~each~~] **such** Indian nation or tribe can obtain cigarettes upon which the tax will not be collected that are for the use or consumption by the nation or tribe or by the members of such nation or tribe. The Indian tax exemption coupons shall be provided to [~~the~~] **such** Indian nations or tribes on a quarterly basis for each of the four quarters beginning with the first day of December, March, June, and September **of that year**. It is intended that the Indian nations or tribes will retain the amount of Indian tax exemption coupons they will need each quarter to purchase cigarettes for official nation or tribal use, and will distribute the remaining Indian tax exemption coupons to reservation cigarette sellers on such nations' or tribes' qualified reservations. Only Indian nations or tribes or reservation cigarette sellers on their qualified reservations may redeem such Indian tax exemption coupons pursuant to this section.

§ 8. Paragraph (d) of subdivision 3 of section 471-e of the tax law, as added by section 2 of part K of chapter 61 of the laws of 2005, is amended to read as follows:

(d) [~~A wholesale dealer~~] **Wholesale dealers** shall **sell only tax-stamped cigarettes to Indian nations and tribes, reservation cigarette sellers and all other purchasers, but shall** not collect the cigarette tax from any purchaser to the extent the purchaser gives such wholesale dealer Indian tax exemption coupons entitling the purchaser to purchase such

quantities of cigarettes as allowed for on each such Indian tax exemption coupon without paying the cigarette tax.

§ 9. Section 471-e of the tax law is amended by adding a new subdivision 6 to read as follows:

6. The failure of the department to establish, issue and provide Indian tax exemption coupons, pursuant to subdivisions one and two of this section, or to promulgate any rules, regulations or directives necessary to implement the provisions of this section, shall not relieve wholesale dealers of the obligation to sell only tax-stamped cigarettes to Indian nations and tribes, and to reservation cigarette sellers.

§ 10. Section 482 of the tax law, as amended by section 125-b of part C of chapter 58 of the laws of 2009, is amended as follows:

§ 482. Deposit and disposition of revenue. (a) All taxes, fees, interest and penalties collected or received by the commissioner under this article and article twenty-A of this chapter shall be deposited and disposed of pursuant to the provisions of section one hundred seventy-one-a of this chapter. (b) From the taxes, interest and penalties collected or received by the commissioner under sections four hundred seventy-one and four hundred seventy-one-a of this article, effective on and after March first, two thousand, forty-nine and fifty-five hundredths, and effective on and after February first, two thousand two, forty-three and seventy hundredths; and effective on and after May first, two thousand two, sixty-four and fifty-five hundredths; and effective on and after April first, two thousand three, sixty-one and twenty-two hundredths percent; and effective on and after June third, two thousand eight, seventy and sixty-three hundredths percent**; and effective on and after July first, two thousand ten, seventy-six percent** collected or received under those sections must be deposited to the credit of the tobacco control and insurance initiatives pool to be established and distributed by the commissioner of health in accordance with section twenty-eight hundred seven-v of the public health law. (c) From the fees collected or received by the commissioner under subdivision two of section four hundred eighty-a of this article, effective on or after September first, two thousand nine, any monies collected or received under that section in excess of three million dollars must be deposited to the credit of the tobacco control and insurance initiatives pool to be distributed by the commissioner of health in accordance with section twenty-eight hundred seven-v of the public health law.

§ 11. Within 60 days after the effective date of this section, the department of taxation and finance shall promulgate any rules and regulations and take any other actions necessary to fully implement the provisions of section 471-e of the tax law, including, but not limited to, the establishment, issuance and provision of Indian tax exemption coupons, pursuant to subdivisions one and two of such section. Furthermore, within 90 days after the effective date of this section, the commissioner of taxation and finance shall submit a written report to the legislature explaining all actions taken by the department of taxation and finance to comply with the provisions of this section.

§ 12. Any Indian nation or tribe, distributor, dealer, or interested party may commence a cause of action for injunctive relief ordering the department of taxation and finance to comply with the provisions of section eleven of this act.

§ 13. Notwithstanding any other provision of law to the contrary, the tax due on cigarettes possessed in New York state as of the close of business on June 30, 2010 by any person for sale solely attributable to the increase imposed by the amendments to section 471 of the tax law, as

amended by section one of this act, shall be paid by September 20, 2010, subject to such terms and conditions as the commissioner of taxation and finance shall prescribe.

§ 14. Subdivision 1 of section 470 of the tax law, as amended by section 1 of part MM-1 of chapter 57 of the laws of 2008, is amended to read as follows:

1. "Cigarette." [~~(a)~~] Any roll for smoking made wholly or in part of tobacco or of any other substance [~~wrapped in paper or in any other substance not containing tobacco, and (b) any roll for smoking made wholly or in part of tobacco wrapped in any substance containing tobacco that, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette described in paragraph (a) of this subdivision. However, a roll will not be considered to be a cigarette for purposes of paragraph (b) of this subdivision if it is not treated as a cigarette for federal excise tax purposes under the applicable federal statute in effect on April first, two thousand eight~~], **irrespective of size or shape and whether or not such tobacco or substance is flavored, adulterated or mixed with any other ingredient, the wrapper or cover of which is made of paper or any other substance or material but is not made in whole or in part of tobacco**.

§ 15. Subdivision 2 of section 470 of the tax law, as amended by section 1 of part MM-1 of chapter 57 of the laws of 2008, is amended to read as follows:

2. "Tobacco products." Any cigar**, including a little cigar,** or tobacco, other than cigarettes, intended for consumption by smoking, chewing, or as snuff.

§ 16. Section 470 of the tax law is amended by adding a new subdivision 2-b to read as follows:

2-b. "Little cigar." Any roll for smoking made wholly or in part of tobacco if such product is wrapped in any substance containing tobacco, other than natural leaf tobacco wrapper, and weighing not more than four pounds per thousand.

§ 17. Subdivision 19 of section 470 of the tax law, as added by section 1 of part MM-1 of chapter 57 of the laws of 2008, is amended to read as follows:

19. "Cigar." Any roll of tobacco wrapped in leaf tobacco or in any substance containing tobacco (other than any roll of tobacco that is a cigarette as defined in subdivision one of this section). [~~However, a roll will not be considered to be a cigar for purposes of this subdivision if it is not treated as a cigar for federal excise tax purposes under the applicable federal statute in effect on April first, two thousand eight.~~] **"Cigar" shall include, except where expressly excluded, any little cigar.**

§ 18. Paragraphs (a) and (b) of subdivision 1 of section 471-b of the tax law, paragraph (a) as amended by section 1 of part I-1 of chapter 57 of the laws of 2009, and paragraph (b) as added by section 2 of part QQ-1 of chapter 57 of the laws of 2008, are amended to read as follows:

(a) Such tax on tobacco products other than snuff **and little cigars** shall be at the rate of [~~forty six~~] **seventy-five** percent of the wholesale price, and is intended to be imposed only once upon the sale of any tobacco products other than snuff **and little cigars**.

(b) Such tax on snuff shall be at the rate of [~~ninety six cents~~] **two dollars** per ounce and a proportionate rate on any fractional parts of an ounce, provided that cans or packages of snuff with a net weight of less than one ounce shall be taxed at the equivalent rate of cans or packages

weighing one ounce. Such tax shall be computed based on the net weight as listed by the manufacturer, and is intended to be imposed only once upon the sale of any snuff.

§ 19. Subdivision 1 of section 471-b of the tax law is amended by adding a new paragraph (c) to read as follows:

(c) Such tax on little cigars shall be at the same rate imposed on cigarettes under this article and is intended to be imposed only once upon the sale of any little cigars.

§ 20. Paragraphs (i) and (ii) of subdivision (a) of section 471-c of the tax law, as amended by section 2 of part I-1 of chapter 57 of the laws of 2009, are amended to read as follows:

(i) Such tax on tobacco products other than snuff **and little cigars** shall be at the rate of [~~forty-six~~] **seventy-five** percent of the wholesale price.

(ii) Such tax on snuff shall be at the rate of [~~ninety-six cents~~] **two dollars** per ounce and a proportionate rate on any fractional parts of an ounce, provided that cans or packages of snuff with a net weight of less than one ounce shall be taxed at the equivalent rate of cans or packages weighing one ounce. Such tax shall be computed based on the net weight as listed by the manufacturer.

§ 21. Subdivision (a) of section 471-c of the tax law is amended by adding a new paragraph (iii) to read as follows:

(iii) Such tax on little cigars shall be at the same rate imposed on cigarettes under this article and is intended to be imposed only once upon the sale of any little cigars.

§ 22. Subdivision 1 of section 11-1301 of the administrative code of the city of New York, as amended by section 3 of part MM-1 of chapter 57 of the laws of 2008, is amended to read as follows:

1. "Cigarette." [~~(a)~~] Any roll for smoking made wholly or in part of tobacco or any other substance [~~wrapped in paper or in any other substance not containing tobacco, and (b) any roll for smoking made wholly or in part of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette described in paragraph (a) of this subdivision. However, a roll will not be considered to be a cigarette for purposes of paragraph (b) of this subdivision if it is not treated as a cigarette for federal excise tax purposes under the applicable federal statute in effect on April first, two thousand eight~~], **irrespective of size or shape and whether or not such tobacco or substance is flavored, adulterated or mixed with any other ingredient, the wrapper or cover of which is made of paper or any other substance or material but is not made in whole or in part of tobacco**.

§ 23. Subdivision b of section 20-201 of the administrative code of the city of New York, as amended by section 4 of part MM-1 of chapter 57 of the laws of 2008, is amended to read as follows:

b. "Cigarette" shall mean [~~(1)~~] any roll for smoking made wholly or in part of tobacco or any other substance [~~wrapped in paper or in any other substance not containing tobacco, and (2) any roll for smoking made wholly or in part of tobacco wrapped in any substance containing tobacco that, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette described in paragraph one of this subdivision. However, a roll will not be considered to be a cigarette for purposes of paragraph two of this subdivision if it is not treated as a cigarette for federal excise tax purposes under the applicable federal~~

~~statute in effect on April first, two thousand eight~~], **irrespective of size or shape and whether or not such tobacco or substance is flavored, adulterated or mixed with any other ingredient, the wrapper or cover of which is made of paper or any other substance or material but is not made in whole or in part of tobacco**.

§ 24. Subdivision 2 of section 1 of chapter 235 of the laws of 1952 relating to enabling any city of the state having a population of one million or more to adopt, and amend local laws, imposing certain specified types of taxes on cigarettes, cigars and smoking tobacco which the legislature has or would have power and authority to impose, to provide for the review of such taxes, and to limit the application of such local laws, as amended by section 5 of part MM-1 of chapter 57 of the laws of 2008, is amended to read as follows:

(2) As used herein, the term "cigarette" shall mean and include [~~(a)~~] any roll for smoking made wholly or in part of tobacco or of any other substance [~~wrapped in paper or in any other substance not containing tobacco, and (b) any roll for smoking made wholly or in part of tobacco wrapped in any substance containing tobacco that, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette described in paragraph (a) of this subdivision. However, a roll will not be considered to be a cigarette for purposes of paragraph (b) of this subdivision if it is not treated as a cigarette for federal excise tax purposes under the applicable federal statute in effect on April first, two thousand eight. The term "cigar" does not include any cigarette as defined in this subdivision~~], **irrespective of size or shape and whether or not such tobacco or substance is flavored, adulterated or mixed with any other ingredient, the wrapper or cover of which is made of paper or any other substance or material but is not made in whole or in part of tobacco**.

§ 25. Severability clause. If any clause, sentence, paragraph, subdivision, section, or part of this act shall be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, subdivision, section, or part thereof directly involved in the controversy in which such judgment shall have been rendered. It is hereby declared to be the intent of the legislature that this act would have been enacted even if such invalid provisions had not been included herein.

§ 26. This act shall take effect immediately; provided, that (a) section one of this act, as to the rate change, and sections five, ten, and thirteen of this act shall take effect July 1, 2010, and shall apply to all cigarettes possessed in the state by any person for sale and all cigarettes used in the state by any person on or after July 1, 2010; and (b) section one of this act, other than as to the rate change, and sections two through four and six through nine of this act will apply to quarters beginning on and after September 1, 2010; and (c) sections fourteen through twenty-four of this act shall take effect on August 1, 2010 as to tobacco products, snuff and little cigars which first become subject to taxation under article 20 of the tax law on or after such effective date.

§ 2. Severability clause. If any clause, sentence, paragraph, subdivision, section or part of this act shall be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, subdivision, section

or part thereof directly involved in the controversy in which such judgment shall have been rendered. It is hereby declared to be the intent of the legislature that this act would have been enacted even if such invalid provisions had not been included herein.

§ 3. This act shall take effect immediately provided, however, that the applicable effective dates of Parts A through D of this act shall be as specifically set forth in the last section of such Parts.

The Legislature of the STATE OF NEW YORK **ss:**

Pursuant to the authority vested in us by section 70-b of the Public Officers Law, we hereby jointly certify that this slip copy of this session law was printed under our direction and, in accordance with such section, is entitled to be read into evidence.

MALCOLM A. SMITH
Temporary President of the Senate

SHELDON SILVER
Speaker of the Assembly

EXHIBIT K

EXHIBIT K

LAWS OF NEW YORK, 2010

CHAPTER 136

AN ACT to amend part D of a chapter of the laws of 2010, amending the tax law and other laws relating to the cigarette tax rate and sales of cigarettes to Indian nations or tribes and the tax on tobacco products, snuff and little cigars, as proposed in legislative bill numbers S. 8285 and A. 11515, in relation to sales of cigarettes to Indian nations or tribes

Became a law June 22, 2010, with the approval of the Governor. Passed on message of necessity pursuant to Article III, section 14 and Article VII, section 5 of the Constitution by a majority vote, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section 11 of part D of a chapter of the laws of 2010, amending the tax law and other laws relating to the cigarette tax rate and sales of cigarettes to Indian nations or tribes and the tax on tobacco products, snuff and little cigars, as proposed in legislative bill numbers S. 8285 and A. 11515, is amended to read as follows:

§ 11. Within 60 days after the effective date of this section, the department of taxation and finance shall promulgate any rules and regulations and take any other actions necessary to fully implement the provisions of **subdivision 5 of section 471 and** section 471-e of the tax law, including, but not limited to, the establishment, issuance and provision of Indian tax exemption coupons, pursuant to subdivisions one and two of such section **471-e**. Furthermore, within 90 days after the effective date of this section, the commissioner of taxation and finance shall submit a written report to the legislature explaining all actions taken by the department of taxation and finance to comply with the provisions of this section.

§ 2. This act shall take effect on the same date as part D of a chapter of the laws of 2010, amending the tax law and other laws relating to the cigarette tax rate and sales of cigarettes to Indian nations or tribes and the tax on tobacco products, snuff and little cigars, as proposed in legislative bill numbers S. 8285 and A. 11515, takes effect.

The Legislature of the STATE OF NEW YORK **ss:**

Pursuant to the authority vested in us by section 70-b of the Public Officers Law, we hereby jointly certify that this slip copy of this session law was printed under our direction and, in accordance with such section, is entitled to be read into evidence.

MALCOLM A. SMITH
Temporary President of the Senate

SHELDON SILVER
Speaker of the Assembly

EXPLANATION--Matter in ***italics*** is new; matter in brackets [-] is old law to be omitted.

EXHIBIT L

EXHIBIT L

336.6 Indian nations or tribes, qualified Indian consumers and registered dealers. [Tax Law, §§ 471, 471-a and 475] (a) As provided for in this section and section 336.7 of this Part, exempt Indian nations or tribes, qualified Indian consumers and registered dealers (as defined herein) may purchase, on qualified reservations, cigarettes upon which the seller has not prepaid and precollected the cigarette tax imposed pursuant to article 20 of the Tax Law.

(b) (1) (i) *Qualified Indian* for purposes of this section means a person, duly enrolled on the tribal rolls of one of the exempt Indian nations or tribes.

(ii) *Qualified Indian consumer* for purposes of this section means a qualified Indian who purchases or intends to purchase cigarettes within the boundaries of a qualified reservation for such Indian's own use or consumption (*i.e.* other than for resale) within such reservation.

(2) *Exempt Indian nation* or *tribe* for purposes of this section means one of the following New York State Indian nations or tribes: Cayuga, Oneida Indian Nation, Onondaga Nation of Indians, Poospatuck, St. Regis Mohawk, Seneca Nation of Indians, Shinnecock, Tonawanda Band of Senecas and Tuscarora Nation of Indians.

(3) *Qualified reservation* for purposes of this section means the following reservations of the exempt Indian nations or tribes: Allegany Indian reservation, Cattaraugus Indian reservation, Oil Spring Indian reservation, Oneida Indian territory, Onondaga Indian reservation, Poospatuck Indian reservation, St. Regis Indian reservation, Shinnecock Indian reservation, Tonawanda Indian reservation and Tuscarora Indian reservation.

(4) *Registered dealer* for purposes of this section means:

(i) an Indian or non-Indian retail dealer (including but not limited to a dealer who has either a valid Indian Trader's License issued by the United States Department of the Interior, Bureau of Indian Affairs, or a valid license issued by an exempt Indian nation or tribe), who:

(*a*) registers with the Department of Taxation and Finance; and

(*b*) makes or intends to make qualified sales of cigarettes on a qualified reservation; or

(ii) a qualified Indian who is a wholesale dealer (including, but not limited to, a dealer who has either a valid Indian Trader's License issued by the United States Department of the Interior, Bureau of Indian Affairs, or a valid license issued by an exempt Indian nation or tribe), who:

(*a*) registers with the Department of Taxation and Finance; and

(*b*) makes or intends to make qualified sales of cigarettes on qualified reservations.

(5) *Qualified sale* for purposes of this section means a sale of cigarettes made on a qualified reservation by an agent, an exempt Indian nation or tribe, or a registered dealer, without prepayment and precollection of the cigarette tax to an exempt Indian nation or tribe, a registered dealer, or a qualified consumer.

(c) Although stamps are usually affixed to packages of cigarettes as evidence of payment of tax, the Commissioner of Taxation and Finance may authorize the use of a special stamp in order to clearly identify packages of cigarettes which are intended for nontaxable sales to qualified Indians on qualified reservations. If such special stamps are so authorized, the special stamps constitute documentary evidence of non-payment of the tax and, if possessed by a registered dealer or an Indian for resale outside the boundaries of a qualified reservation, or by a non-Indian or a non-qualified Indian, such specially stamped packages of cigarettes are deemed to be unstamped packages of cigarettes. Cigarettes, upon which the tax has not been prepaid and precollected, and which bear such special stamps may not be sold to non-Indians or non-qualified Indians under any circumstances. In addition, any such specially stamped packages of cigarettes may not be sold outside the boundaries of a qualified reservation, unless such sale is specifically authorized by this Part.

(d) *Exempt Indian nations or tribes.* (1) An exempt Indian nation or tribe may purchase cigarettes upon which the seller has not prepaid and precollected the cigarette tax for its own use or consumption, or for making qualified sales, provided that the nation or tribe:

(i) holds a valid exempt organization certificate issued by the New York State Department of Taxation and Finance;

(ii) takes delivery of the cigarettes on its qualified reservation; and

(iii) uses, or intends to use, such cigarettes for its own official use or consumption within such reservation, or to make qualified sales.

(2) An exempt Indian nation or tribe may purchase cigarettes upon which the seller has not prepaid and precollected the cigarette tax by issuing to the seller a properly completed certificate of exemption for qualified Indian nations or tribes. Such exemption certificate must disclose the Indian nation's or tribe's exempt organization number referred to in section 529.9(b) of this Title.

(3) Failure to comply with any of the provisions of article 20 of the Tax Law, or any rule or regulation pursuant to such article, may result in the cancellation or suspension of the authority of such nation or tribe to purchase cigarettes upon which the seller has not prepaid and precollected the cigarette tax for purposes of making qualified sales.

(e) *Qualified Indian consumers.* (1) A qualified Indian consumer may purchase cigarettes upon which the seller has not prepaid and precollected the cigarette tax, if such individual:

(i) takes delivery of the cigarettes on a qualified reservation; and

(ii) purchases the cigarettes for such individual's own use or consumption within such reservation.

(2) A qualified Indian consumer may purchase cigarettes upon which the seller has not prepaid and precollected the cigarette tax, by issuing to the seller of the cigarettes a properly completed certificate of individual Indian exemption for certain taxes on property delivered on a reservation.

(f) *Registered dealers.* (1) Upon application, the Department of Taxation and Finance may register an applicant and issue a certificate of registration as a dealer of cigarettes to such applicant, if the applicant:

(i) (*a*) is an Indian or non-Indian retail dealer who or which makes, or intends to make, qualified sales within the boundaries of a qualified reservation; or

(*b*) is a qualified Indian, who is also a wholesale dealer, who makes, or intends to make, qualified sales within the boundaries of a qualified reservation;

(ii) (*a*) has no outstanding liability for any taxes or other amounts imposed pursuant to the Tax Law which has finally been determined to be due from such applicant; and

(*b*) is properly licensed or registered for any applicable taxes (*e.g.* that the applicant has a valid certificate of authority for the sales tax pursuant to Tax Law section 1132(c)); and

(iii) (*a*) provides evidence to the department that such applicant has compiled (or will comply) with any applicable tribal regulations and/or licensing procedures; and

(*b*) has no outstanding liability for any applicable taxes or other sums which may be imposed by an Indian nation or tribe, and which has finally been determined to be due from such applicant.

(2) Unless so registered, or otherwise specifically provided for in this Part, no person shall sell cigarettes within a qualified reservation without prepayment and precollection of the cigarette tax. No fee is charged for this registration.

(3) A registered dealer may purchase cigarettes upon which the seller has not prepaid and precollected the cigarette tax for purposes of making qualified sales, provided that the registered dealer:

(i) has received from the department a valid certificate of registration as a dealer of cigarettes;

(ii) takes delivery of such cigarettes within the boundaries of its qualified reservation; and

(iii) uses or intends to use such cigarettes to make qualified sales.

(4) A registered dealer may purchase cigarettes upon which the seller has not prepaid and precollected the cigarette tax by issuing to the seller of such cigarettes a properly completed certificate of exemption. Such exemption certificate must indicate such dealer's registration number.

(5) Failure to comply with any of the provisions of article 20 of the Tax Law, or any rule or regulation pursuant to such article, may result in the cancellation or suspension of the registration as a dealer of cigarettes.

(g) (1) The exemption certificates prescribed in subdivision (d), (e) and (f) of this section must be completed by the purchaser and given to the seller of cigarettes upon which the tax has not been prepaid and precollected, at the time of an initial purchase.

EXHIBIT M

EXHIBIT M

A separate exemption certificate need not be given for each additional purchase of cigarettes, provided that each delivery of such cigarettes is substantiated as being exempt from tax with an individual bill, invoice, receipt or other form of written evidence given by the seller showing the exempt Indian nation or tribe, qualified Indian consumer, or registered dealer as the purchaser.

(2) Every bill, invoice, receipt or other form of written evidence given by the seller must indicate the quantity of cigarettes delivered, the purchase price of the cigarettes without regard to any exemption and the price paid or to be paid by the exempt purchaser for such cigarettes. In addition, such evidence of each exempt transaction must be retained by the seller and must be signed and dated by the individual taking delivery of the cigarettes. In the case of a purchase by an exempt Indian nation or tribe, such evidence must also indicate such nation's or tribe's exempt organization number. In the case of a purchase by a registered dealer, such evidence must also indicate the dealer's registration number.

(3) Sellers of cigarettes upon which the tax has not been prepaid and precollected must establish an acceptable system of associating copies of these individual bills, invoices, receipts and other forms of written evidence of exemption from tax with the applicable tax exemption certificates initially received from the purchasers.

(4) A licensed cigarette agent must report all sales of cigarettes to exempt Indian nations or tribes, qualified Indian consumers and registered dealers in its monthly cigarette tax return.

Historical Note

Sec. added by renum. and amd. 335.6, filed Dec. 4, 1990 eff. Dec. 19, 1990.

336.7 Qualified sales of cigarettes on qualified reservations. [Tax Law, §§ 471, 471-a, 475 and 481(2)]

(a) (1) The cigarette tax imposed pursuant to article 20 of the Tax Law is not required to be prepaid and precollected when cigarettes are sold under circumstances which preclude the imposition of the tax by reason of the United States Constitution and any laws of the United States enacted pursuant thereto.

(2) Federal constitutional and statutory principles relating to Indian sovereignty, preempt the application of a state cigarette excise tax to a sale of cigarettes on a qualified reservation, if such cigarettes are ultimately purchased on such reservation by a qualified Indian for such Indian's own personal use or consumption. Consistent with such federal principles, sales of cigarettes on a qualified reservation to a non-Indian and nonqualified Indian are subject to the tax since the ultimate incidence of, and liability for, the tax is upon the nonIndian or nonqualified consumer. Additionally, consistent with such principles, all sales of cigarettes made within a state and outside the boundaries of a qualified reservation, regardless of whether the seller and/or the purchaser is an exempt Indian nation or tribe, a registered dealer, or a qualified Indian consumer, are subject to a state's cigarette excise tax.

(b) (1) An agent licensed by the Department of Taxation and Finance to purchase and affix stamps may possess cigarettes upon which the tax has not been prepaid and precollected for purposes of making qualified sales, if that agent - with the prior approval of the Department of Taxation and Finance, or, if applicable, of an exempt Indian nation or tribe - sells and delivers such cigarettes to:

(i) an exempt Indian nation or tribe;

(ii) a registered dealer; or

(iii) a qualified Indian consumer.

(2) No person other than a duly licensed cigarette agent (and its employees) may possess cigarettes for sale in this State and transport such cigarettes onto a qualified reservation located in this State without prepaying and precollecting the cigarette tax. However, as provided in section 336.6 of this Part, subsequent qualified sales may be made solely on such qualified reservations. Properly completed exemption certificates must be received by all sellers of cigarettes, where the tax has not been prepaid and precollected.

(3) In order to administer the cigarette tax with respect to the sale of cigarettes on qualified reservations consistent with federal constitutional and statutory principles, a cigarette agent may sell and deliver cigarettes without prepayment and precollection of the cigarette tax to exempt Indian nation or tribe, a qualified Indian consumer, or a registered dealer; provided that such agent complies with the applicable provisions of subdivisions (c) and (d) of this section with respect to approval of the amount of such cigarettes to be sold and delivered, and further complies with all of the requirements of this Subchapter.

(c) (1) If an exempt Indian nation or tribe agrees with the Department to regulate, license, or control the sale and distribution within its qualified reservation of an agreed upon amount of cigarettes upon which the seller has permissibly not prepaid and precollected the cigarette tax, then an agent must obtain the approval for delivery from that nation or tribe regarding the agreed upon amount of cigarettes to be sold and delivered without prepayment and precollection of such tax, prior to each such sale and delivery of any such cigarettes on such reservation.

(2) In the absence of such an agreement regarding the sale and distribution of cigarettes upon which the tax has not been prepaid and precollected, the agent must obtain the approval for delivery from the department regarding the amount of cigarettes to be sold and delivered without prepayment and precollection of such tax, prior to each such sale and delivery of any such cigarettes on such reservation.

(d) (1) If applicable, departmental approval for delivery will be based upon evidence of valid purchase orders received by the agent of quantities of cigarettes reasonably related to the probable demand of qualified Indian consumers in the trade territory of the exempt Indian nation or tribe (if such nation or tribe chooses to make qualified sales), or registered dealer.

(2) In determining such probable demand, the department will:

(i) in the event that an exempt Indian nation or tribe regulates, licenses or controls the sale and distribution of cigarettes within its reservation, consult with such nation or tribe regarding any evidence it may submit relating to such probable demand (*e.g.* records of previous sales to qualified Indian consumers, records relating to the average consumption of qualified Indian consumers on and near its reservation, tribal enrollment, or other statistical evidence, etc.); or,

(ii) in the absence of such regulation or such evidence, calculate such demand based upon the New York average consumption per capita, as compiled for the most recently completed calendar or fiscal year, multiplied by the number of enrolled members of the affected nation or tribe (or, if such membership numbers are unavailable, by the reservation service area population, as compiled by the federal Bureau of Indian Affairs).

(3) In determining such trade territory, the department will:

(i) in the event that an exempt Indian nation or tribe regulates, licenses or controls the sale and distribution of cigarettes within its reservation, consult with such nation or tribe regarding any evidence it may submit relating to such regulated and/or licensed sellers located on its reservation; or

(ii) in the absence of such regulation or such evidence, calculate such trade territory based upon the information at its disposal.

(4) In addition, the department will also take into consideration any evidence submitted by a registered dealer relating to such probable demand and to that dealer's trade territory (*e.g.* a verified record of previous sales to qualified Indian consumers, evidence of the number of qualified Indian consumers located within a reasonable distance of the dealer's place of business, records indicating the percentage of such trade historically realized by the dealer, or other statistical evidence in support of the proposed transaction).

(5) In the absence of any such evidence by an exempt Indian nation or tribe or a registered dealer, the department may restrict the total deliveries to any reservation of cigarettes, upon which the tax has not been prepaid and precollected, to an amount calculated pursuant to subparagraphs (2)(ii) and (3)(ii) of this subdivision.

(6) Approval for sale or delivery to an exempt nation or tribe or to a registered dealer will be denied where the department finds that such nation or tribe, or dealer are or have been making sales in violation of this Subchapter.

(e) Exempt Indian nations or tribes, qualified Indian consumers, and registered dealers may purchase cigarettes upon which the seller has not prepaid and precollected the tax, only to the extent provided in this section and in section 336.6 of this Part. The possession within this State at any one time of more than 400 cigarettes in unstamped (or unlawfully stamped) packages by any Indian nation or tribe, qualified Indian consumer or registered dealer, except as provided herein, shall be presumptive evidence that such cigarettes are subject to tax. Such Indian nations or tribes, consumers, and dealers, who or which purchase cigarettes under any other circumstances must prepay or pay, as the case may be, the cigarette tax at the time of purchase by remitting the tax to the seller as part of the purchase price of the cigarettes.

Historical Note

Sec. added by renum. and amd. 335.7, filed Dec. 4, 1990 eff. Dec. 19, 1990.

EXHIBIT N

EXHIBIT N

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Taxpayer Guidance Division

TSB-M-10(6)M
Cigarette Tax
TSB-M-10(8)S
Sales Tax
July 29, 2010

Amendments to the Tax Law Related to Sales of Cigarettes on Indian Reservations Beginning September 1, 2010

Chapter 134 of the Laws of 2010 amended the Tax Law related to sales of cigarettes on Indian reservations. As a result, beginning September 1, 2010, wholesale dealers are required to collect the cigarette excise tax and the prepaid sales tax for all cigarettes sold for resale on an Indian reservation to non-Indians and non-members of an *Indian nation or tribe*[1]. Chapter 134 also provides a dual system to ensure that there is an adequate quantity of tax-exempt cigarettes available for the use or consumption of the nation or tribe and its members. This TSB-M explains how the amended provisions of the Tax Law and related regulations (20 NYCRR, section 74.6) will be implemented. These amended provisions apply to every wholesale dealer, including a wholesale dealer that is a licensed cigarette stamping agent.

The amended Tax Law and regulations provide two alternatives for Indian nations and tribes and their members to obtain tax-exempt cigarettes. The governing body of an Indian nation or tribe may elect to participate in the *Indian tax exemption coupon system.* If the coupon election is not made, the *prior approval system* will be used. Under both systems, the quantity of tax-exempt cigarettes will be determined based upon the probable demand of the *qualified Indians*[2] on the Indian nation's or tribe's *qualified reservation*[3], plus an amount needed for official nation or tribal use.

To enforce the collection of the cigarette excise tax and prepaid sales tax, all packs of cigarettes sold by wholesale dealers to Indian nations and tribes and *reservation cigarette sellers*[4] on or after September 1, 2010, must have New York cigarette tax stamps affixed to them. Any packs of cigarettes transported to a qualified reservation on or after September 1, 2010, must have cigarette stamps affixed regardless of the invoice date.

Wholesale dealers may sell stamped packs of cigarettes to Indian nations and tribes and reservation cigarette sellers exempt from tax to the extent Indian tax exemption coupons are provided or to the extent prior approval is received from the Tax Department. Since all packs of cigarettes must bear a cigarette tax stamp, wholesale dealers may claim an expedited refund for the cigarette excise tax and prepaid sales tax associated with these tax-exempt sales.

Any agent or wholesale dealer that sells unstamped or unlawfully stamped cigarettes for use or resale on a qualified reservation will be subject to an assessment for tax, interest, and civil penalties; may have its license cancelled or suspended; and may be subject to criminal penalties.

Probable demand

Probable demand will be determined by reference to, among other data, the United States average cigarette consumption per capita, as compiled for the most recently completed calendar

or fiscal year, multiplied by the number of qualified Indians for each of the Indian nations and tribes. (For more details, see 20 NYCRR, section 74.6.) Except for the initial period described below, each June, the Tax Department will determine the annual amount of stamped tax-exempt packs of cigarettes for each of the Indian nations or tribes for the next 12-month period beginning September 1 and ending August 31. The annual amount will then be prorated to each of the four quarters beginning with the first day of September, December, March, and June. In making the annual determination of probable demand, the Tax Department will consider any evidence submitted by the recognized governing body of an Indian nation or tribe relating to probable demand (for example, a verifiable record of previous sales to qualified Indians or other statistical evidence) and/or relating to the amount needed for the nation's or tribe's official use that is submitted to the Tax Department by **July 31** each year. All evidence must be submitted in writing and mailed to:

NYS Tax Department
Office of Tax Policy Analysis
W A Harriman Campus
Albany NY 12227

The initial quarterly amounts of stamped tax-exempt packs of cigarettes for each of the Indian nations or tribes are shown in the following table for the 12-month period beginning September 1, 2010. However, the Tax Department may adjust these amounts based on evidence submitted in relation to probable demand as described above.

Indian tax-exempt cigarettes for quarters occurring September 1, 2010 - August 31, 2011*

Indian nation or tribe	**NYS population** (2000 census)	**Quarterly cigarette amount** (packs)
Cayuga	947	20,100
Oneida	1,473	31,200
Onondaga	2,866	60,600
Poospatuck (Unkechauge)	376	8,100
Seneca (Allegany, Cattaraugus, Oil Springs)	7,967	168,600
Shinnecock	1,915	40,500
St. Regis Mohawk	13,784	291,600
Tonawanda Band of Senecas	256	5,700
Tuscarora	1,025	21,900

(*See 20 NYCRR, section 74.6(e).)

Indian tax exemption coupon system

Election by Indian nations and tribes

To ensure an adequate quantity of cigarettes on its qualified reservation that may be purchased by an Indian nation or tribe or by its members for their use or consumption exempt from the tax, the recognized governing body of an Indian nation or tribe may annually elect to participate in the Indian tax exemption coupon system. The election must be made by **August 15** each year and applies to the following 12-month period beginning September 1 and ending August 31. If a timely election is made, the Tax Department will provide Indian tax exemption coupons to the governing body of the Indian nation or tribe on a quarterly basis in advance of each quarter beginning with the first day of September, December, March, and June. If a timely election is not made, no coupons will be provided to the Indian nation or tribe for that 12-month period. Instead, the prior approval system described below will be used to ensure there is an adequate quantity of stamped tax-exempt cigarettes available for the use and consumption of the Indian nation or tribe and its members.

The governing body of an Indian nation or tribe must elect to participate in the Indian tax exemption coupon system by writing to:

NYS Tax Department
TDAB FACCTS – Cigarette Tax Unit
W A Harriman Campus
Albany NY 12227

The election must include the name and title of the person making the election and a statement indicating that the person is the federally recognized representative of the Indian nation or tribe (if applicable) and is duly authorized to bind the nation or tribe making the election. A contact name, address, phone number, and E-mail address should also be provided to allow for follow up communications.

When making the election, the governing body of the Indian nation or tribe must contact the Tax Department to make arrangements for the delivery of Indian tax exemption coupons either by including instructions with the written election or by calling the Cigarette Tax Unit at (518) 457-0432, Monday – Friday, between the hours of 9:00 AM and 5:00 PM.

Once the election is made, the Tax Department will provide Indian tax exemption coupons (Form MT-215) to the recognized governing body of each Indian nation or tribe as described above. It is anticipated that each recognized governing body will retain the amount of coupons it will need to purchase cigarettes for official nation or tribal use and distribute the remaining Indian tax exemption coupons to reservation cigarette sellers on the nation's or tribe's

qualified reservation(s). The Tax Department will not distribute Indian tax exemption coupons directly to reservation cigarette sellers.

Redemption of Indian tax exemption coupons

When the coupon system is in effect, an Indian nation or tribe may purchase stamped packs of cigarettes for its own official use or consumption from a wholesale dealer licensed under Tax Law Article 20 without paying the cigarette excise and prepaid sales taxes to the extent that the Indian nation or tribe provides the wholesale dealer with Indian tax exemption coupons.

A reservation cigarette seller may purchase cigarettes for resale from a wholesale dealer without paying the cigarette excise and prepaid sales taxes, provided that:

- The reservation cigarette seller brings the cigarettes or arranges for their delivery onto a qualified reservation for resale on that reservation;
- the reservation cigarette seller provides the wholesale dealer with Indian tax exemption coupons entitling the reservation cigarette seller to purchase the quantities of cigarettes allowed for on each Indian tax exemption coupon; and
- the packs of such cigarettes are affixed with New York cigarette tax stamps.

Coupon instructions for wholesale dealers

Each Indian tax exemption coupon consists of a redemption portion (Part I) for a wholesale dealer's submission to the Tax Department when claiming a refund, and a retention portion (Part II) for a wholesale dealer's record-keeping purposes. Each coupon contains the following pre-printed information:

- the identity of the Indian nation or tribe to which it is issued;
- the quantity of cartons of stamped packs of cigarettes for which it is issued;
- the valid only date by which the coupon must be redeemed; and
- an assigned coupon number.

The wholesale dealer must complete both Part I and Part II of the coupon and submit Part I with the wholesaler's name, the customer' name, date received, and date submitted when claiming a refund. (See *Refunds* on page 6 for more information.)

Coupon expiration date

Since the election must be made annually, coupons are valid only during the 12-month period covered by the coupon election. Coupons for each quarter will expire on August 31 each year and may not be accepted for sales after the expiration date.

Prior approval system to be used by wholesale dealers

If the governing body of an Indian nation or tribe does not elect to participate in the Indian tax exemption coupon system by August 15, no Indian tax exemption coupons will be provided to that Indian nation or tribe for that year. Instead, the prior approval system will be used to ensure there is an adequate quantity of stamped tax-exempt cigarettes available for the use and consumption of the Indian nation or tribe and its members. As with the coupon system, an Indian nation or tribe or a reservation cigarette seller may purchase tax-exempt packs of cigarettes from a wholesale dealer based on the probable demand of the Indian nation or tribe and its members as determined and pre-approved by the Tax Department.

Under this system, wholesale dealers must obtain approval from the Tax Department prior to making any tax-exempt sales of cigarettes to an Indian nation or tribe or its reservation cigarette sellers. All pre-approved packs of tax-exempt cigarettes must bear a tax stamp and must be brought or delivered onto a qualified reservation for use or resale on that reservation.

Online services account needed for prior approval system

To obtain prior approvals for tax-exempt sales to Indian nations and tribes and reservation cigarette sellers, wholesale dealers must use the *View/Report Indian Tax-Exempt Cigarette Sales* system provided through the *Online Services* link on the Tax Department's Web site (*www.nystax.gov*). Wholesale dealers that do not already have an online services account must establish one by following the instructions provided on the department's Web site. The Tax Department will also provide wholesale dealers with instructions for creating an online services account in a separate mailing.

Prior approval and reporting for Indian tax-exempt cigarette sales

The following is a general description of how wholesale dealers should obtain prior approvals using the *View/Report Indian Tax-Exempt Cigarette Sales* system. Specific instructions and updates will be provided online by September 1, 2010.

At the beginning of each quarter, the system will display the available quantities of tax-exempt cigarettes related to Indian nations and tribes that have not elected to participate in the Indian tax exemption coupon system. As with the coupon system, the initial quantities displayed will be the quarterly amounts based on the probable demand of that Indian nation or tribe (see table on page 2). For any Indian nation or tribe that has elected to use the coupon system, the amount shown will be zero.

Upon receipt of a purchase request from an Indian nation or tribe or reservation cigarette seller, a wholesale dealer must sign in and check the system to determine the available cartons of stamped tax-exempt packs of cigarettes that may be sold in relation to that Indian nation or tribe.

If there is an adequate quantity available, the dealer should enter the number of cartons of cigarettes to be sold to the Indian nation or tribe or reservation cigarette seller. Upon submitting the request, the remaining quantity available will be reduced by the amount requested and an authorization number for the sale will be generated.

To ensure that the authorized cigarettes are sold tax-exempt to an Indian nation or tribe or reservation cigarette seller, the system requires that wholesale dealers report the quantity actually sold, the name and address of each purchaser, and the invoice number for each sale within 48 hours of receiving the authorization number. If the total approved quantity is sold to several purchasers, each sale must be reported individually. Upon reporting the sale(s), wholesale dealers will receive a confirmation number to be used when claiming a refund for the applicable taxes prepaid because cigarette tax stamps were affixed. (See *Refunds* below for more information.)

If a prior approved sale is not reported or the full quantity requested is not sold within 48 hours of receiving the authorization number, the balance of the quantity not reported as sold will be added back to the quantity available for Indian tax-exempt sales. Cigarettes not sold within 48 hours may not be sold tax-exempt under the expired authorization number. Wholesale dealers will be liable for any taxes due on cigarettes sold but not reported within 48 hours of receiving an authorization confirmation number for the sale.

Carryover of unused Indian tax-exempt cigarettes

The remaining balance of any Indian tax-exempt cigarettes not sold during the quarter will be added to the cigarettes available for sale in the next quarter. However, if there is a remaining balance of Indian tax-exempt cigarettes on August 31, that balance may not be carried over to the following 12-month period beginning September 1.

Refunds

Wholesale dealers may file a claim for an expedited refund for any cigarette excise tax and prepaid sales tax paid on stamped packs of cigarettes they sold without collecting the taxes because they accepted Indian tax exemption coupon(s) from the purchaser or they received prior approval from the Tax Department to make the sale, and the cigarettes were brought or delivered to the purchaser's qualified reservation. (Since there are no qualified reservations located within New York City, joint city/state cigarette tax stamps may not be used for reservation sales. Thus, an expedited refund is not permitted for packs of cigarettes with joint city/state stamps.)

Wholesale dealers may claim refunds for Indian tax-exempt sales on Form CG-114-E, *Expedited Claim for Refund for Indian Tax-exempt Cigarette Sales*. When claiming a refund based on the acceptance of Indian tax exemption coupons, the redemption portion (Part I) of the

coupon(s) must be submitted with Form CG-114-E. For a refund based on sales made under the prior approval system, the reporting confirmation number must be shown on Form CG-114-E. When applying for a refund, a licensed wholesale dealer who is also a licensed cigarette stamping agent is not required to deduct the commissions that were received. Form CG-114-E will be available on the Tax Department's Web site at *www.nystax.gov* by September 1, 2010.

Tax agreements

If an Indian nation or tribe enters into an agreement with New York State, the terms of the agreement will take precedence over either the coupon system or the prior approval system. Sales to non-Indians by the Indian nation and to non-members of the nation or tribe will be exempt from tax to the extent that the taxes are specifically referred to in the agreement, and the sale or distribution, including transportation, of any cigarettes to the nation's or tribe's qualified reservation will be in accordance with the provisions of the agreement. The Tax Department will provide separate notification in the event a tax agreement is reached with an Indian nation or tribe.

Individual Indian exemption form not applicable

A wholesale dealer may only sell tax-exempt stamped packs of cigarettes to an Indian nation or tribe or reservation cigarette seller when the provisions of the Indian tax exemption coupon system, the prior approval system, or a tax agreement have been met. Form DTF-801, *Certificate of Individual Indian Exemption for Certain Property or Services Delivered on a Reservation*, may not be accepted for sales of cigarettes.

Forms and instructions

Form CG-5, *Nonresident Agent Cigarette Tax Report*, and Form CG-6, *Resident Agent Cigarette Tax Report*, along with several applicable schedules will be revised to incorporate these new provisions and will be mailed to agents to replace the current forms. All new and revised forms will also be available on the Tax Department's Web site at *www.nystax.gov*.

Definitions

[1] An *Indian nation or tribe* is defined to mean one of the following New York State Indian nations or tribes: Cayuga Indian Nation of New York, Oneida Indian Nation of New York, Onondaga Nation of Indians, Poospatuck or Unkechauge Nation, St. Regis Mohawk, Seneca Nation of Indians, Shinnecock Tribe, Tonawanda Band of Senecas and Tuscarora Nation of Indians.

[2] The term *qualified Indian* means a person duly enrolled on the tribal rolls of one of the Indian nations or tribes. In the case of the Cayuga Indian nation of New York, such term shall include enrolled members of such nation when such enrolled members purchase cigarettes on any Seneca reservation.

[3] The term *qualified reservation* means (a) lands held by an Indian nation or tribe that are located within the reservation of that nation or tribe in the state; (b) lands within the state over which an Indian nation or tribe exercises governmental power and that are either (i) held by the Indian nation or tribe subject to restrictions by the United States against alienation, or (ii) held in trust by the United States for the benefit of such Indian nation or tribe; (c) lands held by the Shinnecock Tribe or the Poospatuck (Unkechauge) Nation within their respective reservations, or (d) any land that falls within category (a) or (b) and which may be sold and replaced with other land in accordance with an Indian nation's or tribe's land claims settlement agreement with the state of New York, shall nevertheless be deemed to be subject to restriction by the United States against alienation.

[4] A *reservation cigarette seller* means a seller of cigarettes that is an Indian nation or tribe, one or more members of such tribe, or an entity wholly owned by either or both, that sells cigarettes within the boundaries of a qualified reservation.

NOTE: A TSB-M is an informational statement of changes to the law, regulations, or Department policies. It is accurate on the date issued. Subsequent changes in the law or regulations, judicial decisions, Tax Appeals Tribunal decisions, or changes in Department policies could affect the validity of the information presented in a TSB-M.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

SENECA NATION OF INDIANS,

Plaintiff,

CAYUGA INDIAN NATION,

Plaintiff-Intervenor,

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.

Certificate of Service

Civil Action
No. 10-cv-00687

UNKECHAUGE INDIAN NATION,

Plaintiff,

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.

Certificate of Service

Civil Action
No. 10-cv-711

(caption cont'd on next page)

ST. REGIS MOHAWK TRIBE,

Plaintiff,

v.

DAVID A. PATERSON, Governor, State of New York; JAMIE WOODWARD, Acting Commissioner, New York State Department of Taxation and Finance; and WILLIAM COMISKEY, Deputy Commissioner, Office of Tax Enforcement, New York State Department of Taxation and Finance, each in his or her official capacity,

Defendants.

Certificate of Service

Civil Action
No. 10-cv-811

CERTIFICATE OF SERVICE

I hereby certify that on July 13, 2011 I electronically filed the foregoing with the Clerk of the District Court using its CM/ECF system, which sent electronic notification of such filing to:

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