

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

v.

16-CR-72

IAN TARBELL,

Defendant.

MOTION IN LIMINE OF THE UNITED STATES

The United States of America, by and through the undersigned attorneys, hereby moves this Court to preclude defendant from examining witnesses, adducing evidence, or tendering argument that: (i) Native Americans may lawfully distribute cigarettes that bear no New York State tax stamps; (ii) New York State's alleged policy of "non-enforcement" of its tobacco laws is a defense to the charges in the indictment; and (iii) Native Americans are exempt from paying state or federal taxes on cigarettes.

INTRODUCTION

This case involves the illegal possession of approximately 900,000 unstamped, untaxed cigarettes by the defendant in violation of the Contraband Cigarette Trafficking Act and the Internal Revenue Code. The defendant has indicated that he intends to introduce at trial evidence regarding several issues which are irrelevant to the charges in this case.

Specifically, the government believes the defendant intends to offer evidence that cigarettes distributed by and to Native Americans are not required to bear New York State tax stamps. The government also believes the defendant intends to offer evidence regarding New York State's alleged policy of "non-enforcement" of its tobacco laws as a defense to the charges.

The introduction of this evidence should be denied. The law regarding these issues is settled. The Second Circuit Court of Appeals has repeatedly held that New York State's alleged policy of "non-enforcement" is not a defense to violations of the Contraband Cigarette Trafficking Act. Both the Second Circuit and this Court have held that, under New York State tax law, all cigarettes possessed or distributed in New York State must bear a tax stamp.

In addition, the United States Supreme Court and other courts have held that Native Americans are subject to Internal Revenue Code taxes, which include the federal tax on cigarettes.

Motions *in limine* allow a Court to rule in advance of trial on the admissibility and relevance of certain forecasted evidence. See *Palmieri v. Defaria*, 88 F.3d 136, 141 (2d Cir. 1996). The purpose of a motion *in limine* is "to aid the trial process by enabling the Court to rule in advance of trial on the relevance of certain forecasted evidence, as to issues that are definitely set for trial, without lengthy argument at, or interruption of, the trial." *Id.*

I. THE DEFENDANT SHOULD BE PRECLUDED FROM OFFERING EVIDENCE THAT NATIVE AMERICANS MAY LAWFULLY DISTRIBUTE UNSTAMPED CIGARETTES.

Both the Second Circuit Court of Appeals and this Court have held that all cigarettes distributed in New York State must bear New York State tax stamps. *See Oneida v. Cuomo*, 645 F.3d 154, 158 (2d Cir. 2011); *Seneca Nation of Indians v. Paterson*, 2010 WL 4027796 WDNY (October 14, 2010). Accordingly, the defendant should not be allowed to introduce evidence that transporting unstamped cigarettes from one Native American reservation to another is lawful.

The Contraband Cigarette Trafficking Act (“CCTA”) makes it “unlawful for any person knowingly to ship, transport, receive, possess, sell, distribute or purchase contraband cigarettes.” 18 U.S.C. § 2342(a). Contraband cigarettes are defined as:

a quantity in excess of 10,000 cigarettes, which bear no evidence of the payment of applicable State or local cigarette taxes in the State or locality where such cigarettes are found, if the State or local government requires a stamp, impression, or other indication to be placed on packages or other containers of cigarettes to evidence payment of cigarette taxes....

Id. § 2341(2).

The elements of a CCTA violation are met in this case because the defendant possessed more than 10,000 unstamped cigarettes in New York, a state that mandates that all cigarettes bear a tax stamp pursuant to Section 471 of the New York State Tax Law.

This Court, in *Seneca Nation of Indians v. Paterson*, upheld the constitutionality of Section 471 of the New York State Tax Law. In *Paterson*, this Court held that the New York

State Legislature had effectively amended N.Y. Tax Law § 471 and § 471-e on June 21, 2010. The amendments increased the cigarette tax from \$2.75 to \$4.35 per pack. This Court noted that the 2010 amendments sought to establish a system for collecting taxes on sales made by Native American cigarette retailers to non-members, while at the same time attempting to balance the right of Native Americans to obtain cigarettes tax free for use on reservation territory. This Court held that the amendments properly balanced the interests of the parties and implemented a fair system for the collection of cigarette taxes. Specifically, with respect to the amendments to the statute and whether Indian Nation members can possess, transport or distribute cigarettes to other Indian Nation members, this Court stated:

The statute unequivocally provides: “All cigarettes sold by agents and wholesalers to Indian nations or tribes or reservation cigarette sellers located on an Indian reservation must bear a [New York State] tax stamp,” *id.* at § 471(2), including cigarettes intended to be sold to tribal members for use and consumption on reservation territory.

Seneca Nation of Indians v. Paterson, 2010 WL 4027796 at *4.

Similarly, the Second Circuit has observed that New York's Department of Taxation and Finance “pre-collects” cigarette taxes from a limited number of state-licensed stamping agents and mandates that these agents be the only entry point for cigarettes into New York's stream of commerce. *Oneida v. Cuomo*, 645 F.3d 154, 158 (2d Cir. 2011). In *Oneida*, the Court held that all cigarettes in New York, whether ultimately subject to state tax or not, must bear a tax stamp. Thus, tribal members were obligated to purchase stamped cigarettes for personal use. *Id.* at 160 n.8.

Cigarettes are deemed contraband if they do not bear tax stamps in a state, such as New York, which requires tax stamps. *See generally United States v. Morrison*, 686 F.3d 94, 98

(2d Cir. 2012); *City of New York v. Golden Feather Smoke Shop*, 2009 U.S. Dist. LEXIS 76306, at *74-75; *United States v. 1,920,000 Cigarettes*, 2003 U.S. Dist. LEXIS 12603 at *10-*11 (WDNY 2003) (all three cases holding that cigarettes sold in New York State must be stamped otherwise there is a potential CCTA violation).

Further, the CCTA is a general intent statute. It requires proof only that the defendant acted knowingly (*i.e.*, possessed or transported unstamped cigarettes). It does not require proof that the defendant knows he is violating a specific section of the law. *See United States v. Baker*, 63 F.3d 1478, 1491 (9th Cir. 1995); *United States v. Funds from First Regional Bank Account*, 639 F. Supp. 2d 1203, 1213-14 (W.D. Wash. 2009) (holding that the CCTA's requirement that the conduct be willful “generally means no more than that the person charged with the duty knows what he is doing. It does not mean that, in addition, he must suppose that he is breaking the law.”). Additionally, knowledge of state tax stamping requirements is not necessary. *See United States v. Elshenaway*, 801 F.2d 856, 859 (6th Cir. 1986) (holding that prosecution is required to show that defendant knew the physical nature of what he possessed and does not have to establish knowledge of state stamping requirements).

Based upon the statutory framework and relevant case law, the defendant should be precluded from examining witnesses, adducing evidence, or tendering argument that Native Americans can lawfully distribute contraband cigarettes that bear no New York State tax stamps.

II. NEW YORK STATE'S ALLEGED POLICY OF NON-ENFORCEMENT IS NOT A DEFENSE TO CCTA CHARGES.

Based upon conversations with defendant's counsel, the government believes that the defendant will raise New York State's alleged "policy of non-enforcement" of its tobacco laws as a defense to the CCTA charges in the indictment. Initially, it is debatable whether such a policy uniformly exists in New York State. Indeed, this case originated when local law enforcement officials detained the defendant based in part on suspected violations of New York's tobacco laws. However, regardless as to whether this policy is currently in effect, the Second Circuit has repeatedly held that the alleged policy does not provide a defense to CCTA charges.

This alleged defense was raised in a case which originated in the Western District of New York, *United States v. Kaid*, 241 Fed. Appx. 747 (2d Cir. 2007). In *Kaid*, the defendants, who were accused of trafficking in unstamped/untaxed cigarettes, attempted to negate their criminal liability based on a claim that the State of New York had a policy of not enforcing state tax laws. The Second Circuit rejected this alleged defense, stating:

New York law provides for taxes on non-Native Americans purchasing cigarettes in stores on reservations, but New York has a policy of non-enforcement of this tax. *N.Y. Ass'n of Convenience Stores v. Urbach*, 92 N.Y.2d 204, 213-14, 699 N.E.2d 904, 677 N.Y.S.2d 280 (N.Y. 1998). Ahmed and Abuhamra assert that this non-enforcement policy "effectively 'de-taxed' sales of cigarettes to non-Native Americans on reservation land," thereby negating the element of "contraband" necessary to a conviction for trafficking in contraband cigarettes under 18 U.S.C. §§ 2341-42. This argument is meritless.

Id. at 750.

The Second Circuit reaffirmed its position and again rejected the “non-enforcement” defense in *United States v. Morrison*. 686 F.3d 94, 105-106 (2d Cir. 2012), holding:

There is, of course, no question that the conduct at issue here was made unlawful by the terms of New York's cigarette tax laws. At the time of the events that form the basis of Morrison's prosecution, New York State imposed a tax on all cigarettes sold within the state, with an exception for those sales where the state was "without power to impose such a tax." N.Y. Tax Law § 471(1)... Moreover, the Court had specifically upheld New York's tax regime, as it pertained to on-reservation cigarette sales to non-Native Americans... Consequently, New York's decision, for political and practical reasons, to refrain from enforcing Section 471 did not grant Morrison leave to sell massive quantities of untaxed cigarettes to non-Native Americans. New York had the power to impose that tax and state law mandated that the tax be paid. New York's forbearance policy did not free him to engage in conduct that the law forbade, for, as the Supreme Court has stated "The failure of the executive branch to enforce a law does not result in its modification or repeal." *District of Columbia v. John R. Thompson Co.*, 346 U.S. 100, 113-14 (1953).

As indicated above, even if the defendant believed that New York State's alleged policy of non-enforcement allowed him to distribute unstamped cigarettes, the introduction of such evidence is irrelevant because the CCTA is a general intent statute which simply requires that the defendant act knowingly, (*i.e.*, possessed or distributed more than 10,000 unstamped cigarettes) and does not require proof that the defendant knew he was violating a specific section of the law. *See Baker*, 63 F.3d at 1491; *Elshenaway*, 801 F.2d at 859; *Funds from First Regional Bank Account*, 639 F. Supp. 1213-14.

Accordingly, any evidence regarding defendant's belief that he could distribute unstamped cigarettes based on New York State's alleged policy of non-enforcement should be precluded at trial.

III. DEFENDANT SHOULD NOT BE PERMITTED TO INTRODUCE TESTIMONY THAT HE IS EXEMPT FROM INTERNAL REVENUE CODE PROVISIONS GOVERNING THE TAXATION OF CIGARETTES

The government anticipates that the defendant will seek to introduce evidence claiming that, as a Native American, he is exempt from the federal taxation of cigarettes. Any testimony regarding this legal issue should be disallowed as the law establishes that Native Americans are subject to Internal Revenue Code taxes on tobacco.

All cigarettes manufactured in the United States are subject to excise tax of approximately \$1.066 per pack. *See* 26 U.S.C. § 5701(b). Every person who manufactures tobacco products must file a bond with the Treasury Department and obtain a permit. *See* 26 U.S.C. §§ 5711, 5712, and 5713. All tobacco products must be packaged and labeled as prescribed by the Secretary of the Treasury. 26 U.S.C. § 5723. These statutes apply universally. None sets forth an exemption for Native Americans.

It is well settled that Native Americans are subject to federal taxation. *See Squire v. Capoeman*, 351 U.S. 1, 6 (1956) (“We agree with the Government that Indians are citizens and that in ordinary affairs of life, not governed by treaties or remedial legislation, they are subject to the payment of income taxes as are other citizens.”); *Lazore v. Commissioner*, 11 F.3d 1180 (3d Cir. 1993) (holding that members of Mohawk Nation were not exempt from federal income taxes); *Dillon v. United States*, 792 F.2d 849 (9th Cir. 1986) (holding that income derived from Puyallup Native American smoke shops was subject to federal taxation).

Courts have specifically held that Native Americans must pay federal taxes on tobacco products. In *King Mountain Tobacco Company v. Alcohol and Tobacco Tax and Trade Bureau*, 923 F. Supp.2d 1280 (E.D. Wash. 2014), *vacated on other grounds*, the Eastern District of Washington was asked by a Native American cigarette manufacturer to declare that the cigarettes it produced were not subject to taxation under IRC. However, the Court stated that under the IRC, excise tax is imposed on the manufacture of all cigarettes and that as citizens of the United States enrolled members of Federal Tribes are generally liable to pay federal taxes. *Id.* at 1282-83. The Court noted that, as United States citizens, Native Americans are subject to federal taxation unless explicitly exempted by federal law or treaty. *Id.* at 1287-1288, *citing Fry v. United States*, 557 F.2d 646 (9th Cir. 1977). Thus, the Court found that King Mountain was not exempt from IRC tobacco taxes. *Id.*

Accordingly, while the defendant may introduce testimony regarding whether he intended to violate the Internal Revenue Code, he should not be allowed to introduce any testimony regarding the applicability of the Internal Revenue Code to Native Americans at trial.

CONCLUSION

For the foregoing reasons, this Court should preclude defendant from examining witnesses, adducing evidence, or tendering argument: (i) that Native Americans may lawfully distribute cigarettes that bear no New York State tax stamps; (ii) that New York State's alleged policy of "non-enforcement" of the state's tobacco laws is a proper defense

to the charges in the indictment; and (iii) Native Americans are exempt from paying state or federal taxes on cigarettes.

DATED: Buffalo, New York, January 31, 2017.

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