APL-2017-00029

To be argued by:
Andrew D. Bing
Time Requested: 20 Minutes

APPELLATE DIVISION DOCKET NO. CA 15-01764
CATTARAUGUS COUNTY INDEX NO. 82670

State of New York
Court of Appeals

ERIC WHITE AND NATIVE OUTLET,

Plaintiffs-Appellants,

-AGAINST-

ERIC T. SCHNEIDERMAN, NEW YORK STATE ATTORNEY GENERAL, in his official capacity; and THOMAS H. MATTOX, COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, in his official capacity,

Defendants-Respondents.

RESPONDENTS' BRIEF IN RESPONSE TO AMICI

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PRELIMINARY STATEMENT

Defendants-respondents submit this brief pursuant to Rule 500.12(f) in response to the amicus curiae brief of the Seneca Nation of Indians, the Saint Regis Mohawk Tribe, and the Shinnecock Nation of Indians (the "Seneca amici"), and in response to the amicus curiae brief of the Cayuga Nation.

Tax Law § 471 generally imposes a tax on "all cigarettes possessed in the state by any person for sale," and "the ultimate incidence of and liability for the tax shall be upon the consumer." Tax Law § 471(1), (2). In particular, the tax applies to "all cigarettes sold on an Indian reservation to non-members of the Indian nation or tribe and to non-Indians." *Id.*, § 471(1). In our respondents' brief ("State Br."), we explained that neither Indian Law § 6, nor the 1842 Buffalo Creek treaty, 7 Stat. 586, bar New York from enforcing Tax Law § 471 regarding the cigarettes that plaintiffs sell on the Seneca reservation to non-members of the Seneca Nation and to non-Indians. Our brief also explained that the State's imposition of tax on the cigarettes that plaintiffs sell to their non-Seneca customers is consistent with federal principles of tribal sovereignty and preemption as repeatedly applied by the Supreme Court.

The Seneca amici argue that in forbidding the assessment of taxes "upon any Indian reservation," Indian Law § 6 does not bar only the taxation of reservation lands, as the State asserts. Instead, they contend, contrary to all the courts that have considered the issue, that § 6 broadly precludes the State from assessing "taxes of any kind within the territories of Indian Nations in the State," including cigarette taxes on nonmembers of the tribe who buy their cigarettes from reservation retailers such as plaintiffs. (Seneca Amicus Br. at 9.) The Cayuga Nation argues that Tax Law § 471 violates tribal sovereignty rights and Indian Law § 6, which, the Cayuga Nation contends, should have been construed in favor of the plaintiffs.

Both the Seneca amici and the Cayuga Nation are mistaken. The language and history of Indian Law § 6 demonstrate that, as its title specifies, it grants only an "[e]xemption *of reservation lands* from taxation" (emphasis added), and does not define a zone in which taxes on non-Indian cigarette buyers are forbidden. Contrary to amici's arguments, canons of construction do not require that courts ignore the plain language and historical context of treaties and statutes that contradict later tribal claims, as they do here. Finally, contrary to the

sovereignty argument made by the Cayuga Nation, the Supreme Court has repeatedly held that the collection of taxes on reservation cigarette sales to non-tribe members does not violate tribal sovereignty. For all the reasons explained in our respondents' brief, and those explained below, this Court should reject amici's incorrect interpretation of Indian Law § 6 and their other arguments.[1]

BACKGROUND

For the convenience of the Court, set forth below are the complete text of the ninth article of the 1842 Buffalo Creek treaty and Indian Law § 6.

> ARTICLE NINTH. The parties to this compact mutually agree to solicit the influence of the Government of the United States to protect such of the lands of the Seneca Indians, within the State of New York, as may from time to time remain in their possession from all taxes, and assessments for roads, highways, or any other purpose until such lands shall be sold and conveyed by the said Indians, and the possession thereof shall have been relinquished by them. (Buffalo Creek Treaty of 1842, 7 Stat. 586, 590.)

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[1] The Seneca amici mistakenly suggest that we told this Court in our respondents' brief that the Court had already rejected plaintiffs' arguments. (Seneca Br. at 6 and n. 2.) In fact, we made clear that the Court had not so ruled. (State Br. at 20, noting that "this Court has not had occasion to address the provisions.") The quote in n. 2 of the Seneca brief is from respondents' Appellate Division brief; that court had previously rejected plaintiffs' arguments. *Matter of New York State Dep't of Tax. and Fin. v. Bramhall*, 235 A.D.2d 75, 85 (4th Dep't), *appeal dismissed*, 91 N.Y.2d 849 (1997).

§ 6. Exemption of reservation lands from taxation

No taxes shall be assessed, for any purpose whatever, upon any Indian reservation in this state, so long as the land of such reservation shall remain the property of the nation, tribe or band occupying the same.

ARGUMENT

A. AMICI'S INTERPRETATION CONFLICTS WITH THE LANGUAGE AND HISTORY OF INDIAN LAW § 6 AND THE 1842 TREATY

First, amici's claim that the phrase "upon any Indian reservation" in Indian Law § 6 defines a jurisdictional zone within which no state tax can operate, and does not simply refer to the Indian lands that cannot be taxed, conflicts with the plain meaning of § 6 read as a whole. Amici argue that the term "Indian reservation" is not synonymous with Indian-owned property and that § 6 distinguishes tribal governmental jurisdiction over reservation lands from tribal property ownership. (Seneca Amicus Br. at 10-11.) But Indian Law § 6 explicitly conditions the tax exemption upon continued *tribal ownership* of "the land of such reservation." There is no tax exemption under the statute if the reservation lands are owned by individual tribe members or non-members, even if the lands are still subject to tribal governmental jurisdiction.

If § 6 were meant to erect a jurisdictional wall around the reservation that state cigarette taxes on non-members could not penetrate, ownership of the land within would not matter. The fact that the tribe itself must actually own the reservation land for the tax exemption to apply further confirms that, as its title states, § 6 grants only an "[e]xemption of reservation lands from taxation." *See Matter of Avella v. City of N.Y.*, 29 N.Y.3d 425, 438 (2017) (the title of the statute may help in ascertaining legislative intent, although it may not trump the clear language of the statute); *Matter of Long v. Adirondack Park Agency*, 76 N.Y.2d 416, 420 (1990) (statutes should not be "[r]ead in vacuum-like isolation with absolute literalness"; instead, courts should "give the statute a sensible and practical over-all construction, which is consistent with and furthers its scheme and purpose and which harmonizes all its interlocking provisions").

Second, amici's argument wholly ignores the history and derivation of Indian Law § 6. As we explained in detail in our respondents' brief (State Br. at 9-15, 27-29), that statute and its predecessors are derived from the tax article of the 1842 Buffalo Creek treaty, which protected "the lands of the Seneca Indians" from all taxes and assessments "until such

lands shall be sold and conveyed by the said Indians." 7 Stat. 586, 590. The history of the treaty provision and the statutes derived from it, including Indian Law § 6, establishes that they are concerned solely with protecting reservation lands owned by the tribe from real property taxation. They do not address taxes imposed on non-tribe members who purchase goods within the bounds of a reservation.

In particular, the Seneca amici mistakenly criticize the Fourth Department's reliance on chapter 45 of the Laws of 1857 to support that court's holding that the tax exemption in Indian Law § 6 is limited to taxes on tribally-owned real property. (Seneca Amicus Br. at 22-23; *see* Record 244-245.) As the Fourth Department noted, and our brief explained (State Br. at 12-14), chapter 45 was meant to restore to the Seneca Nation the lands it had lost to real property tax foreclosures and to protect the Seneca lands against such taxes in the future. There is no dispute that § 6 is derived from chapter 45. *See* Indian Law § 6 (McKinney 2014) ("Historical and Statutory Notes"). The Seneca amici's argument that if § 6 applied only to real property, there would be no need for § 6 in addition to chapter 45 is mistaken. As we explained in our brief (State Br. at 14-15), § 6 extended to all reservations the tax exemption

contained in chapter 45 and in a similar provision applicable to the Tonawanda Band, which were later repealed. Indian Law § 200. As the Fourth Department correctly observed, the scope of the tax exemption as applicable only to tribally-owned real property was not enlarged when the exemption was extended to all reservations in § 6.

B. AMICI'S INTERPRETATION OF INDIAN LAW § 6 CONFLICTS WITH THE 2010 AMENDMENTS TO TAX LAW § 471

Amici's interpretation of Indian Law § 6 also conflicts with the Legislature's 2010 amendments to Tax Law § 471 and related statutes. As explained in our respondents' brief, the 2010 amendments implemented settled Supreme Court precedents permitting the State to require reservation cigarette retailers such as plaintiffs to collect state and local taxes on cigarettes that they sell to non-members of the reservation's governing tribe. (State Br. at 18-20, 31-35, 35-40.) Tax Law § 471(1) now provides that "[t]he 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." In a case brought by amici and other tribes, the Second Circuit held that § 471 is consistent with the Supreme Court's decisions. *Oneida Nation of N.Y. v. Cuomo*, 645 F.3d 154 (2d Cir. 2011). (State Br. at 37-40.)

In enacting Tax Law § 471 in its present form in 2010, the Legislature effectively foreclosed any argument that the earlier statute, Indian Law § 6, could be interpreted to nullify the 2010 amendments to Tax Law § 471. As we explained in our respondents' brief (State Br. at 34-35), if Indian Law § 6, last amended in 1909, were interpreted to bar the tax that Tax Law § 471, last amended over a century later in 2010, explicitly imposes, then § 6 would have to give way to § 471, because the latter statute is more recent and more specifically addresses the subject matter. *See Abate v. Mundt*, 25 N.Y.2d 309, 318 (1969) (the later statute controls where there is an obvious inconsistency), *affirmed on other grounds*, 403 U.S. 182 (1971); *People v. Manino*, 81 A.D.2d 896, 897 (2d Dep't 1981) (the more recent and specific enactment is controlling). But here there is no conflict, because both statutes are properly interpreted in a way that renders them internally compatible. *See Matter of Corrigan v. New York State Off. of Children & Family Servs.*, 28 N.Y.3d 636, 643 (2017). Indian Law § 6 bars the State from taxing only tribally-owned reservation land, and, unlike § 471, does not speak to the imposition of cigarette taxes on non-tribe members who purchase cigarettes on a reservation.

The cases cited in our main brief (State Br. at 37-40) also dispose of the Cayuga Nation's argument that § 471 violates tribal sovereignty. (Cayuga Amicus Br. at 2-5.) These decisions have squarely "rejected the proposition that principles of federal Indian law, whether stated in terms of pre-emption, tribal self-government, or otherwise, authorize Indian tribes . . . to market an exemption from state taxation to persons who would normally do their business elsewhere," and have settled that "[o]n reservation cigarette sales to persons other than reservation Indians" are "legitimately subject to state taxation." *Department of Tax. and Fin. of N.Y. v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 64, 72 (1994) (citation and quotation marks omitted).

C. AMICI'S INTERPRETATION OF § 6 IS NOT SUPPORTED BY THE OTHER AUTHORITIES ON WHICH THEY RELY

First, amici's reliance on the canons of construction is unavailing. (Seneca Amicus Br. at 5-6, 20-23; Cayuga Amicus Br. at 5-7.) As we explained in our respondents' brief (State Br. at 21-22), in interpreting statutes and treaties relating to Indians, "courts cannot ignore plain language that, viewed in historical context and given a fair appraisal, clearly runs counter to a tribe's later claims." *Oregon Dep't of Fish &*

Wildlife v. Klamath Indian Tribe, 473 U.S. 753, 774 (1985) (citation and quotation marks omitted). Here, as explained above, the language and history of § 6 and the 1842 treaty "clearly run[] counter" to amici's claims.

This Court also has recognized this principle. *People v. Patterson*, 5 N.Y.3d 91, 97-98 (2005) (canons did not support the tribe member's interpretation of the treaty where the language "clearly contemplate[d]" the contrary result), *cert. denied*, 546 U.S. 1092 (2006). As the Supreme Court explained, "even Indian treaties cannot be rewritten or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties." *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 432 (1943); *see also Confederated Bands of Ute Indians v. United States*, 330 U.S. 169, 179 (1947) ("we cannot, under the guise of interpretation . . . rewrite congressional acts so as to make them mean something they obviously were not intended to mean").

Further, amici's argument is contrary to the canon that "absent clear statutory guidance, courts ordinarily will not imply tax exemptions," even in favor of an Indian tribe. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 156 (1973). (State Br. at 24-25.) In *Mescalero*, the Supreme Court refused to construe a federal statutory exemption from

state taxation for "land and rights in land" held in trust by the United States for a tribe to also exempt "income derived from its use." *Id.* at 155. In this case as well, § 6 and the 1842 treaty exempt only tribally-owned land from taxation, and do not bar a cigarette tax on non-tribe members who buy their cigarettes on the reservation.

Second, there is no merit to amici's reliance on unrelated provisions of the Indian Law in support of their claim that § 6's reference to a reservation denotes a jurisdictional boundary. (Seneca Amicus Br. at 13-17.) In fact, multiple provisions of the Indian Law use the terms "reservation" and "lands" interchangeably. Accordingly, the provisions of the Indian Law cited by amici shed no light on the meaning and scope of § 6.

For example, Indian Law § 9, entitled "[r]esidence of other Indians on tribal lands," permits tribal governing bodies to allow Indians who are members of other tribes to "reside upon the tribal lands thereof," "settle or reside upon such tribal lands," "to become an inhabitant of their reservations," and "to reside on the tribal lands of such nation, tribe or band." Similarly, Indian Law § 12, entitled "[h]ighways on tribal lands," refers to "an Indian reservation" in a town, the "nation, tribe or band

occupying such reservation," and "the county in which such lands are situated." And Indian Law § 23 refers to stone and timber products "on the tribal lands of such nation [referring to the Onondaga Nation], or that has been taken or removed from such lands," and also refers to any such products "on such reservation, or removed therefrom."

Sections 9, 12, and 23, and Indian Law § 6, were all enacted at the same time, L. 1909, ch. 31, establishing that the Legislature's usage of "reservation" and "lands" to mean the same thing was common when § 6 was adopted, contrary to the Seneca amici's argument. And the Legislature's interchangeable usage of "reservation" and "lands" has continued into the modern era. Indian Law § 153, enacted in 1974 (L. 1974, ch. 719), authorized the Poospatuck Tribe "to have an accurate survey and description made of its tribal lands for the purposes of determining its reservation boundaries," thereby explicitly equating "tribal lands" with "reservation boundaries." Thus, the provisions of the Indian Law cited by the Seneca amici are irrelevant to the issue before the Court.

Finally, amici's interpretation of § 6 and the 1842 treaty conflicts with plaintiffs' interpretation. In both their main and reply briefs,

plaintiffs concede that the State may tax the sales of cigarettes by a non-Indian tobacco retailer to a non-Indian customer, *even if the sale occurs on a reservation*. *See* Pl. Br. at 20 ("[t]he State has the authority to impose the tax on the transactions of *non-Indian* retailers located on sovereign Indian lands to *non-Indian* consumers.") (emphasis in original); Pl. Reply Br. at 21-22 ("[p]laintiffs do not object to the enforcement of Tax Law § 471 on the transactions between *non-Indian* owned retailers and their non-Indian customers because the signatories to the Buffalo Creek Treaty did not contemplate any protection of *non-Indians* on the sovereign land of the Seneca Nation.") (emphasis in original).

By admitting that the State's taxing power can reach some cigarette sales on reservation lands, plaintiffs themselves refute amici's argument that § 6 and the 1842 treaty erect a wall around the reservation that no state tax can penetrate. And since plaintiffs' position itself ultimately depends on the claim that § 6 erects that wall, that is, that no taxes shall be assessed within the "geographic boundaries" of a reservation (Pl. Reply Br. at 4), their concession that some taxes may be assessed there is fatal to their entire case.

Tax Law § 471 does not impose a tax on the Seneca Nation of Indians or the other amici, nor on their reservations or lands, nor on their members who purchase cigarettes on their own reservations, nor on plaintiffs. Instead, it is plaintiffs' *non-Indian* customers who bear "the ultimate incidence of and liability for the [cigarette] tax." Tax Law § 471(2). Neither the 1842 Treaty nor Indian Law § 6 protect non-Indians from tax on their purchases of cigarettes on reservation lands.

CONCLUSION

The judgment appealed from should be affirmed.

Dated: Albany, New York
November 1, 2017

Respectfully submitted,

ERIC T. SCHNEIDERMAN
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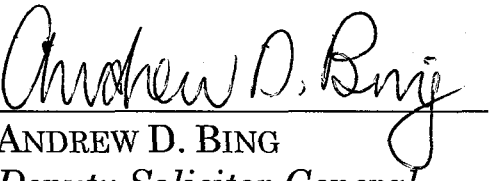
Attorney for Defendants-Respondents

By: 
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APL-2017-00029

New York Court of Appeals

ERIC WHITE AND NATIVE OUTLET,

PLANTIFFS-APPELLANTS,

-AGAINST-

ERIC T. SCHNEIDERMAN, NEW YORK STATE ATTORNEY GENERAL, IN HIS OFFICIAL CAPACITY; AND THOMAS H. MATTOX, COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, IN HIS OFFICAL CAPACITY.

DEFENDANTS-RESPONDENTS.

CERTIFICATE OF COMPLIANCE WITH RULE 500.13(c)(1)

The undersigned attorney, Andrew D. Bing hereby certifies that this brief complies with the type-volume limitations of Rule 500.13(c)(1). According to the word processing system used by this office, all printed text in the body of this brief contains 2810 words.

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State of New York
Court of Appeals

ERIC WHITE AND NATIVE OUTLET,

Plaintiffs-Appellants,

-against-

ERIC T. SCHNEIDERMAN, ET AL.,

Defendants-Respondents.

COURT #APL-2017-00029 - AD #CA 15-01764 – INDEX #82670 - OAG # 14-174303

STATE OF NEW YORK
COUNTY OF ALBANY ss:
CITY OF ALBANY

WILLIAM H. COLLINS being duly sworn says:

I am over eighteen years of age and an employee in the office of the Attorney General of the State of New York, attorney for the **Defendants-Respondents**, herein.

On 1st day of **November, 2017** I served the annexed **Respondents' Brief In Response To Amici** upon the individual named below, by depositing **3 copies** thereof, properly enclosed in a sealed, postpaid wrapper, in the letter box of the Capitol Station post office in the City of Albany, New York, a depository under the exclusive care and custody of the United States Postal Service, directed to the said individual at the address within the State respectively theretofore designated by them for that purpose as follows:

(PLEASE SEE THE ATTACHED SERVICE LIST)

William H Collins

Sworn to before me this
1st day of November, 2017

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