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Testimony of James S. Calvin, President
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Joint Legislative Hearing on the 2008-2009 Executive Budget
Monday, February 11, 2008

Senate Committee on Finance
Owen H. Johnson, Chairman

Assembly Committee on Ways and Means
Herman D. Farrell Jr., Chairman

Chairman Johnson, Chairman Farrell, Committee Members and Staff, thanks for the opportunity to speak with you today.

Our association represents more than 7,000 neighborhood mini-marts and convenience stores from Hamburg to Hempstead that employ 60,000 New Yorkers and serve 6 million customers a day.

Many of our stores are registered with the New York State Department of Taxation and Finance to sell tobacco, the Department of Environmental Conservation to sell motor fuel, the State Liquor Authority to sell beer, and/or the Lottery Division to sell lottery tickets.

We are so relieved that there aren't any tax increases for small businesses in this budget that Governor Spitzer has proposed.

Of course, there are a few surcharges, fee increases, penalty increases, tax "reclassifications," and "reforms." Combined, they would add up to around \$189 million a year in additional costs for retail stores and their customers. But thank heaven, as Governor Spitzer promised, no new taxes.

Some examples of the proposed not-a-tax revenue enhancements:

- \$15 million from reclassifying Smirnoff Ice and other flavored malt beverages, which we sell to adult customers, as "liquor" rather than "beer" for taxation purposes, increasing the tax rate from 11 cents per gallon to \$2.54 per gallon, a jump of 2,210 percent. New York City would be authorized to triple its tax surcharge to 39 cents per gallon.

- \$3.6 million from reclassifying "little cigars" such as Swisher Sweets and Winchester, which we sell to adult customers, as "cigarettes" instead of "cigars" for taxation purposes, increasing the tax from 37% of wholesale value to \$1.50 excise tax per pack of 20. And New York City could impose its own excise tax on top of that.

- \$25 million, rising to \$100 million when fully effective, from expanding the bottle bill to non-carbonated beverages. This would force additional mounds of empty containers down the throats of small food markets that have no place to store them, and no way to prevent them from compromising sanitation.

- \$1.2 million from tripling or quadrupling the maximum fines for violating Agriculture and Markets law or regulations, including food service inspections. Taken together, Governor Spitzer is saying, let's flood mini-marts with unrinsed beverage containers that will pile up in their back room, attracting bugs and bacteria, and then let's send in Ag and Markets inspectors to write them up for poor sanitation, and fine them three or four times as much as we would have last year for the same violation.

- Consolidate and “reform” all state and local taxes on petroleum products to create a new, unified state and local excise tax on motor fuel. Consolidation, which would eliminate costly and duplicative paperwork for us, and the Tax Department, is long overdue, and we commend the administration for advancing the idea. Yet somehow, they found a way to do it that would extract \$13 million more in tax revenue from the motoring public next year, and \$56 million a year thereafter.

In our opinion, the Legislature should reject all of these revenue enhancements. None is warranted. None is desirable. No matter what the Governor calls them, all would have the same, negative effect as higher taxes on New York consumers and businesses.

However, when budget negotiations start, the Second Floor is going to tell you that all these highly creative revenue items are essential to the very survival of the State of New York in the next budget cycle – that no part of this extra \$189 million may be removed without pushing our State toward bankruptcy.

And yet, last November, Mr. Spitzer’s Budget Office revealed that the administration had unilaterally decided to forgo \$200 million in anticipated new revenue they had placed in the current budget. That was supposed to come from the lawful collection of taxes on the vast quantities of gas and cigarettes that Native American retailers sell to non-Native American New Yorkers.

So \$189 million in new taxes and fees and fines and reforms and surcharges that will do nothing but suck the life out of an industry already crippled by the state’s tax policy, the Spitzer administration considers that absolutely imperative. But \$200 million in new revenue from enforcing an existing tax law they have blatantly refused to implement, they consider that optional. Expendable. No big deal.

- No big deal? A full-scale cigarette and motor fuel tax evasion epidemic that costs licensed, tax-collecting retailers \$1 billion or more in gross sales every year, and costs our state at least \$500 million a year in lost tax revenue, not to mention what local governments lose in sales tax?

- No big deal? The average New York household pays \$100 a year in taxes to subsidize other New Yorkers’ tax-free purchases of cigarettes from Native American outlets. Whatever one’s views on smoking, that’s an outrage. Each day this is allowed to continue, the state loses over \$1 million in legitimate tax revenue.

- No big deal? Compelling people to quit smoking by making it too expensive through taxation is a wonderful concept. But it can never work as long as it’s easy for smokers to routinely buy cigarettes without paying the tax. Plus, you’re driving more sales to outlets where there is no reliable system to detect and punish sales of cigarettes to minors.

- No big deal? The rule of law is at stake. Since when does *any* Governor get to pick and choose which duly enacted laws he will or won’t enforce?

With all due respect to the new Tax Commissioner, his prepared remarks on this issue earlier this afternoon were disingenuous. He stated that the Department is “enjoined” from enforcing the tax collection law. In reality, the Department has chosen to enjoin *itself*. It is no more enjoined from enforcing this law than you are enjoined from walking out of this room whenever you wish.

On January 2nd, 2007, in Buffalo, State Supreme Court Justice Rose Sconiers issued a preliminary injunction barring the State of New York from enforcing the cigarette tax collection law until the Department, as required by statute, issues tax-exemption coupons to the tribes to protect the tax exemption on Indian sales to other Indians.

The remedy was simple and obvious. The Department, at its will, could go ahead and implement the law by issuing the tax-exemption coupons to the tribes. Indeed, Governor Spitzer told reporters the day after the ruling: "My understanding is that the decision...can be rendered moot by Tax and Finance taking certain steps to effectuate the statute, and if that is done, then the reasoning behind the opinion would be rendered moot."

It's like the character Otis on the old "Andy Griffith Show." He's in the jail in the local sheriff's office, but whenever he sobers up, he can just reach through the bars, take the keys off the wall and let himself out. The Tax Department has the key, but elects not to use it. The shackles are imaginary, a convenient illusion.

For C-store operators and their suppliers, however, the shackles are painfully real. For 20 years, they've had to do business with one hand tied behind their back by their State government. Trying to keep up with steadily increasing costs and regulations imposed by the State while selling less and less because more and more of their customers desert them for the "tax-free" side of the street.

A casualty of the cumulative economic damage of this inaction lies in Hamburg NY, in Senator Stachowski's district. On January 11th, the 48 employees of E.P. Kirst & Sons, a century-old, fourth-generation family business, were told the firm was closing, permanently. Why? Kirst was a wholesale distributor, and 70 percent of its trade had been supplying tobacco to licensed, tax-collecting convenience stores in Western New York. Because Governor Pataki and now Governor Spitzer refused to enforce the law to restore a level playing field between Indian and non-Indian retailers, thousands of smokers abandoned those convenience stores to buy cheaper "tax free" cigarettes at nearby Indian outlets. Kirst's sales volume plummeted, and finally it reached the point of no return.

Licensed mom-and-pop retailers and wholesalers who dutifully collect taxes for the State of New York have a right to expect our state to ensure a level playing field. Taxpayers have a right to expect that taxation will be administered equitably. Citizens have a right to expect that constitutional duties will be carried out faithfully.

Because the Governor and the Tax Department have turned their back on these principles, small stores and their suppliers are being forced to close or sell, and the State, Four Billion Dollars in the hole, continues to forfeit billions more in legitimate and desperately needed tax revenue.

Here we are, more than a year after "Day One," when Governor Spitzer said everything would change. Nothing has changed – except we have a new Tax Commissioner who offers the same old excuses, EP Kirst and Sons has drowned, and who knows how many more tax-collecting, family-run businesses are right now on the verge of collapse, betrayed by those who preach upstate economic revitalization while serving as handmaidens to upstate economic annihilation.

Now, if you're thinking, "He's barking up the wrong tree," you're absolutely right. Because the Legislature has done its job. You passed the law in 2005 that requires the collection of these taxes. The problem lies with executive branch.

But there are still some things you *can* do.

- You can reject all these not-a-tax, revenue-producing fees and surcharges and reclassifications that would place non-Indian convenience stores at an even greater competitive disadvantage.

- You can keep the tax evasion epidemic from getting worse, by rejecting a motor fuel tax "reform" scheme that would increase the price of gas at our pumps so that we're that much higher than competing Native American outlets that sell gas "tax-free."

- You could refuse to fund the Department of Taxation and Finance in the next budget cycle until it upholds its responsibility by enforcing the tax collection law.

- And you could tell Governor Spitzer to quit nickel-and-diming small businesses to death while talking big about stimulating economic growth. Under his budget, stores that collect sales tax for the State of New York would now have to pay a \$50 annual registration fee to the Tax Department. As if they don't already know who we are. As if we haven't already filed mountains of paperwork to obtain the privilege of collecting and remitting sales tax. Designed to raise \$12 million, this insult-upon-injury tax on the tax collector would negate much of the sales tax vendor allowance retailers currently retain to offset actual administrative costs of collecting and remitting sales tax.

Thank you for the opportunity to speak, and thank you for keeping the views of the convenience store industry in mind.