

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY**

In the Matter of the Application of

DAVID R. TOWNSEND, JR. and
DABIEW MARKETS,

Petitioners,

For a Judgment Pursuant to N.Y.C.P.L.R. Article 78

- against -

ELIOT L. SPITZER, in his official capacity as
Governor of New York, and ROBERT MEGNA,
in his official capacity as Commissioner of the New
York State Department of Taxation and Finance,

Respondents.

**VERIFIED
ARTICLE 78
PETITION**

Index No.

Petitioners David R. Townsend, Jr. (“Assemblyman Townsend”) and Dabiew Markets (“Dabiew”) (collectively, “Petitioners”), through their attorneys, as and for their Verified Article 78 Petition against Respondents Eliot L. Spitzer, in his official capacity as Governor of New York (the “Governor”), and Robert Megna, in his official capacity as Commissioner of the New York State Department of Taxation and Finance (the “Commissioner” or “Department of Taxation”), (together, “Respondents”), allege as follows:

PRELIMINARY STATEMENT

1. New York law imposes a sales tax on all cigarette sales in the State except in certain limited circumstances. *See* N.Y. Tax Law § 471(1). Under the State tax scheme, licensed agents purchase tax stamps and attach them to cigarette packs prior to the first sale in the State. The cost of the tax then becomes part of the full price of the cigarettes at each step in the distribution stream. Ultimately, the tax is passed through and borne by the consumer. *Id.* at

§ 471(2). In turn, the agents are responsible for the collection of the cigarette tax and payment of such tax to the Department of Taxation. *Id.*

2. On April 12, 2005, the New York State Legislature amended the New York Tax Law regarding the imposition and collection of taxes for the sale of cigarettes (and motor fuel) by Indian reservation retailers to individuals who are not members of the tribe on an Indian reservation. *See* N.Y. Tax Law §§ 471-e, 284-e (the “2005 Amended Tax Law” or “Law”). Under the 2005 Amended Tax Law, which was signed by then-Governor George S. Pataki on April 13, 2005, and became effective March 1, 2006, the Department of Taxation is required to provide “Indian tax exemption coupons” to the Indian tribes and nations on a quarterly basis beginning with the first day of December, March, June and September each year based on a statutory coupon allocation formula. *Id.* at § 471-e. The coupons, in turn, must be presented by a reservation cigarette retailer to a wholesale dealer in order to purchase cigarettes exempt from sales and use taxes. *Id.*

3. The 2005 Amended Tax Law also establishes the same coupon scheme with respect to motor fuel products sold by reservation retailers to individuals who are not members of the tribe. *See* N.Y. Tax Law § 284-e.

4. Despite the fact that the 2005 Amended Tax Law came into effect on March 1, 2006, then-Governor Pataki and his Tax Commissioner, Andrew S. Eristoff (“Commissioner Eristoff”), both refused to take any action to implement the coupon distribution requirements under the Law and instead expressly stated that they did not intend to enforce the Law.

5. Throughout 2006, as it became clear that Governor Pataki would not enforce the 2005 Amended Tax Law, then-New York State Attorney General Eliot L. Spitzer, who was at the time campaigning to replace Pataki as Governor of New York, made a number of statements

criticizing the Pataki administration's failure to enforce the Law. Spitzer pledged that, as Governor, he would enforce the 2005 Amended Tax Law and collect the taxes it authorized on Native American sales of cigarettes and motor fuel to non-tribal members.

6. However, nearly two years later and now in office himself, Governor Spitzer, like his predecessor, has failed to take any action to enforce the 2005 Amended Tax Law in violation of his clear duties to the contrary. The current Commissioner has similarly failed in her duties to carry out the Law.

7. Indeed, the failure of both the Governor and the Commissioner to implement the 2005 Amended Tax Law amounts to a *de facto* veto of the Law. Yet neither the Governor nor the Tax Commissioner has the power to invoke such a *de facto* veto. In so doing, the Governor and Tax Commissioner have denied Assemblyman Townsend and his colleagues in the New York State Assembly the opportunity to override that veto -- an opportunity to which they are constitutionally entitled.

8. One of the primary purposes of 2005 Amended Tax Law is to promote the economic interests of the Convenience Store Petitioners as competitors of on-reservation Native American retailers, by creating a level playing field for sales of cigarettes and motor fuel to non-Native American customers.

9. However, because the Law has never been enforced, the Convenience Store Petitioners have lost, and continue to lose, business and business opportunities to Native American retailers, who, as a result of the Government Respondents' failure to enforce the 2005 Amended Tax Law, are able to sell cigarettes and gasoline to non-Native American customers tax-free.

10. The 2005 Amended Tax Law is now in effect. It lays out very specific ministerial duties which the Commissioner must perform and does not give him any discretion whatsoever as to whether she performs those duties. By refusing to implement and enforce the Law, the Commissioner has failed to perform a duty imposed upon him by law -- a duty that he is not at liberty to ignore. The Petitioners thus bring this action to compel the Government Respondents to comply with the Law.

PARTIES

11. Petitioner David R. Townsend, Jr. is a member of the New York State Assembly, representing the 115th Assembly District, which encompasses parts of Oneida and Oswego Counties. Assemblyman Townsend was a member of the New York State Legislature in 2005 and voted to enact the 2005 Amended Tax Law. The Government Respondents' failure to implement and enforce the Law has effectively nullified Assemblyman Townsend's vote enacting the Law.

12. Petitioner Dabiew Markets **[TO BE ADDED]**.

13. Respondent Eliot L. Spitzer is the Governor of the State of New York and the executive power of the State is vested in him. N.Y. Const. art. IV, § 1. The Governor's principal place of business is State Capitol, Albany, New York 12224. The Governor is sued herein in his official capacity at all times relevant hereto.

14. Respondent Robert Megna is the Commissioner of the New York State Department of Taxation and Finance. The Commissioner's principal place of business is New York State Department of Taxation and Finance, Building 9, W.A. Harriman Campus, Albany, New York, 12227. The Commissioner is sued herein in his official capacity at all times relevant hereto.

FACTS

15. The State of New York imposes a tax on all sales of cigarettes in the State except when the sale occurs “under such circumstances that this state is without power to impose such tax.” N.Y. Tax Law § 471(1).

16. The 2005 Amended Tax Law makes clear that “all cigarettes sold on an Indian reservation to non-members of the nation or tribe or to non-Indians shall be taxed.” N.Y. Tax Law § 471-e(1)(a).

17. However, the Law provides that “qualified Indians may purchase cigarettes for ... [their] own use or consumption exempt from cigarette tax on their nations’ or tribes’ qualified reservations” through the use of “tax exemption coupons.” *Id.*

18. The implementation of this tax scheme, under which cigarettes sold to non-members of the tribe are taxed but those sold to tribe members are not, requires that certain actions be performed by the Commissioner. For example, the 2005 Amended Tax Law provides that the Commissioner “*shall* provide the Indian nations and tribes within this state with Indian tax exemption coupons” on a quarterly basis. N.Y. Tax Law § 471-e(1)(b) (emphasis added). The Law provides no discretion to the Department of Taxation to refuse to issue these coupons. *Id.*

19. Without the issuance of the tax exemption coupons by the Commissioner, the 2005 Amended Tax Law cannot be implemented or enforced. Thus, the Commissioner’s failure to perform her non-discretionary duties under the Law has prevented the enforcement of the 2005 Amended Tax Law.

A. The 1988 Indian Sales Regulations

20. For nearly two decades, the State has developed various mechanisms for the collection of cigarette taxes without infringing upon the Indians' immunity from taxation on cigarette sales made by reservation retailers to their tribal members.

21. In an early attempt to address the issue of collection of sales tax from tribal sales of cigarettes to non-enrolled tribe members in New York, the Department of Taxation promulgated tax regulations that shifted the point of tax-collection from the reservation retailers – who had never collected such tax – to the wholesale level, thus easing the burden of collection for the Commissioner. *See* N.Y. Comp. Codes R. & Regs. (“NYCRR”) tit. 20, §§ 336.6 to .7, 414.6 to .7 (repealed 1998) (hereinafter, the “1988 Indian Sales Regulations”).

22. More specifically, the 1988 Indian Sales Regulations provided that the Department of Taxation would allow a certain quantity of untaxed cigarettes to be sold to reservation retailers. NYCRR tit. 20, § 335.7(d)(1) (repealed 1998). The regulations provided for the collection of the sales tax at the wholesale level prior to the transportation of the cigarettes to the reservation. *Id.* Under the 1988 Indian Sales Regulations, the reservation retailers were required to register with the Department of Taxation in order to receive tax-exemption coupons which allowed the retailers to purchase such products tax-free from a licensed wholesaler. *See id.* at § 336.6(g). The wholesalers, in turn, were to submit the coupons they received from the retailers to the Department of Taxation for refunds of the taxes paid. Alternatively, a tribe was permitted to enter into an agreement with the State to regulate the distribution of untaxed cigarettes on its reservation in an amount agreed upon by the parties. *Id.* at § 335.7(c)(1).

23. Despite the United States Supreme Court's unanimous endorsement of the 1988 Indian Sales Regulations in 1994 in *Department of Taxation & Fin. v. Milhelm Attea & Bros.*,

512 U.S. 61 (1994), neither then-Governor Pataki nor the Department of Taxation ever attempted to enforce the regulations until 1997. Subsequently, and only after violent demonstrations and other civil unrest spurred on by anti-tax Indian protesters, enforcement was halted and the 1988 Indian Sales Regulations were repealed by the Department of Taxation in 1998.

B. The 2003 Sales on Native American Tribe Lands Act

24. Despite its awareness of the 1997 protests and the possibility of similar demonstrations, in May 2003, the State Legislature overrode Governor Pataki's veto and enacted the Sales on Native American Tribe Lands Act, which was included in the annual budget bill. N.Y. Tax Law §§ 284-e, 301-a, 471-e, 1112, 1210. Much like the predecessor 1988 Indian Sales Regulation, the 2003 Act specifically provided for the collection of sales and use taxes where an individual who was not a member of the tribe purchased cigarettes from reservation retailers. *Id.* at § 471-e(1)(a). The Sales on Native American Tribe Lands Act required the Department of Taxation to promulgate and enforce new regulations providing for the collection of such cigarette taxes.

25. Although it published proposed regulations in September 2003, by fully utilizing the proposed notice and comment period, the Department of Taxation was able to extend the implementation date of the regulations for the Sales on Native American Tribe Lands Act until late September 2004.

26. In the Regulatory Impact Statement accompanying the proposed regulations, the Department of Taxation and Finance specifically noted that “[t]his rule will benefit off-reservation retailers (e.g., convenience stores and gasoline stations) located near qualified reservations by creating a level playing field for sales to non-Indians.” N.Y. State Register, September 24, 2003, Vol. XXV, Issue 38, Rule Making Activities, related to the Department of Taxation and Finance's Proposed Rule Making pertaining to “Sales on Indian reservations.”

27. In October 2004, however, the Department of Taxation allowed the proposed regulations to “expire” without implementation; thus, they never took legal effect.

C. The 2004 Proposed Law

28. In November 2004, the State Legislature passed another tax collection bill, S. 6288/A. 11089 (N.Y. 2004) and delivered it to the Governor for his signature. Governor Pataki, however, vetoed the proposed legislation, citing as his basis a purported “historic settlement” that he was negotiating with the entire Indian Nation that would alleviate the tax collection issue once and for all.

29. The Legislature failed to seek a veto override.

30. The Governor’s “historic settlement” never came to fruition.

D. The 2005 Amended Tax Law

31. On April 12, 2005, the State Legislature passed and, on April 13, Governor Pataki signed into law the 2005 Amended Tax Law, which became effective on March 1, 2006.

32. In relevant part, the 2005 Amended Tax Law provides:

[Q]ualified Indians may purchase cigarettes for such qualified Indian’s 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 stamp.

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 [D]epartment [of Taxation] shall provide Indian nations and tribes within this state with Indian tax exemption coupons . . . A reservation cigarette seller shall be able to present such Indian tax exemption coupons to a wholesale dealer

. . . in order purchase stamped cigarettes exempt from the imposition of the cigarette tax. . . .

Indian tax exemption coupons shall be provided to the recognized governing body of each Indian nation or tribe . . . The Indian tax exemption coupons shall be provided to the 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.

The amount of Indian tax exemption coupons to be given to the recognized governing body of each nation or tribe shall be based upon the probable demand of the qualified Indians on such nation's or tribe's qualified reservation plus the amount needed for official nation or tribal use.

(i) Probable demand shall 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 such affected Indian nation or tribe.

(ii) In making a determination of probable demand, the [Department of Taxation] shall take into consideration any evidence submitted by such recognized governing body relating to such probable demand . . . and/or relating to the amount needed for such nation's or tribe's official use.

N.Y. Tax Law § 471-e(1)(a), (1)(b), (2)(a), (2)(b).

33. Under the 2005 Amended Tax Law's "Indian tax exemption coupon" scheme, a reservation retailer may present the coupons to a licensed wholesaler in order to purchase tax-free cigarettes. *Id.* at § 471-e(1)(b). The Law explicitly places the burden of distributing the coupons squarely on the Department of Taxation. *Id.*

34. The Department of Taxation is not given any discretion under the Law to refuse to distribute the coupons. Rather, the 2005 Amended Tax law sets forth purely ministerial duties: the Department of Taxation is required to distribute the Indian Tax Exemption coupons on a quarterly basis beginning on the first day of December, March, June and September each year, utilizing the coupon allocation formula. *Id.* at § 471-e(1)(b), (2)(a), (2)(b).

35. The 2005 Amended Tax Law is verbatim with respect to the Department of Taxation's provision of Indian tax exemption coupons to reservation retailers for motor fuel sales. *See id.* at § 284-e.

36. Upon information and belief, the Indian tax exemption coupons have been printed and are ready for distribution to the Indian nations and tribes.

37. The 2005 Amended Tax Law was to come into effect on March 1, 2006. However, in early 2006, both Governor Pataki and Commissioner Eristoff made clear that they would not enforce the 2005 Amended Tax Law, despite their legal duty to do so.

38. For example, in a purported agency "advisory opinion" issued on March 16, 2006, then-Commissioner Eristoff stated that the Department of Taxation had a "long-standing policy of allowing untaxed cigarettes" to be sold to reservation retailers, and that it had no plans to enforce the Law. Commissioner of Taxation and Finance Advisory Opinion, No. TSB-A-06(2)M (March 16, 2006) ("the Department has no intention to alter its long-standing policy"). Moreover, in February 2006, the Commissioner testified before a joint session of the State Legislature's fiscal committees that the Department of Taxation would not begin enforcement of the 2005 Amended Tax Law on March 1, 2006 – the date it became effective. *Id.*

39. In March 2006, Governor Pataki likewise stated that his administration "w[ould] not enforce a law [the 2005 Amended Tax Law] taxing cigarettes and other goods sold to non-Indians at stores on Indian reservations across the state." David Staba, *State to Forgo Cigarette Tax to Keep Peace With Indians*, New York Times, March 20, 2006, at B5.

40. After Governor Pataki's administration announced their intention not to enforce the Law, the Office of then-Attorney General Spitzer issued a press release stating, "[w]e are very surprised by Tax Commissioner Eristoff's statement that he does not want to 'implement'

the new cigarette tax law which goes into effect March 1” and observing that the “law creates a level playing field between on-reservation and off-reservation retailers, by prohibiting licensed tax stamping agents from selling unstamped cigarettes to Indian tribes.”

41. By the end of Governor Pataki’s administration, the coupon distribution and tax collection requirements of the 1988 Indian Sales Regulations, the 2003 Sales on Native American Tribe Lands Act and the 2005 Amended Tax Law (except for a brief period in 1997) had gone unenforced for nearly twenty years.

E. The Current Administration’s Continued Failure to Enforce the 2005 Amended Tax Law

42. During his campaign for governor in 2006, then-Attorney General Spitzer made numerous statements vigorously and unequivocally supporting the enforcement of the 2005 Amended Tax Law when it went into effect on March 1, 2006, and criticizing the Pataki administration for its failure to enforce the Law.

43. For example, in response to Governor Pataki’s proposal to delay the start of enforcement of the Law, then-Attorney General Spitzer stated, “If it’s the law, we should enforce it.” Tom Precious, *Spitzer Opposes Cigarette Tax Collection Delay*, The Buffalo News, January 19, 2006 (“Asked if he supported efforts to collect the taxes [on cigarette sales by Indian retailers], Spitzer... said, ‘Absolutely.’”).

44. Attorney General Spitzer, who in 2006 was campaigning to replace Pataki as Governor of New York, also stated, “The current tax laws are being ignored.... The new law goes into effect automatically on March 1... regardless of what the tax department does.” Moreover, Spitzer stated, “The tax stamping agents are required to comply with the law.... If they don’t, then the tax department should initiate proceedings to pull their stamping licenses.”

The Associated Press, *Questions over Indian Cigarette Taxes Looms*, LegislativeGazette.com, February 27, 2006.

45. Shortly thereafter, Spitzer reiterated his position by stating, “You can’t announce to the world that a law will simply be ignored and not enforced.” *State to Forgo Cigarette Tax to Keep Peace with Indians*, New York Times, March 21, 2006.

46. Indeed, on October 12, 2006, during his final debate with Republican gubernatorial candidate John Faso, Spitzer unequivocally stated that, as Governor, he would enforce the 2005 Amended Tax Law.

47. After assuming the office of Governor on January 1, 2007, Governor Spitzer reaffirmed his commitment to enforcing the 2005 Amended Tax Law and included approximately \$200 million in expected revenue from the enforcement of the Law in the State budget for that year. *See New York: Albany: Uncollected Cigarette Taxes*, New York Times, March 5, 2007; *Hundreds Attend Seneca Rally Opposing Cigarette Taxes*, The Buffalo News, March 13, 2007; Lou Michel and Tom Precious, *Senecas Demand New Deal on Land Used by Thruway; Call Issue Separate from Dispute over Tobacco, Gasoline*, The Buffalo News, April 20, 2007.

48. However, despite the Governor’s repeated promises, on October 30, 2007, a spokesperson for the Spitzer administration announced that the 2005 Amended Tax Law would not be implemented in 2007 and that, accordingly, the Governor was deducting from the State budget forecast the \$200 million in anticipated tax revenue that was to result from the collection of cigarette taxes from Native American retailers under the Law. *See Tom Precious, As Deficit Balloons, Spitzer Backs Off Vow on Indian Sales Taxes; Effort at Collections Won’t Be Made till Next Fiscal Year at Earliest*, The Buffalo News, October 31, 2007.

49. During his campaign, as Attorney General, and after assuming office, Governor Spitzer repeatedly recognized and affirmed the duty of the Governor and the Department of Taxation to implement and enforce the 2005 Amended Tax Law. Nonetheless, it is now clear that the Government Respondents have not enforced the Law.

CAUSE OF ACTION

(Request for Mandamus Against the Government Respondents
Pursuant to N.Y.C.P.L.R. § 7806)

50. Petitioners repeat and reallege each and every allegation in the proceeding paragraphs as if set forth herein in full.

51. The Government Respondents are required to enforce and implement all laws duly passed by the New York State Legislature.

52. The State Legislature passed and duly enacted the 2005 Amended Tax Law. The Law became effective on March 1, 2006.

53. The 2005 Amended Tax Law imposes purely ministerial, nondiscretionary duties upon the Government Respondents.

54. The Government Respondents have failed to implement or enforce the 2005 Amended Tax Law, notwithstanding their duty to do so.

55. N.Y. C.P.L.R. Article 78 provides a right of action against governmental officers and entities who have “failed to perform a duty enjoined upon [them] by law.” N.Y. C.P.L.R. § 7803(1).

56. Petitioners are entitled to judgment under N.Y. C.P.L.R. § 7806 ordering the Governor and Department of Taxation to implement and enforce the 2005 Amended Tax Law.

WHEREFORE, Petitioners demand relief as follows:

- (a) That the Court direct and compel the Government Respondents, and their agencies, officers and employees, to implement and enforce the 2005 Amended Tax Law immediately; and
- (b) Such other, further or different relief as the Court deems just and proper, including reasonable costs and attorneys' fees.

Dated: New York, New York
January __, 2008

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