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TESTIMONY OF JAMES S. CALVIN, PRESIDENT
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before the
Senate Standing Committee on Investigations and Government Operations
HON. CRAIG M. JOHNSON, CHAIRMAN
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Chairman Johnson, Honorable Members of the Committee, thank you for this opportunity. I applaud your persistent, bipartisan efforts – individually and collectively – to spotlight this critical issue and push for a lasting and just solution.

There are 7,700 neighborhood mini-marts and convenience stores in New York State. More than half are single-store, family-run enterprises. Ranging in size from 700 to 7,000 square feet, they are open extended hours, selling food, gas, tobacco, dairy products, snacks, lottery and a wide range of other products. As an industry, they collect more than \$3 billion a year in tobacco, motor fuel, and sales taxes and lottery revenue for New York State.

These small business owners share your commitment to fairness and the rule of law. They share your respect for Native American people, and their right to operate commercial enterprises. They share your belief that all those who do business with New Yorkers should abide by duly enacted standards governing such commerce.

But for the past 15 years or more, our members have had to do business with one hand tied behind their back by their State government. For obtaining a license to sell tobacco products, complying with the myriad regulations, collecting and remitting taxes, providing employment, risking capital, and working seven days a week, their reward is a State tax policy that chases their customers away to unlicensed, unregulated, “tax free” tribal stores they cannot possibly compete with.

Historically, cigarettes have been a core product category for our industry. Nationally, they still account for 35 percent of sales inside the four walls of the typical convenience store. Not here. Many New York convenience stores have lost two-thirds to three-quarters of their previous cigarette sales volume. Here’s why.

By quintupling the excise tax on cigarettes in the span of eight years without closing off well-established channels for dodging that tax, New York State government incited and abetted a tax evasion epidemic that became so prevalent that more than half of New York smokers openly admit buying from untaxed sources, and an entire generation of New York smokers views tax avoidance as a way of life.

This ever-widening crisis has crippled legitimate small businesses, squandered desperately needed tax revenue, promoted lawlessness, and thwarted anti-smoking initiatives.

Whenever a smoker buys a pack of cigarettes “tax-free,” the state loses the \$2.75 excise tax, and the state and local governments lose another 50 cents or so in sales tax revenue.

In addition, licensed, tax-collecting retailers are deprived of a legitimate sale, and the goals of preventing youth smoking and reducing adult smoking is impeded.

The U.S. Supreme Court, in the landmark 1994 *Attea* case, unanimously ruled that New York State is entitled to collect taxes on the sale of cigarettes by Native American tribes to non-Native American customers.

With then-Senator Paterson voting in the affirmative, the State enacted on March 1, 2006, a law to exercise this right. It took effect March 1, 2006. But to date, the Department of Taxation and Finance, in utter defiance of the Constitution, refuses to implement it.

The reasons, expressed or implied, on any given day, seem to fall into five categories:

REASON #1: “The tribes have sovereign immunity.”

All New Yorkers have the deepest respect for the right of Native Americans to govern themselves and operate businesses.

But contrary to tribal assertions, the U.S. Supreme Court says their “sovereign immunity” is not absolute.

In the 1994 *Attea* case, it said previous rulings “make clear that the States 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.” It went on to say New York had devised a reasonable system for collecting these taxes “without unnecessarily intruding on core tribal interests.”

The Seneca Indian Nation routinely claims that the *Attea* ruling is trumped by the Treaty of 1842, concluded at Buffalo Creek, arguing that it expressly forbids the State from imposing sales taxes on their trade with non-Indians. In reality, New York’s courts have refuted this claim, stating unequivocally that the treaty refers solely to exempting Indian *land*, not *commerce*, from taxation. We have furnished the Committee staff with those court rulings.

REASON #2: “If we enforce the law, violence may occur.”

In the post-9/11 era, New York has zero tolerance for violence as a tool for influencing government policy. Section 490.20 of the Penal Law, titled "Making a Terroristic Threat," makes it a Class D felony for anyone to try to "influence the policy of a unit of government by intimidation or coercion" by threatening to commit certain violent crimes, including assault, use of firearms, or arson.

Thus, if violence, or threats of violence, were to arise – from any quarter, over this or any other matter – our State now has a mechanism for prosecuting the offenders in order to protect its citizens from terrorism and preserve the rule of law. If tax collection is being postponed in response to threats that already have been made, it would amount to succumbing to terroristic threats, which is unacceptable.

REASON #3: “The tribes are a major economic force.”

Some tribes point to the economic benefits of their casino, smoke shop and other business enterprises as a reason for the State not to implement the tax collection law. One boasts that its commercial empire contributes over \$1 billion a year to New York’s economy.

Everyone genuinely appreciates the economic contributions of the Oneidas in Central New York, the Senecas in Western New York, and other Indian nations you have heard from. They also value the presence of IBM, General Electric, Pfizer, Citigroup, Verizon, Pepsico, and other Fortune 500 companies in New York.

Being an economic powerhouse, however, does not excuse any entity from abiding by standards enacted by the Legislature for engaging in commerce with New Yorkers.

The notion that massive tax avoidance is a legitimate economic development engine should offend every law-abiding New York citizen.

REASON #4: “The State is enjoined from enforcing the law.”

The Tax Department claims it is “enjoined” from collecting taxes on cigarettes and gas purchased by non-Indian customers at tribal stores.

In reality, the Department has chosen to enjoin *itself*. The supposed shackles are a convenient illusion used to rationalize its shameful policy of non-enforcement.

In January 2007, in the *Day Wholesale* case, 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 prescribed by the statute, issues tax-exemption coupons to the tribes – coupons intended to preserve the undisputed tax exemption on Indian sales to other tribal members.

The remedy was – and still is – obvious. The Department, at its will, can go ahead and implement the law by issuing the coupons to the tribes, and start collecting the taxes.

The Department’s posture brings to mind the character “Otis” on the old Andy Griffith TV show. Otis routinely drops by Sheriff Taylor’s office and locks himself in the jail to sober up. But whenever he wants, he can reach through the bars, take the keys off the wall, and let himself out. Likewise, the Department has the key, but *chooses* not to use it.

REASON #5: “It wouldn’t generate much revenue anyway.”

We commissioned a respected economist, Brian P. O’Connor Ph.D., to quantify the magnitude of cigarette tax evasion on Indian lands in New York. His March 2009 report, which we have shared with your committee staff, showed the State would generate around \$1 billion a year in additional revenue by enforcing the law requiring collection of taxes on tribal sales of cigarettes to non-Indian customers. That’s \$2.7 million every day.

This figure, while alarming enough, is actually higher if one factors in the unknown amount of lost taxes on motor fuel sold “tax-free” at tribal outlets, as well as state and local sales tax on other products those gas and cigarette customers would have purchased while visiting tax-collecting stores.

Contrary to Dr. O’Connor’s conclusions, the Administration seems convinced that enforcing the tax collection law would yield only about \$200 million a year in new revenue.

That doesn’t jibe with a New York State Health Department report saying, “revenue lost to the state as a result of purchasing low price (mainly untaxed) cigarettes was estimated to be between \$436 million and \$576 million in 2004.”

Nor the City of New York’s estimate that the city alone is losing \$195 million a year due to untaxed sales of cigarettes on Indian reservations to the general public.

In fact, way back in March 1997, then-Tax Commissioner, the late Michael Urbach, wrote that cigarette tax evasion was costing the State of New York upwards of \$100 million per year in lost tax revenue. The state cigarette tax rate then was only 56 cents per pack. Now it’s \$2.75.

As you can see, objective analysis of each of these supposed justifications for selectively scrapping enforcement of the tax law reveals them to be exaggerations and excuses, rather than valid reasons.

Whatever the true motivation for refusing to act, there is no question it is taking an enormous toll on small businesses, taxpayers, and public health. Moreover, it undermines the credibility of the Tax Department and its team of dedicated professionals. Every time they say they need to audit our sales tax records to make sure New York State is getting all the tax revenue it’s entitled to, we shake our heads in dismay.

A ray of hope appeared last week in Governor Paterson’s budget message. He said the Tax Department is going to rescind its long-standing “policy of forbearance,” and promulgate regulations to implement the tax collection system prescribed by law, including distributing “tax exemption coupons” to Native American tribes in order to preserve the tax exemption on their sales to tribal members.

While we don’t question Governor Paterson’s sincerity, 15 years of deliberate delay and deceit by his predecessors have taught us to be skeptical of any new promises from the Capitol on this issue. We applaud the intent, and await the follow-through.

We are puzzled, however, as to why the Governor simultaneously proposed another \$1-a-pack increase in the state excise tax on cigarettes, because it would unquestionably worsen the cigarette tax evasion epidemic by chasing even more smokers to the tax-free side of the street, as did each of the three tax hikes over the past 10 years.

The Governor proposes an effective date of June 2nd, 2010, for the tax hike, but indicates the start of the enforcement initiative is at least six to nine months off. That sequence is backward. It would be like loading more passengers onto the bus for a trip down the mountain, and as you wave good-bye, telling them not to worry because you're beginning to schedule an appointment to get the brakes fixed.

We say, first things first. Enforce the law. Recapture the hundreds of millions of dollars in cigarette tax revenue that is escaping at the current rate. Achieve full compliance, and then examine whether any change in the tax rate is really necessary. Enacting the tax hike first would be a grave mistake.

During the struggle for tax equality, the Legislature, to its credit, has tried everything to restore fairness. You have passed legislation, overridden vetoes, passed more legislation, issued reports, and held hearings like this one. On behalf of our members statewide, thank you. What more can you do?

You can prevent it from getting any worse, by rejecting Governor Paterson's call for another cigarette tax increase until cigarette tax evasion has been curtailed.

And in the interest of restoring fairness to the marketplace, fulfilling public health policy objectives, and maximizing tax revenue for state and local governments, you can insist that he follow through immediately on his pledge to move forward with lawful collection of taxes on Indian sales to non-Indian customers.

Thank you for your concern, your support, and the opportunity to comment today.