



New York Association of Convenience Stores
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Mr. John W. Bartlett, Director of Regulations
Taxpayer Guidance Division
NYS Department of Taxation and Finance
W.A. Harriman Campus
Building 9, Room 161
Albany NY 12227

Ref: TAF-10-10-00004-P

Dear Mr. Bartlett

It is with a mix of hope and skepticism that the New York Association of Convenience Stores files the following comments on behalf of 7,500 neighborhood mini-marts and convenience stores from Hamburg to Hempstead that sell cigarettes in accordance with duly enacted state and local standards.

First and foremost, the Paterson Administration is to be commended for initiating the process of promulgating regulations for the lawful collection of taxes on cigarettes sold by tribal enterprises to non-Indian customers. If the Department follows through, it will be a concrete step toward a level playing field for law-abiding, tax-collecting retailers whose livelihoods have been crippled by the artificial price advantage their Native American competitors have enjoyed for decades.

Follow-through, however, has not been the Department's strong suit when it comes to this issue. In fact, it has published regulations and solicited public comment before, only to abandon the process. And since the March 1, 2006 enactment of the state law requiring collection of taxes on Indian sales to non-Indians, the Department has refused to enforce it, allowing cigarette tax evasion to reach epidemic proportions. These painful realities color our perception of the instant rulemaking.

The Collection Scheme

In 1994, in the *Attea* decision, the U.S. Supreme Court ruled unanimously that when non-Indian purchasers buy cigarettes from a tribal retailer, it's a taxable event, and that states are entitled to collect those taxes. Under these regulations, New York would exercise that authority.

While our members whole-heartedly support full and fair collection of taxes, we are skeptical about the effectiveness and sustainability of the collection scheme set forth in the proposed rulemaking versus that prescribed by Section 471e of the Tax Law.

The *Attea* decision endorsed as constitutionally sound a collection system similar to the tax-exemption coupons employed under Section 471e. It is not clear that the alternative scheme set forth in this rulemaking would pass such a test. Granted, both are based on a probable demand formula; that's how each tribe's allotment of tax-exemption coupons would be determined. But the system proposed here is not rooted in law.

A preliminary injunction rendered by State Supreme Court Justice Rose Sconiers precludes the enforcement of Section 471e – but only until such time as the Department issues the prescribed tax-exemption coupons to the tribes in fulfillment of that statute. Respectfully, the remedy is not to circumvent the injunction by concocting a new collection scheme, but to confront it by simply issuing the tax-exemption coupons to the tribes and proceeding with tax collection.

We urge the Department to amend the regulations to incorporate the coupon system mandated by Section 471e.

Regular vs. Emergency Rulemaking

We are puzzled as to why the Department opted to go through the full State Administrative Procedure Act review process in promulgating this regulation, rather than adopting it on an emergency basis.

By contrast, on February 3, 2010, the Lottery Division published in the New York State Register a notice of emergency rulemaking (I.D. No. LTR-05-10-00006-E), saying immediate adoption of revised Lotto game rules was “necessary to counteract the budgetary crisis currently facing the State of New York.”

“Due to the unprecedented need for revenue at this time, the Lottery and the State cannot afford to delay relaunch of the Lotto game until completion of a normal rulemaking process under the State Administrative Procedure Act,” said the notice. “Therefore, the new Lotto regulations must first be implemented through Emergency Adoption.”

Respectfully, the same can be said of the need to collect taxes on cigarettes sold by Indian retailers to non-Indians, which our economist has estimated at \$1 billion a year (see www.nyacs.org/documents/09OConnortaxstudyupdate.pdf).

Whatever the reason for choosing a longer path, it is not apparent from reading the proposed regulation. Every day the Department delays implementation chases more business away from our members' stores, deepens the crater of lost tax revenue, and further weakens efforts to reduce smoking.

Even more disturbing, the Administration, in its Executive Budget for 2010-11, proposes to increase the cigarette excise tax another \$1 a pack. If enacted, the effective date (June 2, 2010) is likely to precede final adoption of this regulation, providing smokers with an added financial incentive to join the cigarette tax evasion stampede, making it that much harder to bring under control when and if these regulations are implemented. The sequence makes no sense. The State should capture the hundreds of millions of dollars in lost tax revenue first, *then* examine whether any change in the tax rate is warranted.

There may be valid political, practical, or strategic considerations that shaped the slower timetable for this rulemaking. But as Governor Paterson observed on April 16, 2009, “Our work to correct injustice cannot depend on factors like timing or guaranteed success.”

Tax Stamping

The proposed regulation expressly permits stamping agents to deliver unstamped, untaxed cigarettes to tribal retailers, directly contradicting Section 471e, which requires all cigarettes delivered to tribal retailers to be tax-stamped.

In our view, permitting *any* quantity of unstamped cigarettes to be delivered to Native American reservations would be an invitation to abuse.

Motor Fuel

There is no provision in the proposed regulation for collecting taxes on motor fuel sold by Native American retailers to non-Indian customers, which is mandated by Section 284-e of the Tax Law. This is a glaring omission.

There is no legal impediment to enforcing Section 284-e. The injunctions imposed by Judge Sconiers pertain solely to the taxation of cigarettes. Estimates of the tax value of sales of motor fuel by Native American retailers to non-Indian retailers range upward from \$200 million a year. The loss of legitimate motor fuel sales by tax-collecting retailers is several times that amount.

While the focus on cigarette tax evasion is understandable given the amount of revenue and the public health consequences, it is short-sighted to totally ignore the need to collect taxes on motor fuel sold by Native American retailers to non-Indian customers.

Conclusion

New York’s convenience store industry commends Governor Paterson and the Tax Department for taking the initiative to propose these regulations as a potential cure for the plague of cigarette tax evasion that harms our economy, fiscal condition, and public health. We applaud the intent and await the follow-through.

We would have preferred an expedited rulemaking, and one that included motor fuel. We recommend the regulations be revised to integrate the tax-exemption coupons prescribed by Section 471e of the Tax Law and to outlaw delivery of unstamped cigarettes to tribal stores.

Thank you for the opportunity to comment.

Sincerely,

James S. Calvin
President