

**STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE**

DAY WHOLESALE, INC. and SCOTT B. MAYBEE,

Plaintiffs,

vs.

Index No. 2006/7668

**THE STATE OF NEW YORK, ELIOT SPITZER,
Attorney General of the State of New York, and
DAVID WEINSTEIN, an Assistant Attorney General,**

Defendants.

MARGARET A. MURPHY, ESQ.
DAVID J. McNAMARA, ESQ.
Attorneys for Plaintiffs

ELIOT SPITZER
Attorney General of the State of New York
STEPHEN GAWLIK, ESQ., of counsel
Attorney for the Defendants

DOUGLAS S. KANTOR, ESQ.
Attorney for Proposed Interveners,
New York Assoc. of Convenience Stores, et.al.

DANIEL A. SEFF, ESQ.
Attorney for the St. Regis Mohawk Tribe
Amicus Curiae

MEMORANDUM DECISION

By order to show cause brought by plaintiffs Day Wholesale, Inc. and Scott B. Maybee, with notice to defendants State of New York, Attorney General Eliot Spitzer, and Assistant Attorney General David Weinstein, this Court granted a temporary restraining order that restrained defendants from taking any action to enforce provisions of Tax Law, § 471-e, as amended by L. 2005, c. 61, pt. K, as amended by L. 2005, c. 63, pt. A, until a determination could be made as to whether this statute is in effect.

The order to show cause seeks a preliminary injunction enjoining enforcement of Tax Law, § 471-e until certain actions are taken, including the issuance of enabling regulations and the distribution of Indian tax-exempt coupons. In response to the order to show cause, defendants opposed the relief sought by plaintiffs and moved to dismiss the complaint. A motion to intervene was made by the New York Association of Convenience Stores, Nice N Easy Grocery Shoppes, and MWS Enterprises, Inc. Also, a motion was made by The Saint Regis Mohawk Tribe to appear *amicus curiae* and submit a brief supporting plaintiffs' position in this action. Plaintiffs and defendants opposed the motion to intervene. There was no opposition to the motion to appear *amicus curiae*.

At oral argument, the motion by The Saint Regis Mohawk Tribe to appear *amicus curiae* was granted. The motion to intervene was denied, but upon request this Court allowed the papers submitted by the proposed interveners to be considered as an *amicus curiae* submission. The defendants' motion to dismiss the complaint was denied and decision was reserved on the plaintiffs' motion for a preliminary injunction. The temporary restraining order has remained in effect pending this decision.

The primary issue in this case is whether Tax Law, § 471-e, as amended, is presently in effect. With respect to the 2005 amendments to Tax Law, § 471-e, which entirely rewrote the statute, the legislation reads "[t]his act shall take effect March 1, 2006, provided that any actions, rules and regulations necessary to implement the provisions of this act on its effective date are authorized and directed to be completed on or before such date." Plaintiffs argue that because no rules and regulations necessary to implement the provisions of this statute have been promulgated, the

statute did not and could not have gone into effect on March 1, 2006. Defendants argue that Tax Law, § 471-e became effective March 1, 2006 and that the issuance of rules and regulations is not a condition precedent to the statute becoming effective on that date.

In support of their position, defendants cite N.Y.A.A.D., Inc. v. State of New York, 1 NY2d 245 (2003), for the proposition that a statute becomes effective on its effective date even if enabling regulations have not been promulgated as of that date. In N.Y.A.A.D., the Court of Appeals addressed the effective date of a statute that permitted the sale and installation of new motor vehicle airbags in all instances and the sale and installation of salvaged airbags only if they met "standards established by a nationally recognized testing, engineering and research body." Vehicle and Traffic Law, § 398-d (6)(e). Subdivision 7 of this statute was to "take effect January 1, 1997, provided, further, the commissioner of motor vehicles shall promulgate such rules and regulations as are necessary to implement the provisions of this act on or before January 1, 1997."

In determining whether the statute was in effect, the Court of Appeals looked not only at the foregoing language, but examined the statute as a whole as well as the relevant legislative history. In doing so, the court revealed that the intent of the statute was to prohibit the installation of salvaged airbags that were not certified, primarily, if not exclusively, to prevent the installation of airbags that were unsafe or stolen. As a result, the court held that the statute was in effect because it was clear that until such time that salvaged airbags could be certified, only newly manufactured airbags could be installed in repaired vehicles.

The same conclusion cannot be reached with respect to Tax Law, § 471-e. While the intent of the statute is to require that non-Indians who purchase cigarettes on Indian reservations pay the New York State stamp tax, the statute can only function if it properly exempts Indians purchasing cigarettes under circumstances where they are not lawfully required to pay such taxes.¹ In order for Tax Law, § 471-e to function, it is essential that the state issue Indian tax exemption coupons. The term "Indian tax exemption coupon," in either the singular or plural form, appears eighteen times in the statute. It is undisputed that, at present, Indian tax exemption coupons have not been issued or distributed as contemplated by the statute. It is difficult to imagine this statute functioning without enabling rules and regulations governing, at a minimum, the printing, allocation, and distribution of Indian tax exemption coupons. What is absolutely clear, however, is that Tax Law, § 471-e cannot, by its terms, function without a system that involves Indian tax exemption coupons. The creation and distribution of these coupons is, under any reading of the statute, one of the "actions . . . necessary to implement the provisions of this act."

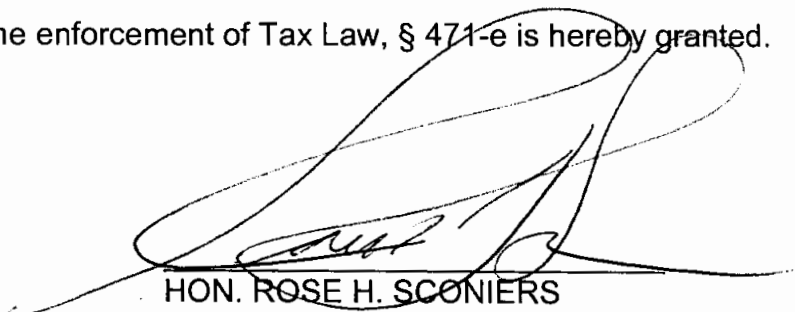
Defendants argue that if any taxes are paid in error by Indians and/or Indian tobacco merchants, they can apply for a refund pursuant to Tax Law, § 476. Section 476 by its terms applies to any "agent, dealer or tobacco products distributor" who may be entitled to a refund of cigarette taxes paid under circumstance where cigarettes

¹ Tax Law, § 471-e (1) provides, in part, "qualified Indians purchasing cigarettes . . . on another nation's or tribe's 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 . . ." Whether it is lawful to tax qualified Indians who purchase cigarettes on another nation's or tribe's reservation will not be addressed at this time.

“have been sold and shipped into another state for sale or use there or have become unfit for use and consumption or unsalable, or have been destroyed, or whenever the commissioner of taxation and finance shall have determined that any tax imposed by this article shall have been paid in error.” This statute does not contemplate refunds for cigarettes sold to a person who is not obligated to pay that tax, i.e. a qualified Indian on an Indian nation’s reservation, nor have defendants cited any regulations issued by the commissioner that would create a system for such tax refunds. Therefore, Tax Law, § 476, a statute first enacted in 1939 and last amended in 1989, does not satisfy the legal requirement that qualified Indians be able to purchase cigarettes on an Indian reservation that are free from taxes.

For these reasons, this Court declares that Tax Law, § 471-e, as amended, is not in effect because on March 1, 2006 and subsequent thereto there has not been any actions taken or rules and regulations issued that would be necessary to implement the provisions of this act. Moreover, even if the statute was deemed to be in effect, the statute cannot function as written, the most notable reason being that Indian tax exemption coupons do not exist. As a result, the plaintiffs’ request for a preliminary injunction seeking to enjoin the enforcement of Tax Law, § 471-e is hereby granted.

Submit order.

A large, stylized handwritten signature in black ink, appearing to read 'Rose H. Sconiers', is written over the printed name and title of the justice.

HON. ROSE H. SCONIERS
SUPREME COURT JUSTICE

Dated: January 2, 2007