STATE OF NEW YORK
SUPREME COURT ALBANY COUNTY

In the Matter of the Application of
NEW YORK ASSOCIATION OF CONVENIENCE
STORES, NICE N EASY GROCERY SHOPPES, and
MWS ENTERPRISES, INC.,

Petitioners,

- against -

Decision, Order & Judgment
Index No.:2915-06

GEORGE E. PATAKI, in his official capacity
as Governor of New York, ANDREW S. ERISTOFF,
in his official capacity as New York Commissioner
of Taxation and Finance, MILHEM ATTEA & BROS.,
INC., DAY WHOLESALE INC., GUTLOVE & SHIRVINT,
MAURO PENNISI, and FRANK COLUCCI, INC.,

Respondents.

Supreme Court, Albany County
RJI# 01-06-ST6694
Special Term

Present: E. Michael Kavanagh, JSC

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Kavanagh, J

The petitioners have commenced this article 78 proceeding seeking a writ of mandamus to compel the respondents to enforce articles 12-A and 20 of the Tax Law, as it applies to Native Americans who sell tax free cigarettes and gasoline to non-Native Americans on tribal lands. Petitioners allege that the decision made by the State Tax Department not to collect these taxes permits shops run by Native Americans on tribal lands to dramatically undercut petitioner's prices on these items and provides them with a significant competitive advantage. Petitioners have also moved for a preliminary injunction restraining and enjoining the respondent cigarette wholesalers from selling cigarettes without tax stamps because to do so violates Tax Law § 471.

The state respondents have moved to dismiss the proceeding on the grounds that the petitioners lack standing to bring this proceeding and that it is barred by res judicata. They also have cross-moved for an order staying all proceedings with respect to petitioner's motion for a preliminary injunction. Respondents Milhelm Attea [sued herein as Milhem Attea], Gutlove & Shirvint and Mauro Pennisi have moved or cross-moved to dismiss the proceeding on the additional grounds that 1) the petition fails to state a cause of action against the wholesalers, 2) the policy issues raised herein are non-justiciable, 3) Tax Law § 471-e is not effective due to the failure of the State Tax Department to promulgate rules and regulations implementing it; 4) Tax Law § 471-e is preempted by federal law because

if implemented it would impinge upon tribal self-government and impose impermissible burdens upon Indian Trade; 5) Tax Law § 471-e unlawfully delegates the administration of a tax exemption coupon program to Indian Nations and Tribes in violation of the New York State Constitution, and 6) this Court should not entertain this proceeding in the absence of representative of the Indian Nations and Tribes which obviously be affected by the granting of the relief requested in the petition.[1] Respondent Mauro Pennisi has also cross-moved for sanctions. The state respondents have requested that if their motion to dismiss the petition is denied, they be granted an opportunity to address these additional issues, which go to the merits of the controversy.

Res Judicata

The issues surrounding the sale of untaxed motor vehicle fuel and cigarettes by Native Americans to non-Native Americans have been the subject of litigation in New York, as well as the rest of the country, for decades. Regulations promulgated by the New York State Department of Taxation and Finance which sought to impose taxes on the sale of these items were upheld by the United States Supreme Court (*Department of Taxation & Fin. of N. Y. v Milhelm Attea & Bros.*, 512 US 61 [1994]). However, the State Tax Department has intentionally abstained from any effort to collect these taxes, and that policy has been the subject of a prior challenge brought by petitioners New York Association of Convenience Stores and MWS Enterprises. A final judgment in that proceeding found that the decision not to collect these taxes from Native Americans was lawful and the petition was dismissed (*Matter of New York Assn. of Convenience Stores v Urbach*, 275 AD2d 520 [3d Dept

[1] The Indians Nations & Tribes cannot be made parties to this proceeding because of sovereign immunity.

2000]). Respondents contend that this judicial determination is res judicata and bars the instant proceeding.

"Simply stated, where there is a valid final judgment the doctrine of res judicata, or claim preclusion, bars future litigation between those parties on the same cause of action." (*Matter of Hodes v Axelrod*, 70 NY2d 364, 372 [1987]). However, there must be an identity between the earlier cause of action and the one sought to be dismissed. A significant intervening change in the law may eliminate the requisite identity, rendering res judicata inapplicable (*id.* at 373).

The lower court in that proceeding found that the petitioners had general standing to compel enforcement of the tax laws, citing *Matter of Dudley v Kerwick* (52 NY2d 542 [1981]) (*Matter of New York Assn. of Convenience Stores v Urbach*, 169 Misc 2d 906 [Sup Ct, Albany County 1996]) and that the Department's decision not to collect these taxes violated petitioner's constitutional right to equal protection. As a result the Court granted the relief sought in the petition and directed the Department to either begin collecting the cigarette tax from Native American retailers or stop collecting it from all other retailers (*Matter of New York Assn. of Convenience Stores v Urbach*, 170 Misc 2d 445 [1996]). The Appellate Division modified the relief granted but affirmed this decision on the ground that the differential enforcement of the Tax Law was a violation of petitioner's constitutional right to equal protection of the laws. In that regard the Court ruled that the selective enforcement of these tax laws created a suspect classification and the Department's justification for this policy did not withstand strict scrutiny analysis (*Matter of New York Assn. of Convenience Stores v Urbach*, 230 AD2d 338 [3d Dept 1997]) . The Court of Appeals found that there was no suspect classification created by this policy and

therefore the Department's decision not to collect these taxes would not violate petitioner's right to Equal Protection if there was a rational basis for it (*Matter of New York Assn. of Convenience Stores v Urbach*, 92 NY2d 204, 213 [1998]). On remittal, it was determined that such a basis did in fact exist:.

> The record here clearly reflects such a state of facts, as it makes plain that the statutes cannot effectively be enforced without the cooperation of the Indian tribes. Because of tribal immunity, the retailers cannot be sued for their failure to collect the taxes in question, and State auditors cannot go on the reservations to examine the retailers' records. Additionally, the Department cannot compel the retailers to attend audits off the reservations or compel production of their books and records for the purpose of assessing taxes. In that regard, representatives of the Department engaged in extensive negotiations with the tribes in an effort to arrive at an acceptable agreement. Those efforts were largely unsuccessful and the vast majority of the Indian retailers refused to register with the Department. In further efforts to enforce the statute, the State attempted interdiction, i.e., interception of tobacco and motor fuel shipments and seizure of those shipments that were found to be in noncompliance with the Tax Law. That strategy resulted in civil unrest, personal injuries and significant interference with public transportation on the State highways. In our view, all of these factors provide a rational basis for the differential treatment of the parties (*Matter of New York Assn. of Convenience Stores v Urbach*, 275 AD2d at 522-523).

Respondents contend that this Decision speaks to the same issues raised by petitioners and requires dismissal of the petition. Petitioners counter that their claim is not based on the Equal Protection Clause, and the legal standard to be applied in passing on this petition is different from that used in the prior proceeding. In addition, they argue that the prior proceeding involved the enforcement of statutes of general applicability, while this proceeding involves statutes which specifically address the sale by Native American of cigarettes and gasoline on tribal lands. They note that this statute contains a specific direction that the Department of Taxation and Finance promulgate regulations designed to collect taxes on these transactions.

Moreover, they argue Tax Law § 471-e is significantly different from the earlier

cigarette tax regulations, which proved unenforceable. Those regulations allowed the sale of a limited number of cigarettes without tax stamps to Native American retailers and tribes based upon a quota system and required their cooperation for their successful implementation. This system proved unworkable and failed to prevent the improper sale of untaxed items on Indian Lands.

In contrast, the current law requires that all cigarettes be taxed and wholesalers of these products prepay it. Tribal governments are given coupons which allow them upon presentation to wholesalers to purchase tax stamped cigarettes without paying any tax. The wholesalers must than redeem these coupons to the State of New York to obtain a refund of the tax they previously had paid.

This statutory scheme is substantially different than its predecessors. It does not make collection of these taxes dependent upon the cooperation of the Native American retailers. The onus is placed on the wholesalers and therefore the public policy rationale for not enforcing these tax provisions against Native Americans no longer exists.

For all of these reasons -- and in particular the marked difference between these laws and their predecessors – the issues generated by this litigation are not identical to those raised in prior proceedings and, as such, this proceeding is not barred by res judicata.

Standing

Respondents also claim that petitioners do not have standing to bring this proceeding to compel enforcement of general tax laws. The Court of Appeals has recently reiterated the requirements that must exist for a party to have standing to sue:

> First, a plaintiff must show 'injury in fact,' meaning that plaintiff will actually be harmed by the challenged administrative action. As the term itself implies, the injury must be more than conjectural. Second, the injury a plaintiff asserts must fall within

> the zone of interests or concerns sought to be promoted or protected by the statutory provision under which the agency has acted (citations omitted). To establish standing, an organizational plaintiff--such as plaintiff here--must show that at least one of its members would have standing to sue, that it is representative of the organizational purposes it asserts and that the case would not require the participation of individual members (*New York State Assn. of Nurse Anesthetists v Novello*, 2 NY3d 207, 211 [2004]).

Without question, petitioners suffered a significant loss of income because their Native Americans competitors who do not pay these taxes are able to sell these products at a substantially reduced price[2] (*see Matter of New York Assn. of Convenience Stores v Urbach*, 230 AD2d at 341, *revd on other grounds* 92 NY2d 204, *supra*). However, that fact alone will not necessarily confer standing. Petitioners' must also show that the injury they have sustained is one that comes within the zone of interests sought to be protected by the laws in question – i.e. Tax Law articles 12-A and 20 (*see Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 773 [1991]). Petitioners point out that the lower court in the prior proceeding found that they had standing based upon the reasoning of *Matter of Dudley v Kerwick* (52 NY2d 542 [1981]) (*Matter of New York Assn. of Convenience Stores v Urbach*, 169 Misc 2d at 914-915; *see also Matter of Campbell Oil Co. v Chu*, 127 Misc 2d 281, 283 [Sup Ct, Albany County 1985]). However that view was not adopted by either the Appellate Division or the Court of Appeals.[3] Furthermore, the holding in *Dudley* has been limited to circumstances that establish a "broad conspiracy involving arbitrary and bad-faith abuses of the administrative process." (*Matter of New*

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[2] The excise tax on cigarettes is now $1.50 per standard pack, or $15.00 per carton (Tax Law § 471)

[3] In fact the dissent in the Appellate Division addressed this issue and would have held that *Dudley* may not be relied upon to provide standing under these facts (*see Matter of New York Assn. of Convenience Stores v Urbach*, 230 AD2d at 345-346).

York State Assn. of Tobacco & Candy Distribs. v New York State Tax Appeals Trib., 159 AD2d 132, 136 [3d Dept 1990].) Such a situation does not exist here. There has been no credible evidence submitted that would even remotely support the conclusion that the decision not to collect these taxes was made in bad faith. While controversial, it is a decision that is rationally related to serious issues that are unique to these types of transactions. Accordingly, this Court finds that the rationale in *Dudley* does not support a finding that petitioners in this proceeding have standing.

While traditional restrictions regarding standing have been eased (*see Matter of Hebel v West*, 25 AD3d 172, 175 [3d Dept 2005]), the general rule is that competitive injury alone is not sufficient to confer it (*see Matter of Dairylea Coop. v Walkley*, 38 NY2d 6 [1975]). In fact an injured party to have standing must also show that protection from the particular injury is an overriding purpose of the statute (*see Matter of Dairylea Coop. v Walkley*, 38 NY2d at 11; *Matter of Blue Cross of W. N. Y. v Cooper*, 164 AD2d 578, 581 [3d Dept 1991]; *New York Hearing Aid Socy. v Children's Hosp. & Rehabilitation Ctr. of Utica*, 91 AD2d 333, 334 [2d Dept 1983]; *see also Matter of LaSalle Ambulance v New York State Dept. of Health*, 245 AD2d 724 [3d Dept 1997]). The fact that the implementation of a statute might provide some party with a competitive benefit does not mean that an injury has occurred which is within the zone of interest sought to be protected by the statute (*see Arnot-Ogden Mem. Hosp. v Guthrie Clinic*, 122 AD2d 413, 414-415 [3d Dept 1986]).

It is clear that the articles 12-A and 20 of the Tax Law exist to collect revenue and prevent tax fraud. Indeed, the United States Supreme Court found that "[t]he sole purpose and justification for the quotas on untaxed cigarettes is the State's legitimate interest in avoiding tax evasion by non-Indian consumers." (*Department of Taxation & Fin. of N. Y.*

v Milhelm Attea & Bros., 512 US at 75). These provisions do not exist to foster and promote fair and equitable economic competition between those that sell these items on tribal lands and those that do not. While the legislative history leading up to the enactment of these provisions refer to the benefit they will confer on non-Native American retailers doing business near Indian Reservations, the statutes do not require the Department of Taxation and Finance to consider these issues in deciding how to administer and implement these statutes (see *Matter of Blue Cross of W. N. Y. v Cooper*, 164 AD2d at 581). In addition there is nothing in the wording of these provisions which indicate that it was the Legislature's intent to protect non-Native American retailers from competition (*see Matter of LaSalle Ambulance v New York State Dept. of Health*, 245 AD2d at 725; *Matter of Sheehan v Ambach*, 136 AD2d 25, 28 [3d Dept 1988]; *Arnot-Ogden Mem. Hosp. v Guthrie Clinic*, 122 AD2d at 414).

The United States Supreme Court has set forth a balancing test to determine the validity of state regulation of commerce with Native Americans.

> "Resolution of conflicts of this kind does not depend on 'rigid rule[s]' or on 'mechanical or absolute conceptions of state or tribal sovereignty,' but instead on 'a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law.' *White Mountain Apache Tribe v Bracker*, 448 US 136, 142, 145 (1980). *See also Cotton Petroleum Corp. v New Mexico*, 490 US 163, 176 (1989)." (*Department of Taxation & Fin. of N. Y. v Milhelm Attea & Bros.*, 512 US at 73).

There are strong federal and tribal interests in promoting tribal self-sufficiency and the economic viability of Native American businesses (*see New Mexico v Mescalero Apache Tribe*, 462 US 324, 334-335 [1983]). Undoubtedly the State of New York has a significant interest in preventing tax evasion and that fact can support the placement of limited

burdens upon Native American retailers and Indian Traders (*see Department of Taxation & Fin. of N. Y. v Milhelm Attea & Bros.*, 512 US at 73-74). However, the State's minimal interest in promoting the economic welfare of non-Native American retailers is not one that is sought to be protected by this Statute (*see New Mexico v Mescalero Apache Tribe*, 462 US at 334-335). The Tax Law must be construed to render it effective and constitutional (McKinney's Cons Laws of NY, Book 1, Statutes §§ 144, 150). As such, the Court finds that any intent to prevent competitive injury to petitioners was an incidental consideration in the enactment of these laws and was not an interest sought to be them.

Therefore petitioners do not have standing to maintain the instant proceeding. The state respondent's motion to dismiss on that ground is granted. Such determination renders petitioners' motion for a preliminary injunction and the state respondents' cross-motion for a stay moot, and those motions are denied. Petitioners' claims are not frivolous within the meaning of 22 NYCRR § 130-1.1, and the cross motion for sanctions is denied.

Accordingly, it is hereby

ORDERED and **ADJUDGED** that the petition is hereby dismissed in all respects. The motion for a preliminary injunction and the cross-motions for a stay and for sanctions are hereby denied.

This constitutes the Decision, Order and Judgment of this Court. All papers are being returned to the Attorney General's counsel. The signing of this Decision, Order and Judgment shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the provisions of that rule regarding entry, filing and notice of entry.

SO ORDERED AND ADJUDGED!

E. Michael Kavanagh, JSC

Dated: 11/17/06

Kingston, New York

Papers Considered:

Notice of petition; petition with exhibits
Notice of motion for a preliminary injunction; affirmation of Robert E. Crotty, Esq. with exhibits
Petitioners' memoranda of law
State respondents' notice of motion and cross-motion; affirmation of David B. Roberts, Esq. with exhibits; memorandum of law
Respondent Gutlove & Shirvint's notice of motion; affidavit of Timothy M. O'Mara, Esq.; affidavit of Joseph Ruda
Wilhelm Attea's notice of motion; affidavit of Joseph E. Zdarsky, Esq. with exhibits; affidavit of Rosemary Saffire with exhibit; memorandum of law
Mauro Pennisi's notice of cross-motion; affirmation of Robert D. Werth, Esq.
Verified answer of Day Wholesale; affidavit of Peter Day; affirmation of Margaret A. Murphy, Esq.; Affidavit of Scott B. Maybee; exhibits
Affirmation of Christine S. Poscablo, Esq. with exhibits; petitioners' memorandum of law
Proposed answer of intervenor A. Harris & Associates, LLC; proposed affidavit of Al Harris with exhibits
Affirmation of David B. Roberts, Esq.
Affirmation of Danielle M. Lazore, Esq.; affirmation of Daniel A. Seff, Esq.; Memorandum of law of the Saint Regis Mohawk Tribe
Affirmation of William C. Cagney, Esq.; Memorandum of law of Native American Business Alliance of Long Island