SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

615.1

CA 08-02582

PRESENT: HURLBUTT, J.P., CENTRA, PERADOTTO, GREEN, AND GORSKI, JJ.

CAYUGA INDIAN NATION OF NEW YORK,
PLAINTIFF-APPELLANT,

V OPINION AND ORDER

CAYUGA COUNTY SHERIFF DAVID S. GOULD AND
SENECA COUNTY SHERIFF JACK S. STENBERG,
DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANTS.

JENNER & BLOCK LLP, WASHINGTON, D.C. (IAN HEATH GERSHENGORN, OF THE WASHINGTON, D.C. AND MASSACHUSETTS BARS, ADMITTED PRO HAC VICE, OF COUNSEL), AND FRENCH-ALCOTT, PLLC, SYRACUSE, FOR PLAINTIFF-APPELLANT.

HARRIS BEACH PLLC, PITTSFORD (PHILIP G. SPELLANE AND KARL L. SLEIGHT, OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

ROBERT ODAWI PORTER, SALAMANCA, AND KANJI & KATZEN, PLLC, ANN ARBOR, MICHIGAN, FOR SENECA NATION OF INDIANS, AMICUS CURIAE.

MICHAEL A. CARDOZO, CORPORATION COUNSEL, NEW YORK CITY (LEONARD KOERNER OF COUNSEL), FOR CITY OF NEW YORK, AMICUS CURIAE.

JOHN C. CRUDEN, ACTING ASSISTANT ATTORNEY GENERAL, WASHINGTON, D.C. (KATHRYN E. KOVACS, OF THE WASHINGTON, D.C. AND MARYLAND BARS, ADMITTED PRO HAC VICE, OF COUNSEL), FOR THE UNITED STATES OF AMERICA, AMICUS CURIAE.

DANIEL M. DONOVAN, DISTRICT ATTORNEY, WHITE PLAINS (JOHN J. CARMODY OF COUNSEL), FOR DISTRICT ATTORNEYS ASSOCIATION OF NEW YORK STATE, AMICUS CURIAE.

Appeal from a judgment (denominated order) of the Supreme Court, Monroe County (Kenneth R. Fisher, J.), entered December 10, 2008 in an action for, inter alia, a declaratory judgment. The judgment, inter alia, denied the motion of plaintiff for summary judgment and granted the cross motion of defendants Cayuga County Sheriff and Seneca County Sheriff for summary judgment.

It is hereby ORDERED that the judgment so appealed from is reversed on the law without costs, the motion is granted in part and judgment is granted in favor of plaintiff as follows:

It is ADJUDGED and DECLARED that Tax Law § 471-e

exclusively governs the imposition of sales and excise taxes on cigarettes sold on a qualified reservation as that term is defined in Tax Law § 470 (16) (a), and

It is further ADJUDGED and DECLARED that plaintiff's two stores in question are located within a qualified reservation as that term is defined in Tax Law § 470 (16) (a),

and the cross motion is denied and the declarations are vacated.

Opinion by HURLBUTT, J.P.:

This appeal presents two primary substantive issues for our consideration. First, we must determine whether Tax Law § 471-e (as amended by L 2005, ch 61, part K, §§ 2, 7; ch 63, part A, § 4) provides the exclusive means by which to tax cigarette sales on an Indian reservation to non-Indians or to Indians who are not members of that nation or tribe where the reservation is located (hereafter, non-member Indians), or whether Tax Law § 471 provides an independent basis for imposing a tax on such sales. Second, we must determine whether plaintiff's two convenience stores are located within a " '[q]ualified reservation' " as that term is defined in Tax Law § 470 (16) (a) (as amended by L 2005, ch 61, part K, § 1). We agree with plaintiff with respect to both issues, i.e., that section 471-e is the exclusive means for taxing such cigarette sales and that plaintiff's two stores are located within a qualified reservation. We therefore conclude that the judgment of Supreme Court (*Cayuga Indian Nation of N.Y. v Gould,* 21 Misc 3d 1142[A], 2008 NY Slip Op 52478[U]) should be reversed.

Factual Background

In 2003 plaintiff purchased property on the open market in Union Springs, Cayuga County and in Seneca Falls, Seneca County and has been operating a convenience store on the property in each county. It is undisputed that plaintiff sells from both stores unstamped cigarettes, upon which New York State sales taxes have not been paid, to both its Indian and non-Indian customers (*see* Tax Law § 471 [1]; § 471-e [1] [a]).

In May 2008 this Court determined in *Day Wholesale, Inc. v State of New York* (51 AD3d 383) that the amended version of Tax Law § 471-e was not "in effect" based on the failure of the Department of Taxation and Finance (Department) to take action to implement that statute by issuing necessary coupons. We wrote in *Day Wholesale* that section 471-e, entitled "Taxes imposed on qualified reservations," "embodie[d] the Legislature's most recent effort to collect taxes on cigarettes sold on Indian reservations" (*id.* at 384). Thereafter, law enforcement officials in Cayuga and Seneca Counties determined that plaintiff was selling unstamped cigarettes from non-reservation lands in violation of Tax Law § 471 and former § 1814. On November 25, 2008, a detective from the Cayuga County Sheriff's Office and an

investigator from the Seneca County District Attorney's Office obtained search warrants in Supreme Court in each county and, pursuant thereto, law enforcement officials seized various items of property, including large quantities of unstamped cigarettes, from both stores.

Procedural History

On November 26, 2008, plaintiff commenced this action seeking, inter alia, the return of the property seized during the execution of the two search warrants and a declaration that plaintiff was not violating Tax Law §§ 471, 471-e, 473 or former § 1814 by selling unstamped cigarettes. The first cause of action seeks a declaration that, "because [section] 471-e is not in effect, [p]laintiff is under no obligation to pay or collect taxes on the cigarettes [it] sell[s]." The second cause of action alleges that, because Tax Law § 471-e is not in effect, the search warrants and subsequent seizure of property were illegal. The third cause of action seeks the return of a computer on the ground that it was outside the scope of the applicable search warrant. The fourth cause of action seeks, inter alia, a preliminary injunction enjoining defendants "from alleging that [p]laintiff and/or its employees have violated . . . Tax Law §§ 471, 471-e, 473, or [former §] 1814 . . . ."

On the same day that plaintiff commenced this action, plaintiff also moved by order to show cause for relief similar to that requested in the complaint. The Cayuga County Sheriff and the Seneca County Sheriff (defendants) cross-moved to dismiss the complaint against them on several grounds. In the alternative, defendants sought to convert their cross motion to one for summary judgment dismissing the complaint against them. Upon notice to the parties, Supreme Court, Monroe County, converted plaintiff's motion to one seeking summary judgment, and also converted defendants' cross motion to one for summary judgment. Although the court rejected defendants' contention that declaratory relief was not a remedy available to plaintiff, the court denied plaintiff's motion. The court granted judgment declaring, inter alia, that Tax Law § 471-e did not "exclusively govern the imposition of sales and excise taxes on cigarettes" sold from the two stores and determined that the two stores in question are not located on qualified reservations. The court also "declared" that this Court's decision in *Day Wholesale* did not invalidate prosecutions under section 471 and former section 1814 (*Cayuga Indian Nation of N.Y.*, 2008 NY Slip Op 52478[U], at *17). Although we agree with the court that plaintiff properly sought declaratory relief, we disagree with the court's remaining conclusions. Instead, we conclude that section 471-e is the exclusive statute governing the imposition of sales and excise taxes on cigarettes sold on reservations. We further conclude that both stores are located within a qualified reservation, as that term is defined in section 470 (16) (a).

Availability of Declaratory Relief

As a preliminary matter, we note that defendants and amicus District Attorneys Association of New York State contend that a

declaratory judgment action cannot be maintained by a party against whom a criminal proceeding is pending, relying primarily on *Kelly's Rental v City of New York* (44 NY2d 700) and *Matter of Morgenthau v Erlbaum* (59 NY2d 143, *cert denied* 464 US 993). We reject that contention. Although courts of equity "will *not* ordinarily intervene to enjoin the enforcement of the law by prosecuting officials" (*Reed v Littleton*, 275 NY 150, 153), a declaratory judgment action is available "in cases where a constitutional question is involved or the legality or meaning of a statute is in question and no question of fact is involved" (*Dun & Bradstreet, Inc. v City of New York*, 276 NY 198, 206; *see Cooper v Town of Islip*, 56 AD3d 511, 512; *Ulster Home Care v Vacco*, 255 AD2d 73, 76-77).

In this case, plaintiff commenced the action the day after the search warrants were executed but before a "criminal action" was commenced against it by the filing of an accusatory instrument (CPL 1.20 [17]). Plaintiff sought a declaration concerning its criminal liability pursuant to Tax Law §§ 471, 471-e, 473 and former § 1814, and no factual issues are in dispute. The reliance by defendants and amicus on *Kelly's Rental* for the proposition that a party cannot bring a declaratory judgment if a "[c]riminal proceeding" (CPL 1.20 [18]) is pending against that party is misplaced. Although in *Kelly's Rental* the Court of Appeals uses the term "criminal proceeding" instead of "criminal action," a criminal action had been commenced in that case when the declaratory judgment action was brought (*id.* at 702; *see Matter of Beneke v Town of Santa Clara*, 9 AD3d 820, 820-821). Thus, under the facts of *Kelly's Rental*, plaintiff was not precluded from bringing this action inasmuch as a criminal action against it had not yet been commenced.

The reliance by defendants and amicus on *Morgenthau* for the proposition that only the People may commence a declaratory judgment action in this context is also misplaced (*see id.* at 152). In that case, the Court of Appeals stated that only the People could challenge an interlocutory ruling of a criminal court in the defendant's favor, noting that a defendant "always has available a right to appeal" (*id.*). The declaratory judgment action in *Morgenthau*, however, was commenced during the pendency of a criminal action, rather than prior to its commencement (*see id.* at 146). Thus, we conclude that the court properly determined that it could entertain this action insofar as it involved the "application of certain statutes to plaintiff's undisputed conduct" and not "collateral review of the validity of the search warrants or the manner of [their] execution" (*Cayuga Indian Nation of N.Y.*, 2008 NY Slip Op 52478[U], at *4; *see generally New York Foreign Trade Zone Operators, Inc. v State Liq. Auth.*, 285 NY 272, 276-278; *Dun & Bradstreet*, 276 NY at 206; *Bunis v Conway*, 17 AD2d 207, 208-209, *lv dismissed* 12 NY2d 645, 882).

Legislative and Executive History

Section 471 (1) of the Tax Law provides in relevant part that "[t]here is hereby imposed and shall be paid a tax on all cigarettes possessed in the state by any person for sale, except that no tax

shall be imposed on cigarettes sold under such circumstances that this state is without power to impose such tax . . . .” It is well settled that a state is without power to tax cigarettes to be consumed on reservations by tribal members but has the power to tax on-reservation sales to non-Indians and non-member Indians (*see generally Oklahoma Tax Commn. v Citizen Band Potawatomi Indian Tribe of Okla.*, 498 US 505, 512-513; *Washington v Confederated Tribes of Colville Reservation*, 447 US 134, 151, 160-161, *reh denied* 448 US 911; *Moe v Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 US 463, 481-483).

Prior to 2003, this State’s attempts to collect the tax on cigarette sales to non-Indians were based solely on regulations promulgated by the Department (*see e.g.* 20 NYCRR former 336.6, 336.7). 20 NYCRR former 336.6 (b) (3) defined qualified reservation as “the following reservations of the exempt Indian nations or tribes: Allegany Indian reservation, Cattaraugus Indian reservation, Oil Spring Indian reservation, Oneida Indian territory, Onondaga Indian reservation, Poospatuck Indian reservation, St. Regis Mohawk (Akwesasne) Indian reservation, Shinnecock Indian reservation, Tonawanda Indian reservation and Tuscarora Indian reservation.” Under that definition, plaintiff’s stores are not located on property that constituted a qualified reservation. Effective April 29, 1998, however, those regulations were repealed, based in part on enforcement difficulties faced by the Department (*see* NY Reg, Apr. 29, 1998, at 22-24), and the Department adopted a policy of forbearance, pursuant to which it suspended all attempts to collect the tax on reservation sales of cigarettes (*see generally Matter of New York Assn. of Convenience Stores v Urbach*, 92 NY2d 204, 213-215).

Soon after the repeal of the aforementioned regulations, litigation initiated by non-Indian convenience store owners resulted in the determination that the Department had a rational basis for refusing to enforce the regulations and could not be compelled to do so (*see Matter of New York Assn. of Convenience Stores v Urbach*, 275 AD2d 520, 522-523, *appeal dismissed* 95 NY2d 931, *lv denied* 96 NY2d 717, *cert denied* 534 US 1056). Thereafter, in June 2001, the United States District Court for the Northern District of New York held in *Oneida Indian Nation of N.Y. v City of Sherrill, N.Y.* (145 F Supp 2d 226) that various properties that had been acquired by the Oneida Nation of New York (OIN) on the open market were not taxable by the City of Sherrill and the counties in which they were located based on the doctrine of sovereign immunity (*see id.* at 253-254). Although the District Court’s judgment was affirmed by the Second Circuit Court of Appeals and ultimately reversed by the United States Supreme Court (*id.*, *affd* 337 F3d 139, *revd* 544 US 197, *reh denied* 544 US 1057), we note that the District Court found “no evidence of any congressional act that disestablished the [OIN] Reservation” between the 1794 Treaty of Canandaigua, which confirmed and guaranteed the Reservation, and the present day (*id.* at 254). On May 15, 2003, while the appeal from the District Court’s judgment was pending before the Second Circuit, the Legislature overrode the Governor’s veto to pass chapter 62 of the Laws of 2003. Chapter 62, part T3, section 4 (as amended by L 2003, ch 63, part Z, § 4) created Tax Law former § 471-e, entitled “Taxes

imposed on native American nation or tribe lands," provided that the Department was directed to "promulgate rules and regulations necessary to implement the collection of sales and use taxes on . . . cigarettes" where a non-Native American purchases such cigarettes "on or originating from native American nation or tribe land" (former § 471-e).

As noted, the Second Circuit thereafter affirmed the District Court's judgment in OIN's favor, holding that the OIN's aboriginal reservation was not disestablished by the 1838 Treaty of Buffalo Creek and that, because the OIN's properties in the City of Sherrill that were purchased on the open market "are located within that reservation . . . Sherrill can neither tax the land nor evict the [OIN]" (*Oneida Indian Nation of N.Y.*, 337 F3d at 167). Two months later, in September 2003, the Department proposed regulations in response to Tax Law former § 471-e (*see* NY Reg, Sep. 24, 2003, at 18-21). To the extent relevant here, those proposed regulations defined qualified reservation as it is currently defined in section 470 (16) (*see Proposal of Indian tax enforcement provisions,* http://www.tax.state.ny.us/pdf/rulemaking/sep1003/indianenf/text.pdf [NY St Dept of Tax & Fin, Sept. 10, 2003, at 5-6]).

On April 23, 2004, the District Court determined that plaintiff's original reservation of approximately 64,000 acres had not been disestablished and that plaintiff was not subject to local zoning regulation (*see Cayuga Indian Nation of N.Y. v Village of Union Springs*, 317 F Supp 2d 128, 143, 151).

In June 2004, the Legislature passed a bill that essentially tracked the language of the Department's proposed regulations, including the definition of qualified reservation and the current language of Tax Law § 471-e (*see* 2004 NY Senate Bill S6822-B). The bill's Senate sponsor noted that, despite the passage of former section 471-e in 2003, the Department had refused to implement a system to collect "non-Indian taxes" (Sponsor's Letter, Veto Jacket, 2004 Senate Bill S6822-B). The legislation was vetoed by the Governor (*see* Governor's Veto No. 265, Veto Jacket, 2004 Senate Bill S6822-B).

On March 27, 2005, the same proposed legislation, with minor amendments, came to the floor of the Senate and Assembly. On March 29, 2005, the United States Supreme Court issued its decision in *Oneida Indian Nation of N.Y.*, reversing the Second Circuit by holding that the OIN could not reassert sovereignty over lands that had been allocated to it in the 1794 Treaty of Canandaigua but that had been free of Indian ownership or control for 200 years (*see* 544 US at 202-203). Two days later, on March 31, 2005, the Legislature passed chapter 61 of the Laws of 2005, amending, inter alia, Tax Law §§ 470 and 471-e. The Governor signed the bill into law on April 12, 2005 (*see* L 2005, ch 61).

On March 16, 2006, 15 days after coupons necessary to allow member Indians to purchase tax-free cigarettes were to be issued by the Department (*see generally* L 2005, ch 63, part A, § 4), the Department issued an advisory opinion stating that it was adhering to

its policy of forbearance (*see* NY St Dept of Tax & Fin Advisory Op No. TSB-A-06[2]M, available at http://www.tax.state.ny.us/pdf/advisory_opinions/misc/a06_2m.pdf). On May 2, 2008, this Court issued its decision in *Day Wholesale* holding that Tax Law § 471-e was not in effect because the Department had not issued the necessary coupons (*see* 51 AD3d at 388-389).

Discussion
I Section 471-e

Our first task is to discern the intent of the Legislature in its enactment of chapter 61 of the Laws of 2005. As amended by that chapter, Tax Law § 471-e (1) (a) provides that,

> "[n]otwithstanding any provision of this article to the contrary [. . .,] Indians may purchase cigarettes for [their] own use or consumption exempt from cigarette tax on their nations' or tribes' qualified reservations. However, . . . 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 tax stamp."

In resolving the parties' dispute concerning the meaning of Tax Law § 471-e, we are mindful that our function "is to ascertain and give effect to the intention of the Legislature" (McKinney's Cons Laws of NY, Book 1, Statutes § 92 [a]), and that "statutory text is the clearest indicator of legislative intent" (*Matter of DaimlerChrysler Corp. v Spitzer*, 7 NY3d 653, 660). Nevertheless, " 'inquiry must be made of the spirit and purpose of the legislation, which requires examination of the statutory context of the provision as well as its legislative history' " (*Mowczan v Bacon*, 92 NY2d 281, 285, quoting *Matter of Sutka v Conners*, 73 NY2d 395, 403; *see Consedine v Portville Cent. School Dist.*, 12 NY3d 286, 290-291).

The Legislature's express imposition of the cigarette tax in Tax Law § 471-e and adoption of the language of the proposed regulations of the Department demonstrate the intention of the Legislature to overhaul the statutory scheme and, in our view, to provide a single statutory basis for taxing cigarette sales on qualified reservations. Historically, the State of New York has not attempted to impose taxes on reservation cigarette sales unless a specific regulatory or statutory scheme was in place to differentiate between sales to Indians and sales to non-Indians or non-member Indians. Without such a scheme in place, it logically follows that no taxes may be collected

or owed to the State by plaintiff. Moreover, the Legislature acted after the courts had determined that the Department had a rational basis for refusing to enforce the regulations (*see New York Assn. of Convenience Stores*, 275 AD2d at 522-523), and thus in 2005 the Legislature was aware that, although the Department was directed to promulgate regulations by former section 471-e, the Department was not required to enforce those regulations. The Legislature therefore recognized the need to have a separate statutory scheme in place, aside from the general taxing provision of Tax Law § 471, in order to impose a cigarette tax on reservation sales to non-Indians and non-member Indians, while at the same time acknowledging that it was "without power" to tax reservation sales to qualified Indians (§ 471 [1]).

As this Court noted in *Day Wholesale*,

> "there is no question that the Legislature intended to create a procedure that would permit the State to collect cigarette taxes on reservation sales to non-Indians and non-members of the nation or tribe while simultaneously exempting from such tax reservation sales to qualified Indian purchasers. Because both aspects of the procedure *must function simultaneously*, the Legislature provided for a system utilizing Indian tax exemption coupons to distinguish taxable sales from tax-exempt sales. Without the coupon system in place, cigarette wholesale dealers and reservation cigarette sellers have no means by which to verify sales to tax-exempt purchasers"

(51 AD3d at 387 [emphasis added]). Given the recognition of the Legislature that the sovereignty considerations attendant upon imposing and collecting a state cigarette tax on reservation sales renders Tax Law § 471 alone insufficient to impose the tax and its express imposition of the tax in section 471-e, as well as our decision in *Day Wholesale* that section 471-e is not in effect, we are compelled to conclude that there is no statutory basis for the imposition of a cigarette tax on a qualified reservation as that term is defined in section 470 (16) (a). Thus, possession or sales of untaxed cigarettes on qualified reservations cannot subject the seller or possessor to criminal prosecution.

II Qualified Reservation

Of course, if the convenience stores in question were not situated on a qualified reservation, as defendants contend, then Tax Law § 471-e would be inapplicable, and the stores would be fully subject to taxation under section 471 and, more to the point, to criminal prosecution under former section 1814. We conclude, however, that the Legislature intended to include the subject properties within the definition of a qualified reservation. Tax Law § 470 (16) provides a four-part definition of the term qualified reservation. We note that of relevance in this case is the fact that subdivision (a)

defines a qualified reservation as "[l]ands held by an Indian nation or tribe that is located within the reservation of that nation or tribe in the state . . . ." In 2003, when the Department drafted the proposed regulations that were then adopted by the Legislature, federal common law provided that Indian nations or tribes could purchase land on the open market and regain sovereignty over that land provided that the land was within that nation's or tribe's original reservation (*see generally Oneida Indian Nation of N.Y.*, 337 F3d at 155-157). It is in this context that the definition of qualified reservation was proposed by the Department and subsequently adopted by the Legislature. We conclude that the Legislature intended that the definition of qualified reservation reflect the existing federal common law at the time that the legislation was passed. Thus, under the plain language of the statute and consistent with legislative intent, the two properties in question in this case qualify as "[l]ands held by an Indian nation or tribe" as contemplated by the statute (§ 470 [16] [a]).

We acknowledge that the language of Tax Law § 470 (16) (a) does not take into consideration the Supreme Court's determination in *Oneida Indian Nation of N.Y.* that Indian nations cannot regain sovereignty over such lands (*see* 544 US at 202-203). Nevertheless, that case was decided well after the definition of qualified reservation was crafted by the Department, and only two days prior to the enactment of section 470 (16) adopting that definition. Moreover, it is apparent that the Legislature intended to include within the definition of qualified reservation properties such as those in question in this case. Subdivision (b) of section 470 (16) expressly includes a concept of sovereignty in the definition of qualified reservation as "[l]ands . . . over which an Indian nation or tribe exercises governmental power . . . ." In contrast, subdivision (a) contains no mention of sovereignty. We thus agree with plaintiff that the clear legislative intent was to omit any consideration of sovereignty under subdivision (a).

As the legislative and executive history preceding the enactment of chapter 61 of the Laws of 2005 noted above makes clear, the Legislature intended the definition of qualified reservation to comport with the holdings of the District Court and Second Circuit Court of Appeals in *Oneida Indian Nation of N.Y.* that there has been no disestablishment of the reservation lands ceded to the OIN (and to plaintiff) by the Treaty of Canandaigua (*see* 337 F3d at 161-165; 145 F Supp 2d at 254). The Supreme Court found it unnecessary to address that issue when it reversed the Second Circuit in *Oneida Indian Nation of N.Y.* (*see* 544 US at 215 n 9). We are thus persuaded that, based on the current state of the federal common law, plaintiff's reservation has not been disestablished and thus constitutes a qualified reservation pursuant to the plain language of Tax Law § 470 (16) (a). We therefore conclude that the two stores at issue in this case, which are located on plaintiff's original reservation, are located on a qualified reservation.

Conclusion

In sum, the legislative purpose, context, and history of Tax Law § 471-e lead to the conclusion that it exclusively governs the imposition of sales and excise taxes on cigarettes sold on a qualified reservation as that term is defined in section 470 (16) (a). Further, both of plaintiff's stores are located within a qualified reservation as that term is defined in section 470 (16) (a).

Accordingly, we conclude that the judgment should be reversed, plaintiff's motion granted in part, judgment granted in favor of plaintiff declaring that section 471-e exclusively governs the imposition of sales and excise taxes on cigarettes sold on a qualified reservation as that term is defined in section 470 (16) (a) and that plaintiff's two stores in question are located within a qualified reservation as that term is defined in section 470 (16) (a), defendants' cross motion denied and the declarations vacated.

CENTRA, GREEN, and GORSKI, JJ., concur with HURLBUTT, J.P.; PERADOTTO, J., dissents and votes to affirm in the following Opinion: I respectfully dissent, and would affirm. I agree with the majority that plaintiff's two convenience stores are located on a "[q]ualified reservation" as that term is defined in Tax Law § 470 (16) (a) and that declaratory relief is available to plaintiff on the facts of this case. I cannot agree with the majority's conclusion, however, that Tax Law § 471-e is the exclusive statute governing the imposition of sales and excise taxes on cigarettes sold on Indian reservations. In my view, the majority's conclusion is belied by the plain language of the statute and its legislative history. The statutory tax obligation on all cigarettes possessed for sale in New York State—including cigarettes sold by reservation retailers to non-Indians and Indians who are not members of that nation or tribe where the reservation is located (non-member Indians)—is imposed by Tax Law § 471. In my view, section 471-e does not circumscribe the long-standing tax obligation imposed by section 471. To the contrary, section 471-e establishes a statutory mechanism for the *collection* of that tax from reservation sales to non-Indians and non-member Indians which have historically evaded the cigarette tax.

Statutory Text

"It is fundamental that a court, in interpreting a statute, should attempt to effectuate the intent of the Legislature" (*Patrolmen's Benevolent Assn. of City of N.Y. v City of New York*, 41 NY2d 205, 208), and that "the most direct way to effectuate the will of the Legislature is to give meaning and force to the words of its statutes" (*Desiderio v Ochs*, 100 NY2d 159, 169). To that end, "[w]here the language of a statute is clear and unambiguous, courts must give effect to its plain meaning" (*Matter of Tall Trees Constr. Corp. v Zoning Bd. of Appeals of Town of Huntington*, 97 NY2d 86, 91).

Tax Law § 471 (1) clearly and unambiguously provides:

> "*There is hereby imposed and shall be paid a tax on all cigarettes possessed in the state by any*

> *person for sale*, except that no tax shall be imposed on cigarettes sold under such circumstances that this state is without power to impose such tax . . . It shall be presumed that all cigarettes within the state are subject to tax until the contrary is established, and the burden of proof that any cigarettes are not taxable hereunder shall be upon the person in possession thereof" (emphasis added).

Section 471 (2) requires that stamping agents "purchase stamps and affix such stamps in the manner prescribed to packages of cigarettes to be sold within the state . . . ." There is no language in section 471 exempting reservation sales from the cigarette tax or otherwise limiting the applicability of the tax based upon where in the state such sales take place or to whom such sales are made. Rather, the plain language of section 471 imposes a tax on all cigarettes possessed for sale in the state except where the state lacks the power to impose such a tax (*see* § 471 [1]). It is by now well settled that a state is without power to tax reservation cigarette sales to tribal members for their own consumption (*see Department of Taxation and Fin. of N.Y. v Milhelm Attea & Bros., Inc.*, 512 US 61, 64; *Moe v Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 US 463, 475-481). It is equally well settled, however, that the tax obligation imposed by section 471 validly applies to reservation sales to non-Indians and non-member Indians (*see Milhelm Attea & Bros.*, 512 US at 64; *Snyder v Wetzler*, 84 NY2d 941, 942). As the United States Supreme Court recognized in *Milhelm Attea & Bros.*, Tax Law § 471 (1)

> "imposes a tax on all cigarettes possessed in the State except those that New York is 'without power' to tax . . . Because New York lacks authority to tax cigarettes sold to tribal members for their own consumption . . ., cigarettes to be consumed on the reservation by enrolled tribal members are tax exempt and need not be stamped. *On-reservation cigarette sales to persons other than reservation Indians, however, are legitimately subject to state taxation*" (512 US at 64 [emphasis added]).

Thus, the clear, mandatory language of section 471 requires that stamping agents affix tax stamps to all cigarettes that the state has the power to tax, including cigarettes sold by reservation retailers to non-Indians and non-member Indians (*see City of New York v Milhelm Attea & Bros., Inc.*, 550 F Supp 2d 332, 346, *reconsideration denied* 591 F Supp 2d 234).

The enactment of the current version of Tax Law § 471-e in 2005 did not, as the majority concludes, alter the tax obligation imposed by section 471. Rather, section 471-e sets forth a comprehensive procedure to collect cigarette taxes in connection with reservation sales to the general public while permitting tribal members to purchase tax-free cigarettes for their own consumption (*see Day*

Wholesale, Inc. v State of New York, 51 AD3d 383, 387). Also, contrary to the conclusion of the majority, section 471-e does not "impose" a tax on reservation sales to non-Indian consumers. The tax obligation enforced by section 471-e predated the enactment of that statute (*see* § 471 [1]; *see also Milhelm Attea & Bros.*, 512 US at 64). In concluding that section 471-e creates a tax obligation independent of section 471, the majority relies on subdivision (1) (a) of section 471-e, which provides:

> "Notwithstanding any provision of this article to the contrary qualified Indians may purchase cigarettes for such qualified Indians' 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 tax stamp."

Subdivision (1) (a), the introduction to section 471-e, merely recites the undisputed proposition that cigarettes purchased by enrolled tribal members on tribal lands are tax exempt, while cigarette sales to all other persons are subject to the cigarette tax. The remainder of the statute establishes a system for the collection of the cigarette tax as applied to reservation sales to non-Indians and non-member Indians. Reading section 471 together with section 471-e thus compels the conclusion that the former section imposes the tax on cigarettes, which includes cigarettes sold on reservations to non-Indians and non-member Indians, while the latter section establishes a mechanism for enforcing and collecting the tax on qualified reservations and preserves the tax exemption enjoyed by qualified Indians (*see Day Wholesale*, 51 AD3d at 384-385). As Supreme Court explained in this case, "[s]ection 471-e was merely designed to facilitate the state's collection of cigarette taxes arising from Indian sales to non-Indian consumers" (*Cayuga Indian Nation of N.Y. v Gould*, 21 Misc 3d 1142[A], 2008 NY Slip Op 52478[U], *5).

The statutory text therefore does not support the majority's conclusion that Tax Law § 471-e limits the scope of section 471. In my view, if the Legislature intended to supersede or restrict the longstanding tax obligation imposed by section 471 with respect to reservation cigarette sales to non-Indians and non-member Indians, it would have so stated. Under the plain language of section 471, cigarettes sold by Indian retailers to the public are subject to the state's cigarette tax. In the absence of limiting language in section 471 or an explicit legislative directive in section 471-e, the enactment of the latter statute does not extinguish the tax liability

imposed by the former statute.

Legislative History

The legislative history of Tax Law § 471-e also supports my view that the Legislature's intent in enacting that provision was to provide a statutory collection mechanism for the tax imposed by section 471. For more than two decades, the State has attempted—without success—to devise an effective means of enforcing and collecting the cigarette tax established by section 471 from reservation sales to non-Indians and non-member Indians. As this Court explained in *Day Wholesale*, section 471-e simply "embodies the Legislature's most recent effort to collect taxes on cigarettes sold on Indian reservations" (51 AD3d at 384).

In 1988, the Department of Taxation and Finance (Department) promulgated a series of regulations to facilitate the collection of sales and excise taxes on reservation sales, including cigarette sales, to non-Indians (*see* 20 NYCRR former 335.4, 335.5; *Matter of New York Assn. of Convenience Stores v Urbach*, 92 NY2d 204, 209). The regulations, which were based on a system of "probable demand," provided that stamping agents would supply registered dealers with unstamped or specially stamped cigarettes for tax-exempt sales and with stamped cigarettes for taxable sales to non-Indians (NY Reg, Sept. 14, 1988, at 45). As the majority points out, the regulations were repealed 10 years later, based in part on enforcement difficulties faced by the Department (*see* NY Reg, Apr. 29, 1998, at 22-24). Nonetheless, the Department specifically recognized that "[t]he repeal of the regulations does not eliminate the *statutory liability* for the taxes as they relate to sales on Indian reservations to non-exempt individuals" (*id.* at 23 [emphasis added]).

After the repeal of the regulations, the Department publicly articulated a "forbearance" policy, pursuant to which it suspended its enforcement efforts to collect the tax imposed by Tax Law § 471 on reservation sales of cigarettes (*see Milhelm Attea & Bros.*, 550 F Supp 2d at 346; *see also New York Assn. of Convenience Stores*, 92 NY2d at 213-215). As a result of the forbearance or, in the words of Supreme Court in this case, the "paralysis" of the Department in enforcing the cigarette tax as applied to reservation sales to non-Indians (*Cayuga Indian Nation of N.Y.*, 2008 NY Slip Op 52478[U], at *7), the Legislature interceded and, in 2003, enacted the first version of section 471-e (*see* L 2003, ch 62, part T3, § 4, as amended by L 2003, ch 63, part Z, § 4). The statute provided that,

> "[w]here a non-native American person purchases, for such person's own consumption, any cigarettes . . . on or originating from native American nation or tribe land . . ., the commissioner shall promulgate rules and regulations necessary to implement the collection of sales, excise and use taxes on such cigarettes or other tobacco products."

It is clear from the face of the statute that the purpose of section 471-e was not to *impose* a tax on cigarettes sold to non-Indians and non-member Indians on reservations, but to require the Department to establish the rules and regulations required to *collect* the tax imposed by section 471. The Governor's veto message explained that the statute "would mandate that the Department . . . begin *collecting taxes* on retail purchases by non-Native Americans on Native American reservation land" (Governor's Veto No. 2, Veto Jacket, 2003 Assembly Bill 2106-B [emphasis added]). The Commissioner of the Department criticized the bill, noting that "the Tribes are not inclined to assist the State in the *collection* of state taxes," and he stated that the bill "proposes no new approach or solutions to this tax *collection* dilemma" (Commissioner's Letter, Veto Jacket, 2003 NY Assembly Bill A2106-B [Bill Jacket, L 2003, ch 62, at 37] [emphasis added]).

Pursuant to Tax Law former § 471-e, the Department developed regulations to collect taxes on reservation cigarette sales to non-Indians (*see* NY Reg, Sept. 24, 2003, at 18-21). The stated purpose of the regulations was "[t]o implement the collection of excise taxes and sales and compensating use taxes on retail sales made to non-Indians on New York State Indian reservations" (*id.* at 18; *see also id.* at 20 ["Chapters (62) (Part T3) and 63 (Part [Z]) of the Laws of 2003 mandate that the Commissioner adopt rules and regulations to effectuate the collection of taxes on retail sales made to non-Indians on Indian reservations in this State"]). Significantly, the Department noted that "[t]his tax liability of non-Indian consumers is a feature of current law and has been for some time" (*id.* at 20). Thus, the Department recognized that section 471-e did not impose a new tax. Instead, the statute directed the Department to establish a "mechanism[]" for the collection of taxes long imposed by New York law (*id.*).

The proposed regulations, however, were never adopted. Thus, in June 2004, the Legislature passed a bill mirroring the language of the proposed regulations and including the current language of Tax Law § 471-e (*see* 2004 NY Senate Bill S6822-B). As the Senate sponsor stated, "[t]his bill codifies existing Department . . . regulations to implement its provisions to collect taxes from non-Native Americans who purchase cigarettes . . . on Native American reservations. The bill allows New York State to collect [those] taxes at the distributor level before they are transported onto the reservation" (Sponsor's Letter, Veto Jacket, 2004 NY Senate Bill S6822-B). Although that bill was vetoed by the Governor, it was reintroduced with minor amendments the following year, and it was signed into law on April 12, 2005 (*see* L 2005, ch 61, part K, § 2).

As the legislative history of the statute makes plain, Tax Law § 471-e did not create a new tax or limit the scope of the tax liability imposed by section 471. Rather, when the Department refused to implement a regulatory framework for the collection of the tax imposed by section 471, the Legislature enacted a comprehensive statutory collection scheme by means of the amended section 471-e. Far from impairing the tax obligation established in section 471, the clear intent of section 471-e was to collect the taxes lawfully imposed

pursuant to section 471 by requiring all cigarettes intended for sale—whether on or off a reservation and whether to Indians or non-Indians—to be tax stamped. Thus, the legislative history does not support the majority's conclusion that "[t]he Legislature . . . recognized the need to have a separate statutory scheme in place, aside from the general taxing provision of Tax Law § 471, in order to impose a cigarette tax on reservation sales . . . ." Rather, in enacting section 471-e, the Legislature recognized that the executive branch was not going to enforce the cigarette tax imposed by section 471 in the absence of explicit legislative directives. As a result, the Legislature crafted a statutory collection scheme to address the particular obstacles posed by reservation cigarette sales. The tax liability established by section 471 was unaffected.

The Impact of *Day Wholesale*

In my view, this Court's decision in *Day Wholesale* does not compel a different result. In that case, we merely determined that the specific collection method outlined in Tax Law § 471-e is not in effect because the State failed to implement the tax exemption coupon system, which we determined was necessary "to the functioning of the procedure set forth in the amended version of Tax Law § 471-e" (51 AD3d at 387). Our decision in that case did not disturb the underlying obligation to pay the taxes imposed by section 471. To the contrary, we recognized that the tax obligation on cigarettes stems from section 471, not section 471-e, and stated:

> "Pursuant to Tax Law § 471 (2), the ultimate liability for the cigarette tax falls on the consumer, but the cigarette tax is advanced and paid by agents . . . through the use of tax stamps . . . The tax applies to 'all cigarettes possessed in the state by any person for sale, except that no tax shall be imposed on cigarettes sold under such circumstances that this state is without power to impose such tax' . . . Those circumstances pertain only to some of the cigarettes sold on Indian reservations" (*id.* at 384).

The fact that, as a result of *Day Wholesale,* the particular collection scheme established in section 471-e is no longer "in effect" (*id.*) does not relieve reservation retailers of their legal obligation to sell only tax-stamped cigarettes to non-Indian and non-member Indian purchasers. The tax liability imposed by section 471 remains regardless of whether the State has a statutory mechanism in place for the effective collection of the required taxes from Native American retailers.

In a recent federal case, the District Court of the Eastern District of New York rejected the defendants' claims that our decision in *Day Wholesale* altered the scope of Tax Law § 471 (*see Milhelm Attea & Bros.*, 591 F Supp 2d at 237). In that case, the City of New York commenced an action against cigarette wholesalers for violation of the

federal Contraband Cigarette Trafficking Act (18 USC § 2341 *et seq.*), alleging that the defendants shipped unstamped cigarettes to Indian retailers who re-sold the cigarettes to the general public in violation of section 471 (*see Milhelm Attea & Bros.*, 591 F Supp 2d at 235). After this Court's decision in *Day Wholesale*, the defendants moved for reconsideration of the District Court's order denying their motions to dismiss, arguing "that stamping agents are not required to affix tax stamps on cigarettes sold to reservation retailers until the Department issues and distributes tax exemption coupons pursuant to [section] 471-e" and that, therefore, the defendants' sale of unstamped cigarettes did not violate New York law (*id.* at 236). In denying defendants' motion for reconsideration, the District Court stated:

> "This Court does not disagree with the contention that [section] 471-e was intended by the New York legislature to provide a mechanism to collect taxes on re-sales of cigarettes by Native American retailers to non-tribe members. The current enforceability of that statute, however, does not alter the scope of [section] 471 or its legal force. Those sales do not become non-taxable events with the Appellate Division's decision in *Day Wholesale*; rather, the court in that case found that statutorily prescribed pre-conditions for one proposed mechanism of collection have not been met" (*id.* at 237-238).

The Department's Forbearance Policy

The majority states that, "[h]istorically, the State of New York has not attempted to impose taxes on reservation cigarette sales unless a specific regulatory or statutory scheme was in place to differentiate between sales to Indians and sales to non-Indians or non-member Indians. Without such a scheme in place, it logically follows that no taxes may be collected or owed to the State by plaintiff." I cannot agree with the majority's reasoning. As discussed above, the State has imposed taxes on cigarette sales to non-Indians—whether on or off a qualified reservation—for decades. While it is true that the Department has adopted a longstanding policy of "forbearance"[1] pursuant to which it has not sought to collect those taxes on reservation sales, an administrative agency's non-enforcement policy does not and cannot nullify a tax obligation created by statute (*see Milhelm Attea & Bros.*, 550 F Supp 2d at 347 ["The (District) Court recognizes that the Department has publicly articulated a forbearance policy on the collection of taxes from the sale of cigarettes by stamping agents to reservation retailers . . . However,

[1] In my view, the fact that the Department has a "forbearance policy" with respect to the collection of cigarette taxes from Indian sellers suggests that the tax obligation is independent of any regulatory or statutory framework for the collection of such taxes.

an enforcement decision by the Department does not serve to obviate state legislation."]). "Simply stated, states 'require' certain conduct via duly enacted laws; the failure of the executive branch to enforce the law is not the same as saying that the legislative branch has repealed it" (*United States v Morrison*, 521 F Supp 2d 246, 254). While the majority may be correct in concluding that, in the absence of the collection scheme established by section 471-e, it may be difficult or impossible for the State to *collect* cigarette taxes from reservation retailers, it does not "logically follow[]" that no taxes are *owed* by plaintiff.

Conclusion

The tax liability imposed by Tax Law § 471 is independent of any particular regulatory or statutory framework established to collect the tax. Accordingly, I would affirm the judgment denying plaintiff's motion for summary judgment and granting defendants' cross motion for summary judgment and declaring that section 471-e does not exclusively govern the imposition of sales and excise taxes on cigarettes sold in plaintiff's two stores and that our decision in *Day Wholesale* does not foreclose prosecutions under the Tax Law. Regardless of whether the State can effectively collect cigarette taxes on reservation sales to non-Indians and non-member Indians, section 471 (1) mandates that all such sales are "subject to tax" and, thus, reservation retailers who flout that obligation risk prosecution under former section 1814.

Entered: July 10, 2009

Patricia L. Morgan
Clerk of the Court