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Cayuga Indian Nation of New York v. Goud
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N.Y.Sup. 2008.

Slip Copy21 Misc.3d 1142(A), 2008 WL 5158093, 2008 N.Y. Slip Op. 52478(U)

Cayuga Indian Nation of New York, Plaintiff,
v.
David S. Gould, as Cayuga County Sheriff, SENECA COUNTY SHERIFF JACK S. STENBERG, CAYUGA COUNTY DISTRICT ATTORNEY JON E. BUDELMANN, SENECA COUNTY DISTRICT ATTORNEY RICHARD E. SWINEHART, Defendants.
2008-16350

Supreme Court, Monroe County

Decided on December 9, 2008

CITE TITLE AS: Cayuga Indian Nation of N.Y. v Gould

ABSTRACT

Native Americans
Reservations
Taxation of Cigarette Sales

Declaratory Judgments
When Remedy Available

Cayuga Indian Nation of N.Y. v Gould, 2008 NY Slip Op 52478(U). Native Americans-Reservations-Taxation of Cigarette Sales. Declaratory Judgments-When Remedy Available. Tax Law-§ 471-e (Taxes imposed on Native American nation or tribe lands). Tax Law-§ 1814 (Cigarette and tobacco products tax). (Sup Ct, Monroe County, Dec. 9, 2008, Fisher, J.)

OPINION OF THE COURT

Kenneth R. Fisher, J.
This is an action for declaratory and injunctive relief pursuant to CPLR § 3001 and Article 63. The complaint seeks in its first cause of action a declaration that NY Tax Law §471-e, as amended by L.2005, ch. 61, part K, as amended by L. 2005, ch. 63, §4, exclusively governs plaintiff's obligation to pay or collect taxes on the cigarettes they sell on property owned by plaintiff's members, and that therefore the Cayuga Indian Nation has not evaded or avoided the payment of cigarette taxes in violation of Tax Law §1814. In the second cause of action, plaintiff seeks a declaration that, by virtue of the Fourth Department's decision in *Day Wholesale, Inc. v. State of New York*, 51 AD3d 383 (4th Dept. 2008), which upheld a preliminary injunction directed against the State and Attorney General precluding enforcement of Tax Law §471-e, as amended, regarding the taxation of cigarettes on Indian reservations on the ground that the amended version of the statute is not presently in effect, the search warrant issued to Cayuga and Seneca County law enforcement authorities on November 25, 2008, and the seizures made thereunder on the same day, were illegal and unauthorized, and that the property seized must be returned to the owners.

In the third cause of action, plaintiff seeks a declaration that the Cayuga County law enforcement authorities who executed the warrant exceeded the scope of the warrant's authorization by seizing a computer used in, and essential to, the operation of the Union Springs store, which also sells gasoline.

The fourth cause of action seeks an injunction restraining defendants from pursuing a threatened criminal prosecution by "alleging that Plaintiff and/or its employees have violated New York Tax Law §§471, 471-e, 473, or 1814, at least until such time as the Tax ***2** Department has taken the necessary actions and promulgated the necessary rules or regulations to implement the Indian tax exemption coupon system under §471-e." Finally, in plaintiff's prayer for relief and in the paragraph entitled Nature of the Case in paragraphs 1-2 of the complaint, plaintiff seeks an order "requiring the Defendants immediately to return the Plaintiff's property that was seized pursuant to the unlawfully obtained search warrants."

By order to Show Cause, plaintiff seeks a preliminary injunction which (1) orders defendants to return all property issued pursuant to the two search warrants; and (2) enjoins defendants from alleging that plaintiff or its employees have violated Tax Law §§ 471, 471-e, 473, and 1814. The motion also seeks an order and judgment declaring that section 471-e is not in effect; that by possessing unstamped cigarettes, plaintiff is not in violation of section 1814; and that therefore the seizure of property pursuant to the warrants was unlawful.

By Notice of Cross-Motion, defendants Gould and Stenberg, the sheriffs of Cayuga and Seneca counties, respectively, seek an order dismissing the complaint pursuant to CPLR 3211(a)(1)(defenses based on documentary evidence), (a)(5)(collateral estoppel), and (a)(7)(failure to state a cause of action). In the alternative, these two defendants seek conversion of plaintiff's motion to one for summary judgment, and they move for summary judgment dismissing the complaint as against them. The other defendants have not similarly so moved, but have opposed plaintiff's motion for a preliminary injunction.

At oral argument, however, plaintiff suggested, and all defendants agreed, that the motion for a preliminary injunction and the motions to dismiss should be converted to cross-motions for summary judgment on due notice to all parties. A motion for a preliminary injunction opens the record and permits the court to pass on the sufficiency of the parties' respective claims and defenses. *Guggenheimer v. Ginzburg*, 43 NY2d 268, 272 (1977); *Berio v. Berio*, 143 AD2d 866, 867-68 (2d Dept. 1988).*Seealso*, *Rochester City School District v. County of Monroe*, 13 AD3d 1052, 1053 (4th Dept. 2004). It is the duty of the court in this declaratory judgment action to "declar[e] the rights of the parties." *Village of Webster v. Town of Webster*, 270 AD2d 910 (4th Dept. 2000).

Availability of Declaratory and Injunctive Relief

A threshold question raised by defendants in their consolidated response to the motion is whether collateral declaratory relief is available to the target of a criminal investigation, and whether coercive relief in the nature of an injunction directed against local law enforcement authorities is at all appropriate in these circumstances. Despite some statements in cases that "only an application for declaratory ***3** relief by the People should be entertained," *Matter of Morganthau v. Erlbaum*, 59 NY2d 143, 152 (1983) (citing *Kelly's Rental v. City of New York*, 44 NY2d 700 (1978)), the Court of Appeals has sanctioned as "an appropriate use of a declaratory judgment action to challenge a criminal statute," a potential criminal defendant's use, after three acquittals during successive vagrancy prosecutions, of CPLR 3001 to seek "a declaration that the vagrancy statute was unconstitutional on its face." *Id*. 59 NY2d at 151,*discussing**Fenster v. Leary*, 20 NY2d 309 (1967).*See*, *Erlbaum*, 59 NY2d at 150-51, which described *New York Foreign Trade Zone Operators v. State Liquor Authority*, 285 NY 272 (1941) as also involving an appropriate use of a declaratory judgment action brought by a plaintiff who "potentially faced criminal prosecution" seeking a declaration whether, in the undisputed circumstances of that case, a distiller's license was re-

quired to conduct plaintiff's activities of "import[ing] liquor into a trade zone, where it diluted the spirits, repackaged them, and then shipped them to other parts of the United States or to foreign countries." *Erlbaum*, 59 NY2d at 151.

In none of these cases was the plaintiff "[a] party against whom a criminal proceeding is pending" at the time of commencement of the declaratory judgment action such that he or she "may not seek declaratory relief." *Kelly's Rental, Inc. v. City of New York*, 44 NY2d at 702.Cf., *Cooper v. Town of Islip*, __ AD3d __, 2008 WL 4890009 (2d Dept. November 12, 2008)(criminal action pending).*Seealso*, *People v. Mateo*, 2 NY3d 383, 400-01 (2004); *Oglesby v. McKinney*, 28 AD3d 153, 158 (4th Dept. 2006), *aff'd*, 7 NY3d 561, 565 (2006). The argument that entertaining an action for declaratory relief would interfere in the proper administration of criminal justice was, for cases of the current kind, ultimately laid to rest in *New York Foreign Trade Zone Operators v. State Liquor Authority*, 285 NY at 277-78;*Playtogs Factory Outlet, Inc. v. Orange County*, 51 AD2d 772, 780 (2d Dept. 1976)(collecting cases); *Bemis v. Conway*, 17 AD2d 207, 208-09 (4th Dept. 1962)(" [r]esort to this remedy and also to that of an injunction may be had even with respect to penal statutes and against a public official or public agency whose duty it is to conduct appropriate prosecutions"')(quoting *De Veau v. Braisted*, 5 AD2d 603, 606-07,*aff'd*, 5 NY2d 236,*aff'd*, 363 U.S. 144, 80 S.Ct. 1146);*Rockland County Multiple Listing System, Inc. v. State*, 72 AD2d 742, 743 (2d Dept. 1979).

The absence of a pending criminal action at the time of commencement makes it discretionary whether to entertain this action for declaratory relief. *Beneke v. Town of Santa Clara*, 9 AD3d 820 (3d Dept. 2004)("petitioner failed to avail himself of this remedy *priorto* the commencement of the criminal action")(emphasis supplied); *Royal Service LLC v. Village of Monticello*, 247 AD2d 779, 781 (3d Dept. 1998). That discretion ***4** is exercised in favor of entertaining the action insofar as it does not concern a collateral review of the validity of the search warrants or the manner of execution of the Cayuga County warrant. *Calderon v. City of Buffalo*, 61 AD2d 323, 326-27 (4th Dept. 1978). There are no factual issues, as only questions of law about the application of certain statutes to plaintiff's undisputed conduct are presented. *Erlbaum*, 59 NY2d at 150-51.The defendant district attorneys, in their memoranda of law, each posit that there is a factual issue inasmuch as the targets of the investigation have not explicitly admitted that they sold untaxed cigarettes as alleged in the warrant applications. But that argument strains this record; plaintiff's complaint is wholly premised on the proposition that their members indeed do sell untaxed cigarettes on the parcels targeted for search, and that this is permissible under our law and at oral argument, plaintiff's attorneys made this concession explicit. The first two causes of action are, therefore, cognizable in this declaratory proceeding.

The balance of the complaint, directed to the manner of the Cayuga County search and seeking an injunction prohibiting prosecutions and a return of the seized property, is subject to a different analysis. The remedy of prohibition is not available to remedy an unconstitutional search conducted pursuant to a warrant which has already been executed, *Matter of James "N" v. D'Amico*, 139 AD2d 302, 308-09 (4th Dept. 1988)(Boomer and Pine, J.J., concurring), but a writ will lie to challenge the territorial jurisdiction of a criminal court over a crime. *Matter of Taub v. Altman*, 3 NY3d 30, 33 n.2 (2004); *Matter of Rush v. Mordue*, 68 NY2d 348, 353 (1986); *Matter of Steingut v. Gold*, 42 NY2d 311 (1977).

Separately, a writ of prohibition is available to obtain return of seized property after an unreasonable length of time in a case of an unfocused investigation in which there was no indication that the property seized would ever form the basis of a criminal prosecution. *Matter of B.T. Productions v. Barr*, 44

NY2d 226 (1978). On the other hand, the writ is unavailable in a case involving an "investigation of a particular criminal activity" and where it is determined that criminal prosecution has not been unreasonably delayed. *Matter of Agresta v. Roberts*, 66 AD2d 929, 930 (3d Dept. 1978). This case is of the latter variety. In *Matter of Moss v. Spitzer*, 19 AD3d 599 (2d Dept. 2005), for example, it was held that an Article 78 proceeding would not lie to obtain return of property seized under a warrant "first because the seized property ha[d] not been held for an inordinately long period of time, and second, because petitioners [we]re seeking, in effect, little more than a pre-indictment order suppressing evidence." *Id*. 19 AD3d at 600.

Nor will mandamus lie in circumstances such as these. *Matter* ****5*** *of Manhattan Gold & Silver, Inc. v. Hynes*, 51 AD3d 671 (2d Dept. 2008); *Matter of Marra v. Hynes*, 221 AD2d 539 (2d Dept. 1995); *Matter of Burse v. Bristol*, 203 AD2d 962 (4th Dept. 1994). Finally, replevin is not an appropriate remedy, because it would interfere with an impending criminal prosecution. *B.T. Productions, Inc. v. Barr*, 44 NY2d 226, 233 n.2 (1978)("in the typical case replevin would not be an appropriate remedy since it would constitute an unjustified and unacceptable interference with a pending or potential criminal prosecution"); *SSC Corp. v. State of New York Organized Crime Task Force*, 128 AD2d 860 (2d Dept. 1987); *Meegan v. Tracy*, 220 App. Div. 600, 602 (3d Dept. 1927)(property seized pursuant to a search warrant is "beyond the reach of the requisition in replevin, while the necessity to use it in a criminal proceeding remained"); *Dwyer v. County of Nassau*, 66 Misc2d 1039, 1040 (Sup. Ct. Nassau Co. 1971)(Meyer, J.). Accordingly, to the extent plaintiff's motion is for a preliminary injunction directing the return of the property, that motion is denied. By like reasoning, the defendant sheriffs' cross-motion for summary judgment dismissing the complaint as against them insofar as it seeks return of the same is granted, and the court declares that, on the current record, plaintiff is not entitled to a review of the manner of the Cayuga County search nor is plaintiff entitled to a return the seized property in a proceeding such as this. The remedy is a motion to suppress in any ensuing criminal action, or a writ if it appears that no prosecution will be brought.

Tax Law §471-e and Day Wholesale Do Not Warrant Relief

In support of plaintiff's motion for a preliminary injunction, plaintiff is required to establish a likelihood of success on its claim that a recently enacted statute governing taxation of cigarettes on Indian reservations, New York Tax Law §471-e, exclusively governs plaintiff's obligation to pay or collect taxes on cigarettes sold in Seneca and Cayuga counties. If so, plaintiff is unquestionably entitled to relief. *See Day Wholesale, Inc. v. State of New York*, 51 AD3d 383 (4th Dept. 2008). The court concludes, however, that the sale of cigarettes in each of these counties is not exclusively governed by §471-e as asserted in plaintiff's first cause of action. That provision did not establish the applicability of tax on these cigarettes and, in any event, the sales in question did not occur on "a qualified reservatio [n]" within the meaning of Tax Law §471-e(1)(a), or "Indian country" within the meaning of 18 U.S.C. §1151(a)("all land within the limits of any Indian reservation under the jurisdiction of the United States Government").

The court agrees that the tax referred to in §1814 is the one imposed by §471, not §471-e. Section 471-e was merely designed to facilitate the state's collection of cigarette taxes arising from Indian sales to non-Indian consumers by requiring ***6** wholesalers to pay the tax earlier in the distribution chain than the previously enacted collection mechanisms contemplated. As defendants contend, §471-e does not create the tax obligation itself, although it refers to it. The tax obligation itself long ago was established by the legislature as applicable to qualified

reservation and non-reservation sales alike to non-Indians, which was upheld by the Supreme Court in *Washington v. Confederated Trades of Colville Indian Reservation*, 447 U.S. 134, 100 S. Ct. 2069 (1980), and the New York courts in *Snyder v. Wetzler*, 193 AD2d 329 (3d Dept. 1993)(tracing the relevant Supreme Court jurisprudence on the subject), *aff'd*84 NY2d 941 (1994). These decisions predated enactment of §471-e. The Supreme Court well perceived the interplay between §471 and §1814:

Article 20 of the New York Tax Law imposes a tax on all cigarettes possessed in the State except those that New York is "without power" to tax. N.Y.Tax Law § 471(1) (McKinney 1987 and Supp.1994). The State collects the cigarette tax through licensed agents who purchase tax stamps and affix them to cigarette packs in advance of the first sale within the State. The full amount of the tax is part of the price of stamped cigarettes at all subsequent steps in the distribution stream. Accordingly, the "ultimate incidence of and liability for the tax [is] upon the consumer." § 471(2). Any person who "willfully attempts in any manner to evade or defeat" the cigarette tax commits a misdemeanor. N.Y.Tax Law § 1814(a) (McKinney 1987).

Department of Taxation and Finance of New York v. Milhelm Attea & Bros., Inc., 512 U.S. 61, 64, 114 S.Ct. 2028, 2031 (1994).

Similarly, in *Snyder v. Wetzler*, *supra*, and directly contrary to plaintiff's argument in this case, the Court of Appeals upheld the applicability of §471, even as applied on established tribal reservations, over a claim that, as a general statute, §471 could not be applied on tribal lands under the doctrine of *Fellows v. Denniston*, 23 NY 420, 431-32 (1865).*Snyder v. Wetzler*, 84 NY2d 941,*aff'g*, 193 AD2d 329 (*see* Brief for Appellant and Reply Brief for Appellant)(reproduced on WESTLAW). And in *Matter of New York State Dept. of Taxation and Finance v. Bramhall*, 235 AD2d 75 (4th Dept. 1997), the court observed:

" Even on reservations, state laws may be applied unless such application would interfere with reservation self-government or would impair a right granted or reserved by federal law."' (*Rice v. Rehar*, 473 U.S. 713, 718, 103 S. Ct. 3291, 3295, quoting *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148, 93 S. Ct. 1267, 1270). State taxation of sales of cigarettes and other products to non-Indians on reservations and other taxes directed toward the activity of non-Indians on reservations have been sustained notwithstanding Indian claims of sovereignty.

***7** *Id.* 235 AD2d at 85.Inasmuch as the tax liability referred to in §1814 springs from §471, the fact that recently enacted §471-e has been judicially declared by *Day Wholesale* to be "not in effect" is of no moment. Nor does the Tax Department's apparent paralysis in this area, which has been styled a permanent forbearance policy, *Day Wholsale*, *supra*;*New York Association of Convenience Stores v. Urbach*, 275 AD2d 520 (3d Dept. 2000), rewrite or erase legislative enactments, i.e., in §1814 making a violation of §471 a crime. *Cf.*, *Gristede"s Foods, Inc. v. Unkechauge Nation*, 532 F.Supp.2d 439, 449 (E.D.N.Y 2007)(regardless of whether the Department allows wholesalers or reservation retailers to sell unstamped cigarettes, the tax imposed by the statutes are lawful and may be enforced).

The foregoing is enough to dispose of this case. But it is worthwhile to consider the merit of plaintiff's subsidiary contention that, if §471-e was applicable, the sales at the two stores targeted for search occurred on a " qualified reservation" within the meaning of the statute. Notwithstanding plaintiff's argument to the contrary, a "qualified reservation" under the NY Tax Law §470(16)(a)("[l]ands held by an Indian nation or tribe that is located within the reservation of that nation or tribe in the state") refers of necessity (because the tax law does not explicate the definition further) to " all land within the limits of any Indian reservation under the jurisdiction of the United States Government." 18 U.S.C.

§1151(a). Because there is no contention that the State of New York at any time created a separate or competing system of Indian reservations within the state, the only plausible interpretation of the word "qualified" is to link it with 18 U.S.C. §1151(a).*Seealso*, fn.1, *infra*.Accordingly, the naked reference to the Cayuga Indian Nation of New York in Tax Law §470(14) is no legislative creation, or recognition even, of a particular "qualified reservation " belonging to the Cayuga Indian Nation not recognized as "Indian country " under 18 U.S.C. §1151(a).

Plaintiff attempts to divorce the concept of sovereignty from the concepts of "qualified reservation" or "reservation seller" under the pertinent provisions of the Tax Law. Plaintiff begins with §470(17), which defines a reservation seller as an Indian Nation or tribe, one or more members of a tribe, or an entity wholly owned by either or both, which sells cigarettes on a qualified reservation. Plaintiff proceeds to §470(14) which lists the Cayuga Indian Nation as an Indian Nation or tribe, and then concludes that §470(16)(a), by necessary implication from the foregoing two provisions, means that the Cayugas have a "qualified reservation" by virtue of its members' open market purchases of land, for some 200 years held by the non-Indian public and subject to regulation by New York State and its political subdivisions, within the 64,000 acre aboriginal ***8** territory recognized in the Treaty of Canandaigua. While the separate definitions provided in §470(16)(a) and (b) support plaintiff's distinction between the question of sovereignty and that of "qualified reservation,"[FN1] it does not follow by necessary implication or otherwise that, by themselves, §470(17) and §470(14) means that the parcels recently purchased by members of the Cayuga Nation are "[l]and held by an Indian Nation or tribe that is located within the reservation of that nation or tribe in the state." §470(16)(a). The Tax Law thus requires some other method of establishment of a reservation than in the provisions of the Tax Law itself to qualify a reservation as a "qualified reservation" within the meaning of the statute.

Recognition of the Cayuga's claim to qualified reservation status would come as surprising news to the Department of Taxation and Finance. The concept of " qualified reservations" first appeared in regulatory form and was contained in the "Exempt Organizations" regulations promulgated following enactment of Tax Law § 1116 ("Exempt Organisations") and in particular subdiv. (a)(6):

Section 529.9. Certain Indian nations or tribes. [Tax Law, §1116(a)(6)]

(a) General.***9**

(1) The Indian nations or tribes specified in paragraph (2) of this subdivision are exempt from the sales and use tax on purchases of tangible personal property, services, food and drink, hotel occupancy, or admissions and dues. In addition, such tribes or nations, under circumstances described in subdivision (d) of this section, may make sales without collecting the sales or use tax.

(2) Only the following Indian nations or tribes residing in New York State are entitled to exemption:

Exempt Tribes and Nations

Cayuga

Oneida Indian Nation

Onondaga Nation of Indians

Poospatuck

St. Regis Mohawk

Seneca Nation of Indians

Shinnecock

Tonawanda Band of Senecas

Tuscarora Nation of Indians

Qualified Reservations

Allegany Indian Reservation

Cattaraugus Indian Reservation

Oneida Indian Territory

Onondaga Indian Reservation

Poospatuck Indian Reservation

St. Regis Indian Reservation

Shinnecock Indian Reservation

Tonawanda Indian Reservation

Tuscarora Indian Reservation

20 N.Y.C.R.R. § 529.9 (filed Nov. 24, 1982; amds filed Aug. 31, 1990; March 7, 1994 eff. March 23, 1994. amended (c)(2)). This duly promulgated regulation, *General Elec. Capital Corp. v. New York State Div. of Tax Appeals*, 2 NY3d 249, 254-55 (2004), thus establishes that, so far as the Department of Taxation and Finance was concerned, the Cayuga Indian Nation had no reservation of its own under state law. *Seealso*, Tax Law §470(15)(second sentence)(implicit legislative recognition of the then current regulations). While not dispositive and "ha[ving] no legal effect standing alone," *Matter of UCP-Bayview Nursing Home v. Novello*, 2 AD3d 643, 645 (2d Dept. 2003) (collecting ***10** authorities), the court observes that, in every on-line publication and tax form addressed to the subject in the Department's web-site, the Cayugas are recognized as an exempt organization but having no "qualified reservation":

Sales to members of recognized Indian nations or tribes are not subject to sales tax, provided that delivery is made to the member of the qualified nation or tribe on a qualified reservation. The qualified reservations are Allegany, Cattaraugus, Oil Spring, Oneida, Onondaga, Poospatuck, St. Regis Mohawk (Akwesasne), Shinnecock, Tonawanda, and Tuscarora.

New York State Dept. of Taxation and Finance, *A Guide to Sales Tax in New York* at 31 (Publication No.750)(2/08).*Seealso*, to the same effect, *A Guide to Sales Tax for Drugstores and Pharmacies* at 20 (Publication #840)(8/98); *Instructions* for Form FT-946/1046, Part D ("Qualified Reservations in New York State"); *Certificate of Tax Exemption for a Qualified Indian Nation or Tribe on Purchases of Motor Fuel, Diesel Motor Fuel, and Cigarettes*, FT-939 (7/03) (backside)(containing the same listing); Form DTF-801 (4/96) (backside)(containing the same listing); Form TP-156.9 (8/82)(same listing); *Sales Tax Treatment of Sales Made on Indian Reservations*, TSB-M-83 (18)s (July 12, 1983)(same listing); *Taxable Status of Sales to Indians*, TSB-M-82 (19)s (August 20, 1982)(same listing). Accordingly, by the time §§ 470(16) and 471-e were enacted employing the concept of "qualified reservation," the term had an established meaning in the regulations of the Dept. of Taxation and Finance. Cf., *Abraham & Straus v. Tully*, 47 NY2d 207, 214 (1979); *Matter of Lockport Union-Sun & Journal v. Preisch*, 7 AD2d 502, 507-508 (4th Dept. 1959), *revd. onothergr.*, 8 NY2d 54 (1960). For all the above reasons, I reject plaintiff's contentions drawn from state law that the sales in question here occurred on a "qualified reservation."

Assuming, however, that the legislative definition of "qualified reservation " in §470(16)(a) sweeps in more than contemplated under 20 N.Y.C.R.R. §529.9, the court further rejects plaintiff's effort to find qualified reservation status from the relevant federal authorities. To hold otherwise would for the Cayuga Indian Nation render meaningless the holdings of *City of Sherrill, New York v. Oneida Indian Nation of New York*, 544 U.S. 197, 125 S.Ct. 1478

(2005); *Cayuga Indian Nation of New York v. Pataki*, 413 F.3d 266 (2d Cir. 2005); and especially *Cayuga Indian Nation of New York v. Village of Union Springs*, 390 F.Supp.2d 203 (N.D.NY 2005). In each of these cases, it was held that plaintiff's "re-unification theory" of title as between " aboriginal title" and newly acquired titles on the "open market" of parcels long publicly held, could not be sustained. *City of Sherrill*, 544 U.S. at 213, 213-14, 125 S.Ct. at 1489, 1489-90:***11**

In this action, OIN seeks declaratory and injunctive relief recognizing its present and future sovereign immunity from local taxation on parcels of land the Tribe purchased in the open market, properties that had been subject to state and local taxation for generations. We now reject the unification theory of OIN [unified fee and aboriginal title'] ... and hold that standards of Federal Indian Law and Federal equity practice' preclude the Tribe from rekindling embers of sovereignty that long ago grew cold.

And in *Cayuga Indian Nation of New York v. Pataki*, 413 F.3d at 273:

Sherrill concerned claims by the Oneida Indian Nation, another of the Six Iroquois Nations, that its "acquisition of fee title to discrete parcels of historic reservation land revived the Oneida's ancient sovereignty piecemeal over each parcel" and that, consequently, the Tribe need not pay taxes to the City of Sherrill [quoting *Sherrill*, 125 S.Ct. at 1483]. The Supreme Court rejected this claim, concluding that "The Tribe cannot unilaterally revive its ancient sovereignty, in whole or in part, over the parcels at issue." [quoting *Sherrill*, 125 S.Ct. at 1483].

The Second Circuit applied this holding "more generally" to the discrete claims of the Cayugas in that case. *Pataki*, 413 F.3d at 274, 277.Those claims concern the very land the Cayugas conveyed to the State of New York out of their "Original Reservation" set forth in the 1789 Treaty, in the 1789 Treaty conveyance itself, in the 1795 Treaty, and in the 1807 conveyance. *Seeid.* 413 F.3d at 268-69 (describing the history of those transactions).

Finally, in *Cayuga Indian Nation v. Village of Union Springs*, *supra*, the Cayuga Indian Nation's claim to land in Union Springs was rejected on similar reasoning.[FN2] After these cases, and in particular the *Village of Union Springs* case, plaintiff's current claim that their convenience stores in Seneca and Cayuga Counties are situate on "qualified reservation" land such that they have sovereign immunity from local taxation in general, or from an abstract application of §471 in particular, cannot be ***12** sustained. A fortiori, plaintiff can claim no sovereign or other immunity from application of Tax Law § 1814 on these convenience store parcels.

Plaintiff also contends that these two parcels, once situate within the boundaries of the "Original Reservation" recognized in the 1789 Treaty, *Pataki*, 413 F.3d at 268, have never been disestablished by an Act of Congress within the meaning of the "Nonintercourse Act," now codified as 25 U.S.C. § 177. The Supreme Court has declined to decide whether the 1838 Treaty of Buffalo Creek, 7 Stat. 550, disestablished the Oneida Indian Reservation, *City of Sherrill*, 544 U.S. at 216 n.10, 125 S.Ct. at 1491 n.10, and the Second Circuit similarly declined to reach the same question in connection with the claims of the Cayuga Indian Nation. *Pataki*, 413 F.3d at 269 n.2. Yet the holdings in these cases compelled the result reached in *Village of Union Springs* quite without regard to the Cayuga Indian Nations' contention in regard to the need for Congressional disestablishment, and therefore the court does not in this case reach that question. *Seealso*, *State of New York v. The Shinnecock Indian Nation*, 523 F.Supp.2d 185, 290-91 (E.D.NY 2008); *The Seneca-Cayuga Tribe of Oklahoma v. Town of Aurelius, New York*, 233 F.R.D. 278, 279, 281-82 (N.D.NY 2006) (dismissing action seeking a declaration that the property is "Indian country"

within the definition of 18 U.S.C. §1151(a) and that the Tribe has sovereign jurisdiction of the property).

To hold otherwise would be to sanction precisely the result the Supreme Court rejected in *City of Sherrill*.In that case, as in this one, granting the relief demanded by the Indian Nation would upset New York's long exercised sovereignty over the area, create a "checkerboard of alternating state and tribal jurisdiction in New York State - created unilaterally at . . . [the Nation]'s behest - would seriously burde[n] the administration of state and local governments' and would adversely affect landowners neighboring the tribal patches." *City of Sherrill*, 544 U.S. at 219-20, 125 S. Ct. at 1493.The result sought by the Cayuga Nation in this case unquestionably would create the same conditions, and therefore it is unnecessary to determine whether the 1838 Treaty of Buffalo Creek disestablished a Cayuga reservation or even whether the original Cayuga reservation was ever recognized in the Treaty of Canandaigua or by Congress, questions sharply disputed and now presented to the Second Circuit in *OIN of New York v. Madision County and Oneida County, New York*, No. 05-5458-CV(L), 06-5168- CV(CON), 06-5515-CV (CON), *onappealfrom* 401 F.Supp.2d 219 (N.D.NY 2005), *and* 432 F.Supp.2d 285 (N.D.NY 2006). If the Supreme Court could make its determination that OIN exercised no sovereignty over the parcels it had recently obtained on the open market and that the land was subject to taxation, without reaching the disestablishment issue, ***13** the court in this case can reach the same result to the extent it needs to look to federal law to resolve plaintiff's claims.[FN3]

****14** Non-cooperation of the State Tax Department*

Plaintiff places great reliance on the refusal of the State Department of Taxation and Finance to assist the defendant district attorneys in their criminal investigation or otherwise to take action at the administrative level against the targeted store owners. Plaintiff refers to an advisory opinion of the Commissioner TSB-A-06(2)M (Petition No. M060316A)(March 16, 2006) in which the Department adhered to its "long-standing policy of allowing untaxed cigarettes to be sold from licensed stamping agents to recognized Indian Nations and *reservation-based* retailers making sales from qualified Indian reservations." (emphasis applied). The Commissioner opined that the enactment of §471-e would not change this policy of forbearance until several "issues are fully addressed and considered." Significantly, the question addressed by the opinion was not whether the Commissioner had the power to require Indian retailers, on recognized reservations, to collect and remit sales, use and excise taxes on sales to non-Indian customers. As set forth above, the Court of Appeals authoritatively laid that issue to rest in favor of the Commissioner's power in *Snyder v. Wetzler*, 193 AD2d 329 (3d Dept. 1993), *aff'd*, 84 NY2d 941 (1994). Moreover, as the emphasized portions of the administrative opinion quoted above make clear, it has no application outside the context of cigarette sales on "qualified reservations." Here, for the state law reasons stated above, the sales occurred outside any currently recognized Indian reservation territory.

The Commissioner's policy of forbearance was, much earlier, upheld against an equal protection challenge brought by the state association of convenience stores, *Matter of New York Association of Convenience Stores v. Urbacher*, 92 NY2d 204 (1998), and it was later held that an "indefinite [period of] forbearance" in regard ***15** to enforcement was supported by a rational governmental basis founded in the impossibility of state "enforce[ment] without the cooperation of the Indian tribes," *id*. 275 AD2d 520, 522 (3d Dept. 2000), which was not forthcoming. The court explained:

Because of tribal immunity, the retailer 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 reproduction of their books and records for the purpose of assessing taxes.

Id. 275 AD2d at 522.The court concluded by crediting the Department's recognition that the feasible method of enforcement, i.e., interdiction via off-reservation seizures of unstamped cigarettes on public highways, upheld on *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 161-162, 100 S.Ct. 2069, 2085-86 (1980); *Matter of DeLoronde*, 142 AD2d 90, 92-93 (3d Dept. 1988); *cf*., *Matter of New York State Dept. of Taxation and Finance v. Bramhall*, 235 AD2d 75 (4th Dept. 1997), proved largely unsuccessful in the past and that it led to "civil unrest, personal injuries and significant interference with public transportation on the State highways," *Urbach*, 275 AD2d at 522-23.A recent unpublished Second Circuit decision has observed, however, that the Department's policy of forbearance would not extend to "massive quantities of cigarettes . . . purchased on reservations by non-Native Americans for resale." *United States v. Kaid*, 241 Fed. Appx. 747, 750 (2d Cir. Sept. 12, 2007).*Seealso*, *U.S. v. Morrison*, 521 F.Supp.2d 246, 249-51 (E.D.NY 2007).

The common denominator in these administrative opinions and court cases is the fact that they all concern sales of cigarettes on recognized or qualified reservations. Here, by contrast, the sales occurred on ancestral or aboriginal land of the Cayugas, but for reasons stated above not on sovereign or qualified Indian reservations within the meaning of Tax Law §470(16), §471-e, or " Indian country" within the meaning of 18 U.S.C. §1151(a), as authoritatively interpreted in *City of Sherrill*,*Pataki*, and *Village of Union Springs*.Accordingly, because the Department's policy of forbearance has no application to cigarette sales on non-reservation lands, and in any event the forbearance concerns only the particular collection mechanisms created by §471-e, not §471's imposition of tax liability itself, the Commissioner's refusal to aid defendants in their criminal investigation cannot support plaintiff's position.

Another important observation must be made. The discretionary considerations which animate the Tax Department's policy of forbearance under Tax Law §471-e cannot dictate or circumscribe the exercise of discretion vouchsafed by statute to ***16** other governmental actors, here the elected district attorneys in Seneca and Cayuga counties, under County Law §700 to determine whether criminal charges should be brought under plainly applicable penal statutes such as Tax Law §1814.[FN4] District Attorneys "have plenary prosecutorial power in the counties where they are elected." *People v. Romero*, 91 NY2d 750, 754 (1998). None of the provisions of the Tax Law which confer on the Attorney General concurrent jurisdiction to prosecute crimes within the counties, *People v. Romero*, 91 NY2d at 757-58 (***17**Tax Law §512, §691, and §1091), authorizes anyone other than the elected district attorney defendants to bring a state prosecution under §1814. By parity of reasoning, and contrary to plaintiff's contention, the Commissioner's letter to the defendant district attorneys in this case reveals a careful effort not to encroach upon the plenary powers of the defendants under County Law §700. Moreover, a determination by this court in plaintiff's favor would constitute a wholly unauthorized usurpation of the district attorney's discretionary power to determine whether these off-reservation sales of un-taxed cigarettes should be prosecuted under Tax Law § 1814.

Conclusion

For the foregoing reasons, the court finds that plaintiff has not established a likelihood of success on the merits of their claims which are cognizable in this declaratory proceeding (*see* above), that irreparable harm has not been shown, and that the balance of equities tips in favor of defendants. The motion for a preliminary injunction is in all respects

denied. Summary judgment is granted declaring that §471-e does not exclusively govern the imposition of sales and excise taxes on cigarettes sold from these two parcels, that *Day Wholesale* does not invalidate or interdict prosecutions under §471 and §1814, that plaintiff is not in this proceeding entitled to challenge the manner of search at the Cayuga County Union Springs store, and that plaintiff may not in this proceeding obtain a return of the property.

SO ORDERED.

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Kenneth R. Fisher

JUSTICE SUPREME COURT

DATED:December 9, 2008

Rochester, New York

FOOTNOTES

FN1. It is more probable that the distinct definitions of §470(16)(a) and (b) follow the congressional reformulation of §1151(a)("Indian country") in 1948 to include lands "*not* presumptively tied to Indian ownership, land title or administration," *Thompson v. County of Franklin*, 314 F.3d 79, 90 (2d Cir. 2002)(Sack, J. dissenting), i.e., by uncoupling reservation status from Indian ownership. *Id.* 314 F.3d at 89-90 (Sacks, J. dissenting). "After 1948, that is, the extinguishment of title alone should no longer be presumed to disestablish the jurisdictional boundaries of a reservation." *Id.* 314 F.3d at 90 (Sacks, J. dissenting).*See**Solem v. Bartlett*, 465 U.S. 463, 468, 104 S.Ct. 1161, 1165 (1984)("Only in 1948 did Congress uncouple reservation status from Indian ownership, and statutorily define Indian country to include lands held in fee by non-Indians within reservation boundaries. ")(citing Act of June 25, 1948, ch. 645, § 1151, 62 Stat. 757 (codified at 18 U.S.C. § 1151)). The Supreme Court presumably was aware of this expanded definition, and the history behind it, ably described in *Wisconsin v. Stockbridge-Munsee Community*, 366 F.Supp.2d 698 (E.D.Wis. 2004), when it made its ruling in *City of Sherrill*.*See* discussion, *infra*, and at fn. 3,*infra*.

FN2. Plaintiff relies on an earlier opinion in this case (317 F. Supp.2d 128, 143), and neglected to reveal (in its initial motion papers) that the case was vacated for reconsideration in light of *City of Sherrill* by the Second Circuit on May 23, 2005, and, after *Pataki* was decided a month later, ultimately resulted in a dismissal of the Cayuga Indian Nation's complaint on the same ground as animated *City of Sherrill* and *Pataki*,*Village of Union Springs*, 390 F. Supp.2d at 205, 206, i.e., rejection of the reunification theory of reservation title.

FN3. Assuming that the Cayugas had a recognized reservation in the late 18th century that was not disestablished by an act of Congress or otherwise by federally approved alienation, courts have held that the Nonintercourse Act is not applicable to modern land purchases by the Indians of land previously approved for alienation. In *Bates v. Clark*, 95 U.S. 204 (1877), the Supreme Court observed "that all country described by the act of 1834 [Indian Trade and Intercourse Act] as Indian country remains Indian country so long as the Indians retain their original title to the soil, and ceases to be Indian country whenever they lose that title. " *Id.* 95 U.S. at 209. "[N]o

court has held that Indian land approved for alienation by the federal government and then reacquired by a tribe again becomes inalienable." *Lummi Indian Tribe v. Whatcom County*, 5 F.3d 1355, 1359 (9th Cir. 1993). On the other hand, the Nonintercourse Act would presumably be applicable to modern land purchases by Indians of recognized reservation land not disestablished, diminished, or released to alienation by Congress, as plaintiff contends in this case. Because the Supreme Court in *City of Sherrill* declined to reach whether the land in question was of the latter variety even in the face of the 1948 redefinition of "Indian country" in 18 U.S.C. §1151(a) (decoupling title from sovereign status), the court rejects plaintiff's reliance on *Oneida Indian Nation of New York v. Madision County*, 401 F. Supp.2d 219 (N.D.NY 2005) and *Oneida Indian Nation of New York v. Oneida County*, 432 F.Supp.2d 285 (N.D.NY 2006), both on appeal to the Second Circuit, *supra*, as fundamentally inconsistent with the core holding in *City of Sherrill* and in particular the declaration therein that OIN "cannot unilaterally revive ancient sovereignty, in whole or in part, over the parcels at issue. " *City of Sherrill*, 544 U.S. at 202-03, 125 S.Ct. at 1483.As the district court held in *Oneida Tribe of Indians of Wisconsin v. Village of Hobart, Wisconsin*, 542 F.Supp. 2d 908 (E.D. Wis. 2008), which disagreed with the two cited Northern District cases now on appeal in the Second Circuit on the question of disestablishment and alienability, "[u]nless a state or local government is able to foreclose on Indian property for a non-payment of taxes, the authority to tax such property is meaningless, and the court's analysis in *Yakima*, *Cass County*, and *Sherrill* amounts to nothing more than an elaborate academic parlor game." *Id.* 542 F.Supp.2d at 921.Similarly, in this case, disestablishment is beside the point, for the simple reason that plaintiff cannot revive sovereignty "in whole or in part" under *City of Sherrill* on parcels recently acquired on the open market which have remained subject to state and local regulation for nearly two centuries. To apply the phrase "qualified reservation" in §471-e to the patchwork of parcels recently acquired by the Cayuga Indian Nation, or to make the application of that phrase in our tax statutes dependant on the ultimate resolution of plaintiff's disestablishment argument, would create the very chaos *City of Sherrill* was designed to prevent, and without any clear state legislative direction that this should be done in favor of the Cayugas. As set forth above, the concept of "qualified reservation" had established meaning in the Tax Department's duly promulgated regulations by the time it was recently incorporated into the Tax Law §§ 282(20), (21); 284-e; 470(8), (14)-(17); 471-e; and 1112. Plaintiff presents no evidence of legislative intent to the contrary, and the plain words of §470(16)(a) do not suggest the result plaintiff would have this court order.

FN4. As well stated:
The clear language of § 471(1) imposes a "tax on all cigarettes possessed in the state" except those cigarettes the state lacks the power to tax. Section 471(2) goes on to require that stamping agents "purchase stamps and affix such stamps in the matter prescribed to packages of cigarettes to be sold within the state." The plain, mandatory phrasing of the statute sets forth a requirement that stamping agents affix tax stamps to all cigarettes the state has the

power to tax, which includes those sold by reservation retailers for re-sale to the public. *See*Dep't of Taxation & Fin. of NY v. Milhelm Attea & Bros., Inc., 512 U.S. at 61, 114 S.Ct. 2028.In reaching this conclusion, the Court follows "[t]he preeminent canon of statutory interpretation" which requires a court to " presume that the legislature says in a statute what it means and means in a statute what it says there." *Bed-Roc Ltd., LLC v. United States*, 541 U.S. 176, 183, 124 S.Ct. 1587, 158 L.Ed.2d 338 (2004) (citation omitted).

City of New York v. Milhelm Attea & Bros., Inc., 550 F.Supp.2d 332, 346 (E.D.NY 2008). Furthermore,

The 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, and that a New York State court has upheld the rationality of that policy.*See*In re of New York Assoc. of Convenience Stores v. Urbach, 275 AD2d 520, 522,712 N.Y.S.2d 220, 222 (N.Y.App.Div. 2000). However, an enforcement decision by the Department does not serve to obviate state legislation.

Id. 550 F.Supp.2d at 347.Nor is there any indication that the forbearance policy extends to non-reservation sales to the public, despite the department's refusal to aid defendants' investigation.

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