

STATE OF NEW YORK
SUPREME COURT

ALBANY COUNTY

In the Matter of the Application of
THE COUNTY OF SENECA,
a municipal corporation of
the State of New York,

Petitioner,

- against -

Decision, Order & Judgment
Index No.: 3172-06

ANDREW S. ERISTOFF, as the Commissioner,
New York State Department of Taxation and
Finance, MILHEM ATTEA & BROS., INC.,
DAY WHOLESALE INC., GUTLOVE & SHIRVINT,
MAURO PENNISI, FRANK COLUCCI, INC., and
CAYUGA INDIAN NATION OF NEW YORK,
D/B/A CAYUGA ENTERPRISES
D/B/A LAKESIDE TRADING

Respondents.

Supreme Court, Albany County
RJI# 01-06-ST6727
Special Term

Present: E. Michael Kavanagh, JSC

Appearances:

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Kavanagh, J

The petitioner commenced this article 78 proceeding seeking a writ of mandamus to compel the respondents to enforce articles 20 and 29 of the Tax Law. Petitioner seeks to challenge the long-standing executive policy which does not enforce these laws as they apply to Native Americans and allows them to sell untaxed cigarette and gasoline products to non-Native Americans who purchase them on tribal lands.

Respondent Eristoff has moved to dismiss the proceeding on the grounds that the petitioner lacks capacity to sue and that the petition fails to state a cause of action. Respondents Milhelm Attea [sued herein as Milhem Attea], Gutlove & Shirvint and Mauro Pennisi have separately moved to dismiss the proceeding on the grounds that 1) the petition fails to state a cause of action against them as wholesalers, 2) the policy issues raised herein are non-justiciable, 3) Tax Law § 471-e is not effective due to the Department's failure to promulgate rules and regulations implementing these laws required by the statute, 4) Tax Law § 471-e, is preempted by federal law because it impinges upon tribal self-government and imposes impermissible burdens upon Indian Traders, 5) Tax Law § 471-e unlawfully delegates the administration of a tax exemption coupon system to Indian Nations and Tribes in violation of the New York State Constitution, and 6) the Court should not proceed in the absence of Indian Nations and Tribes which may be inequitably affected by a judgment herein¹. Respondent Mauro Pennisi has also requested an award of sanctions. The state respondents have requested that if their motion to dismiss the proceeding is denied, they be granted an opportunity to address these additional issues, which go to the merits of the controversy.

Respondents seek to dismiss the proceeding on the threshold issue that petitioner Seneca County does not have capacity to bring an action against the New York State Tax Commissioner Eristoff to compel enforcement of general tax laws. "As a general rule,

¹ These entities cannot be made parties to this proceeding because of sovereign immunity. In that regard, Respondent Cayuga nation moves to dismiss because of its status as an independent nation not subject to this jurisdiction.

municipal corporate bodies, as subdivisions of the state, cannot contest the actions of the state which affect them in their governmental capacity or as representatives of their inhabitants (see *City of New York v State of New York*, 86 NY2d 286, 289-290 [1995]).” (*Matter of County of Oswego v Travis*, 16 AD3d 733, 735 [3d Dept 2005]; see also *Matter of Town of Riverhead v New York State Office of Real Prop. Servs.*, 21 AD3d 1116, 1117 [2d Dept 2005]).

“The only exceptions to the general rule barring local governmental challenges to State legislation which have been identified in the case law are: (1) an express statutory authorization to bring such a suit (*County of Albany v Hooker*, 204 NY, at 9, *supra*); (2) where the State legislation adversely affects a municipality's proprietary interest in a specific fund of moneys (*County of Rensselaer v Regan*, 173 AD2d 37, *affd* 80 NY2d 988; *Matter of Town of Moreau v County of Saratoga*, 142 AD2d 864); (3) where the State statute impinges upon ‘Home Rule’ powers of a municipality constitutionally guaranteed under article IX of the State Constitution (*Town of Black Brook v State of New York*, 41 NY2d 486); and (4) where ‘the municipal challengers assert that if they are obliged to comply with the State statute they will by that very compliance be forced to violate a constitutional proscription’ (*Matter of Jeter v Ellenville Cent. School Dist.*, 41 NY2d 283, 287 [citing *Board of Educ. v Allen*, 20 NY2d 109, *affd* 392 US 236]).” (*City of New York v State of New York*, 86 NY2d 286, 291-292 [1995]).

Petitioner has not alleged that it has received any express statutory authorization to bring this proceeding. Moreover, the fact that Tax Law § 1250 by its terms provides that sales taxes shall be administered and collected by the state tax commission negates any inference that counties have a right to control the collection of the taxes (see *Matter of Town of Riverhead v New York State Bd. of Real Prop. Servs.*, 5 NY3d 36, 42-43 [2005]). Nor does the absence of enforcement of sales tax laws impact “home rule” powers. There is also no allegation that the failure to collect sales taxes will force petitioner to violate any constitutional proscription.

The only exception to this general rule that might apply to these facts is petitioner's

contention that the Tax Commissioner's decision not to enforce this law and collect these taxes effects its interest in a specific fund of money. In order for such exception to apply, there must be a specific fund of money in existence (*see County of Albany v Hooker*, 204 NY 1, 18 [1912]; *see also City of New York v State of New York*, *supra* at 294) to which the petitioner has an immediate right to possession (*see Matter of Town of Moreau v Saratoga County*, 142 AD2d 864, 865 [3d Dept 1988]). Petitioner does not contend that these tax revenues have been collected or contest how they have been allocated. Instead, petitioner seeks to compel respondent Eristoff to create a fund of money by collecting sales taxes and than distribute it. This is an administrative process which is not subject to such a challenge.


Therefore petitioner does not have capacity to maintain the instant proceeding. The respondents' motions to dismiss on that ground is granted. The motion to dismiss on the ground of sovereign immunity is rendered moot and shall be denied. It is further determined that petitioners' claims are not frivolous within the meaning of 22 NYCRR § 130-1.1 and the request for sanctions is denied.

Accordingly, it is hereby

ORDERED and **ADJUDGED** that the petition is hereby dismissed in all respects. The motion to dismiss on the ground of sovereign immunity and the request for sanctions are hereby denied.

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

SO ORDERED AND ADJUDGED!



E. Michael Kayanagh, JSC
11/16/06

Dated:

Kingston, New York

Papers Considered:

Notice of petition; petition with exhibits; affidavit of James Bastian with exhibit; affidavit of Donald Wayne Brewer; affidavit of Nicholas A. Sciotti
State respondents' notice of motion; affirmation of David B. Roberts, Esq. with exhibits; memorandum of law
Respondent Gutlove & Shirvint's notice of motion; affidavit of Timothy M. O'Mara, Esq.; affidavit of Joseph Ruda
Wilhelm Attea's notice of motion; affidavit of Joseph E. Zdarsky, Esq. with exhibits; affidavit of Rosemary Saffire with exhibit; memorandum of law
Mauro Pennisi's notice of motion; affirmation of Robert D. Werth, Esq. with exhibit
Cayuga Indian Nation's notice of motion; affidavit of Lee Alcott, Esq.; affidavit of Clint Halftown; affidavit of Betty J. Radford; memorandum of law
Verified answer of Day Wholesale; affidavit of Peter Day; affirmation of Margaret A. Murphy, Esq.; Affidavit of Scott B. Maybee; exhibits
Proposed answer of intervenor A. Harris & Associates, LLC; proposed affidavit of Al Harris with exhibits
Affirmation of Steven J. Getman, Esq. with exhibits
Affirmation of David B. Roberts, Esq.
Affirmation of David B. Roberts, Esq.
Reply memorandum of law of Cayuga Indian Nation