



United States Department of the Interior

IN REPLY REFER TO:

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OFFICE OF THE SOLICITOR
Office of the Field Solicitor
686 Federal Building, Fort Snelling
Twin Cities, Minnesota 55111

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January 24, 1979

Mr. Edwin L. Demery
Area Director
Minneapolis Area Office
Bureau of Indian Affairs
831 Second Avenue South
Minneapolis, MN 55402

Dear Mr. Demery:

This will respond to two letters from your office requesting that we examine the implications of the State of Wisconsin's excise tax for the sales of cigarettes through outlets which might be licensed by Wisconsin Indian tribes. The first request dated October 2, 1978, asked for a review of the implications of the tax for on-reservation sales. The second, dated January 4, 1979, forwarded a letter to the Superintendent of the Great Lakes Agency from Mr. Ronald Peterson, and asked that we address a plan of Mr. Peterson's under which he would act as a broker for tribally licensed cigarette sellers, bringing untaxed cigarettes into Wisconsin, storing them on a reservation, and selling them to tribally licensed outlets located perhaps on the same reservation or perhaps on other reservations in Wisconsin or Minnesota.

At the outset, we must caution the Bureau, the tribes, and all other interested persons that there is a case presently pending before the United States Supreme Court which may well be dispositive of most of the questions which the two letters raise. The State of Washington has appealed the United States District Court's decision in Confederated Tribes of the Colville Reservation v. State of Washington, 446 F.Supp. 1339 (E.D.Wash. 1978), appeal pending, 47 U.S.L.W. 3278 (1978) (No. 78-630). In that case, a divided three-judge District Court held that the cigarette sales, licensing, and taxation systems of the Colville; Lummi, Makah, and Yakima Tribes of Washington, together with the federal scheme for licensing Indian traders, operated to preclude the imposition of the State's excise taxes on non-Indian buyers of Tribally-sold cigarettes. The court based its decision on two independent grounds: first, it held that the State's tax was preempted, because the regulatory scheme which the Tribes and the United States had adopted was comprehensive and would be impeded by the imposition of the State's tax; second, it held that since the effect of the State's tax would be to substantially reduce the monies available to the Tribes for social and economic development programs, the tax's imposition would constitute an unauthorized interference with the Tribe's right to self-government. We recently spoke with the attorney, in the office of the Washington Attorney General, who is presently responsible for the State's

appeal of the case, and we were informed that probably within a month the Supreme Court will decide whether it wishes to hear the appeal. Because of the importance which the case might have for the questions which we will discuss below, and perhaps for much broader areas of Indian law as well, we will keep you apprised of its status.

Turning to the matters raised by the two letters, we think that perhaps the clearest discussion can be provided by first identifying the several specific questions which we see raised by the plans which the letters describe, and then simply discussing those issues in serial fashion. Taking the plans together, we see four major questions raised: (1) By licensing shops (which are also federally licensed as Indian traders) to sell Tribally-owned tobacco products on reservations, and by imposing taxes on the sales of such tobacco, can Indian tribes in Wisconsin avoid the imposition of otherwise applicable Wisconsin taxes on sales to non-Indians? (2) Can an Indian broker purchase untaxed cigarettes outside the State of Wisconsin, transport them into the State, and warehouse and sell them to tribes, perhaps not on the same reservation, without paying otherwise applicable Wisconsin taxes, and without acquiring a Wisconsin distributor's license? (3) Would the transactions described in question number (2), above, perhaps run afoul of the recently passed, cigarette-related amendment to the Federal racketeering statutes? (4) Could the Great Lakes Inter-Tribal Council itself establish the cigarette taxing and sales scheme contemplated by question number (1)?

(1) Discussion of the first question can sensibly begin with the observation that in order for a tribal cigarette sales plan to have substantial success, it is necessary that no event in the chain of events involved in the plan can be taxable by the State. If one event is taxable, the cigarettes presumably could not be priced in such a fashion as to give the Tribes the competitive edge which such a plan would require.

The pertinence of this observation derives from the fact that under the model ordinance with which we have been furnished, and which we understand to be contemplated for use if a tribal cigarette sales plan is adopted by some Wisconsin tribe, there are two sets of events on which the State might seek to impose its tax:* the purchase and possession of the cigarettes by the Tribes, and the subsequent purchase and possession of the cigarettes by non-Indian**

* The ordinance appears to have been based upon the one adopted by the Colville, Makah, and Lummi Tribes, which is discussed in the Colville case. It contemplates no intermediate transfer of the cigarettes from the Tribe to the tribally licensed dealer. Instead, the Tribe would retain ownership of the cigarettes sold through licensed outlets, and would simply permit the outlet's operator to sell the cigarettes for the Tribe. The operator would collect and remit the Tribe's tax, together with a sum equal to the amount which the Tribe paid for cigarettes, and would retain as a commission the net profits from the sale.

** Any sales by a tribal or tribally licensed seller, or by a federally licensed trader, to an Indian on a reservation would not be taxable in Wisconsin or anywhere else. Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976); Warren Trading Post v. Arizona Tax Commission, 380 U.S. 685, 85 S.Ct. 1242, 14 L.Ed.2d 165 (1965); and Bryan v. Itasca County, 426 U.S. 373, 96 S.Ct. 2102, 48 L.Ed.2d 710 (1976).

consumers. Of these, the second--the Tribe's purchase and possession of the cigarettes--clearly is not taxable by the State, presuming the purchase and possession occurs within a reservation. But we think that Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976) makes it clear that this tribal immunity does not mean that the other set of events--the purchase, possession, and use of the cigarettes by the non-Indians--is also non-taxable. And this fact is of critical importance in Wisconsin, where the statutory scheme for taxing cigarettes provides that if a consumer holds cigarettes which have not been taxed by the State, the consumer is liable for a "use tax" in the same amount as the tax which the State would otherwise have imposed before the cigarettes were sold. See Wis. Stat. §139.33. Obviously, if this "use tax" can be imposed on purchases from the tribes, the tribes' own immunity would be irrelevant to the success of their sales plan.

In this respect, the situation in Wisconsin is the same as Washington's situation is in the Colville case. There too--

. . . the legal incidence of the tax [is] upon the seller where the transaction takes place within the state and involves only non-Indians, but upon the buyer when the transaction involves an on-reservation sale by an Indian to a non-Indian.
446 F.Supp., at 1354.*

Thus, it is the Colville court's holding to the effect that the State's tax could not be imposed upon non-Indian buyers which makes the case so centrally important to the Wisconsin situation: if the case's holding on this point stands, there would appear to be no bar to the implementation of a similar system in Wisconsin.

It should be stressed, however, that even if the District Court's decision in the Colville case does survive appeal, tribes wishing to place themselves within the case's ambit should take care to assure that revenues generated by their sales plans will be used for programs of a plainly governmental nature. The Colville opinion stresses the importance of such programs both to its holdings that the Tribes' plan pre-empted the State's tax, and to its further holding that the Tribe's right to self-government would be interfered with if the state's tax were imposed. See e.g., 446 F.Supp., at 1361.

(2) The second question concerning the extent of state tax immunity which would be enjoyed by a cigarette broker who imported cigarettes into a Wisconsin reservation for sale to Indian tribes, does not appear to necessarily involve the same legal issues as the first. Presuming, as we do, that the broker is an Indian (as Mr. Peterson is) and that the broker's sales to the tribes take place on a reservation, we think that Moe v. Confederated Salish

*Compare Vending Unlimited, Inc. v. State of Florida, 5 Indian L. Rep. G-21 (Cir.Ct.Fla., March 3, 1978), where the incidence of the only state tax imposed on cigarettes fell upon a tribally owned "smoke shop," and where, therefore, the state could collect no taxes on the cigarettes sold by the shop.

and Kootenai Tribes, supra, prohibits the imposition of any Wisconsin tax-- whether it be sales tax, occupation tax, or use tax--either on the broker or the broker's immediate buyers. And, further presuming that the broker was a federally licensed Indian trader, the same result also would flow from Warren Trading Post v. Arizona Tax Commission, 380 U.S. 685, 85 S.Ct. 1242, 14 L.Ed.2d 165 (1965). However, if the broker also sold to non-Indians, outside of the sort of tribally licensed and run scheme which we have discussed in relation to question (1), we think Moe would require both that the state's taxes be imposed on the buyers and that the broker obtain a Wisconsin cigarette distributor's license under the provisions of Wis. Stat. §139.34.

(3) The third question, concerning the recently passed federal legislation dealing with contraband cigarettes, has a relatively straightforward answer. The legislation prohibits the transportation, possession, or sale of more than 60,000 cigarettes for which "applicable State taxes" have not been paid. Pub. L. No. 95-575, 92 Stat. 2463 (1978). Thus, from the face of the statute we think it is plain that if a series of transactions is legally immune from state taxes, the taxes would not be "applicable," and the federal prohibitions would not operate. We are reinforced in this view by a portion of the Act's legislative history, which notes that one of the problems which the Act seeks to reach is the resale of large quantities of cigarettes which have been purchased from legitimate tax-free outlets such as "international points of entry, military post exchanges, and Indian reservations." S.Rep.No. 962, 95th Cong., 2d Sess., reprinted in (1978) U.S. Code Cong. & Ad. News 7026, 7028 (emphasis supplied). By framing the matter in this way, we think Congress explicitly recognized that cigarette sales on Indian reservations may be properly free of state taxes; and it directed its concern not at any of the transactions relating to such sales but at "bootleg" resales of cigarettes purchased from such sources. (We note that since the model ordinance which has been submitted to us contains a provision limiting the numbers of cigarette cartons which can be purchased by a single person, its implementation and enforcement would foreclose any massive resale problem.)

Before leaving this point, we should note that the Federal legislation contains certain recordkeeping and reporting requirements for persons and entities which deal in large numbers of cigarettes. By its terms, the statute does not limit the applicability of these provisions to transactions where a state tax is "applicable," and we therefore believe that on-reservation Indian sales may be subject to them. However, since the nature and extent of these requirements is a matter to be established by regulations promulgated by the Secretary of the Treasury, we suggest that specific inquiry on this point is not appropriate until and unless a specific plan is adopted by a tribe.

(4) The final question which we noted above--as to whether the Great Lakes Inter-Tribal Council can adopt a taxation and licensing ordinance governing cigarette sales on member reservations--has a short answer: no. The Council

has no legislative authority over any of its member tribes. Such authority is retained by each tribe, and must be exercised within the bounds of their respective Constitutions.

If we can be of further assistance concerning these matters, please do not hesitate to call John Jacobson of this office.

Sincerely yours,



Elmer T. Nitzschke
Field Solicitor