

## **TSB-A-06(2)M is revoked**

As of February 23, 2010, TSB-A-06(2)M is revoked. Current judicial injunctions that prevent the Department from enforcing the tax laws as they relate to sales by stamping agents to reservation sellers and reservation sales to non-Indians remain in place.

**New York State Department of Taxation and Finance**  
**Office of Tax Policy Analysis**  
**Technical Services Division**

TSB-A-06(2)M  
Miscellaneous Tax  
March 16, 2006

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. M060316A

On March 16, 2006, the Department of Taxation and Finance received a Petition for Advisory Opinion from Milhem Attea & Bros., Inc., 1509 Clinton Street, Buffalo, New York 14206.

The issues raised by Petitioner, Milhem Attea & Bros., Inc., are:

1. What is the Department of Taxation and Finance's current policy with respect to the sale of cigarettes from stamping agents to Indian Nations and Indian retailers making sales from reservations?
2. Has the Department of Taxation and Finance altered its long-standing policy as a result of the enactment of section 471-e of the Tax Law?
3. In light of section 471-e of the Tax Law, does the Department of Taxation and Finance have any plans to issue assessments to stamping agents regarding the sale of unstamped cigarettes to Indian Nations and Indian retailers making sales from reservations after March 1, 2006?

Petitioner submitted the following facts as the basis for this Advisory Opinion.

Petitioner is a licensed stamping agent which sells cigarettes and other tobacco products at wholesale to Indian Nations and Indian retailers on reservations for resale to the public.

**Applicable law**

Section 471-e of the Tax Law provides, in part:

1. General. (a) 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.

(b) In order to ensure an adequate quantity of cigarettes on Indian reservations which may be purchased by qualified Indians exempt from the cigarette tax, the department shall provide Indian nations and tribes within this state with Indian tax exemption coupons as set forth in this section. A reservation cigarette seller shall be able to present such Indian tax exemption coupons to a wholesale dealer licensed pursuant to this article in order to purchase stamped cigarettes exempt from the imposition of the cigarette tax. Qualified Indians may purchase cigarettes from a reservation cigarette seller exempt from the cigarette tax even though such cigarettes will have an affixed cigarette tax stamp.

2. Indian tax exemption coupons.

(a) Indian tax exemption coupons shall be provided to the recognized governing body of each Indian nation or tribe to ensure that each Indian nation or tribe can obtain cigarettes upon which the tax will not be collected that are for the use or consumption by the nation or tribe or by the members of such nation or tribe. The Indian tax exemption coupons shall be provided to the Indian nations or tribes on a quarterly basis for each of the four quarters beginning with the first day of December, March, June, and September. It is intended that the Indian nations or tribes will retain the amount of Indian tax exemption coupons they will need each quarter to purchase cigarettes for official nation or tribal use, and will distribute the remaining Indian tax exemption coupons to reservation cigarette sellers on such nations' or tribes' qualified reservations. Only Indian nations or tribes or reservation cigarette sellers on their qualified reservations may redeem such Indian tax exemption coupons pursuant to this section.

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3. Tax exempt purchaser. (a) An Indian nation or tribe may purchase cigarettes for its own official use or consumption from a wholesale dealer licensed pursuant to this article without payment of the cigarette tax to the extent that the Indian nation or tribe provides such wholesale dealer with Indian tax exemption coupons entitling the Indian nation or tribe to purchase such quantities of cigarettes as allowed for on each Indian tax exemption coupon without paying the cigarette tax.

(b) A qualified Indian may purchase cigarettes for his or her own use or consumption without payment of the cigarette tax, provided that the qualified Indian makes such purchase on a qualified reservation.

(c) A reservation cigarette seller may purchase cigarettes for resale without payment of the cigarette tax from a wholesale dealer licensed pursuant to this article:

(i) provided that such reservation cigarette seller brings such cigarettes or causes them to be delivered onto a qualified reservation for resale on such reservation;

(ii) to the extent that such reservation cigarette seller provides such wholesale dealer with Indian tax exemption coupons entitling the reservation cigarette seller to purchase such quantities of cigarettes as allowed for on each Indian tax exemption coupon without paying the cigarette tax; and

(iii) provided that such cigarettes are affixed with a cigarette tax stamp.

(d) A wholesale dealer shall not collect the cigarette tax from any purchaser to the extent the purchaser gives such wholesale dealer Indian tax exemption coupons entitling the purchaser to purchase such quantities of cigarettes as allowed for on each such Indian tax exemption coupon without paying the cigarette tax.

## Opinion

As Petitioner is probably aware, the New York State Department of Taxation and Finance (the Department) has a 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. In a challenge to the State's policy (*New York State Association of Convenience Stores v. Urbach*), the Court held that the policy of indefinite forbearance was rationally based, and therefore, the petitioners' Article 78 proceeding attempting to compel the State to enforce the collection of excise and sales taxes pertaining to on-reservation sales of cigarettes and motor fuel to non-Indian consumers was dismissed. This policy has been reiterated on several occasions by the Department over the years since the decision in *NYACS*.<sup>1</sup>

The Petition specifically asks whether the enactment of section 471-e of the Tax Law has resulted in a change in policy. The Commissioner indicated in his testimony to a joint session of the Legislature's fiscal committees on February 15, 2006 that the Department would not begin enforcement on March 1, 2006 (the effective date of section 471-e). In the Executive Budget, several amendments were proposed to correct deficiencies in the law. Specifically, the amendments include the creation of an Indian export decal system relating to out-of-state sales, a provision to allow qualified Indians to purchase tax exempt products from any qualified reservation and changes to facilitate the negotiation of tax agreements with the various Nations.

These amendments will respect Indian sovereignty and avoid excessive State entanglement in Indian commerce. Pending resolution of these issues, it would be premature to

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<sup>1</sup> See, for example, Department affidavit dated February 10, 2006 in *Milhelm Attea & Brothers, Inc v. Spitzer*; Department affidavit in *Ward v. Spitzer* dated July 7, 2003; Department Office of Counsel letter dated June 12, 2003; and Department TSB-M-00(4)M dated October 20, 2000 (superseded by TSB-M-03(1)M)

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begin enforcement. Moreover, it is likely that a party will commence a lawsuit or otherwise challenge the new law, which could have the effect of invalidating or postponing the new statutory scheme.<sup>2</sup> Therefore, the Department has no intention to alter its long-standing policy until such issues are fully addressed and considered. However, if the Department decides to revise its policy in the future, it will provide adequate notice to all affected stamping agents.

Addressing Petitioner's last question with respect to the possibility of issuing assessments in light of the enactment of section 471-e, the Department will not issue such assessments with respect to transactions occurring during the period of forbearance as that would be inconsistent with the State's long-standing policy.

DATED: March 16, 2006

NOTE: The opinions expressed in Advisory Opinions are limited to the facts set forth therein.

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<sup>2</sup> A lawsuit was, in fact, recently commenced against Department and Attorney General Spitzer challenging section 471 and the entire cigarette taxing scheme, but was withdrawn on the eve of a Temporary Restraining Order hearing.