

STATE OF NEW YORK
DEPARTMENT OF TAXATION AND FINANCE
COMMISSIONER OF TAXATION AND FINANCE
ALBANY, NEW YORK

Pursuant to the authority contained in subdivision First of section 171; subdivisions (1), (4), and (5) of section 471; section 471-e; and section 475 (not subdivided) of the Tax Law, the First Deputy Commissioner of Taxation and Finance, being duly authorized to act due to the vacancy in the office of the Commissioner of Taxation and Finance, hereby makes and adopts the following amendments to the Cigarette Tax Regulations, as published in Article 1 of Subchapter I of Chapter I, of Title 20 of the Official Compilation of Codes, Rules and Regulations of the State of New York.

Section 1. New section 74.6 is added to such regulations to read as follows:

Sec. 74.6 Taxes imposed on qualified reservations. (Tax Law, Secs. 470, 471, 471-e, and 475)

(a) "General." (1) 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 are not exempt from paying the cigarette tax when purchasing cigarettes within this state.

(2) All cigarettes sold on an Indian reservation to non-members of the Indian nation or tribe and to non-Indians will be taxed, and evidence of such tax will be by means of an affixed cigarette tax stamp.

(3) All cigarettes sold by agents and wholesale dealers to Indian nations or tribes or reservation cigarette sellers located on Indian reservations must bear a tax stamp.

(4) As provided in subdivision (b) of this section, an Indian nation or tribe may elect to participate in the Indian tax exemption coupon system established in section 471-e of the Tax Law which provides a mechanism

for the collection of tax on cigarette sales on its qualified reservation to non-members of the Indian nation or tribe and to non-Indians and for the delivery of quantities of tax-exempt cigarettes to the Indian nation or tribe for the use or consumption of the nation or tribe or by its members.

(5) If an Indian nation or tribe within this state does not elect to participate in the Indian tax exemption coupon system, the prior approval system established in section 471(5) of the Tax Law will be the mechanism for the delivery of quantities of tax-exempt cigarettes to the Indian nation or tribe for the use or consumption of the nation or tribe or by its members as set forth in subdivision (d) of this section.

(b) "Election to participate in the Indian tax exemption coupon system." (1)(i) In order to ensure an adequate quantity of cigarettes on Indian reservations that may be purchased by an Indian nation or tribe or by its members for their use or consumption exempt from tax, the recognized governing body of an Indian nation or tribe may annually elect for the twelve-month period beginning September 1 and ending August 31 to participate in the Indian tax exemption coupon system for that period. Except as otherwise provided in subparagraph (ii) of this paragraph, such election must be made by the August 15 occurring prior to the start of the twelve-month period.

(ii) The department may allow the recognized governing body of an Indian nation or tribe to elect to participate in the Indian tax exemption coupon system after the August 15 date prescribed in subparagraph (i). If the recognized governing body of an Indian nation or tribe elects to participate in the Indian tax exemption coupon system after August 15 in accordance with this subparagraph, the Indian tax exemption coupon system shall apply with respect to that Indian nation or tribe for the remainder of the twelve-month period beginning September 1. In this case, the amount of coupons provided to the recognized governing body for the first quarter during which the election applies shall be reduced to account for the quantity of tax-exempt cigarettes sold to the Indian nation or tribe or a reservation cigarette seller in compliance with the prior approval system during the quarter.

(2) If the recognized governing body of an Indian nation or tribe timely elects to participate in the Indian tax exemption coupon system for the twelve-month period beginning September 1 and ending August 31, the Tax Department will provide the Indian nation or tribe with Indian tax exemption coupons for that period as set forth in subdivision (c) of this section.

(3) For any twelve-month period beginning September 1 and ending August 31 that the recognized governing body of an Indian nation or tribe does not elect to participate in the Indian tax exemption coupon system by the August 15 occurring prior to the start of such period, no Indian tax exemption coupons will be provided to that Indian nation or tribe for that twelve-month period. Instead, for that twelve-month period, the prior approval system set forth in subdivision (d) of this section will be used to ensure that the Indian nation or tribe can obtain cigarettes upon which the tax will not be collected that are for the use or consumption of the nation or tribe or by its members.

(c) "Indian tax exemption coupon system."

(1) If the recognized governing body of an Indian nation or tribe timely elects to participate in the Indian tax exemption coupon system for any twelve-month period beginning September 1 and ending August 31, the Indian nation or tribe and reservation cigarette sellers located on the nation's or tribe's qualified reservation will be able to present Indian tax exemption coupons to wholesale dealers licensed under article 20 of the Tax Law in order to purchase stamped cigarettes exempt from the imposition of the cigarette tax. Qualified Indians may purchase cigarettes from a reservation cigarette seller on their qualified reservations exempt from the cigarette tax even though such cigarettes will have an affixed cigarette tax stamp.

(2) The Indian tax exemption coupons will be provided to such governing body to ensure that the 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 its members. The Indian tax exemption coupons will be provided to the Indian nation or tribe on a quarterly basis for each quarter of the twelve-month period that the nation or tribe timely

elects to participate in, beginning with the first day of September, December, March, and June. It is intended that 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.

(3) The amount of Indian tax exemption coupons to be given to the recognized governing body of each Indian nation or tribe that elects to participate in the Indian tax exemption coupon system will be based upon the probable demand of the qualified Indians on such nation's or tribe's qualified reservation plus the amount needed for official nation or tribal use.

(4) Each Indian tax exemption coupon will consist of a retention portion for a wholesale dealer's recordkeeping purposes and a redemption portion for a wholesale dealer's submission to the department when claiming a refund as set forth in paragraph (6) of this section, and will contain the following information:

- (i) the identity of the Indian nation or tribe to which it is issued;
- (ii) the identity and the quantity of the product for which it is issued;
- (iii) the date of issuance and the date of expiration; and
- (iv) any other information as the commissioner may deem appropriate.

(5) Wholesale dealers may sell only tax-stamped cigarettes to Indian nations and tribes, reservation cigarette sellers, and all other purchasers, but shall not collect the tax from any purchaser to the extent the purchaser gives the wholesale dealer Indian tax exemption coupons entitling the purchaser to purchase such quantities of cigarettes as allowed for on each Indian tax exemption coupon without paying the tax. Any sales of stamped untaxed packages of cigarettes made by an agent or a wholesale dealer to an Indian nation or tribe, reservation cigarette seller, and all other purchasers that are not covered by Indian tax exemption coupons will

be made in violation of the terms of Article 20 of the Tax Law.

(6) A wholesale dealer licensed under article 20 of the Tax Law who has one or more Indian tax exemption coupons may file a claim for refund as provided for in Part 77 of this Title with respect to any tax previously paid on cigarettes, as represented by the affixed tax stamps, it sold without collecting the tax because it accepted an Indian tax exemption coupon from its purchaser pursuant to this Part, except that no deduction for commissions is required. The department will issue expedited refunds or credits to wholesale dealers under the Indian tax exemption coupon system.

(d) "Prior approval system. " (1) For any twelve-month period beginning September 1 and ending August 31 that a recognized governing body of an Indian nation or tribe has not timely elected to participate in the Indian tax exemption coupon system, a prior approval system as set forth in this subdivision and pursuant to section 471(5) of the Tax Law will be used to ensure an adequate quantity of tax-exempt cigarettes on such Indian nation's or tribe's qualified reservation for the use or consumption of the nation or tribe or by its members. Under this system the Indian nation or tribe or a reservation cigarette seller located on its reservation will be entitled to purchase up to a certain number of untaxed packages of cigarettes from New York State licensed cigarette stamping agents and wholesale dealers. Such packages of cigarettes will nonetheless bear an affixed cigarette tax stamp.

(2) The amount of stamped untaxed packages of cigarettes for each Indian nation or tribe will be an amount determined by the department based upon the probable demand of the qualified Indians on the nation's or tribe's qualified reservation plus the amount needed for official nation or tribal use.

(3) Prior approval as to the amount of stamped untaxed packages of cigarettes that agents and wholesale dealers may sell to Indian nations or tribes or reservation cigarette sellers must be obtained from the Tax Department by the agents and wholesale dealers prior to making such sales. Any sales of stamped untaxed packages of cigarettes made by an agent or a wholesale dealer to an Indian nation or tribe or reservation

cigarette seller without obtaining such prior approval will be made in violation of the terms of Article 20 of the Tax Law. The manner and form of prior approval will be determined by the department, and may include the use of an interactive Web application.

(4) A wholesale dealer licensed under article 20 of the Tax Law may file a claim for refund as provided for in Part 77 of this Title with respect to any tax, as represented by the affixed tax stamps, previously paid on cigarettes it sold without collecting the tax pursuant to this subdivision, except that no deduction for commissions is required. The department will issue expedited refunds or credits to wholesale dealers under the prior approval system.

(e) "Probable demand. (1) Probable demand will be determined by reference to, among other data, the United States average cigarette consumption per capita, as compiled for the most recently completed calendar or fiscal year, multiplied by the number of qualified Indians for each such affected Indian nation or tribe. Except with respect to the twelve-month period beginning September 1, 2010, which determination is set forth below, each June the Tax Department will determine the annual amount of stamped untaxed packages of cigarettes for each of the Indian nations or tribes for the forthcoming twelve-month period beginning September 1. The annual amount of stamped untaxed packages of cigarettes will be determined using a probable demand methodology as follows: (A) the most recent U.S. Census data available on tribal populations in New York State is obtained and then increased by ten percent for each Indian nation or tribe to allow for potential undercounting in Census enumeration and for nation or tribal use and (B) each Indian nation's or tribe's adjusted population is then multiplied by average annual per capita consumption amounts, as produced annually by the federal government, for cigarettes. The estimated annual consumption amounts for each Indian nation or tribe are then prorated to quarterly periods for each of the four quarters beginning with the first day of September, December, March, and June. The quarterly consumption amounts are then rounded upward to accommodate cases of 300 packs of 20 cigarettes. Using the methodology above for the twelve-month period

beginning September 1, 2010, the quarterly amounts of stamped untaxed packages of cigarettes for each of the Indian nations or tribes for any quarterly period during which these provisions apply are calculated in the table below. As indicated in paragraph (2) of this subdivision, these amounts are subject to adjustment based on evidence provided by the Indian nations or tribes as to their actual consumption amounts for these periods.

| Indian Nation or Tribe: | NYS Population (2000 census) | Quarterly Cigarette Amount (Packs) |
|--|---------------------------------|--|
| Cayuga | 947 | 20,100 |
| Oneida | 1,473 | 31,200 |
| Onondaga | 2,866 | 60,600 |
| Poospatuck (Unkechaug) | 376 | 8,100 |
| Seneca (Allegany, Cattaraugus, Oil Springs) | 7,967 | 168,600 |
| Shinnecock | 1,915 | 40,500 |
| St. Regis Mohawk | 13,784 | 291,600 |
| Tonawanda Band of Senecas | 256 | 5,700 |
| Tuscarora | 1,025 | 21,900 |
| Total | 30,610 | 648,300 |

(2) In making a determination of probable demand, the department will take into consideration any evidence submitted by the recognized governing body of an Indian nation or tribe relating to such probable demand (e.g., a verifiable record of previous sales to qualified Indians or other statistical evidence) and/or relating to the amount needed for such nation's or tribe's official use. In the case of the annual determination made by the department in June, any such evidence submitted by July 31 will be taken into consideration and any adjustments will be made prior to the twelve-month period beginning September 1 to which the determination relates.

(f) "Tax agreements with Indian nations or tribes." If an Indian nation or tribe enters into an agreement with New York State pursuant to section 471(6) of the Tax Law regarding the sale and distribution of cigarettes

on the nation's or tribe's qualified reservation, the terms of such agreement will take precedence over the provisions of this Part.

Section 2. A new section 74.7 is added to such regulations to read as follows:

74.7 Agent certification (Tax Law sections 471(1) and (4))

(a) "General." (1) Pursuant to section 471(4) of the Tax Law, no person, including but not limited to a tobacco product manufacturer, may sell unstamped packages of cigarettes to any agent until the person selling the unstamped packages of cigarettes (the supplier) receives a certification from such agent purchasing the unstamped packages of cigarettes certifying, in good faith and under penalty of perjury, that none of the unstamped packages of cigarettes the agent will purchase for resale in or into New York State will be resold by the agent in violation of the terms of Article 20 of the Tax Law.

(2) Before an agent may purchase unstamped packages of cigarettes for resale in or into New York State, the agent must provide to the supplier and to the department, in good faith, a certification, under penalty of perjury, that none of the unstamped packages of cigarettes the agent purchases from the supplier will be resold by the agent in violation of the terms of Article 20 of the Tax Law.

(b) "Contents of certification." The certification required by section 471(4) of the Tax Law shall provide, under penalty of perjury, that none of the unstamped packages of cigarettes the agent will purchase for resale in or into New York State from the supplier will be resold by the agent in violation of the terms of Article 20 of the Tax Law or in violation of any rule or regulation adopted pursuant to Article 20. The certification must specifically provide that:

(1) the agent will not resell unstamped packages of cigarettes in or into New York State, except as specifically authorized by law;

(2) the agent will not affix stamps to packages of cigarettes unless the certifications provided for in section 1399-pp of the Public Health Law pursuant to section 480-b of the Tax Law have been provided by the cigarette manufacturer;

(3) the agent will not affix stamps to packages of cigarettes that have not been certified by the cigarette manufacturer and marked as provided for in section 156-c of the Executive Law pursuant to section 480-b of the Tax Law;

(4) the certification applies to each of the agent's purchases for the entire period covered by the certification;

(5) the agent will only make tax-exempt sales of stamped packages of cigarettes to Indian nations or tribes or to reservation cigarette sellers that are in accordance with the provisions of section 74.6 of this Part.

(c) "List of suppliers." Certifications filed with the department must include a list of suppliers from whom the agent will purchase or otherwise acquire unstamped packages of cigarettes.

(d) "Period covered by the certification."

(1) The certification must be filed with the supplier and with the department prior to the first purchase of unstamped packages of cigarettes by the agent from the supplier.

(2) An amended certification and list of suppliers must be filed with the department before the first purchase of unstamped packages of cigarettes from a supplier not listed on the current certification.

(3) The agent will be required to provide a new certification to each supplier and to the department each year on or before the date prescribed by the department.

(e) "Certification signature requirements." (1) The proprietor must sign the certification on behalf of a proprietorship; a general partner must sign the certification on behalf of a partnership; and the president, vice president, treasurer, assistant treasurer, chief accounting officer, or other officer duly authorized must sign on behalf of a corporation.

(2) The certification must be sworn to or affirmed:

- (i) before a New York State notary public or any other person authorized by section 298 of the Real Property Law if the certification is sworn to or affirmed in New York State, or
- (ii) before any officer authorized by, and in the manner described in, section 299 of the Real Property Law if the certification is sworn to or affirmed outside New York State. The proof of authority of the officer issuing the oath or witnessing the affirmation must meet the requirements of section 299-a of the Real Property Law.

Dated: Albany, New York
October 22, 2010

Jamie Woodward
Acting Commissioner and Executive Deputy
Commissioner of Taxation and Finance