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Cigarette tax dispute leaves Day Wholesale facing lawsuits

By JACOB RESNECK, Enterprise Staff Writer

TUPPER LAKE — Day Wholesale is facing several lawsuits seeking damages against cigarette wholesalers who sell untaxed cigarettes to non-natives on Indian reservations in the state. It's a fight that's pitting cigarette wholesalers, the city of New York, Indian reservations and the state's tax and finance authority against each other, with a string of unlikely alliances.

Attorneys for the city of New York said a 2005 city Department of Health survey found that about 15 percent of all smokers consume untaxed cigarettes. In 2004, a state DOH study projected that the state loses as much as \$576 million in lost tax revenue through the sale of untaxed cigarettes, the city's lawsuit said.

"The claim against (wholesalers) is that they're simply selling untaxed cigarettes," city lawyer Eric Proshansky told the Enterprise. The reason the city is aggressively pursuing the case now is to enforce legislation passed in March requiring cigarette taxes and tax stamps on all cigarettes sold within New York state, he said.

Peter Day, owner of Day Wholesale in Tupper Lake, says his company has done nothing wrong and is following the legal advice of the agency that regulates state cigarette tax, the Department of Taxation and Finance.

"The law hasn't really changed," Day said.

In fact, it's this authority in charge of regulating cigarette taxes that is — indirectly — rising to the defense of wholesalers. In a legal opinion released March 16 by the Department of Taxation and Finance, wholesalers were advised that the department, "has no intention to alter its long-standing policy" regarding the sale of untaxed cigarettes on Indian reservations. The new law, the legal opinion said, needs to be amended to respect Indian sovereignty and "avoid excessive entanglement in Indian commerce."

Taxation and Finance spokesman Tom Bergin said he couldn't comment because of the litigation involved, but he confirmed that his department is advising cigarette wholesalers that the law is not being enforced until the law is amended to the satisfaction of the commissioner of Taxation and Finance.

"We said we're not going to enforce this law," Bergin said. "We're going to consider some amendments" before directing wholesalers to change their business practices.

Proshansky said the city takes issue with the Department of Taxation and Finance's selective enforcement of laws.

"We believe, regardless of what an agency does, it's on the books," Proshansky said. "It's a law; you have to obey it — regardless of whether an agency enforces it."

But Day said he and other wholesalers will continue to follow the advice of the Tax and Finance commissioner, and he expects the lawsuits against wholesalers to be thrown out of court.

Day, who employs 22 people in Tupper Lake, said he's been doing business with the Indian reservations for 18 years and is confident that he'll prevail in court. About 80 percent of his revenue is from the sale of cigarettes and tobacco products to Indian reservations, Day is quoted as saying in a deposition with Seneca County attorneys.

Day said the whole issue is the result of rising taxes, which naturally increases demand for tax-free products. With the state collecting \$15 per carton in excise tax and \$3.60 in sales tax, it is the state that profits the most from the sale of cigarette sales, Day said. And New York City collects even more, with an additional \$1.50 per pack.

“The simple solution is for state government to reduce onerous excise taxes on cigarettes, tobacco and motor fuel,” Day said. “Then there would not be the incentive for people to go shopping on the reservations. But all they want is to get the Indians out of the cigarette business.”

In the federal lawsuit, which the wholesalers are expected to answer by the end of the month, the City of New York seeks damages from the wholesalers, including city excise and sales taxes lost as a result of alleged violations of the March statute requiring that cigarettes to non-Indians be taxed.

The lawsuit is also asking the court to cease the practice of selling unstamped cigarettes and tobacco products in the state. This lawsuit, filed in U.S. District Court in Brooklyn last month, was preceded by two similar lawsuits, brought by Seneca County and the New York Association of Convenience Stores.

Day said he’s confident these lawsuits will be thrown out as they impinge on tribal sovereignty, which only the U.S. Congress can legislate.

“The Indian nations have rights and treaties in this state that go back to colonial times,” Day said. “These nations were never defeated; they entered into treaties. They were looked on to be brothers and equals with the Europeans. All we’re asking is that these treaties be recognized and be allowed to have commerce as they’ve always had it.”

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