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Cigarette Tax: Not About Money? (Parts I-III)

Ryan Dreveskracht

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Cigarette Tax: Not About Money?

Dreveskracht, Ryan D

I grew up Longview, Washington. A small town on the banks of the Columbia River, on the Washington-Oregon border, Longview had a few small stores, mostly catering to the logging industry that inundates all small towns in the Pacific Northwest. For Christmas shopping, or, come to think of it, for any big-ticket purchases, my family would hit the 1-5 South to Portland, Oregon.

When I turned sixteen, I got a job and a drivers licence, and it was time to do my own Christmas shopping. By this time, Longview had a mall - complete with a Bon Marché and a Nordstrom - but I still drove to Portland. Probably for the same reason my parents did. Probably for the same reason everyone did. Oregon does not impose a sales tax.

According to the Washington State Revenue Department, local governments lose an estimated \$50 million in tax revenue annually to OregonWashington cross-border shopping.

Apparently, We Were Breaking the Law

When Washington residents make an in-state retail purchase, the sales tax is usually added on by the retailer, who in turn pays it to the Department of Revenue. (Oregonians shopping in Washington may present their Oregon ID to the seller in order to prove an exemption). When Washington's sales tax is not paid on purchases - when purchases are made in Oregon, for instance, where Washington's sales tax is not collected by the seller - a "use tax" is due. The buyer must report this tax to the Department of Revenue by the 15th of the month after the item is first "stored, used, or consumed" in Washington. Use tax also applies on items used in Washington that were purchased in other states that have a sales tax rate lower than Washington's. Use tax rates are the same as sales tax rates, around 7-9%, depending on where in the State the resident lives.

Yet, growing up, I was not afraid that the FBI or the local sheriff's department would be kicking in my door to inspect my presents and arrest my family. And they never did.

That a large percent of Washingtonians flagrantly violate state tax law has been well documented - as has the utter failure of state officials to prosecute. While the tax liability upon the value of the goods being used within a state's boundaries is clear, case law has worked to relieve outof-state sellers of their responsibility to collect and remit the tax - unless they maintain some "physical presence" in the state. In other words, it's not the job of Oregon merchants to collect Washington's taxes. But given the tough fiscal rut that the State is in, one wonders why other efforts are not being made to recoup the almost \$90 million in use tax owed to the State by its own citizens each year.

Tribal Governments as Tax Collectors

Anyone following the news in Indian Country is painfully aware of the most recent stream of headlines like this one from the Syracuse Post-Standard: State Vows to Collect Taxes on Indian Reservation Cigarette Sales. These articles have evoked comments and op-eds, like this one from the Cayuga County Citizen: Indians Should Pay Their Fair Share of Taxes.

This media brouhaha is the result of a recent court decision out of the U.S. Court of Appeals for the Second Circuit, holding that Indian merchants selling cigarettes to non-Indians in Indian country have to collect sales tax for the State of New York. Subsequent to the Second Circuit's opinion, the Seneca Nation applied for a temporary restraining order barring enforcement of the law, arguing that the State violated procedural requirements in adopting its tax regulations. As it stands, the State is enjoined from requiring tribes to carry the tax burden at least until June 20th, when the parties will make their case in front of a judge.

Contrary to popular belief indicated in media accounts, the State is not doing any tax collecting. The State is actually completely barred, pursuant to well-established federal law, from collecting anything from tribes or their citizens. Rather, the statute at issue is meant to "precollect" the New York sales tax from cigarette wholesalers, who pass that cost on to individual merchants, who pass the cost along the distribution chain to the non-Indian consumer. In essence, the statutory scheme forces tribal retailers - and in those instances where tribes themselves are the retailer, tribal governments - to collect taxes for the State of New York. If the law stands, tribes will have been reduced to either staying out of the tobacco market or being an administrator and executrix of another sovereign's laws. A tax collector.

Not About Money

In its ruling, the Second Circuit purportedly weighed the state/tribal interests, finding that New York's "valid interest in ensuring compliance with lawful taxes that might easily be evaded" outweighed the tribes' interest in inherent sovereignty.

Indeed, it is New York citizens, not tribes, who are evading tax liability. New York State has a similar tax structure as Washington. If a sales tax has not been collected by the merchant, New York citizens must report and pay a use tax directly to the NY Tax Department. Sales of most tangible property - including cigarettes and other tobacco products, which have a specific reporting form for consumer ease - are subject to use tax. It is estimated

that New York loses an estimated \$1.4 billion a year to uncollected use tax.

But whose fault is it that New York is not enforcing its own laws upon its own citizens? In weighing the state/tribal interests, what if the state's laws were not so shifty? Where would the court stand if the state chose to enforce its law - if the state took steps to ensure that its laws were not "easily evaded"?

At least, the "balancing test" employed by the Second Circuit is inapplicable here - where one side can determine the weight of the other. However, considering that adjacent states often have "widely divergent taxes on the same product, industry or service" - but the courts have reserved this "balancing test" for tribal governments - at most, the test is a pretense used to eviscerate tribal sovereignty.

The irony is that the alleged \$180 million that New York is losing when its own citizens purchase cigarettes on Indian land is a small fraction of the \$1.4 billion that the state would receive if it were to enforce its own laws against those New York citizens. According to the Court, New York actually considered this option, but ultimately determined that collection of its tax "through efforts directed at individual buyers is impractical, and that, if it is to be collected at all, the tax must be precollected." In other words, the State would rather invade the sovereignty of tribal governments, in order to obtain less than one-tenth of the amount due to it, than to make efforts to enforce its own laws against its own citizens. Not to mention the racking up of exorbitant legal fees.

No, this is not about money - it's about bossing tribal governments around. It's about showing tribes what, exactly, their sovereignty is worth in the eyes of the state. Apparently, it's not much.

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Part II: Cigarette Tax - Still Not About Money

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Last month I wrote an article in the Native American Times where I argued that, from an economic standpoint, New York State's recent legal attack on tribal sovereignty made absolutely no sense. I argued that the state's approach to taxation - forcing tribal governments to act as New York tax collectors - had to be more involved than meets the eye. In essence, the state's tax enforcement policies allow \$1.4 billion to slip through its hands. Instead of focusing on this revenue, however, New York has chosen to specifically target tribal smoke shops, a strategy that recoups only a very small fraction of what the state would recover were it to use those same resources to force its own citizens to comply with its own tax laws on its own land.

New York's threatened attacks are now a reality. Since June 21, 2011, the state has ramped up its enforcement by trailing vehicles that leave the Reservations, inspecting tax stamping agents' inventories, and secretly conducting surveillance on Reservation smoke shops. Although not quite as vulgar as New York City Mayor Michael Bloomberg's proposal of getting "a cowboy hat and shotgun [and] standing in the middle of the New York State Thruway," the recent attacks on tribal sovereignty are offensive nonetheless.

In part II of this three-part series, I put forth another reason that New York's recent attack makes no sense: We've already been through this, and we know the outcome. Although tribal retailers are legally obliged to collect state taxes on sales to nonIndians in many instances, states do not have the jurisdiction to enforce their law on Reservation sales. When compared to other alternatives, states actually lose a lot of potential revenue by engaging in zero-sum tax battles with tribal governments.

Early 1990s Tribal-State Tobacco Taxation in Oklahoma

In 1987 the U.S. Supreme Court handed down *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), initiating a nationwide boom in Indian gaming. Once gaming exposed the geopolitical barrier shielding Indian country from civil-regulatory jurisdiction, Indian entrepreneurs began opening smoke shops - exposing a comparative tax advantage that would be easily exploited by non-Indians in states with shoddy tax enforcement policies.

Oklahoma immediately put the hit on tribal smoke shops. County sheriffs and the Oklahoma Tax Commission (OTC) began issuing warnings and tickets to shop operators accused of tax evasion. But since the OTC did not have the jurisdiction to physically invade the smoke shops -as firmly established years earlier in *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 162 (1980) - it put the pressure on tobacco wholesalers, requiring them to precollect a state tax. If the wholesalers refused, their tobacco would be deemed "contraband" and subject to confiscation.

By late 1987, the OTC had assessed the Citizen Band of Potawatomi \$2.7 million in unpaid taxes, penalties, and interest on the Tribe's tobacco sales. The Tribe refused to pay the tax - it being a fundamental rule of tribal-state relations that states cannot levy their taxes on tribal governments or their citizens. In 1991, after years of litigation, the Supreme Court issued its opinion in *Oklahoma Tax Commission v. Citizen Band of Potawatomi*, 498 U.S. 505 (1991), holding that although tribes were obliged to collect state excise taxes on tobacco sales to non-Indians, the state had absolutely no authority to enforce its laws against tribal governments or peoples.

Tribal governments didn't budge. Rather than voluntarily acting as a state tax collector, tribal smoke shops continued to pass the untaxed tobacco savings to its customers, leaving it up to the non-Indian consumers to report their purchases independently. If the non-Indian consumers failed to comply with state law, it was up to the OTC to enforce its own laws, on its own citizens, on its own land.

In the long run, the OTC's attack on tribal sovereignty only limited its ability to receive any revenue at all. Shop owners simply started buying tobacco from out-of-state wholesalers. This put the state in a bind. Oklahoma was losing millions of dollars in potential tax revenue each year, but each time it attempted to exceed its jurisdiction, the less cooperation it received from tribal governments, smoke shops, and tobacco wholesalers. Of course, the state could have elected to ramp up the enforcement its "use" tax, but this was an entirely unsavvy move, politically.

In Potawatomi, the Court encouraged states to "enter into agreements with the tribes to adopt a mutually satisfactory regime for the collection" of tobacco taxes. 498 U.S. at 515. With the State of Oklahoma's back against the wall, in 1990 a draft compact was proposed whereby the state would agree to withdraw OTC efforts to collect taxes on sales to non-Indians and instead recognize that tribal governments had the sole authority to tax these transactions. In return, the tribal government would remit a percent of those tribal tax monies to the state. On June 8, 1992, Governor David Walters signed the first tribal-state tobacco compact with the Seminole, Cherokee, Chickasaw, and Choctaw Nations. Chickasaw Governor Bill Anoatubby remarked that the 'government-to-government compact [was] the most reasonable method of settling our disputes. This is a true exercise of tribal sovereignty."

Today, a very large majority of federally recognized tribes in Oklahoma have signed tobacco compacts, and the result has been an undeniable success for both sovereigns. The compacts provide a small tax base for tribes where there formally was none. Compacting also helped tribal governments to establish greater geopolitical authority, and garnered greater respect from the state. Indian entrepreneurs are no longer seen as bootleggers. Tribal smoke shops have now gained legitimacy, and many have grown into expansive retail markets that benefit both the tribe and the surrounding state.

Oklahoma saw its revenues from these sources grow at a rate of 100 percent. Oklahoma tribes sell a lot of tobacco. Whereas the market was otherwise untapped because the state had no enforcement powers, the compacts allowed the state to collect approximately 25 percent of its excise tax, at the wholesale level. In 2007, this amounted to over \$31 million paid to the state. Tribal sovereignty respected, no intrusive enforcement tactics, no lengthy and drawn-out court proceedings, no bad blood between state and tribal governments - just money, and lots of it.

What Happened?

One is left wonder, what happened between 1992 and 2010 that prompted New York to turn a blind eye to compacting - a tried and true source of problem-free revenue? In Part III of this series I hope to shed some light on the matter.

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Part III: Cigarette Tax - Okay, Maybe it is About Money

Dreveskracht, Ryan D

In part III of this three-part series I hope to shed some light on the question: If it is actually in the states' best interest not to attack tribal sovereignty vis-à-vis tobacco taxation, then how does one explain New York's recent unwavering stance on the matter?

To reiterate from Parts I and II: 1) States would receive much more revenue if they chose, rather than intruding on tribal sovereignty, to enforce their own tax laws, on their own citizens, on their own lands. 2) State-tribal compacting is a proven win-win - it is a guaranteed, tribal sovereignty respecting, no-hassle, source of state revenue.

The fact that option one would be political suicide explains - but by no means justifies - New York's ignoring it. But, one is left wonder, what happened between 1992 and 2010 that prompted New York to turn a blind eye to compacting - a tried and true source of problem-free revenue?

The Current Trend: An Illogical Stance on Tribal Tobacco Tax Revenue

New York is not alone in the recent illogical stance on tribal tobacco. In March of 2011, the Nebraska Department of Revenue illegally raided a Ponca tribal smoke shop for alleged state tax violations. In February of 2010, numerous state and federal agencies illegally entered the Yakama Reservation in Washington State in order to serve a questionable arrest warrant on a Yakama businessman for alleged cigarette tax violations in another state.

Even tribes located in the compact trendsetting State of Oklahoma are not immune. Despite the \$31 million given to the state the previous year, in October of 2008 the Oklahoma Tax Commission illegally raided two Indian smoke shops for allegedly selling contraband cigarettes.

Not About Tax Revenue

According to New York Governor Andrew Cuomo, the purpose of the recent crack-downs and court battles is all about collecting taxes and putting tax revenue in the state coffers: "[T]his is revenue rightly owed to the state [and] my administration will move to [collect it] expeditiously" Lieutenant Governor Bob Duffy also chimed in, "this enforcement activity is about getting back to the state the revenues that are owed the state through untaxed, illegal cigarettes."

As discussed in Parts I and II, from a pure economic analysis, this stance is illogical. Unless, that is, there is another factor that the state is not publicly discussing.

There is.

In 1998, the Attorneys General of 46 states, five U.S. territories, and the District of Columbia settled various legal actions involving antitrust, product liability, and consumer protection claims against the nation's four largest tobacco companies. (In the early years of the Bush Administration, the Department of Justice decided not to pursue claims against tobacco manufacturers for harm caused in Indian country). The states wanted billions of dollars, and were right to demand it. The tobacco companies, however, anticipated that they would have to substantially raise cigarette prices to pay for their financial obligations to the states. They also knew that by raising their prices, other nonparticipating companies would have a competitive price advantage.

In settling the suits, the major tobacco companies got a sweetheart deal. As part of the settlement agreement, states agreed to enact and "diligently enforce" escrow statutes that "effectively and fully neutralize [d]" competition from nonparticipating companies. These statutes impose financial obligations on non-participating companies by requiring them to make escrow payments based on the number of tax-stamped cigarettes sold in a participating state. Participating tobacco companies are not subject to these payments. Nonparticipating companies, however - companies that have never been sued or found culpable for conduct giving rise to liability - are required to make the payments.

Semi-secret sweetheart deals between state governments and "big tobacco" super-corporations? It seems the stuff of conspiracy theories. But it's true. The major tobacco companies are now in cahoots with the states. To give an idea of the significance of the deal: base payments to the states began at \$ 4.5 billion for the year 2000, and are set to increase to \$9 billion in the year 2018. New York State alone is estimated to receive at least \$25 billion in payments through 2025.

An important aspect of this scheme is that if the major tobacco companies actually lose a market share, the overall payments to that state will be significantly reduced. Unless, that is, the state proves to the companies that it is "diligently enforc[ing]" its escrow law.

In order to comply with this provision, New York State has enacted a statute where cigarette tax stamping agents may only affix the tax stamp to those cigarettes that derive from either: a) a participating "big tobacco" company, or b) nonparticipating companies that are regularly placing money into the escrow account. Untaxed cigarettes are "contraband" and are subject to confiscation. In other words, the tax stamps are not only about tax, but

serve also - and most importantly - as indicia of compliance with New York's statutory scheme (a scheme likely authored by the participating tobacco companies themselves) that forces smaller tobacco companies to pay for big tobacco's mistakes.

In 2006, participating tobacco companies began withholding what is now \$5.2 billion in payments. "Big tobacco" companies are claiming that the states have not done enough of the "diligent enforcement" required of them to stop small rival cigarette companies from undercutting them on prices. Indeed, as aptly described by John Blackhawk, Chairman of the Winnebago Tribe of Nebraska, the "big tobacco" companies are currently wielding the settlement agreement "over the [states] like a Sword of Damocles, continually threatening to default on its payments to the State should the State refuse to use the sanction of law to crush Big Tobacco's competitors." In response, states like New York are ramping up their efforts to plug the holes where they can - and because the scheme is based upon a tax stamp, the attack is on "untaxed" cigarettes flowing from Indian country. This actually has nothing to do with tax revenue, mind you.

What is more, because states have been using these projected settlement payments as collateral, they almost have no choice at this point. In 2003, South Dakota, for instance, issued a \$278 million bond against their projected payments. Lance Morgan, chief executive officer of Ho-Chunk Winnebago Tribe's economic arm, put it best: New York and other participating states "made a deal with the devil, and like all deals with the devil it started off pretty good, but in order to keep that money flowing, they have to do what the devil says, and right now Marlboro doesn't want the tribes to be competitors."

Now it Makes Sense - But not for Tribes

Unfortunately, the settlement agreement has also seriously upset any compacting balance that may have existed prior. The pre-settlement compacts with tribal governments have now become a tool for telling tribal retailers what is and what is not legal on their own Reservation. Essentially, because the state will only stamp certain non-blacklisted cigarettes (i.e. those from "big tobacco" or escrow-paying companies), those non-stamped cigarettes (i.e. tribal tobacco manufacturers) are deemed equivalent to non-taxed cigarettes and will be contraband anywhere but on the Reservation. But for those tribes that have compacted revenue-sharing agreements with the state, the compact's requirement that tribal smoke shops carry only stamped cigarettes severely limits not only the price of the cigarettes, but also the type of cigarettes that tribal smoke shops can carry.

Talk about an attack on tribal sovereignty. Compacting tribes with "buy Indian" initiatives for instance - tribal laws that require Reservation businesses to buy the goods and services of Indian country before looking to outside manufacturers - must now break their own law in order to comply with the state's demands. Tribes that had earlier ventured into the tobacco business are also stifled in that they cannot even sell their own product in their own stores. All so the state can make a buck, or a billion.

Okay, maybe it is about the money.

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