



Second Circuit Rules on the Legal Framework for Cigarette Sales Between Indian Reservations

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A November 8, 2019 federal appellate [decision](#) likely will have a significant financial effect on how Indian tribal cigarette companies sell cigarettes manufactured on their home reservation to retailers on out-of-state Indian reservations. Prior to this decision, it was unclear if such companies had to comply with the registration and filing requirements of the Prevent All Cigarette Trafficking Act ([PACT Act](#)) or pay applicable state cigarette taxes for “reservation-to-reservation” cigarette sales. According to the [U.S. Department of Justice](#), “such reservation-to-reservation sales” are “commonplace, . . . represent[ing] a substantial proportion of interstate cigarette sales throughout the United States.”

In the case, *New York v. Mountain Tobacco Co.*, the U.S. Court of Appeals for the Second Circuit [held](#) that King Mountain Tobacco Company’s (King Mountain) cigarette shipments from the Yakima Reservation in Washington State to Indian reservations in New York State are “[interstate commerce](#)” and must comply with the [PACT Act’s registration and reporting requirements](#). In addition, the court ruled that King Mountain must also comply with certain New York laws that, [among other things](#), tax cigarette sales to persons who were not tribal members.

This Sidebar first outlines two federal laws that combat cigarette smuggling—the PACT Act and the Contraband Cigarette Trafficking Act ([CCTA](#))—and the New York State cigarette tax regime governing cigarette sales on Indian reservations at issue in the case. Then, the Sidebar describes King Mountain’s operations, analyzes the issues in the case, and presents some considerations for Congress.

Legal Framework of State Taxing Authority on Cigarettes Sold on Indian Reservations

Because the federal [Constitution](#) gives Congress “[plenary](#)” authority over Indian affairs, states have limited authority over Indians in “[Indian country](#),” a term that includes Indian reservations, absent congressional authorization. Several Supreme Court decisions have interpreted the limits of state taxing authority over tribal Indians and their activities and property in [Indian country](#). Although the Supreme Court has [noted](#) that “Indian tribes and individuals generally are exempt from state taxation within their

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own territory,” the Court has held that states have concurrent jurisdiction to tax on-reservation sales of cigarettes to persons who are not tribal members in a series of cases, including *Moe v. Confederated Salish & Kootenai Tribes*, *Wash. v. Confederated Tribes of the Colville Indian Reservation*, and *Okla. Tax’n Comm’n v. Citizen Band of Potawatomi Indian Tribe*. Moreover, in 1994, in *Dep’t of Taxation & Fin. N.Y. v. Milhelm Attea & Bros. Inc.*, the Supreme Court rejected a facial challenge to New York’s system of collecting cigarette taxes from wholesalers marketing cigarettes to tribal retailers, holding that the taxes impose “minimum burdens reasonably tailored to the collection of valid taxes from non-Indians.”

The PACT Act. The PACT Act imposes registration and reporting requirements on persons selling cigarettes in “interstate commerce.” It [requires](#) “[a]ny person who sells, transfers, or ships for profit cigarettes . . . in interstate commerce . . . into a State . . . taxing the sale . . . of cigarettes” to comply with various registration and reporting requirements and to comply with “all . . . laws generally applicable to sales of cigarettes . . . within the specific State.” The PACT Act [defines](#) “interstate commerce” in three ways, none of which specifically refers to commerce between reservations in different states. The three [definitions](#) are: “commerce between a State and any place outside the State”; “commerce between a State and Indian country in the State”; and, “commerce between points in the same State but through any place outside the State or through any Indian country.” The statute provides enforcement [authority](#) for state attorneys general to seek civil penalties, damages, and injunctive relief in federal court.

The CCTA. The CCTA criminalizes knowingly shipping 10,000 or more cigarettes that “bear no evidence of the payment of applicable State . . . taxes in the State or locality where the cigarettes are found, if the State . . . requires a stamp . . . to evidence payment of cigarette taxes.” The statute provides [authority](#) for state attorneys general to bring enforcement actions in federal court to prevent “any person” from violating the statute, subject to an [exemption](#) for “an Indian tribe or an Indian in Indian country.”

New York Cigarette Tax Law. New York State [taxes](#) on-reservation cigarette sales to persons who are not tribal members; requires that tax stamps be affixed to cigarette packages; makes tax stamps for sales to tribal members available for free; specifies various methods for paying such taxes, including the use of tax agreements; provides an Indian tax exemption coupon system; and allows pre-payment of taxes by an agent who affixes the required tax stamp. Under an administrative [regulation](#), cigarettes sold by agents and wholesale dealers to Indian nations or tribes or by reservation cigarette sellers located on Indian reservations must bear a tax stamp.

New York v. Mountain Tobacco Co.: Background and Decision

[King Mountain](#) is a company organized under the tribal law of the Yakima Nation and owned by a Yakima tribal member. It grows tobacco on the Yakima Indian Reservation, combines it with tobacco from North Carolina, manufactures cigarettes, and ships them from the Yakima reservation to Indian reservations in New York State for sale to tribal members and non-members free of state taxes and tax stamps. In another case, the U.S. Court of Appeals for the Ninth Circuit [held](#) King Mountain liable for \$58 million plus interest for delinquent federal cigarette manufacturing excise taxes.

In *New York v. Mountain Tobacco Co.*, King Mountain appealed a [decision](#) from the U.S. District Court for the Eastern District of New York, which held that King Mountain violated state laws on cigarette sales. The district court also [held](#) that King Mountain’s cigarette shipments did not constitute “interstate commerce” within a plain reading of the PACT Act’s distinct definitions of “State,” “Indian country,” and “interstate commerce.” On appeal to the Second Circuit, King Mountain argued, among other things, that New York State’s regulation of commerce between Indian nations violated federal Indian protections. The State argued on appeal that King Mountain’s cigarette deliveries constitute “interstate commerce” under the PACT Act, and that the CCTA’s exemption for “Indians in Indian country” did not apply to King Mountain as an Indian-owned, closely held company organized under tribal law.

In a unanimous decision, the Second Circuit reversed the district court on the PACT Act interpretation, holding that King Mountain’s reservation-to-reservation cigarette sales were in “interstate commerce.” The court **based** this conclusion on the “plain meaning and statutory context,” **noting** that the PACT Act defines “State” as “each of the several States of the United States . . . ,” a definition that “as a general rule includes Indian reservations within the States.” This interpretation, moreover, according to the court, **avoids** the absurdity by which “a transaction touching one State and one Indian reservation would be reportable ‘interstate commerce’ [because of the explicit statutory definition of “interstate commerce” as “commerce between a State and Indian country in the State”], whereas a delivery traversing more than ten States and two Indian reservations . . . would not be.”

On the CCTA issue, the court, agreeing with the district court, ruled that King Mountain **qualified** for the “Indians in Indian country” exemption as “an entity wholly owned by a member of the Yakima Nation, located on the Yakima reservation, and organized under the laws of that nation.” The court noted that “[t]he CCTA does not define ‘Indian’; but neither does it define ‘person,’ which under the **Dictionary Act** includes ‘corporations, companies, associations . . . as well as individuals.’”

Considerations for Congress.

The potential profit from selling cigarettes that are free from sizable state taxes—New York State’s **tax** is \$4.35 per 20 cigarettes—may lead to litigation by King Mountain or **other** reservation-based cigarette manufacturers in other states. To clarify how the PACT Act applies, Congress may amend the statute to specify whether cigarette sales and shipments between Indian nations in different states are “interstate commerce” under the PACT Act. Congress could also clarify whether the CCTA exemption for “an Indian in Indian country” applies to an “Indian entity or corporation” or to Indian tribes and individual Indians. Congress could also investigate whether encouraging tribal-state cooperative cigarette-tax revenue sharing **agreements** would curb tax avoidance and cigarette smuggling.

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