



NEW YORK CITY LAW DEPARTMENT
OFFICE OF THE CORPORATION COUNSEL

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Press Release

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For Immediate Release

NEW YORK CITY AWARDED SUMMARY JUDGMENT AGAINST TWO TOBACCO WHOLESALEERS FOR FAILURE TO COLLECT CIGARETTE TAXES

COURT TO DETERMINE IF UP TO \$15 MILLION IN PENALTIES SHOULD BE AWARDED TO THE CITY AGAINST WHOLESALEERS HELD LIABLE FOR SELLING MILLIONS OF UNTAXED CIGARETTES TO NATIVE AMERICAN RETAILERS IN VIOLATION OF THE FEDERAL CONTRABAND CIGARETTE TRAFFICKING ACT

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New York, New York, August 22, 2012 – Corporation Counsel Michael A. Cardozo announced today that Chief Judge Carol B. Amon of the United States District Court for the Eastern District of New York has granted the City's motion for summary judgment against two wholesale tobacco distributors for selling massive quantities of "unstamped" cigarettes on which cigarette taxes had not been pre-paid. The two distributors' failure to include the cigarette taxes required by State law in the wholesale cigarette price permitted the cigarettes ultimately to be sold to consumers at illegally reduced prices. The wholesalers' sales were made to cigarette outlets located on the Poospatuck Reservation in Mastic, New York, from where they were bootlegged in large quantities into the City. Such sales annually deprive the City and State of hundreds of millions of dollars in tax revenue used to provide public services.

The city's case against the tobacco wholesalers, filed in 2006, unfolded during a period in which New York State struggled to enact and enforce methods for collecting cigarette taxes from cigarette sellers located on Indian reservations. The wholesalers sued in this case contended that the absence of a State-imposed method of tax collection permitted them to sell unlimited quantities of "unstamped" cigarettes, on which taxes had not been pre-paid, to reservation cigarette retailers. However in a March 2008 decision, the federal court rejected this defense, holding that the plain language of New York's cigarette tax statute required that taxes be pre-paid on all cigarettes destined to be sold to the public, regardless of whether the cigarettes were sold by an Indian retailer. Under federal law the only cigarette sales that are exempt from state or local taxation are sales between members of the same tribe, on their reservation, for personal consumption.

In its August 17, 2012, decision granting summary judgment to the City against wholesale distributors Gutlove & Shirvint, Inc., and Mauro Pennisi, Inc., the court held that the City had proven that the vast majority, if not all, of the unstamped cigarettes that Gutlove and Pennisi sold to reservation retailers were resold to and consumed by the public, "and that any reasonable wholesaler would have been well aware of that fact." The court observed that it was "uncontroverted that large quantities of Gutlove and Pennisi cigarettes were trafficked into New York City" and that Gutlove and Pennisi "have undoubtedly been on notice of that fact, at least since the time the City brought this action in 2006 ..."

The sales by Gutlove & Shirvint, Inc. and Mauro Pennisi, Inc. violated the federal Contraband Cigarette Trafficking Act ("CCTA") and the two defendants could be liable for a total of up to \$15 million in penalties for the violations. The court has ordered a hearing will be held to determine the amount of the penalty.

The court dismissed claims against one wholesaler, Day Wholesale of Tupper Lake, N.Y, after finding insufficient evidence that the cigarettes sold by that company had made their way into the City.

Corporation Counsel Michael A. Cardozo said, "This decision demonstrates the strong legal basis for the City's efforts to curb illegal tobacco sales, and businesses at all levels of the illegal cigarette trade can expect future enforcement actions directed to them."

"Untaxed cigarettes are not only a threat to the health of our citizens, they give shady businesses the edge over honest, hardworking small business owners who follow the law," added Finance Commissioner David M. Frankel. "We will continue to do our part to protect the vast majority of New Yorkers who do the right thing from those who try to cheat the system. I would like to thank Corporation Counsel Cardozo and his staff for their work prosecuting this case."

"We applaud today's judgment. Untaxed cigarettes have numerous consequences; they undermine the public health benefit of increased taxes on cigarettes," said Health Commissioner Dr. Thomas Farley. "Taxing tobacco is one of the most effective strategies to reduce tobacco use, especially among young people. As a result of taxes, smokers quit and youth do not start smoking, thereby preventing illness, suffering, and premature death."

This lawsuit is part of a comprehensive effort by the City to eliminate illegal cigarette sales, which has included actions against cigarette retailers, internet sellers, so-called roll-your-own businesses and cigarette traffickers.

The defendants, all of which are licensed cigarette stamping agents and wholesalers, are:

- Gutlove & Shirvint, Inc., 39-26 23rd Street, Long Island City, New York.
- Mauro Pennisi, Inc., 78-80 West Hoffman Ave., Lindenhurst, New York.
- Day Wholesale, Inc., 151 Park Street, Tupper Lake, New York.

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