

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: DEPARTMENT OF TAXATION AND FINANCE OF
NEW YORK, ET AL., Petitioners v. MILHELM ATTEA
& BROS., INC., ETC., ET AL.

CASE NO: No. 93-377

PLACE: Washington, D.C.

DATE: Wednesday, March 23, 1994

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 ~~ORAL ARGUMENT OF~~ - - - - -X PAGE

3 DEPARTMENT OF TAXATION AND :

4 FINANCE OF NEW YORK, ET AL., :

5 ~~ORAL ARGUMENT~~ Petitioners :

6 ~~JOSEPH E. ZDARSKY, ESQ.~~ : No. 93-377

7 MILHELM ATTEA & BROS., INC., :

8 ETC., ET AL. OF :

9 ~~RESPONSE OF~~ - - - - -X

10 On behalf of the United Washington, D.C. the

11 Respondents Wednesday, March 23, 1994 40

12 ~~REBUTTAL~~ The above-entitled matter came on for oral

13 argument before the Supreme Court of the United States at

14 11:05 a.m. half of the Petitioners 42

15 APPEARANCES:

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17 Albany, New York; on behalf of the Petitioners.

18 JOSEPH E. ZDARSKY, ESQ., Buffalo, New York; on behalf of

19 the Respondents.

20 BETH S. BRINKMANN, ESQ., Assistant to the Solicitor

21 General, Department of Justice, Washington, D.C.; on

22 behalf of the United States, supporting the

23 Respondents.

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1 P R O C E E D I N G S

2 (11:05 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 93-377, Department of Taxation and Finance
5 of New York v. Milhelm Attea Brothers.

6 General Koppell.

7 ORAL ARGUMENT OF G. OLIVER KOPPELL

8 ON BEHALF OF THE PETITIONERS

9 GENERAL KOPPELL: Mr. Chief Justice and may it
10 please the Court:

11 This case is of enormous importance to the State
12 of New York, indeed, to other States, and also to people
13 in private business. I urge this Court to reverse our own
14 court of appeals which found our system for taxing
15 cigarette sales by Indian traders to non-Indians preempted
16 by Federal law. It is indeed somewhat ironic that I must
17 ask this Court to protect our State's fisc by reversing
18 the determination of our court of appeals. However, this
19 Court's prior decision in Moe, Colville, and Potawatomi,
20 sustained the State system as consistent with Federal law,
21 and that is what the court of appeals said was not so.

22 Indeed, when this Court remanded this very case
23 to our State courts 2 years ago, I believe that it did so
24 because you recognized that States may require both retail
25 and wholesale Indian traders to assist in collecting taxes

1 due on sales to non-Indians at reservation stores.

2 QUESTION: General Koppell, may I ask you if
3 this case was litigated below at all on the notion that
4 the New York statute is severable, that there are a
5 variety of provisions in it, and that some of them should
6 survive even if others do not?

7 GENERAL KOPPELL: Your Honor, the case before us
8 narrowly focuses on the regulation of wholesalers, and not
9 retailers, and what we are looking here is merely those
10 aspects of the regulation that regulate the sale, or sales
11 by wholesalers. In my opinion, those are very narrow,
12 they are very limited, and the Court should look at the
13 regulatory scheme only as it affects the respondents here,
14 who are cigarette wholesalers.

15 QUESTION: And is the statute severable, in your
16 view?

17 GENERAL KOPPELL: Yes, I think it's severable.
18 I think the Court could indeed uphold even portions of the
19 regulations on wholesalers and not others, and certainly
20 this Court should only deal with wholesalers.

21 The Solicitor General brings into his brief
22 before this Court the way the regulations affect the
23 retailers. That's really not before this Court. It was
24 not briefed below. There's really no evidence in the
25 record with respect to how the regulations affect

1 retailers.

2 With respect to wholesalers, again, I think this
3 Court could sever and find some of the regulations
4 applicable, but I do want to emphasize that the
5 regulations on the cigarette wholesalers are quite
6 limited, and really only require a limited amount of
7 record-keeping and in fact are quite consistent with the
8 regulation of Indian traders that has been upheld by this
9 Court in the Moe case and in the Colville.

10 QUESTION: Does the provision requiring
11 licensing of --

12 GENERAL KOPPELL: Of the wholesalers?

13 QUESTION: -- the wholesaler, is that before us?

14 GENERAL KOPPELL: The wholesalers only have to
15 be licensed with respect to sales to non-Indians. If
16 there were a wholesaler -- and in fact Elias Attea, who is
17 one of the respondents here, sells only on Indian
18 reservations. If he contended that he wanted to sell only
19 to Indians, and not to non-Indians, and that he would only
20 meet Indian demand on the reservation, he would not have
21 to be licensed.

22 However, we believe that virtually all Indian
23 stores sell both to Indians and to non-Indians. To the
24 extent that cigarettes go from the wholesalers to non-
25 Indians, they would have to be licensed, as are all

1 wholesalers in the State of New York who sell cigarettes
2 that are not tax-exempt.

3 QUESTION: And the retailers would have to be
4 licensed as well, so --

5 GENERAL KOPPELL: No --

6 QUESTION: They would not?

7 GENERAL KOPPELL: That is not so, Your Honor.
8 They would have to register under the system that the
9 State established --

10 QUESTION: I see.

11 GENERAL KOPPELL: -- not license, and
12 specifically in the regulations, Your Honor, it states
13 there is no fee.

14 QUESTION: I see.

15 GENERAL KOPPELL: It's basically a re --

16 QUESTION: Well, fee or not, let me ask the same
17 question --

18 GENERAL KOPPELL: It's not like licensing. When
19 you get licensed you have to pay a fee.

20 QUESTION: Mr. Koppell.

21 GENERAL KOPPELL: Yes.

22 QUESTION: Let me ask you the same question, I
23 think perhaps, or get to the same point that Justice
24 O'Connor has in mind.

25 Can we decide this case strictly on the question

1 of whether there is an impermissible limitation on
2 quantities that may be sold, or is it impossible to
3 determine -- to resolve that issue without getting into
4 questions of registration, licensing, and so on?

5 GENERAL KOPPELL: Well, the -- as I indicated
6 earlier, the question of registration is really not before
7 this Court, shouldn't be before this Court. The Solicitor
8 General --

9 QUESTION: Well, then your answer is no.

10 GENERAL KOPPELL: No, my answer is yes.

11 QUESTION: We can decide it strictly on the
12 issue of quantity.

13 GENERAL KOPPELL: You can decide -- you can
14 decide the -- you can decide that issue. You can decide
15 whether it is in fact permissible to limit the quantity of
16 nontaxable cigarettes.

17 QUESTION: And that's all we have to decide.

18 GENERAL KOPPELL: No, I think there is more for
19 you to decide.

20 QUESTION: What is the more that we have to
21 reach?

22 GENERAL KOPPELL: I think you also have to reach
23 the issue of whether the record-keeping requirements can
24 be imposed on the wholesalers, the limited record-keeping
25 requirements.

1 QUESTION: Okay.

2 GENERAL KOPPELL: As I indicated before, if I
3 may, the court of appeals makes two basic mistakes in its
4 reading of this Court's teachings in the Moe and Colville
5 and Potawatomi cases, two basic flaws which are
6 fundamental to the court of appeals decision which is
7 before Your Honors.

8 If you look at A12 in the appendix to our
9 petition, I will read from there, and they say the
10 following. They say -- they contend that inasmuch as the
11 Supreme Court approved the imposition of precollection and
12 record-keeping requirements on Indian retailers in those
13 cases, the State can lawfully impose them on wholesalers,
14 who are just one step further back on the distribution
15 chain.

16 Moe and Colville involved burdens placed on
17 Indian retailers dealing with non-Indians rather than on
18 wholesalers dealing with Indians, a significant
19 difference, and that is the major difference why they hold
20 that in fact the regulations here are impermissible with
21 respect to the respondents, the wholesalers, but there is
22 no distinction.

23 They make a distinction between retailers and
24 wholesalers for purposes of the Indian Traders Act, but if
25 you go to the Indian Traders Act, you see that that is not

1 a distinction made.

2 Now, it is clear in Colville, for instance, that
3 in fact the Indian retailers in that case were, in fact,
4 Indian traders under the Federal law. They were in the
5 same category as the wholesalers here.

6 This distinction the court of appeals makes that
7 you can, in fact, burden retailers but you cannot burden
8 wholesalers, otherwise you are preempted by the Federal
9 law, that distinction is not found in the Federal law and
10 should not be made. If you can regulate the retailers and
11 have record-keeping requirements for the retailers, you
12 can have those very same record-keeping requirements on
13 the wholesalers.

14 The distinction they make is simply not found in
15 Federal law, and it is nowhere found in the precedents of
16 this Court, and again, I would suggest that the reason
17 that this Court sent the case back to New York suggesting
18 that the court look at Potawatomi, is that this Court
19 recognized that that distinction between retailers and
20 wholesalers really makes no sense. It has no basis in
21 Federal law. We are talking about --

22 QUESTION: As you read the decision below --

23 GENERAL KOPPELL: Yes.

24 QUESTION: If New York told wholesalers that it
25 had to sell -- that it could never sell any untaxed

1 cigarettes --

2 GENERAL KOPPELL: Yes.

3 QUESTION: -- and that there were then some
4 provisions for refunds of taxes paid by Indian consumers,
5 would that statute pass muster under this court's -- this
6 lower court's opinion?

7 GENERAL KOPPELL: I think that a system that
8 required precollection of all taxes and then refund might
9 well not pass muster, but this is not the system here.

10 What is attempted to be done by the system is
11 very simple: to estimate the number of tax-free
12 cigarettes which are required on the reservation and then
13 allocate those, and then say the remainder of the
14 inventory has to be taxable, so that with respect to the
15 Indian sales, the sales to Indians on the reservation, no
16 tax is precollected, there's no requirement of
17 precollection of the tax and request for refund.

18 QUESTION: But why isn't the estimation of the
19 quantity in advance -- why isn't that in conflict with the
20 Federal statute that says it's the Federal authority and
21 not the State that is to specify the kind and quality of
22 goods?

23 GENERAL KOPPELL: That -- I'm -- thank -- it is
24 not the same, Your Honor, and I'm glad you asked the
25 question, because that's the second flaw in the court of

1 appeals' argument.

2 The fact of the matter is that we are not
3 regulating the number of cigarettes. In no way. You can
4 send as many cigarettes -- the wholesalers can send as
5 many cigarettes as they want onto the reservation. The
6 Indian retailers can sell as many cigarettes as they want.

7 All we are saying is that with respect to
8 untaxed cigarettes, that there, no precollection. We are
9 limiting the number of those to the legitimate demand of
10 the Indians on the reservation, and if that demand
11 changes, the allocation will be increased by the tax
12 department. It's not a fixed number, and it's not created
13 in a vacuum.

14 First of all, the regulations specifically talk
15 about an agreement between the tribes and the State with
16 respect to the number of tax-free cigarettes that will be
17 required on the reservation. Only in absence of such an
18 agreement does the State come in and make an estimate of
19 the number of tax-free cigarettes that are required to
20 meet legitimate Indian demand, so that the system has
21 integrity and is flexible, and if by chance not enough
22 tax-free cigarettes are brought to the reservation and
23 brought to the reservation retailers, they can, under our
24 tax law, specifically apply for a refund.

25 QUESTION: I was trying to determine how that

1 refund worked, both as a matter of -- would there be
2 interest on the prepayment, if there's a refund, and how
3 long is the process to get a refund?

4 GENERAL KOPPELL: I don't know -- I don't know,
5 to tell you the truth, Your Honor, the details of that,
6 but the fact of the matter is that there is a process.
7 You just show that you made a tax-free sale, and that you
8 prepaid the tax, and then you get the money back.

9 QUESTION: Yes, but if it's a prolonged process
10 and there's no interest, then you are also making an
11 interest-free loan to the State of New York, are you not?

12 GENERAL KOPPELL: Well, if it's a prolonged
13 process, which we do not believe it would be -- it has not
14 been implemented yet. We don't see any reason why it
15 would be a prolonged process, and in fact the tax
16 department regulations contemplate a very generous supply
17 of tax-free cigarettes to the reservation.

18 You see, the problem now is not that there's a
19 little bit of evasion going on, there's a huge amount of
20 evasion going on. It's costing the State \$100 million a
21 year.

22 The tax department's not looking to make sure
23 that every single package of cigarettes that's untaxed is
24 not -- that no package of cigarettes untaxed is sold to a
25 non-Indian, but what we have here is that the reservation

1 sales even 6 years ago -- even 6 years ago was over 30
2 times the estimated demand by Native Americans on the
3 reservation. We're talking about massive evasion costing
4 the State over \$100 million.

5 So once these estimates are made, it is
6 anticipated that there will be more than enough tax-free
7 cigarettes flowing from the wholesalers like the
8 respondents here onto the reservation, and it will not be
9 necessary to go down and check each sale.

10 Furthermore, the alternative to this system
11 would be far more intrusive, because if you had an
12 alternative of only collecting the tax from the Indian
13 retailers and leaving the wholesalers alone, think of what
14 that would require. That would require going in and
15 auditing all of these retailers -- and you know how much
16 the Indians resent intrusion by outsiders on the
17 reservation -- coming into each of the Indian smoke shops,
18 checking all of their books and sales to see how many tax-
19 free cigarettes they sold --

20 QUESTION: But didn't we uphold some sort of
21 procedure like that in either Moe or Colville, and wasn't
22 that done at the retail level?

23 GENERAL KOPPELL: Yes, it -- yes, Your Honor, it
24 was upheld that one could do that. I myself think that
25 some of the problems that you addressed in the Potawatomi

1 case ensued, and you will recall, Your Honor, that in the
2 Potawatomi decision, you indicated that if there were
3 problems collecting from the retailers, or going after the
4 retailers, you suggested you can well go after the
5 wholesalers, and I think that was a recognition that going
6 after the retailers is a difficult thing to do and is a
7 very intrusive thing to do.

8 And I am not suggesting here that in fact that
9 if the burden was placed on the retailers it would
10 necessarily violate the Indian Traders Act. What I am
11 suggesting, however, that this is a much less intrusive
12 way of dealing with this problem -- creating a realistic
13 assessment, or allotment of tax-free cigarettes to go into
14 the reservation, then providing for the wholesalers to be
15 able to sell that inventory without tax stamp.

16 The remainder of the inventory that the
17 wholesalers have would bear the tax stamps, would have the
18 prepayment of taxes attached to them, and by -- and then
19 having a system down the line that allows for the
20 wholesalers to distribute the tax-free cigarettes to the
21 retailers based on these coupons that the Department of
22 Taxation would issue to the retailers, who would then
23 present them to the wholesalers.

24 We are looking now at how much this burdens the
25 wholesalers. All they have to do is get sufficient

1 inventory to meet the tax-free demand, wait for the
2 retailers to come to them with the coupons, and then
3 record the tax-free transactions and the taxable
4 transactions, and obviously on the taxable transactions
5 remit the advance payment of the tax.

6 From the point of view of the Attea Brothers,
7 this is not a complicated or burdensome system, and the
8 court of appeals was simply wrong when it suggested that
9 there were significant burdens imposed on respondents by
10 this system, and again, as I mentioned when I answered
11 Justice Ginsburg's questions, the court of appeals was
12 certainly wrong when they said that this somehow limits
13 the number or quantity of goods available on the Indian
14 reservations. In no way does it do that.

15 QUESTION: General Koppell, are there Federal
16 taxes imposed on the cigarettes?

17 GENERAL KOPPELL: I believe there are, Your
18 Honor. I believe there are, Your Honor.

19 QUESTION: Is that handled by any kind of a
20 stamp mechanism?

21 GENERAL KOPPELL: Again, I believe so, but I
22 haven't really studied that. I've looked only at the
23 State tax system. In any event --

24 QUESTION: I assume this could be a problem for
25 any New York sales taxes, couldn't it? It just so happens

1 that tax is particularly high on cigarettes, and that's
2 why --

3 GENERAL KOPPELL: Yes. Yes.

4 QUESTION: That's why the problem only arises
5 with cigarettes.

6 GENERAL KOPPELL: Yes, that is correct.

7 QUESTION: But it could happen for sales of
8 other goods as well.

9 GENERAL KOPPELL: Yes, and there have been very
10 serious problems when New York has attempted to collect
11 sales taxes on reservation sales, and we're trying to get
12 at it without creating, if you will a -- it wouldn't be a
13 civil war, because these are sovereign nations, but
14 without creating a war with the Indian nations, or with
15 individuals on the Indian reservations, and that's why
16 this allocation system, that allocates a certain number of
17 tax-free cigarettes, is the most efficient way and easiest
18 way and least intrusive way of solving the problem and
19 still retaining to the State the ability to tax.

20 Again, I say that there are tens of thousands if
21 you will, maybe hundreds of thousands of individuals, who
22 are evading their tax obligation. It should be
23 remembered, and this Court has recognized in the Colville
24 case and in the Moe case particularly, that the tax
25 obligation is not on the wholesaler or the retailer.

1 The tax obligation is on the ultimate purchaser
2 or consumer of the cigarettes, and the current system
3 which has allowed these tax-free cigarettes to flow on the
4 reservation without control has allowed thousands and tens
5 of thousands, indeed, probably hundreds of thousands of
6 New Yorkers, to violate the law.

7 QUESTION: I can't resist this question, when
8 you speak of the huge amount of evasion. Do you accept
9 the figure that was in the -- I guess the Tobacco
10 Retailers and Candy Distributors brief that the -- at the
11 present time the average number of packs supposedly sold
12 to every man, woman, or consumed by every man, woman and
13 child on the reservations is 12,800 a year? Is that
14 figure right?

15 GENERAL KOPPELL: 12,000 -- I think that the
16 estimate that we were given by the Tax Department was that
17 if the consumption in 1988 was really only by Indians,
18 they would be smoking 15 packs a day, every man, woman,
19 and child, so that the evasion is obviously substantial.

20 I think this Court can take some judicial notice
21 of the fact that with the introduction now of gaming on
22 the reservations, the number of non-Indians who will be
23 coming on the reservations will increase exponentially,
24 and we will only have a greater problem with respect to
25 the sale of untaxed cigarettes unless we have some kind of

1 system in place to control the flow.

2 QUESTION: General Koppell, does the same
3 problem exist with regard to other products that are sold
4 on the reservation, for instance, in discount stores on
5 major appliances and so forth?

6 GENERAL KOPPELL: The same problem can exist
7 with respect to that, but the taxes are much, much lower,
8 obviously. Cigarette taxes are very high, as was pointed
9 out.

10 QUESTION: But it's the same situation.

11 GENERAL KOPPELL: Yes, it would be the same
12 situation, and you --

13 QUESTION: But there, New York has no scheme for
14 advance payment of taxes, presumably. There's no stamp
15 required.

16 GENERAL KOPPELL: No, there's no -- no, there's
17 no system, that's correct. However, gasoline --

18 QUESTION: So there you would have to impose any
19 record-keeping on the retailer.

20 GENERAL KOPPELL: That is correct. That is
21 correct, Your Honor. However, gasoline is another area
22 where the very same system is involved, and the very same
23 system has been enjoined because of the litigation over
24 this system, so it is really cigarettes and gasoline.
25 First of all, the taxes are much higher there, and second

1 of all, as you correctly point out, Justice O'Connor,
2 there is this precollection requirement for all of those
3 taxes which doesn't exist with respect to other sales.

4 QUESTION: You could probably solve the problem
5 by lowering the taxes.

6 (Laughter.)

7 GENERAL KOPPELL: You -- well, as you know, Your
8 Honor, the trend, whether fortunately or unfortunately, of
9 taxation on both cigarettes and gasoline is in the other
10 direction.

11 QUESTION: I don't have a precise hypothetical
12 for you, but if the State were attempting to impose this
13 sort of regulation on some other State, like Baldwin v.
14 Seilig, we would have a metaphysical problem because you
15 would be regulating an interstate transaction, and that's
16 beyond your authority.

17 In our cases, do we ever make parallels between
18 Indian State relations and the Interstate Commerce
19 jurisprudence that we have?

20 GENERAL KOPPELL: Well, I don't recall, but I do
21 know that there are severe limitations on our ability to
22 actually impact on the sovereign State itself. In fact,
23 that was the problem in the Potawatomi case, and
24 therefore, if the sovereign nation gets into this
25 business, that would make it even more difficult to assess

1 the tax on other than the wholesaler.

2 QUESTION: That is why I had suggested that if
3 the wholesalers just couldn't sell any nontaxed cigarettes
4 at all, that ultimately may be more intrusive, but it
5 seems to me that it confines you to your proper
6 jurisdiction without your running up against the Federal
7 statute, which is its exclusive area.

8 GENERAL KOPPELL: I don't believe that the
9 Federal statute prevents you from doing what we're doing
10 here. I don't think that -- in fact, it would be in some
11 senses more violative of the Federal statute, because it
12 would require more burden on the wholesaler to precollect
13 the tax on sales to Indians. That's what we want to get
14 away from. We want to get away from any tax on the sale
15 that goes down to the Indian, so in my opinion, though I'm
16 not suggesting that it would be impermissible to have
17 total precollection, because I don't want to concede that,
18 but I think this system is less burdensome on the
19 wholesaler --

20 QUESTION: But my submission is --

21 GENERAL KOPPELL: -- and therefore --

22 QUESTION: My submission is it may be less
23 burdensome, but the hypothetical I put still confines you
24 to your appropriate area of regulation.

25 GENERAL KOPPELL: I don't quite follow Your

1 Honor. It seems to me the appropriate -- we are permitted
2 to provide for minimal burdens without violating the
3 Indian Trader Act.

4 The minimal burden here is not dissimilar to the
5 burden placed on retailers which has been approved by this
6 Court on a number of occasions, and it seems to me if we
7 provided for the prepayment of taxes on sales to Indians,
8 and then required them to go for a refund in every case,
9 we would be doing more than we're doing here. We wouldn't
10 be doing less, we'd be doing more to invade an area that
11 arguably has been preempted by the Indian Traders Act.

12 I think we're trying to stay away from -- after
13 all, the Indian Traders Act does not regulate trade
14 between non-Indians and non-Indians, or even Indians and
15 non-Indians. It only regulates trade with Indians by both
16 Indians and non-Indians, so that the fact of the matter is
17 to the extent we can stay away from burdening trade
18 between the Indian trader and the Indians, we are
19 consistent in my view with the Federal law and not,
20 therefore, preempted from acting, which is what is
21 suggested -- I think incorrectly suggested by our own
22 court of appeals.

23 In any event, Your Honors, I believe that the
24 system here is consistent with precedent. As I indicated,
25 I believe that our court of appeals was wrong in

1 concluding that there's any difference with what --
2 regulations that can burden retailers who are indian
3 traders and wholesalers who are Indian traders, and I also
4 believe there are no significant burdens placed on the
5 wholesalers here, and for the reasons that I gave.

6 I also suggest that the Solicitor General's
7 argument with respect to the burdens placed upon the
8 Indian retailers, and suggesting that the court of appeals
9 be affirmed because those burdens are excessive, although
10 the Solicitor General agrees with our argument with
11 respect to the wholesalers, I suggest that this Court
12 really should not consider that at this time.

13 That may come before the Court in the future. I
14 don't believe that we have anything in the record to
15 consider. In a sense, it's the same situation that we had
16 with respect to this matter in Colville, where the Indians
17 didn't put in the record any evidence with respect to the
18 burden upon them by these regulations, and therefore the
19 Court felt that since it was on the -- the burden was on
20 the retailers, if you will, to put evidence in the record
21 with respect to the burden and absent such evidence this
22 Court upheld the --

23 QUESTION: You don't think the wholesaler can
24 raise the interest of a third party in not having this
25 rationing system.

1 GENERAL KOPPELL: I don't think that they can,
2 and frankly I don't think that they did in this case, even
3 if they could, so the fact -- but again, even if we look
4 at that system, and I call to your attention,
5 incidentally, with respect to that a particular affidavit
6 which is in the record on appeal, pages 244 to 246, which
7 describes the system as respects the retailers, and I
8 don't believe that that is impermissible or violates
9 preemption, because I think it's a logical system that
10 allocates the tax-free cigarettes among the retailers, and
11 as I indicated earlier, they don't have to be licensed,
12 they merely have to register, and so again, Your Honors, I
13 urge you to reverse the determination of the court of
14 appeals and sustain the system, and I would request that I
15 reserve the remaining time for rebuttal.

16 QUESTION: Very well, General Koppell.

17 Mr. Zdarsky.

18 ORAL ARGUMENT OF JOSEPH E. ZDARSKY

19 ON BEHALF OF THE RESPONDENTS

20 MR. ZDARSKY: Mr. Chief Justice, and may it
21 please the Court:

22 We believe that this case is controlled by the
23 Court's decisions in Warren Trading Post v. Arizona Tax
24 Commission, and Central Machinery Company v. Arizona Tax
25 Commission. Both of those cases held that trade with

1 Indians is preempted by the Federal Indian trader laws,
2 and that there is no room whatsoever for any additional or
3 supplementary State burdens on trade with Indians.

4 One factual matter that is important to stress
5 is that the respondents are wholesale distributors whose
6 only sales on reservations in New York are to Indians --
7 Indian retail vendors that purchase from us pursuant to
8 the Indian trader laws and regulations which we must
9 comply with with respect to all of those transactions.

10 It is a separate and distinct transaction from
11 the subsequent retail sales of which my learned colleague
12 complains, and it is our view that this Court has
13 sustained in the Moe, Colville, and Potawatomi cases,
14 reasonable, minimal burdens on retail transactions between
15 an Indian vendor and a non-Indian customer who comes on
16 the reservation, but that the Court has made it very clear
17 in Warren Trading Post and Central Machinery that no
18 burdens whatsoever may be imposed on the sale to an
19 Indian, and that's the business we have.

20 QUESTION: Well, the Indian vendor that you
21 refer to, the retailers, they are Indian traders too,
22 aren't they?

23 MR. ZDARSKY: They are in the sense that they --

24 QUESTION: As far as the act is concerned.

25 MR. ZDARSKY: Correct.

1 QUESTION: They qualify under the act.

2 MR. ZDARSKY: Insofar as they sell to Indians,
3 they are Indian traders.

4 QUESTION: So why couldn't you regulate them
5 with the same degree of -- considering the Indian Trading
6 Act, if both are subject to the Indian Trading Act?
7 You're suggesting that wholesalers can be less burdened by
8 the State than retailers?

9 MR. ZDARSKY: No, sir. Your Honor, what I am
10 suggesting is that regulation of the wholesale Indian
11 trader, his Indian customer who purchases goods from him,
12 both of those parties and that transaction are regulated
13 by Federal law, and that the Federal law does not provide
14 for the addition of State taxes at the time goods are sold
15 by an Indian trader to another Indian.

16 QUESTION: The Federal law didn't provide for
17 addition of State taxes at the time the Indian retailers
18 sold to nontribal members. We nonetheless said it could
19 be done.

20 MR. ZDARSKY: That's true, Your Honor, and the
21 reason that you did was because sales to non-Indians are
22 not within the scope of the Indian trader laws.

23 QUESTION: Well, that's not why we said -- we
24 didn't even mention the Indian trader law in Moe I don't
25 think, did we?

1 MR. ZDARSKY: I think -- well, Your Honor, I
2 would trust your recollection, but my belief is that in
3 Moe or Colville the Court specifically noted that the
4 Indian trader laws and regulations did not preempt the
5 enforcement of the tax at the retail level because it was
6 a sale to a non-Indian, and that there was an important
7 distinction between Congress' intention to comprehensively
8 regulate sales to Indians and sales to non-Indians where
9 there is no such intent.

10 I think that was set forth in the Colville case
11 which followed Moe, so the Indian trader laws, insofar as
12 Moe was concerned, I can't recall whether they were
13 raised, but I believe that the Court made the observation
14 in both cases that these were sales to non-Indians, and
15 the problem with counsel's argument is that he would have
16 this Court ignore the fact that there is an intervening
17 transaction between the respondents and the Indians and
18 the non-Indians who purchase on the reservation.

19 That intervening transaction is a sale to an
20 Indian, and the regulation which New York has adopted
21 imposed significant burdensome requirements on both
22 parties to that regulation -- to that sale. The
23 wholesaler must be a licensed New York State tax agent.
24 Even if he has no sales to anyone in New York except
25 Indians on reservations, he must be a New York State tax

1 agent.

2 The retail --

3 QUESTION: I thought that General Koppell said
4 that no license would be required for a wholesaler who
5 sold only to Indians. I heard him say that.

6 MR. ZDARSKY: He said -- he said --

7 QUESTION: Do you disagree with that?

8 MR. ZDARSKY: Your Honor, I believe what he
9 meant was that no license would be required if he sold
10 only to Indians who in turn sold only to Indians. When he
11 refers to sales only to Indians, as he did in several
12 points in his argument, he was looking past the retail
13 vendor at the ultimate purchaser.

14 We don't have anything to do with that ultimate
15 purchaser. Our clients, the respondents, don't make
16 retail sales to non-Indians on reservations. We don't
17 have places of business on the reservations. Our only
18 transactions are sales to Indians on the reservations, and
19 that is why the court of appeals of New York found that
20 Warren Trading Post and Central Machinery controlled in
21 this instance.

22 QUESTION: None of the retailers on the
23 reservations are non-Indians? All of the retailers are
24 Indians?

25 MR. ZDARSKY: All of the retailers are Indians,

1 sir.

2 QUESTION: Is that a requirement, or just --

3 MR. ZDARSKY: There's not a requirement,
4 although I think in most --

5 QUESTION: In practice, it's --

6 MR. ZDARSKY: In most cases on reservations in
7 New York the tribal governments would not approval a non-
8 Indian conducting a retail operation on a reservation, so
9 in this case all of the retail vendors, all of our
10 purchasers, are Indians, and the problem with --

11 QUESTION: Well now -- now, has this Court
12 indicated that a State can even require an Indian retailer
13 to assume minimum burdens of record-keeping and the
14 collection and payment to the State of taxes on sales by
15 the Indian retailer to non-Indians?

16 MR. ZDARSKY: Yes, Justice O'Connor.

17 QUESTION: And the State says that's all their
18 doing here.

19 MR. ZDARSKY: But that's not all the State is
20 doing here. The State is imposing the tax one step
21 further back in the distribution chain at the time of the
22 wholesale transaction. Section 471 of the New York tax
23 law imposes a tax at the time of the sale by the
24 respondents to their Indian purchasers.

25 QUESTION: But they say they are only taxing

1 based on projected sales to non-Indians. That's their
2 scheme, anyway.

3 MR. ZDARSKY: That's true, and that's what their
4 claim is, but frankly, we have no way of determining
5 whether that is a reasonable scheme. There are no
6 procedures --

7 QUESTION: Well, if that's true -- if that's
8 true, is there a problem under our cases?

9 MR. ZDARSKY: I think so, Your Honor. I think
10 there's a substantial problem.

11 QUESTION: Why?

12 MR. ZDARSKY: Because this Court has recognized
13 that regulating trade with Indians is a Federal matter.
14 It is so because there should be consistency, because the
15 Federal Government has a responsibility to Indians,
16 because the Federal Government has experience in
17 regulating these matters, and therefore there is a uniform
18 scheme that applies to regulating people who sell to
19 Indians. That scheme, for better at worse, at this point
20 does not include the right of a State to impose a tax and
21 require the Indian trader to include that tax in the price
22 of the goods and require his Indian purchaser to pay it.

23 QUESTION: Mr. Zdarsky, in Moe we took up the
24 Warren Trading Post argument and there was argued there
25 that it was contrary to Warren Trading Post to allow the

1 exaction of the sales tax on Indian retailer sales to non-
2 Indians, and we said, unlike the sales tax in Moe, the tax
3 in Warren was imposed directly on the seller, and here to
4 extend that principle to the -- the way you're talking
5 about, we refused to do it in Moe. We expressly refused
6 to do it.

7 MR. ZDARSKY: Your Honor, I would respectfully
8 disagree with that reading of the case.

9 Our view of that case was that the rationale for
10 excluding the Warren Trading Post holding was that the
11 sales that were being regulated were simply the retail
12 sales, and what the Court held in Moe was that the State
13 could require the retail vendor to simply add the price,
14 add the tax to the price that he charges his retail
15 customer, and collect the tax at the time of the retail
16 sale.

17 The Court was careful to stop short of endorsing
18 a scheme that required the Indian to pay that tax, or that
19 endorsed any procedure where the Indian would be required
20 to front that tax to the wholesaler, or anything that
21 would require that the Indian otherwise be burdened.

22 It was a very minimal thing that only applied at
23 the retail level, and it is important to note in this
24 context, Mr. Chief Justice, that while we obtained in
25 injunction in 1989 that enjoined the State from enforcing

1 these regulations as against the respondents and their
2 sales to Indians at wholesale, there was no injunction
3 that prohibited the State from taking any other action
4 that has been suggested by this Court in its prior cases,
5 including requiring retailers --

6 QUESTION: Oh, but I would think under you
7 theory you would have been entitled to one. Under your
8 theory, if it's regulated -- as I understand it, you don't
9 contend there's any conflict between any Federal
10 regulation under the Indian Traders Act and the State
11 program, do you?

12 MR. ZDARSKY: I do contend there is conflict.

13 QUESTION: Oh. I just thought you thought there
14 was kind of a field preemption by the statute.

15 MR. ZDARSKY: Well, that's our principal
16 argument, that the field has been preempted.

17 QUESTION: But there is also specific
18 implementing Federal regulations that are in conflict with
19 the --

20 MR. ZDARSKY: Yes, Justice Stevens. The Federal
21 Indian trader laws provide that the Commissioner of Indian
22 Affairs, now the Department of Interior, has the sole
23 authority to determine price, quantity, and the kind of
24 goods sold on reservations.

25 QUESTION: Well, this doesn't determine price,

1 quantity, or kind, does it?

2 MR. ZDARSKY: It certainly does, sir. The
3 statute which New York is seeking to enforce and apply
4 here -- section 471 -- specifically requires that the tax
5 be paid by the Indian as part of the price.

6 QUESTION: You're saying the tax is part of the
7 price, that's --

8 MR. ZDARSKY: It is part of the price, and that
9 is specifically expressly provided in the New York
10 statute, and as this Court has held in the past, a tax
11 law --

12 QUESTION: What if they amended the New York
13 statute to say, although we used to call it part of the
14 price, we just now call it a surcharge, or something like
15 that. Then would there be a conflict with the Federal
16 trade -- Federal --

17 MR. ZDARSKY: Yes, I think there would, because
18 in this Court's decision in the Mississippi Tax Commission
19 cases, which dealt with an analogous circumstance -- sales
20 to a Federal instrumentality -- there was a wholesale
21 markup that was charged on sales by out-of-State
22 distributors to military bases within the State of
23 Mississippi.

24 This Court held that because the Mississippi law
25 required that that markup be included in the price charged

1 to the military base and paid by the Federal Government at
2 the time of purchase, that it as a matter of law was a tax
3 on the Federal Government, and struck down that
4 requirement, so whether you call it a tax, a markup, a
5 surcharge --

6 QUESTION: I don't see that that case supports
7 your position that there's a conflict between this
8 regulation and --

9 MR. ZDARSKY: Well --

10 QUESTION: I understand your argument about
11 preemption, but the question I really was leading up to
12 is, why isn't your -- why wasn't your preemption position
13 totally controlling of the sale by an Indian retailer to
14 either a non-Indian or an Indian, because it's still
15 governed by the statute, the Federal statute, isn't it?

16 MR. ZDARSKY: We are not involved in that
17 subsequent transaction.

18 QUESTION: No, I understand, but your argument,
19 it seems to me, would have required a different result in
20 the portion of the opinion that the Chief Justice read to
21 you. That's where I don't quite follow your logic.

22 MR. ZDARSKY: Mr. Justice Stevens, our position
23 is that the sales to the retail customer do not determine
24 the preemptive effect of the Indian trader laws on the
25 wholesale transaction. Therefore --

1 QUESTION: Yes, but wouldn't your 100 percent
2 preemption argument require that there be no regulation of
3 the retail sales by the State, no impact on that at all?

4 MR. ZDARSKY: No, because as I understand it,
5 insofar as retailers are selling to non-Indians, by
6 electing to sell to both Indians and non-Indians, this
7 Court has found that those sales that to non-Indians,
8 since they are not covered by the Indian trader laws, that
9 permits the State to impose a minimal burden on that
10 retail seller.

11 QUESTION: Whereas you sell only to Indians.

12 MR. ZDARSKY: That's -- that's --

13 QUESTION: That's the principal distinction.

14 MR. ZDARSKY: That's right, Your Honor.

15 QUESTION: But in assessing the burdens that are
16 placed on the wholesalers in connection with that sale, it
17 seems to me that we should look only at the burden on the
18 wholesaler, not any subsequent downstream burden imposed
19 on the subsequent Indian retail sale.

20 MR. ZDARSKY: I agree.

21 QUESTION: Let me ask another hypothetical about
22 your position. Supposing there was a State environmental
23 law. Say you're dealing with a product that got sour in
24 3 days, or something like that, and there was an
25 environmental law that required that the product be

1 delivered within 3 days of the purchase agreement,
2 something like maybe milk, that would sour, you'd say the
3 State couldn't impose that requirement if the wholesaler
4 is dealing with Indian retailers to sell milk?

5 MR. ZDARSKY: I think that that's true, Your
6 Honor, because Congress has not authorized the States --

7 QUESTION: Right.

8 MR. ZDARSKY: -- to enforce those laws.
9 However, Congress has authorized States to enforce its own
10 liquor laws with respect to liquor sales, certain sanitary
11 codes which may have application on the reservation, and
12 in numerous other cases. Our view here is that the State
13 has come to the wrong place with its problem.

14 QUESTION: Are you saying that it's only
15 Congress that can provide the cure, that the Commissioner
16 could not say, well, this is a pretty good scheme that New
17 York has, so I'm going to adopt a regulation that says all
18 States can do this?

19 MR. ZDARSKY: I think that the Commissioner
20 could adopt a regulation, Justice Ginsburg, that provides
21 for a scheme that would affect trade with Indians. I
22 don't think the Commissioner could delegate to the States
23 some power that they would have to adopt a scheme on their
24 own, but a scheme that the Commissioner found proper might
25 well be imposed as a regulation, because the Commissioner

1 has sole authority over sales to Indians on reservations,
2 and he can do that.

3 QUESTION: Mr. Zdarsky, do you think that if you
4 were selling to a retailer who was not an Indian --
5 hypothetically. You say you don't have any -- but if you
6 were, would you be an Indian trader?

7 MR. ZDARSKY: Who's not an Indian?

8 QUESTION: Yes.

9 MR. ZDARSKY: You would not be.

10 QUESTION: You sell onto the reservation, to a
11 retailer on the reservation, but that retailer is not an
12 Indian.

13 MR. ZDARSKY: You would not be an Indian trader
14 as to that transaction, because that transaction is not
15 covered by the Indian trader statutes or regulations.
16 That transaction is the same as if we sold it --

17 QUESTION: Even though the resale -- even though
18 the sale is onto the reservation and it's known that the
19 resale will be made to Indians, among others.

20 MR. ZDARSKY: That's correct, Your Honor,
21 because the Indian trader laws and regulations don't
22 provide that the coverage at the wholesale level is
23 determined by something that happens at a subsequent event
24 at the retail level.

25 How could we ever, as wholesalers, be bound to

1 monitor transactions which take place by people -- we have
2 30 or 40 customers on our reservation. Some may sell to
3 the non-Indians, some may not. The State claims they
4 can't monitor it, but they would like, in their reply
5 brief, to impose on us as the -- on the respondents as the
6 wholesaler some obligation, some contingent liability to
7 be responsible for what happens to those cigarettes down
8 the chain.

9 QUESTION: Suppose it were not a contingent
10 obligation. Suppose you simply had to sell taxed
11 cigarettes in all cases, and then the Indian retailer
12 could use some refund mechanism which is not your concern?

13 MR. ZDARSKY: I think that would be worse,
14 Justice Kennedy.

15 QUESTION: Would it be -- as a practical matter,
16 would it be a greater burden on you?

17 MR. ZDARSKY: Yes, because every dollar that our
18 customer must commit to paying tax to us as opposed to
19 purchasing product limits the ability of the wholesaler to
20 sell goods to that customer. If he has \$1,000 to commit
21 to buying cigarettes, and he has to commit \$200 of it to
22 paying a State tax to us, he could purchase -- he can't
23 purchase as much as he could otherwise.

24 Our position is that the State cannot impose any
25 burden on our sales to our customers.

1 QUESTION: How do you answer the problem of the
2 15 packs a day for every woman, man, and child on the
3 reservation? I mean, there's obviously grand scale
4 evasion.

5 MR. ZDARSKY: But that isn't our -- that isn't
6 our doing, Justice Ginsburg.

7 QUESTION: Are you saying that the State is
8 helpless until either the Commissioner or Congress comes
9 to the rescue?

10 MR. ZDARSKY: No, I do not, Justice Ginsburg.
11 The State is not helpless, but they have taken no action,
12 as suggested by this Court, since the injunction was
13 granted in 1989, to try to collect these taxes.

14 They haven't tried to impose a scheme at the
15 retail level that might be possible, although the Indians
16 claim some treaty rights. They have not attempted to
17 enter into a tax compact with the tribes that might solve
18 the problem, and, even though they've got 13 or 14 States
19 filing amicus briefs, numerous political heavyweights
20 filing amicus briefs, they haven't gone to Congress, which
21 this Court has suggested is the place to go if you've got
22 a problem with the Indian trader laws.

23 QUESTION: No, but you're also implicitly
24 saying, leaving aside legislation and agreements, you are
25 implicitly saying, or explicitly saying, that some action

1 could be taken directly against the Indians with respect
2 to the non-Indian sales, and since you are in a derivative
3 position, why aren't you just as open to such action as
4 the retailers would be?

5 MR. ZDARSKY: Because, Your Honor, we do not
6 agree that we are in a derivative position. We don't have
7 any involvement or participation with the retail
8 transaction. We are as separate from that as when we sell
9 to the Coast Guard base, or we sell to the Air Force base.
10 We have no control over those cigarettes which are sold
11 without taxes if they are sold to members of the family at
12 a PX that are not permitted to purchase, we don't have
13 that control, and we don't have any derivative
14 responsibility as it exists now under New York law.

15 New York law is set up to provide for imposition
16 of the tax at the wholesale level. That is our complaint.
17 That is why we brought this lawsuit, because --

18 QUESTION: Why aren't you in a derivative
19 position simply because ultimately your complaint rests
20 upon the fact that there is a limitation or a tax upon an
21 Indian sale which in fact is prohibited?

22 MR. ZDARSKY: Because our position, Your Honor,
23 is based on the fact that we are selling to an Indian,
24 that Indian transaction, that sale transaction cannot be
25 regulated by the State, and that therefore we are not

1 responsible for the taxes from that point on.

2 QUESTION: Thank you, Mr. Zdarsky.

3 Ms. Brinkmann, we'll hear from you.

4 ORAL ARGUMENT OF BETH S. BRINKMANN

5 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

6 SUPPORTING THE RESPONDENTS

7 MS. BRINKMANN: Thank you, Mr. Chief Justice,
8 and may it please the Court:

9 We submit that the New York tax regulations are
10 invalid for at least three reasons. First, they're
11 preempted by Federal Indian trader statutes which occupy
12 the field; second, the State regulations are preempted
13 because they conflict with the Indian trader statutes in
14 the implementing regulations; and third, the State
15 regulations are invalid under the Court's reasoning in Moe
16 and Colville.

17 Although we believe that pursuant to those cases
18 the State can require wholesalers to collect and remit
19 State taxes on valid sales to Indians and maintain sales
20 records, we believe that the New York regulations go far
21 beyond the requirements that were upheld in those cases.

22 QUESTION: Well, you then take on the Attorney
23 General in his view of the narrowness of this case.

24 MS. BRINKMANN: Yes, Your Honor.

25 QUESTION: You say we cannot decide it as

1 narrowly as he said. Will you explain why that's --

2 MS. BRINKMANN: Yes, Your Honor.

3 QUESTION: Would you just -- did I hear you
4 right, you can require the wholesaler with respect to
5 sales to Indians, did you say, or did you mean non-
6 Indians?

7 MS. BRINKMANN: We believe under the reasoning
8 of Moe and Colville the State can impose on the wholesaler
9 simple collection and remittance requirements and record-
10 keeping requirement on their sales that are going through
11 Indian retailers to non-Indian.

12 QUESTION: Collection, remittance, and what
13 else?

14 MS. BRINKMANN: Of the tax and record-keeping,
15 which this Court upheld in Colville.

16 QUESTION: Ms. Brinkmann, a fair amount of your
17 brief here was devoted to the effect of the New York
18 regulations on Indian retailers, and yet as I read the New
19 York Court of Appeals opinion, there weren't any Indian
20 retailers involved. They weren't plaintiffs in this case.
21 The New York Court of Appeals didn't base any of its
22 reasoning on the fact that there were retailers involved.

23 MS. BRINKMANN: Your Honor, I think that's
24 similar to the question that was just asked of me also
25 about the question of what's before the Court.

1 We believe that, as this Court in earlier
2 cases -- for example, Potawatomi and elsewhere -- has
3 recognized that the Indian trader statutes go to
4 regulating trade, commerce -- there are two ends to those
5 transactions, and in assessing the burdens on that
6 commerce or trade, it's necessary to look at both ends.

7 Also, the New York Court of Appeals did look to
8 some of the burdens on retailers.

9 QUESTION: But in fact there were no retailers
10 who were parties to this case.

11 MS. BRINKMANN: That's correct, Your Honor.

12 QUESTION: So one has to decide it only in terms
13 of the wholesalers' claims, and perhaps wholesalers can
14 claim that they are protected by the Indian trader
15 statutes in their dealing with retailers, but you agree
16 there are no retailers parties here.

17 MS. BRINKMANN: There are no retailers parties,
18 Your Honor, but I think the New York Court of Appeals
19 recognized the inherent connection between the two ends of
20 commerce and trade.

21 QUESTION: Well, in effect you're saying that
22 the wholesalers have standing to raise the burdens that
23 are imposed on the retailer.

24 MS. BRINKMANN: Your Honor, for example, the
25 burden that retailers register with the State, that

1 necessarily is a burden on the wholesalers. It eliminates
2 their customers if the retailers don't register, so that's
3 the most blatant burden there can be on wholesalers.
4 They'll have no one to trade with.

5 QUESTION: What do you say to the respondents'
6 position that there's nothing derivative about his rights?

7 MS. BRINKMANN: We disagree, Your Honor. We
8 believe that under the reasoning of the Court in Moe and
9 Colville, that because there is a validly taxed
10 transaction on non-Indians, that there can be a minimal
11 burden of collection on the retailer, that that same
12 minimal burden can be passed through to the wholesaler
13 under the Court's reasoning, they determined that that
14 wasn't a transaction protected by the Indian trader
15 statutes, and absent some showing that it wasn't
16 necessary, that that was permitted so that the State could
17 recoup a valid tax.

18 QUESTION: Well, do you think the tax can be
19 collected in advance of the sale by the State, if it's a
20 sale to a non-Indian?

21 MS. BRINKMANN: Yes, Your Honor. I think under
22 the Court's reasoning in Moe and Colville it could be,
23 unless, of course, the Indian traders could show that it's
24 more than a minimum burden, it's unduly burdensome, or
25 that it's not necessary to avoid --

1 QUESTION: But the mere fact that it's collected
2 in advance and is in turn transmitted by an Indian
3 retailer does not invalidate the State scheme?

4 MS. BRINKMANN: We believe that the Court's
5 analysis in its early opinions in which it permitted the
6 retailers to be required to collect the tax, from that it
7 flows that that can be passed on to the wholesaler.

8 In Moe, in fact, that was the underlying factual
9 situation. The retailer would --

10 QUESTION: The argument being made by
11 Mr. Zdarsky is that the difference is it can only be
12 collected at the time of sale, and no advance payment of
13 the tax can be levied, but I don't understand you to be
14 supporting that argument.

15 MS. BRINKMANN: That's correct, Your Honor.
16 Under Colville, in fact, the factual situation was that
17 the retailers had to prepurchase tax stamps from the
18 State, and then they put it on the pack at the time of the
19 retail sale.

20 QUESTION: Then do you take issue with New
21 York's effort to estimate the amount of tax that will be
22 required --

23 MS. BRINKMANN: Yes, Your Honor.

24 QUESTION: -- based on estimated sales to non-
25 Indians?

1 MS. BRINKMANN: Yes, Your Honor. We believe
2 that the statutory -- the regulatory scheme set up here
3 imposing a system of coupons and quotas and trade
4 territories is a comprehensive regulation scheme that's
5 clearly preempted by the plain language of the Indian
6 trader statutes and also conflicts with those statutes and
7 the regulations, and we should --

8 QUESTION: I could see how you can say that if
9 you also took the position that you can't make them prepay
10 taxes, but it seems to me rather strange to say that it's
11 not an impermissible burden to make them prepay taxes that
12 are really owed by somebody else, but that they cannot be
13 forced to comply with relatively minimal record-keeping
14 requirements.

15 MS. BRINKMANN: Your Honor, I think it's the
16 difference between a mere collection of a tax that as the
17 Court in its earlier cases found was necessary because of
18 a validly imposed tax and a regulatory scheme that in
19 truth --

20 QUESTION: But how are you going to determine
21 what the prepayment should be? You said prepayment is
22 valid. What are they going to pay, on what quantity?

23 MS. BRINKMANN: Your Honor, we believe there are
24 several avenues which the State can pursue, and I think
25 one of the issues that we differ is the premise of the

1 wholesale evasion.

2 QUESTION: Well, what --

3 MS. BRINKMANN: The --

4 QUESTION: First explain to me what -- you say
5 prepayment by the wholesaler is all right. What does
6 the --

7 MS. BRINKMANN: As well as the retailer.

8 QUESTION: -- wholesaler tie that prepayment to?
9 How does it know how many stamps it has to buy per period?

10 MS. BRINKMANN: For example, in Colville, the
11 Court upheld the record-keeping requirement on the
12 retailers for both sales to Indians and non-Indians. That
13 simple requirement can also be imposed on the retailer and
14 wholesaler to have a knowledge of where the cigarettes
15 that are being sold are ultimately being sold to.

16 That record-keeping would inform the wholesaler
17 which of the retailer's cigarettes are being -- the
18 quantity which is being sold to non-Indians or Indians.
19 That's already a requirement that this Court has upheld,
20 and imposing that type of system which -- New York has
21 just jumped over that, and has gone to this wholesale
22 regulatory scheme.

23 Stepping back, if the State --

24 QUESTION: Can you be a little clearer on
25 exactly what New York could legitimately do in the way of

1 saying, wholesaler, you prepay. Now, you prepay, how is
2 it determined how much you prepay?

3 MS. BRINKMANN: Once the Court makes clear that
4 these taxes are applicable in the State of New York to the
5 retailers and wholesalers, there's no reason to expect
6 that there would be this type of wholesale evasion that's
7 alleged here.

8 Right now, it's based on good faith belief that
9 these are invalid taxes. As happened after the Court's
10 declaration of the law in Potawatomi, the State and the
11 tribe went back and entered into a compact.

12 Here, the State could enter into a compact with
13 the tribes --

14 QUESTION: Yes, but if it doesn't want to, it
15 seems to me it can stonewall the whole thing by saying
16 yes, you can precollect, but we're simply not going to
17 give you the figures upon which you can base a
18 precollection, and because the other aspects of the scheme
19 have been held to be unduly onerous, that's the end of the
20 precollection scheme.

21 MS. BRINKMANN: Your Honor, under Colville we
22 believe that they would be required to provide that
23 record-keeping. The Court has clearly said that the tribe
24 has to provide the record-keeping to the State for their
25 sales of both Indians and non-Indians under that analysis.

1 Also, we believe that the State certainly, as
2 Mr. Zdarsky pointed out, the Court has numerous times
3 suggested that they can go to Congress if there is
4 evidence of a real tax collection problem after the law
5 has been made clear.

6 Also, I think as Justice Ginsburg mentioned,
7 there certainly are avenues --

8 QUESTION: Well --

9 MS. BRINKMANN: -- through the Department of the
10 Interior if there are regulations --

11 QUESTION: -- that's fine, except that I think,
12 if I understand what you're saying, you're saying the
13 State would simply go to a different collection scheme.
14 It wouldn't base its collection scheme upon a burden
15 placed upon the wholesaler. It would place the burden
16 directly on the retailer.

17 MS. BRINKMANN: No, Your Honor, we believe that
18 that record-keeping obligation can be also imposed on the
19 wholesaler. That's where we differ from Mr. Zdarsky.

20 QUESTION: As an incident of this taxation
21 scheme.

22 MS. BRINKMANN: Yes. What we don't agree with
23 is --

24 QUESTION: I think your time has expired --

25 MS. BRINKMANN: Thank you, Your Honor.

1 QUESTION: -- Ms. Brinkmann.

2 General Koppell, you have 4 minutes remaining.

3 REBUTTAL ARGUMENT OF G. OLIVER KOPPELL

4 ON BEHALF OF THE PETITIONERS

5 GENERAL KOPPELL: To be very brief, Mr. Chief
6 Justice, the Central Machinery and Warren Trading Post
7 cases relied on by respondents specifically related to
8 taxes on sellers, in the case of Central Machinery of farm
9 machinery, to Indian tribes and Indians on the
10 reservation.

11 The Warren case dealt with tax, State tax on
12 gross income of a corporation selling goods at retail to
13 Indians on an Indian reservation.

14 That's completely different, and not related to
15 what's happening here, and what illustrates that best,
16 Mr. Chief Justice is -- and I quote from the Moe
17 decision -- "The State's requirement that an Indian tribal
18 seller collect a tax validly imposed on non-Indians is a
19 minimal burden designed to avoid the likelihood that in
20 its absence non-Indians purchasing from the tribal seller
21 will avoid payment of a concededly lawful tax, since this
22 burden is not, strictly speaking, a tax at all."

23 The argument that we are here taxing the Indian
24 trader is simply not so, and it's -- the Warren case and
25 the Central Michigan case are completely different.

1 The tax also is not -- it's not part of the
2 price. If you look in the appendix at page A46 you'll see
3 that the tax has to be added to the price, but it's not
4 part of the price and we're therefore not affecting the
5 price of goods, which is the province of the Federal
6 Government. We are simply having the tax added to the
7 price on the non-Indian purchaser, which is concededly
8 valid under the Moe decision and the Colville decisions.

9 Furthermore, if the non-Indian -- if there was a
10 non-Indian who was in fact on the reservation and sold to
11 Indians, I believe that that transaction would not be any
12 different from a transaction between the Indian trader
13 wholesaler and the Indian retailers, in answer, I believe
14 it was to your question, Judge -- Justice Scalia.

15 So as I indicated before, the issue here is very
16 narrow. It's --

17 QUESTION: Excuse me, I'm not sure what you just
18 said. You would regard a person to be an Indian trader --

19 GENERAL KOPPELL: Yes.

20 QUESTION: -- if he wholesales to a non-Indian
21 who retails --

22 GENERAL KOPPELL: Who is doing business on the
23 reservation, that's correct. He would be covered by the
24 Indian trader law.

25 There is no distinction -- this is the key.

1 There's no distinction in Federal law between a retail
2 Indian trader and a wholesale Indian trader, and the very
3 same burdens as have been approved in Colville and Moe and
4 by indirection in Potawatomi are placed upon the
5 wholesalers here and should be upheld.

6 QUESTION: Do you have a case for that, that
7 wholesaling to a non-Indian retailer makes you a --

8 GENERAL KOPPELL: No. I derive that from a
9 reading of the Indian trader statutes, and what in fact
10 constitutes an Indian trader. Those are also in the
11 appendix.

12 But the fact of the matter is that what we are
13 doing here is not at all dissimilar from what was done and
14 approved in Colville and Moe.

15 Thank you, Your Honor.

16 CHIEF JUSTICE REHNQUIST: Thank you, General
17 Koppell. The case is submitted.

18 (Whereupon, at 12:06 p.m., the case in the
19 above-entitled matter was submitted.)
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

DEPARTMENT OF TAXATION AND FINANCE OF NEW YORK, ET AL., Petitioners
v. MILHELM ATTEA & BROS., INC., ETC., ET AL.

CASE NO.: 93-377

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Ann Marie Federico

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