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M e m o r a n d u m

To: Dean Kinnee, Chief MIC:64
Assessment, Policy, Standards Department

Date: August 11, 2003

From: Melanie Darling
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Subject: ***Taxability of Personal Property Leased to Indian Tribes***

This is a response to your memorandum of February 26, 2003 to Assistant Chief Counsel Kristine Cazadd in which you asked, on behalf of a representative of an Indian tribe, about the taxability of equipment leased to tribes and used on the reservation. As you may be aware, absent specific federal authority, states lack jurisdiction to impose a tax on the personal property of Indian tribes or individual Indians used on reservation land. For the reasons set forth below, we conclude that the state is pre-empted by federal law from imposing such a tax on Indian lessees of leased equipment located on reservation lands. However, the leased equipment may be assessable to the lessor provided that the tax would not impose a burden on tribal activity that is subject to comprehensive federal regulation.

In your request, you provided these facts: An Indian tribe leases business equipment under the cover of a "true lease" in connection with business enterprises operating on Indian lands. The equipment is located on Indian lands and is used solely by the tribe. Apparently, the tribe is being assessed property tax on the equipment. A representative of the Indian tribe has asked the following questions:

1. Can the county assess the tribe directly because the equipment is owned by a non-Indian entity not on federal land?
2. Can the county assess the lessor of the equipment, with the lessor then passing the tax down to the tribe as part of the rent? Or, should the county assess the lessor with the restriction that such a pass-through by the lessor of the taxes is not permitted?

We have taken the liberty of slightly recasting the questions posed for purposes of providing a more complete response as discussed below.

Law and Analysis

It is well settled that, unless federal law expressly waives immunity, a state has no jurisdiction over tribal Indians on a reservation for taxation purposes. *McLanahan v. Arizona State Tax Commission*, (1973) 411 U.S. 164, 171. The Supreme Court has consistently held that states may tax Indians only when Congress has made its intention to allow it "unmistakably clear." *Montana v. Blackfeet Tribe*, (1985) 471 U.S. 759, 765.

The State Generally is Pre-empted by Federal Law from Assessing Property Owned or Leased by Indians.

1. Can a county assess personal property tax on equipment leased by a tribe that is located on reservation land?

No. The United States Supreme Court has held that absent express congressional authority, states have no power to impose personal property tax on Indians and Indian tribes. This is known as the "per se" rule: unless Congress has expressly granted taxing authority to states for personal property tax on Indians, a court must construe a state personal property tax statute to be pre-empted by federal law as to Indians. [*California v. Cabazon Band of Indians*, (1987) 480 U.S. 202; see also, e.g. Prairie Band of Potawatomi Nation (1987) 241 F. Supp. 2d 1295 ("[A] state may not levy taxes on Indian tribes or individual Indians inside Indian country without express approval of Congress.[1] Because of the 'unique trust relationship' between the United States and Indian Nations, statutes that affect Indians are to be construed broadly, with any ambiguous provision to be interpreted to their benefit.[2]") Unless Congress makes it abundantly clear that it intends to grant taxing authority to the states, the Court must construe the statute as not allowing the taxation of Indians.[3] *Coeur d'Alene Tribe v. Hammond*, 224 F. Supp.2d 1264, 1267 (2002).]

The Supreme Court has examined and struck down numerous examples of personal property taxes that states have attempted to impose on Indians and tribes on the reservation.[4] The Court, in repeated analyses, has examined several state statutes and not found any federal authority for a personal property tax. For example, in *Bryan v. Itasca County*, (1976) 426 U.S. 373, the Court held that a state cannot levy a personal property tax on an Indian's mobile home located on reservation land. The Court rejected a claim that the grant of general civil jurisdiction provided to tribes in 28 U.S.C. §1360(b) authorized plenary civil jurisdiction by the state, including taxing authority. The Court cited *Moe v. Confederated Salish & Kootenai Tribes*, (1976) 425 U.S. 463 in which it held that a state's personal property tax could not be validly applied to motor vehicles owned by tribal members who resided on the reservation. The Court in Moe rejected the argument that the General Allotment Act of 1887 (Dawes Act) or the Indian

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[1] See, County of Yakima v. Confederated Tribes & Bands of Yakima Nation, (1992) 502 U.S. 251, 258 ("['] Absent cessation of jurisdiction or other federal statutes permitting it' we have held, a state is without power to tax reservation lands and reservation Indians.")(quoting Mescalero Apache Tribe v. Jones, (1973) 411 U.S. 145, 148). See also Montana v. Blackfeet Tribe (1985) Supra, et. 764 ("The Constitution vests the Federal Government with exclusive authority over relations with Indian tribes…and in recognition of the sovereignty retained by Indian tribes even after the formation of the United States, Indians and Indian tribes and individuals generally are exempt from state taxation within their territory.")

[2] Couer D'Alene tribe v. Hammond, (D. Idaho 2002) 224 F. Supp.2d 1264, 1268 (citing Oneida County v. Oneida Indian Nation, (1985) 470 U.S. 226, 247.

[3] Hammond, 224 F. Supp.2d at 1268.

[4] "Reservation" as used herein means "Indian country." If the Indian resides on trust lands, then s/he is in "Indian country" and the state lacks authority absent a clear Congressional act. [Oklahoma Tax Com. V. Sac & Fox Nation (1993) 411 U.S. 114]. The Supreme Court held that "a tribal member need not live on a formal reservation to be outside the state's taxing jurisdiction; it is enough that the member live in "Indian country." [Sac & Fox Nation 508 U.S. at 123.] The Court has addressed the definition of "Indian country" adopted by Congress to explain that the Preemption Doctrine applied to Indians living in formal and informal reservations, dependent Indian communities, and Indian allotments, whether restricted or held in trust by the United States (citing 18 U.S.C. 1151[4])." Oklahoma Tax Comm'n. v. Citizen Band of Potawatomi Tribe of Okla. (1991) 498 U.S. 505, 511 508 U.S. at 123, 128.

Reorganization Act of 1934 (IRA) authorized states to impose personal taxes on Indians or Indian tribes on reservations.

Neither subsequent legislation nor Supreme Court case law have changed this long-standing bar to imposition of personal property taxes by a state on reservation Indians and Indian tribes. Therefore, we conclude that the county cannot impose a personal property tax on an Indian or Indian tribe for leased personal property on the reservation because California law is pre-empted by federal law.

2. Can the county assess the non-Indian lessor of leased equipment in the possession of Indians on a reservation?

Yes, an assessor has the authority to assess leased equipment under a long-term agreement to the non-Indian lessor. Pursuant to Revenue and Taxation Code section[5] 405, an assessor is authorized to assess the owners and/or the persons in possession or control of taxable property. [See also, Assessors' Handbook 504[6]. (AH 504) *Assessment of Personal Property and Fixtures* at p.5].

Property Tax Rule 204, governs the situs of leased personal property for assessment purposes. The Rule establishes situs for assessment of the property based on the length of the lease. Property leased for a short term (e.g. daily, weekly, or other short-term basis) has situs with the lessor. The situs of property leased or rented for "an extended, but unspecified, period" or lease term of more than 6 months, has situs with the lessee. Thus, under Rule 204, if the business equipment is leased for more than six months, the property is assessable at the situs of the lessee. If the property is leased on a short term basis, it is assessable at the situs of the lessor, typically the lessor's place of business.

Based on the foregoing discussion, although counties may not assess personal property tax on Indian lessees of leased equipment (because no express federal law permits it), the Revenue and Taxation Code gives an assessor the authority to assess the lessor of the equipment, unless otherwise prohibited or pre-empted by federal law. [Section 405(b).] Indeed, Section 441, subdivision (a), requires each person "owning" taxable personal property to file a property statement with the assessor upon request.

A Tax on Non-Indians Doing Business on the Reservation May be Pre-empted

3. If the lessor thereafter passes the personal property tax down to the lessee tribe or individual Indian lessee as part of the rent, would the tax constitute a prohibited state tax on the Indians?

[5] Unless otherwise indicated, the term "section" referes to the Revenue and Taxation Code.

[6] "A person who owns, claims, possesses or controls property on the lien date is the assessee of that property. This is either the lessee or the lessor. Under section 405, the assessor may assess leased property to either, or both…" [AH 504 at 102-103

Possibly, but this is a factual question to be determined by a court with reference to specific facts and circumstances. Although the state's personal property tax is imposed on a non-Indian lessor, if such a tax results in an indirect economic burden on the tribe it may be prohibited. [*White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980).]

Federal pre-emption is grounded in the Supremacy Clause of the United States Constitution which provides Congress with the power to pre-empt local laws. [*CSX Transp. v. City of Plymouth*, 86 F.3d 626, 627 (6th Cir. 1996)]. In CSX, the Court of Appeals held that pre-emption occurs, *inter alia*, when Congress, in enacting a federal statute 1) expresses a clear intent to pre-empt state law, 2) has legislated comprehensively, or 3) where the state law stands as an obstacle to the execution of the full objectives of Congress. [86 F.3d at 627].

Courts have held that an otherwise non-discriminatory tax on non-Indians may be pre-empted if it is either (1) pre-empted by federal law or (2) interferes with Indian self-government[7]. These two barriers to state regulatory authority are separate and independent. [White Mountain, 448 U.S. at 143]. In White Mountain, the Court applied the first test by balancing the particular competing federal, tribal and state interests at stake before finding a state fuel use tax on a non-Indian logging contractor on the reservation was pre-empted. The Court balanced comprehensive federal timber laws against a state tax bearing no relation to the taxed activity and found that imposition of the tax would burden the federal purpose of Indian self-sufficiency and was, therefore, preempted.. Id. at 148. The Ninth Circuit Court of Appeals applied the White Mountain ruling in *Marty Indian School Board v. South Dakota*, 824 F.2d 684 (9th Cir. 1987). The Court held that a motor fuel use tax on fuel purchased and used by the tribal school board was preempted by the "federal interest in and comprehensiveness of the regulatory scheme" for the school. The Court also said that imposition of the tax would frustrate the federal interest in essential self-determination "by depleting the funds available for the operation of the school." 824 F.2d at 687-88. Thus, in those areas comprehensively regulated by the federal government, any additional state tax, even a tax that falls on non-Indians, will likely violate the pre-emption test.

With regard to the second test of interference with self-government, however, the economic burden on a tribe must be more than minimal to invalidate a tax on non-Indians. In one case, the Supreme Court held that a state could impose a nondiscriminatory tax on non-Indians doing business with a tribe, even though the financial burden of the tax fell on the tribe. [*Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 174-175 (1989)]. In Cotton Petroleum Corp., the U.S. Supreme Court held that a state could impose oil and gas severance taxes on a non-Indian lessee of mineral rights on Indian land under a lease with the United States because the tax only "slightly affected" the demand for leases so the burden on the Indians was "too indirect and too insubstantial" to support a claim of pre-emption 490 U.S. at 187.

Similarly, in Prairie Band Potawatomi Nation, (D. Kansas 2003) 241 F. Supp. 1295, the district court upheld a motor fuel tax imposed on fuel distributors who delivered fuel to a tribal owned

[7] Interference with tribal self-government has been found when state regulation infringes on a tribe's control over its own affairs. *Middletown Rancheria of Pomo Indians v. Workers Compensation Appeals Board* 60 Cal. App. 4 1340, rev. den. (1998). For example, the state's Workers Compensation laws did not apply to a non-Indian casino employee because enforcement of the laws interfered with the tribe's right of self-government over its own employment matters. Tax laws do not ordinarily invoke this test.

gas station because the pre-emption balance favored the state. The Tribe's interest in raising revenues is "at its weakest when goods are imported from off-reservation for sale to non-Indians [and] the state's interest in raising revenues is strongest when non-Indians are taxed." 241 F. Supp. at 1309. In connection with weighing the state's interest, the district court also noted that the state provided off-reservation governmental services funded by the tax paid by non-Indian purchasers of the fuel. Thus, a specific connection between the tax and services provided to those paying the tax strengthens the state's revenue interest in the balancing test.

In our view, a personal property tax imposed on a lessor of ordinary business equipment leased to Indian tribes or individuals, would not be pre-empted per se. If the activity for which the equipment was used is not subject to strict federal government regulation and does not interfere with tribal self-government, the assessment would be permissible.

However, if the leased equipment is used in the operation of a reservation casino, then it's highly probable that the tax would be pre-empted. Indian gaming is subject to comprehensive federal regulatory law known as the Indian Gaming Regulatory Act which pre-empts all state laws related to gaming. [*Gaming World International v. White Earth Band of Chippewa Indians*, 317 F.3d 840 (8th Cir. 2003). The comprehensive federal law evidences a congressional intent that the tribal enterprise is essential to the tribe's self-sufficiency, economic development, and self-government. The additional financial burden of the tax would interfere with the federal plan. Thus, the tax would be pre-empted because the comprehensive federal regulation leaves no room for additional burdens on the Indian tribe. [See, White Mountain, 448 U.S. 136 (1980)]

Based on the foregoing analysis, it is the opinion of the Board legal staff that imposition of the personal property tax on a non-Indian lessor is permissible, depending on the facts of the particular case. However, if the particular equipment is leased for use in reservation Indian gaming and the lessor passes through the tax so that the economic burden of the tax falls on the Indian tribe, the tax would probably be pre-empted.

4. Should the county assess the lessor with the restriction that such a pass-through by the lessor of the taxes is not permitted?

This is a matter of first impression and one that also raises questions of state and federal pre-emption. No actual language for a proposed county ordinance was provided and such language would be crucial to any specific analysis of its viability. However, some general principles to be considered are discussed below and tend to suggest that such an ordinance may be challenged, unless it is clear that the legal incidence of the tax falls does not fall on the Indian tribe.

You have proposed an ordinance that would prohibit a lessor of personal property from "passing on" the tax to an Indian lessee. However, the mere presence of language in an ordinance is not dispositive as to whether it would be pre-empted. For example, one district court, in *Coeur D'Alene Tribe v. Hammond*, rejected a state motor fuels tax law with Legislative intent language which "expressly impose[s] the legal incidence of the tax on the [non-Indian] fuel distributor…." 224 F. Supp. 2d at 1270. In that case, the Court held that a statement of legislative intent was not conclusive as to its legality. The court found that the

practical effect of the tax was a "collect and remit scheme" that placed the incidence of the tax on Indian retailers. Therefore, an ordinance which prohibits pass-through of the tax may still be found to be preempted, depending on the incidence of the tax could possibly still be found to be preempted, depending on the legal incidence of the tax.

In addition, a local rule that prevents a business from passing on costs of business to a particular class of customers, may also raise questions of violation of the Contracts Clause and the Equal Protection Clause of the United States Constitution. [*Exxon Corp. v. Eagerton*, 462 U.S. 176, 186 (1983)]. In Exxon, the Court examined a state law that prohibited "pass-through" of a severance tax to customers. The pass-through was struck down as to interstate sales but allowed intrastate because the particular federal law did not prevent it. No facts are given as to whether the lessors are engaged in interstate commerce. At this time, it is not possible to determine whether a court would find a local prohibition on pass-through of the personal property tax is pre-empted by federal law based on violation of the Indian Supremacy Clause, the Contracts Clause, or other federal grounds.

While no express authority exists for a county to enact an ordinance that prohibits pass-through of the personal property tax to a category of lessees, there is no direct provision precluding it. However, such an ordinance could be viewed as inconsistent with and preempted by section 405 which provides assessors broad authority to assess either a lessee or lessor of property, or both. [*State Board of Equalization v. Ceniceros*, (1998) 63 Cal. App. 4th 122 (4th Dist. 1998)]. In *State Board of Equalization v. Ceniceros*, a county adopted a set of rules to govern its assessment appeal boards which particularly dealt with the exchange of information prior to an assessment appeal hearing. The SBE contended that the rule was contrary to and, thus, preempted by state law. The Court held in this case that state law did not pre-empt the rule because counties were expressly authorized to adopt rules governing assessment appeal hearings, and because the rule at issue was consistent with regulations set forth under section 441.

Therefore, it is the opinion of the Board legal staff that a county ordinance prohibiting the pass-through by a lessor of personal property tax to an Indian lessee could be found to be pre-empted by either state or federal law. Absent specific language to analyze, we are unable to provide a definitive opinion in this regard.

The views expressed in this memorandum are only advisory in nature; they represent the analysis of the legal staff of the Board of Equalization based on present law and the facts set forth herein, and are not binding on any person or public entity.

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