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April 14, 1997

Redacted

Dear Mr. Redacted

I am in receipt of your letter dated February 7, 1997 addressed to Mr. William Minor of the Assessment Standards Division in which you request a letter from the State Board of Equalization confirming that property leased to the Redacted Tribal Health Organization and used in the operation of two off-reservation health centers is not subject to local property taxation. The Redacted Tribal Health Organization (THO) contracts with and receives funding from the federal Indian Health Service to operate two health care center in Redacted and Redacted, California. Such contracts are specifically authorized under federal law by the Indian Self-Determination and Education Assistance Act, P.L. 93-638, 25 U.S.C. §§ 450et seq. ("Self-Determination Act"). You cite *Ramah Navajo School Board, Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832 (1982) and cases following that decision, as support for your view that the Self-Determination Act preempts state taxation of property leased by THO. You also contend that THO, because of its special contractual agreement with the HIS, is a federal instrumentality and, therefore, property leased by THO is immune from state taxation.

For the reasons set forth in detail below, it is our view that property leased by THO is subject to local property taxation, the same as is property leased to the Indian Health Service and the same as is property leased to the United States. At issue here is taxation of property not owned by a tribal organization and not located on a reservation. The case you cite as controlling authority in support of your position, *Ramah Navajo School Board*, involved taxation in connection with the construction of an Indian-owned school on a reservation. Furthermore, a tribal organization, such as THO, performing a contract with a federal government agency is not a federal instrumentality. Regardless of whether THO is a federal instrumentality, however, leased property, unlike property owned by the federal government or a federal instrumentality, is not immune from state and local taxation. Finally, the letter from the Redacted County Assessor's office indicated that THO qualifies as an organization for the welfare exemption but made no finding of eligibility with regard to any property owned or leased by the THO. To be eligible for the welfare exemption, both the claimant organization, or organizations in the case of leased property, and the property for which the claim is filed must meet specific statutory requirements. Notwithstanding the county assessor's belief, claims for the welfare exemption must be filed and reviewed by the State Board of Equalization which makes final determination as to whether a claimant(s) and its property meet all the requirements for the welfare exemption.

Factual Background

The Redacted Tribal Health Organization ("THO") is a joint powers agency organized and controlled by the governing bodies of two federally-recognized Indian tribes – the Redacted Tribe of the Redacted Rancheria and the Redacted Tribe of the Redacted Rancheria. The THO was organized by a joint powers agreement for the purpose of providing health care services to the members of the Redacted and Redacted tribes and other Indians. THO contracts with the Indian Health Service ("IHS"), a federal agency, to operate health care centers providing health care services to Indians pursuant to the Indian Self-Determination and Education Assistance Act, P.L. 93-638, 25 U.S.C. sections 450 et seq. ("Self-Determination Act"). Section 450a of the Self-Determination Act declares congress' intent to establish a policy of self-determination enabling Indian people to undertake effective and meaningful participation in the planning, conduct and administration of services and programs benefitting Indians. Section 450a directs the Secretary of Health and Human Services, upon request by a tribal organization, to enter into a self-determination contract to plan, conduct and administer various programs for the benefit of Indians. Section 450j requires that self-determination contracts include certain provisions and permits the Secretary to use government personnel and property as a means of accomplishing of the purposes of the contract.

The provisions of the Self-Determination Act are incorporated in the contract between THO and the IHS which is entitled the Self-Determination Agreement between the Secretary of Health and Human Services and Redacted Tribal Health Organization ("Self-Determination Agreement"). To carry out its purpose of providing health care services, the Self-Determination Agreement requires that THO and the HIS, within 90 days after the Self-Determination Agreement becomes effective, negotiate and enter into leases for two health centers as provided for by Section 450j(l) of the Self-Determination Act. Subdivision (l) requires that the IHS shall compensate THO for the amounts due under the leases, to include "rent, depreciation based on the useful life of the facility, principal and interest paid or accrued, operation and maintenance expenses, and such other reasonable expenses as the IHS determines, by regulation, to be allowable."

Law and Analysis

All real property and all tangible personal property located in California is taxable unless specifically exempted by the California Constitution or made immune by federal law. Section 1 of Article XIII of the California Constitution provides, in part, that

> "Unless otherwise provided by this Constitution or the laws of the United States.
>
> (a) All property is taxable and shall be assessed at the same percentage of fair market value…" Section 201 of the Revenue and Taxation Code[1] which interprets section 1 of Article XIII states "All property in this State, not

[1] All section references are to the Revenue and Taxation Code unless otherwise stated.

exempt under the laws of the United States or of this State, is subject to taxation under this code."

Federal law does not preempt local property tax.

It is well-settled that, unless federal law expressly waives immunity, a state has no jurisdiction over Indian-owned property located on a reservation for taxation purposes. *McClanahan v. Arizona Tax Commission* (1973) 411 U.S. 164, 169. The Indian Commerce Clause, Article I, section 8, clause 3 of the United States Constitution, grants to Congress broad powers to regulate Indian tribal affairs. *White Mountain Apache Tribe v. Bracker* (1980) 448 U.S. 136, 142. Consistent with these powers, Congress has determined that some aspects of Indian affairs should not be subject to state authority and, thus, federal law has preempted state law in those areas. Furthermore, in view of the "semi-independent position" of the Indian tribes, a state's exercise of jurisdiction may contravene the tribal right of sovereignty and the self-government. *White Mountain Apache Tribe, id*. at 142-143. As a consequence, "there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation. . ." *Mescalero Apache Tribe v. Jones* (1973) 411 U.S. 145, 148.

Where tribal activity is not conducted on a reservation or on lands held in trust by the federal government, federal law does no preempt state and local tax laws. The federal government does not have exclusive jurisdiction over Indian tribes for all purposes regardless of "whether the enterprise is located on or off tribal land." *Mescalero Apache Tribe* 411 U.S. at 147-148. In general, absent federal law to the contrary, Indians involved in business and other matters off the reservation and off lands held in trust are subject to nondiscriminatory state laws, including property tax laws, otherwise applicable to all citizens of the State. See Id. at 149; *Oklahoma Tax Comm'n v. Potawatomi* (1991) 498 U.S. 505. Thus, it is clear that a state may exercise its taxing authority over property owned by a non-Indian and leased to a tribal organization such as THO.

You take the position that a tax imposed on property leased by THO contravenes the policy of the Self-Determination Act because a lessor will increase the rent to cover the amount paid out in tax, which increase will thereby divert federal funds that otherwise would be used to provide health care services. By placing an additional financial burden on the program, you believe the property tax "impedes the federal interests expressed in the [Self-Determination] Act". As support for your position you cite *Ramah Navajo School Board v. Board of Revenue*, (1982) 458 U.S. 832, *Marty Indian School Board v. South Dakota*, (8th Cir. 1987) 824 F.2d 684 and *Hoopa Valley Tribe v. Nevins*, (9th Cir. 1989) 881 F.2d 657. However, unlike the tax on private property leased by THO, those cases involved state taxation of non-Indians involved in activities or programs on a reservation or on land held in trust. The federal and tribal interests, as outlined above, that the courts sought to protect in those cases outweighed the state's interest in taxation.

In *Ramah and Marty*, the state had taxed activities related to Indian schools funded by the federal government. The schools were organized pursuant to the Self-Determination Act as non-profit corporations and were operated exclusively by members of the Tribe. The *Marty* court, in reliance on *Ramah*, held that the tax removed from the tribe control over the expenditure of federal money which undermined tribal interests by affecting the tribe's ability "to make its own rules and be governed by them" and interfered with the federal interest in "providing the quantity and quality of educational services and opportunities which will permit Indian children . . . to achieve the measure of self-determination essential to their social and economic well-being." The court held that the state had no legitimate interest in taxation because the tribe bore the burden of the taxes but did not receive any direct benefits in the form of educational services in return. Likewise, in *Hoopa Valley*, the court found that the state timber yield tax had no relationship to the timber activities being taxed. The absence of any direct services to the tribe rendered the state's interest in taxation insufficient to allow intrusion on the comprehensive federal regulatory scheme and encroachment on the tribe's interests.

Neither the property leased by THO nor the activity affected on a reservation or on lands held in trust, and any tribal and federal interests are outweighed by the state's interest in taxation. Off the reservations, or lands held in trust, THO has no overriding interest in enacting and enforcing its own rules as did the tribal organizations in *Ramah and Marty*, THO must comply with the laws applicable to all citizens. The federal government, through the HIS, has delegated the provision of health care services to THO and, therefore, there is no comprehensive federal regulation, as there was in *Hoopa Valley*, which would be impaired by application of state and local law. The state, through a political subdivision, has a compelling interest in the taxation of property within the subdivision/county. Local property taxes raise revenue to provide direct services, such as police and fire protection, to the property, to its owner(s), and to THO as the lessee of the property.

Although the imposition of the property tax may result in THO paying a higher rent to the property owner(s), there is no absolute prohibition against taxation where the ultimate burden of the tax falls on the tribe. "A state can impose a nondiscriminatory tax on private parties with whom the United States or an Indian tribe does business, even though the financial burden of the tax may fall on the Unites States or the tribe." *Cotton Petroleum Corp. v. New Mexico*, (1989) 490 U.S. 163, 175. In *Cotton Petroleum*, the state imposed oil and gas production taxes on a non-Indian lessee of mineral rights on Indian land under a lease issued by the United States and the Tribe. After distinguishing its earlier decision in *Montana v. Blackfeet Tribe of Indians*, (1985) 471 U.S. 759, 767 (holding that direct state taxation of royalty payments to the Indians frustrate the legislative purpose of "ensuring that Indians receive the greatest return from their property"), the Court held that the burden imposed by the tax on non-Indians lessees was "too indirect and too insubstantial" to support a claim of pre-emption. The Court found that the tax imposed on the non-Indian lessee only slightly affected the demand for on-reservation leases, the value to the Tribe of those leases, and the ability of the Tribe to increase the tax rate. In considering the state's interest, the Court noted that the trial court found that the state provided substantial services to the lessee and the tribe.

Where, as here, the taxed activity takes place off the reservation and off lands held in trust, even a direct tax on a tribal enterprise is permissible. In *Mescalero Apache Tribe v. Jones*, (1973) 411 U.S. 145, of-reservation land was leased by a tribe and developed as ski resort under the auspices of the Indian Reorganization Act of 1934. The express purpose of the Act was "to rehabilitate the Indian's economic life and to give him a change to develop the initiative destroyed by a century of oppression and paternalism." The court rejected the argument that this declaration evidenced Congress' intent that off-reservation tribal enterprises should be considered a federal government function. Because the resort was not located on Indian lands, the court upheld the state gross receipts tax on the ski resort operations and a use tax on personal property.

In summary, *Ramah, Marty and Hoopa Valley* are inapposite because they concern taxation of activities conducted on reservations or on lands held in trust by the federal government whereas the leased property in issue here is privately-owned, leased property. The state's interest in taxation overrides the tribal and federal interests in promoting Indian autonomy and self-sufficiency.

No Federal Instrumentality Immunity

You also maintain that the Self-Determination Act authorizing THO to operate health care centers under contract with the federal government make THO a federal instrumentality immune from state taxation. Your position is premised on a provision of the Self-Determination Act which, for purposes of applying the Federal Tort Claims Act, deems employees of a tribal organization carrying out a contract to be employees of the Public Health Service. As further support, you also point to provisions affording a contracting tribal organization other federal government benefits and protections.

Despite federal government oversight and financial assistance, a tribal organization under contract pursuant to the Self-Determination Act is not a federal instrumentality. The most significant factor in determining whether a particular entity is a federal instrumentality is whether it performs an important governmental function. *U.S. v. Michigan*, (6th Cir. 1988) 851 F.2d 803, 806. The Self-Determination Act aims to remove services such as Indian health care from the range of federal government functions by empowering Indian peoples to assume responsibility for programs and services benefitting Indians. The policy of the Act is to "permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services." 25 U.S.C. § 450a(b). Thus, rather than having tribal organizations serve as surrogates for federal government agencies, the Act's purpose is to devolve authority from the federal government to Indian peoples.

In *Mescalero*, the Supreme Court held that a business enterprise created pursuant to the Indian Reorganization Act of 1934 was not a federal instrumentality. One of the purposes of the I

Indian Reorganization Act was to encourage tribal self-government through the creation of corporations authorized to conduct the business and economic affairs of the tribe. Such economic development was necessary to serve the tribe's social and educational needs. The court conceded that such a business enterprise "serves a federal function with respect to the Government's role in Indian affairs". However, rather than reading the legislative intent as the creation of the equivalent of another federal agency, the Court held that, "on the contrary, the aim was to disentangle the tribes from the official bureaucracy."

Even assuming for the sake of discussion that THO is a federal instrumentality, immunity does not attach to property leased to a federal instrumentality, the same as is the case with respect to property leased to the United States. Only property owned by the federal government or a federal instrumentality is immune from state taxation. *Clallam County v. United States* (1923) 263 U.S. 341.

Qualification for the Property Tax Welfare Exemption

As you state in your letter, Redacted County Assessor's office notified the tribes that THO qualifies as an organization for the welfare exemption. The letter to which you refer, dated December 13, 1996, states that an evaluation by the Redacted County Assessor's office, based on responses to a "business questionnaire", indicates that THO qualifies for the welfare exemption. The letter further advises that tax exempt organizations such as THO are required to file annually a business property statement and a welfare exemption claim form. From your letter, it seems that you mistakenly understand that all property owned or leased by THO qualifies for the welfare exemption. To clear up any possible misunderstanding about the welfare exemption, summarized below are the statutory requirements which must be met by a claimant or claimants and property and the process of granting a claim for welfare exemption.

Article XIII, section 4(b) of the California Constitution authorizes the Legislature to exempt from property taxation in whole or in part "[p]roperty used exclusively for religious, hospital, or charitable purposes and owned or held in trust by corporations or other entities (1) that are organized and operating for those purposes, (2) that are nonprofit, and (3) no part of whose net earnings insures to the benefit or any private shareholder or individual." Section 214 of the Revenue and Taxation Code implements the main provisions of the welfare exemption and provides, in part, that

> (a) Property used exclusively for religious, hospital, scientific, or charitable purposes owned and operated by community chests, funds, foundations or corporation organized and operated for religious, hospital, scientific, or charitable purposes is exempt from taxation…

Subdivision (a) further lists specific qualifying requirements applicable to the owner and specific qualifying requirements for the property. To fall within the purview of Section 214, the claimant organization(s) must be organized and operated for qualifying purposes and the property must be used exclusively for qualifying purposes and activities.

While the letter from the assessor's office states that THO qualifies as an organization, both an organization(s) and its property must meet all of the requirements for exemption in order for the property to be eligible for the welfare exemption. Where property, such as leased property, is owned by one organization but operated by another organization, both organizations must file a claim for and qualify for the welfare exemption. Additionally, the property for which the exemption is claimed must be exclusively used for one or more of the purposes set forth in section 214 and must meet all of the requirements for exemption. A nonqualifying owner and/or operator and/or nonqualifying uses will render the property ineligible for the exemption.

The welfare exemption is administered by the State Board of Equalization ("Board") which makes final determinations approving eligibility. Accordingly, pursuant to section 254.5, welfare exemption claims are filed with the assessor and the assessor is required to forward all such claims with recommendations for approval or denial to the Board. Subdivision (b) of section 254.5 provides that "the board shall make a finding of eligibility of each applicant and the applicant's property and shall forward its finding to the assessor concerned . . . The assessor may deny the claim of an applicant the board finds eligible but may not grant the claim of an applicant the board finds ineligible." Thus, even though an assessor may believe that THO is a qualifying organization for purposes of the exemption, the Board must review and confirm that conclusion through its review of a welfare exemption claim filed by THO if and when such a claim is filed. Similar Board review of any welfare exemption claim filed by the owner of the real property as lessor thereof would be appropriate if and when such a claim is filed.

The views expressed in this letter concerning federal law, the application thereof, and federal instrumentalities are, of course, only advisory in nature. They are not binding upon the Redacted County Assessor or the assessor of any county.

Our intention is to provide courteous, helpful, and timely responses to inquiries such as yours. Suggestions that help us to accomplish this objective are appreciated.

Very Truly Yours,

Louis Ambrose
Tax Counsel

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