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OPINION NO. 2011-12

INDIAN TRIBES; PREEMPTION; TIRE FEE: NRS 444A.090 does not exempt from the new tire fee sales of tires made by a business remitting sales taxes to a governing body of an Indian tribe or colony pursuant to NRS 372.800.

Christopher G. Nielsen, Deputy Director
Nevada Department of Taxation
1550 North College Parkway, Suite 115
Carson City, Nevada 89706

Dear Mr. Nielsen:

You have requested an opinion from the Office of the Attorney General as a result of it coming to your attention that businesses located on Indian reservation or colony land are selling tires and failing to collect and remit the fee on the sale of new tires.

QUESTION ONE

Is a business remitting sales taxes to a governing body of an Indian tribe or colony pursuant to NRS 372.800–.805 exempt from the fee on new tire sales imposed by NRS 444A.090?

ANALYSIS

NRS 444A.090, which imposes a fee of $1 per new tire sold at retail, provides in pertinent part as follows:

> 1. A person who sells a new tire for a vehicle to a customer for any purpose other than for resale by the customer in the ordinary course of business *shall collect from the purchaser*

> *at the time the person collects the applicable sales taxes* for the sale a fee of $1 per tire. A person who did not pay the fee imposed by this section at the time of purchase because he or she purchased the new tire for resale and who then makes any use of that tire other than to resell it in the ordinary course of business, shall pay the fee imposed by this section to the Department of Taxation at the time of the first use of that tire for a purpose other than holding it for resale.
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> 2. The seller shall account separately for all money received pursuant to subsection 1 as a deposit to be held in trust for the State. In accordance with the regulations adopted pursuant to subsection 3, the seller shall transmit 95 percent of the money held in trust pursuant to this section to the Department of Taxation for deposit with the State Treasurer for credit to the Solid Waste Management Account in the State General Fund. The remaining 5 percent and all interest and income which accrued on the money while in trust with the seller become the property of the seller on the day the balance for the month is transmitted to the Department of Taxation and may be retained by the seller to cover his or her related administrative costs.
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> 3. The Director of the Department of Taxation shall adopt regulations establishing acceptable methods for accounting for and transmitting to the Department money collected or required to be paid by retailers pursuant to subsection 1. The regulations must include a designation of the persons responsible for payment. The regulations must, in appropriate situations, allow for the transmission of that money together with the payment of the applicable sales and use taxes.
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> 4. In collecting the fee, the Department of Taxation may employ any administrative and legal powers conferred upon it for the collection of the sales and use taxes by chapters 360 and 372 of NRS.
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> . . . .

NRS 444A.090 (emphasis added).

A business making retail sales of new tires operating on Indian colony land in Reno contends that because it remits its sales taxes to the Indian governing body pursuant to NRS 372.800–.805, it never remits "applicable sales taxes" as set forth in

NRS 444A.090(1), and is, therefore, exempt from the tire tax fee imposed by that provision. The business, therefore, puts in question the meaning of the statute.

An investigation of legislative intent requires looking first to the plain meaning of the law. *Bergna v. State*, 120 Nev. 869, 873, 102 P.3d 549, 551 (2004). A statute does not have a plain meaning with respect to a given subject if it has more than one reasonable interpretation or has internal conflict. *Orion Portfolio Services 2 LLC v. Clark County*, 126 Nev. ____, 245 P.3d 527, 531 (Adv. Op. 39, October 14, 2010).

The phrase "applicable sales taxes" is not defined in the statute. However, it is plain that for taxes instituted by an Indian governing body to qualify under NRS 372.800, they must, by definition, be sales taxes (i.e., "a tax on the privilege of selling tangible personal property at retail"). Insofar as the taxes apply to a transaction in which a tire is sold, it is an applicable tax. Thus, in circumstances where a retailer remits tax to a tribal governing body based on a tax ordinance implemented by the body pursuant to NRS 372.800, there is an "applicable sales tax" within the meaning of NRS 444A.090.

Further, to interpret the provision "collect from the purchaser at the time the person collects the applicable sales taxes" any other way would run against the presumption against exemptions. "There is a presumption that the state does not intend to exempt goods or transactions from taxation. Thus, the one claiming exemption must demonstrate clearly an intent to exempt." *Sierra Pac. Power Co. v. Dep't of Taxation*, 96 Nev. 295, 297, 607 P.2d 1147, 1148 (1980). Said provision is better read as language of timing, i.e., prescribing when in time the tire fee must be paid, rather than language conditioning the payment of the tire fee.

CONCLUSION TO QUESTION ONE

NRS 444A.090 does not exempt from the new tire fee sales of tires made by a business remitting sales taxes to a governing body of an Indian tribe or colony pursuant to NRS 372.800.

QUESTION TWO

Is the State of Nevada preempted by federal law from requiring a retailer making sales of new tires on reservation or colony land to collect the fee imposed by NRS 444A.090 on those sales from its purchasers, both tribal or nontribal members?

ANALYSIS

Federal preemption of state jurisdiction to tax reservations, colonies and persons residing or conducting business thereon can depend on specific statutes and treaty provisions. *See generally McClanahan v. State Tax Comm'n of Arizona*, 411 U.S. 164

(1973). Nevada has within its borders twenty-six recognized tribal entities, which creates the possibility of variation. Bearing that in mind, certain conclusions may nevertheless be reached.

First, a state may generally not impose a tax[1] the legal incidence of which falls on the tribe, its members living on the reservation, or persons trading with the tribe or its members on the reservation. *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458 (1995). This limitation is present unless a federal statute authorizes such taxation by a state. *Cf. White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 151 n.16 (1980).

In the subject circumstances, the legal incidence of the new tire fee falls on the purchaser of the new tires, given that, under NRS 444A.090, the retailer is required to collect the tax from the buyer and is compensated for its role as collector. *Chickasaw Nation*, 515 U.S. at 461–62.

Therefore, a retailer of new tires selling on reservation or colony land may not be required to collect the tire fee from members of the reservation or colony, unless a federal statute so authorizes.

A different analysis is undertaken where the incidence of taxation falls on a person who is not a member of the tribe. "(W)here . . . a State asserts authority over the conduct of non-Indians engaging in activity on the reservation," in the absence of a preempting statute, the courts have applied an interest-balancing test for determining whether the assertion is preempted by federal law. *Bracker*, 448 U.S. at 144. That analysis involves making a "particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." *Id.* at 145 ("the *Bracker* test").

Under the *Bracker* test, the courts have found implied preemption where the tax involved an area of tribal activity in which there was pervasive federal regulation of the tribe. *Id.* at 148 (harvesting timber on reservation land); *Ramah Navajo School Bd., Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832 (1982) (construction of a tribal school). On the other hand, where no such federal involvement exists and the "taxation is directed at off-reservation value," for example, items imported to the reservation and sold to the non-members without change, the courts have found no such implied

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[1] The fee is an involuntary exaction used to fund waste management programs, as well as public education, provided by the State and health districts. NRS 444.616. As such, it is analyzed as a tax, not a user fee. *Nat'l Cable Television Ass'n, Inc. v. U.S.*, 415 U.S. 336, 341 (1974); *In re Lorber Indus. of Cal. Inc.*, 675 F.2d 1062, 1067 (9th Cir. 1982).

preemption. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 147 (1980); *see also Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463 (1976).

At this point, we have no indication that the activity of selling new tires to tribes is in an area of pervasive federal regulation, or that the tires themselves derive any value from the colony. Therefore, we have no basis for concluding that application of NRS 444A.090 to sales to non-tribal members is preempted.

CONCLUSION TO QUESTION TWO

Absent a federal statutory or treaty provision to the contrary, a retailer of new tires on a reservation or colony may not be required to collect the new tire fee from a member of that reservation or colony but may be required to collect the fee from non-reservation or colony members.

Sincerely,

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By: 
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