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OPINION NO. 2012-07

TAXATION; INDIAN COUNTRY: The State may collect sales tax from sales of construction project materials occurring outside of Indian country to a non-Indian construction contractor who then delivers and uses the material on tribal property. A tribe may collect sales tax from sales of construction project materials within Indian country to a non-Indian contractor where the transaction concludes on tribal land, precluding the ability of the state to levy a sales tax on the same transaction.

Christopher Nielsen, Executive Director
Department of Taxation
1550 College Parkway, Suite 115
Carson City, Nevada 89706-7937

Dear Mr. Nielsen:

You have asked this office for an opinion on the subject of taxation in Indian country.¹ Your request is for advice about state authority to levy several different kinds

¹ The term Indian country is widely accepted to mean,

(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government . . . , (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

of tax in different circumstances. With your consent, your opinion request will be bifurcated. This opinion will address the question that you have indicated should be prioritized; remaining questions will be addressed in a subsequent opinion.²

QUESTION ONE

If a non-Indian construction contractor³ performing a construction contract for improvement to real property⁴ on tribal land, purchases and receives construction material outside the reservation, and then transports the material to the work site on the reservation, are applicable sales or use taxes due to the tribal government or to the State of Nevada?

ANALYSIS

Because this question hypothesizes the application of either a sales tax or a use tax, there are two distinct analyses that must be made: (i) whether sales tax is due on the purchase; and (ii) if sales tax is avoided (*i.e.*, a resale certificate is presented), whether use tax is due on the use of the materials. These issues will be addressed in turn.

Sales and Use Tax Generally

Nevada imposes a sales tax upon retailers for the privilege of selling tangible personal property at retail in Nevada. NRS 372.105. Nevada also imposes a corresponding excise tax, known as a use tax, on the storage, use, or other consumption of tangible personal property in Nevada. NRS 372.185, NRS 372.190. Use tax is complementary to the sales tax in that it guarantees that any nonexempt retail sales of property that have escaped sales tax liability are nonetheless taxed when the property is utilized in the state. *State, Dep't of Taxation v. Kelly-Ryan, Inc.*, 110 Nev. 276, 280, 871 P.2d 331, 334 (1994); *see also* NRS 372.345. While sales tax is

18 U.S.C. § 1151, *quoted in Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 526–27 (1998).

² The other questions concern state authority to impose taxes based on lodging; cigarettes or other tobacco products; and tires. You have also asked whether the exemptions created for tribes in state law at NRS 372.805 and 374.805 apply when land is acquired in fee title by an Indian tribe.

³ “‘Construction contractor’ means any person who acts solely in his or her professional capacity or through others to construct, alter, repair, add to, remodel or otherwise improve any real property.” NAC 372.190(1).

⁴ “‘Construction contract for improvement to real property’ means a contract for erecting, constructing or affixing a structure or other improvement on or to real property, or the remodeling, altering or adding to or repairing of an improvement to real property.” NAC 372.190(2).

assessed at the time of sale, use tax is assessed at the time storage, use, or other consumption of the property occurs within Nevada. *Sparks Nugget, Inc. v. State ex rel. Dep't of Taxation*, 124 Nev. 159, 164, 179 P.3d 570, 574 (2008). Although complementary, the two are separate and distinct taxes administered by the State of Nevada.

A tribe has authority to tax transactions occurring within Indian country. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982). This includes the right of the tribe to impose a sales tax. “The power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status.” *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 152 (1980).

Where the transaction occurs outside of Indian country with a non-tribal member, the law is clear that the state may levy its sales tax on the transaction, regardless of where the property is ultimately consumed, as state taxation is unaffected by tribal sovereignty. “An Indian tribe’s sovereign power to tax—whatever its derivation—reaches no further than tribal land.” *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 653 (2001). This was firmly established in *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 99 (2005). There the State of Kansas imposed a tax on receipt of motor fuel by non-Indian fuel distributors even though the distributors subsequently delivered that fuel to a gas station owned by, and located on, the Reservation of the Prairie Band Potawatomi Nation. Prior to *Wagnon*, authorities held differing views about whether an interest-balancing test – drawn from *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980) – is required to determine state authority to tax in the face of claims of preemption based on a tribe’s sovereign interest. The *Wagnon* Court, though, resolved the dispute by simply rejecting use of *Bracker’s* interest-balancing test outside of Indian country.⁵

[W]e formulated the balancing test to address the “difficult questio[n]” that arises when “a State asserts authority over the conduct of non-Indians engaging in activity on the reservation.” The *Bracker* interest-balancing test has never been applied where, as here, the State asserts its taxing authority over non-Indians off the reservation. (Citations omitted.)

Wagnon, 546 U.S. at 110.

⁵ In its analysis, the Court first determined that the legal incidence of the state tax fell on the non-Indian distributor and not on the tribe. The conclusions drawn in this opinion also rest on the assumption that the legal incidence of Nevada’s sales and use taxes fall on the non-Indian contractor, not the tribe.

Therefore, under the rule of *Wagon*, the State may impose a sales tax on the sale of construction project material occurring outside of Indian country, even if the material is ultimately used in Indian country.⁶

Use Tax for Use of Materials in Indian Country

Payment of sales tax creates an exemption from use tax. NRS 372.345, NRS 372.350. Therefore, where a retail sale is made outside of Indian country to a non-tribal member without the application of sales tax, for example under a resale certificate, and the ultimate use of the property is made on tribal land, the analysis shifts to use tax.

Nevada law is clear that, in a construction contract for improvement to real property, the construction contractor is the consumer of the property, subject to use tax on materials consumed in the construction contract that were not subject to sales tax. NAC 372.190(2), NAC 372.200. Here, the contractor, as a non-tribal member, will be subject to Nevada use tax on the consumption of the property used in completion of the construction contract as: (i) the legal incidence of the tax does not fall on the tribe or a tribal member, and (ii) there is no provision for use tax in most Indian tax ordinances; and even where the Tribe asserts a use tax, a similar levy by the State is not precluded by NRS 372.805.

Legal Incidence of Use Tax Falls on Non-Tribal Construction Contractor

The incidence of the use tax falls directly on the non-Indian construction contractor, not the tribe or a member of the tribe. “[A] State’s excise tax is [per se] unenforceable if its legal incidence falls on a Tribe or its members for sales made within Indian country.” *Oklahoma Tax Comm’n v. Chickasaw Nation*, 515 U.S. 450, 453 (1995). Where the incidence of a state tax falls on non-tribal members, a state’s action in imposing the tax is permissible because it does not interfere with any supervening federal law and does not violate the proscription against direct on-reservation taxation of

⁶ Your question infers that the answer must be that either the State can tax a transaction or a tribe may do so. But state and tribal taxation are not mutually exclusive. Even if the State may tax an off-reservation transaction, the tribe may also impose its own tax.

When two sovereigns have legitimate authority to tax the same transaction, exercise of that authority by one sovereign does not oust the jurisdiction of the other. If it were otherwise, we would not be obligated to pay federal as well as state taxes on our income or gasoline purchases. Economic burdens on the competing sovereign . . . do not alter the concurrent nature of the taxing authority.

Wagon, 546 U.S. at 114–15, quoting *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134, 184, n. 9 (1980) (Rehnquist, J., concurring in part, concurring in result in part, and dissenting in part). We offer no conclusions regarding any tribe’s specific authority.

Indians without clear congressional intent. *Herzog Bros. Trucking, Inc. v. State Tax Comm'n*, 508 N.E.2d 914 (N.Y. 1987), *cert. granted, judgment vacated on other grounds*, 487 U.S. 1212 (1988). It is irrelevant who bears the economic burden of the tax. Only the legal incidence of the tax is relevant. *Barona Band of Mission Indians v. Yee*, 528 F.3d 1184, 1189 (9th Cir. 2008). Where a construction contractor is statutorily or by regulation liable for tax as the consumer of the property used in a construction contract, the construction contractor is the party upon whom the legal incidence of the tax falls. *Id.* at 1190; NAC 372.200, NAC 372.210. Here, the legal incidence of the use tax falls upon the construction contractor.

Additionally, while a full evaluation of the balancing factors set forth in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980) is beyond the scope of this opinion, the taxation of a non-Indian construction contractor making use of tangible personal property that escaped sales taxation outside of Indian country is likely permissible under a *Bracker* analysis.

With respect to on-reservation activities by non-tribal members, there are two barriers to the levy of the use tax by the State: (i) preemption by federal law; and (ii) an infringement on the sovereignty of the Tribe. *Bracker*, 448 U.S. at 142-43. As noted above, there is nothing preempting the application of the use tax, as the incidence of the test falls on a non-Indian construction contractor, and there is no direct federal preemption of the use tax. And with regard to the infringement of the sovereignty of the tribe, without having a full description of circumstances to apply the balancing factors, a specific determination cannot be made. However, given that the taxation involves non-tribal members, *Gila River Indian Cmty. v. Waddell*, 91 F.3d 1232, 1236 (9th Cir. 1996); *Salt River Pima-Maricopa Indian Cmty. v. State of Arizona*, 50 F.3d 734, 739 (9th Cir.), *cert. denied*, 516 U.S. 868 (1995); it is levied in a non-discriminatory manner; and it is intended to tax items that for one reason or another escaped State sales taxation, the application of the use tax to the construction contractor is likely valid. Assessment of a use tax on a construction contractor would not impact the right of the tribe to conduct its affairs.

Tribal Taxing Ordinance Does not Include Levy of Use Tax

Within Nevada, where a tribe has authority to levy a sales tax, the State has legislatively preempted collection of a State sales tax on the same transaction, to the extent the tribe has levied its own tax, regardless of whether the State *may* do so under a *Bracker* analysis. More specifically, the Nevada Legislature has concluded that the State may not collect sales or use taxes on the "sale of tangible personal property on an Indian reservation or Indian colony . . . if: (1) The tax is equal to or greater than the tax imposed by this chapter; and (2) A copy of an approved tribal tax ordinance imposing the tax has been filed with the Department of Taxation." NRS 372.805 (emphasis added). There is no analogous statutory provision preventing collection of use tax by

the State, as the express statutory language is limited to the “sale” of property in Indian country.

As an example, the Washoe Tribe Law and Order Code levies a sales tax for transactions on reservation land stating, “[f]or the privilege of *selling* tangible personal property at retail, a tax is hereby imposed upon all retailers located within the jurisdiction of the Washoe Tribe” at the sales tax rate applicable where the tribe is located. Washoe Tribe of Nevada and California, Law & Order Code, Title 12, §12-20-010 (emphasis added).

CONCLUSION TO QUESTION ONE

The State may collect sales tax from sales of construction project materials occurring outside of Indian country to a non-Indian construction contractor who then delivers and uses the material on tribal property. Additionally, the State may collect use tax on the use of construction project materials by a non-Indian construction contractor where such materials were sold by non-Indian retailers outside of Indian country and escaped sales taxation.

QUESTION TWO

If a non-Indian construction contractor, engaging in a construction job on tribal land, receives construction material delivered to the work site on the reservation, are all applicable sales or use taxes due to the tribal government or to the State of Nevada?

ANALYSIS

Once again, the issue addressed in this question requires analyses of two separate factual scenarios: (i) where the sale concludes outside of tribal land and the goods are then delivered to tribal lands; and (ii) where delivery upon tribal land concludes the sale, and is thus the situs for the incidence of taxation. In the first scenario, the State of Nevada retains taxing jurisdiction, while in the second, the tribe has authority to tax.

For a “sale” to occur, there must be a “transfer of title or possession . . . in any manner or by any means whatsoever, of tangible personal property for a consideration.” NRS 372.060(1); *Shell Oil Co. v. Dir. of Revenue*, 732 S.W.2d 178 (Mo. 1987). The transfer of title or possession is the moment upon which the transaction occurs for sales and use tax purposes. *Hales Sand & Gravel, Inc. v. State Tax Comm'n*, 842 P.2d 887, 892 (Utah 1992). Delivery of goods is not itself sufficient to conclude transfer or right, title, or possession, as delivery to a particular place or consignee, such as a common carrier, consummates the transaction and is considered the point of sale, regardless of whether delivery has been made to the ultimate purchaser. *Id.*

Thus, the situs of the transaction is the place at which right, title, or possession transfers. If right, title, or possession transfers off the reservation, the sales tax analysis described above dictates that the transaction is taxable by the State of Nevada. If however, the transaction concludes on the reservation, the State is preempted from taxing the transaction, to the extent the tribe has complied with the requirements of NRS 372.805.

In Nevada, the Legislature has eliminated uncertainty in conflicting taxation, stating, “[t]he governing body of an Indian reservation or Indian colony may impose a tax on the privilege of selling tangible personal property at retail on the reservation or colony.” NRS 372.800(1). Based on the analysis set forth above, where a sale is deemed to transact on the reservation, the tribe has the authority to levy a sales tax. If a tribe collects a sales tax on a transaction occurring on the reservation, the State cannot, so long as the tribe’s tax is at least as great as the State’s would be, and the ordinance providing for such taxation is on file with the Department of Taxation pursuant to NRS 372.800 and 372.805 (and parallel provisions NRS 374.800 and 374.805).

Specific facts are necessary to evaluate where a particular sale transacts. However, if the sale transacts on non-tribal land, and the delivery to the tribal land is subsequent to the incidence of the tax, the State retains the right to levy a sales tax. If, however, delivery to tribal land is a condition of the sale, and delivery is made other than by a consignee (*i.e.*, a common carrier), the sale concludes on tribal land, and the tribe retains the authority to levy its own sales tax, precluding the State’s ability to levy a sales tax, assuming the requirements of NRS 372.805 are satisfied.

It should be noted that where the parties attempt to alter the substance of the transaction by concluding the sales on tribal land, such action may not be respected. For example, when a sale would have occurred outside the reservation but for the tax exempt status of the tribe, the State retains the right to tax such transactions. This is because the balance of interests tips in favor of the State when “the state levies a neutral sales tax on non-Indians’ purchases that—but for contractual creativity—would have occurred on non-Indian land.” *Barona Band of Mission Indians v. Yee*, 528 F.3d 1184, 1192 (9th Cir. 2008).

CONCLUSION TO QUESTION TWO

A tribe may collect sales tax from sales of construction project materials within Indian country to a non-Indian contractor where the transaction concludes on tribal land, precluding the ability of the state to levy a sales tax on the same transaction pursuant to the requirements of NRS 372.805. If the transaction concludes on non-tribal land, and


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the materials are merely delivered to tribal land after consummation of the sale; the state retains authority to levy a sales tax.

Sincerely,

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By


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