

SMALL BUSINESS FORMATION FOR AMERICAN INDIAN ENTREPRENEURS

**TAXATION ISSUES (NORTH DAKOTA)
2013**

Disclaimer

- **The information provided is for informational purposes only, does not constitute legal advice or create an attorney-client relationship, and may not apply to all circumstances. If legal advice or other expert assistance is required, the services of a competent professional person should be sought.**

Topics

Federal and State Taxes

- Section A: Preface
- Section B: Four Primary State Taxes
- Section C: Governing Law of State of Incorporation
- Section D: Determine State and Federal Taxes Applicable to Your Business
- Section E: Income and Corporate Taxes
- Section F: Sales and Use Taxes - General Information (Applicable to Businesses Outside of Indian Country or Non-Indian Businesses Inside Indian Country for Transactions with Non-Indians)
- Section G: Sales and Use Taxes - Indian Issues

Section A: Preface

Business License and Permit Requirements along with Tax Rules Applicable to Indian Owned Businesses Vary.

A "Rigid Rule" of State Taxing Powers In Indian Country Does Not Exist.

Tribal Tax Compact Agreements for Gaming or Oil and Gas Are Not Discussed

Section B: Four Primary ND State Taxes

- Personal Income Tax
- Sales and Use Tax
- Real Property
- Severance Tax

Section C: Governing Law of State of Incorporation

States have tried to impose state tax liability on Indian businesses that have incorporated under state law. In two cases, where the Supreme Court denied review, it was held that an Indian business that incorporates under state law does not lose its tax immunity. However, in North Dakota it is uncertain due to a North Dakota Supreme Court 1983 case regarding jurisdiction, not taxation per se.

Due to questions of state governing authority, as well as for tax considerations, tribes and tribal members generally find the use of state-chartered entities not as desirable as entities created under tribal law.

Governing Law of State of Incorporation (con't.)

- Pourier v. South Dakota Dept. of Revenue
(2004)

658 N. W. 2d 395, rehearing denied (April 1, 2003), rehearing granted in part, opinion vacated in part on rehearing by 674 N. W. 2d 314 (S. D. 2004), cert. denied, 124 S. Ct. 2400 (U.S.S.C. 2004)

Governing Law of State of Incorporation (con't.)

- Loren Pourier is an enrolled member of the Oglala Sioux Tribe and a resident of the Pine Ridge Indian Reservation in South Dakota. Muddy Creek Oil and Gas, Inc. (“Muddy Creek”) is a **South Dakota corporation** whose sole shareholder and president is Pourier. The corporation's principal place of business is Pine Ridge. Muddy Creek purchased gas in Nebraska and trucked it to Pine Ridge for resale to consumers including reservation residents. The South Dakota Department of Revenue imposed a State motor fuel tax on Muddy Creek which is the basis of challenge in this case.

Governing Law of State Of Incorporation (con't.)

- The Department claims that Muddy Creek cannot meet the threshold requirement of being either the Tribe or an enrolled member of the Tribe because as a corporation, it does not have a racial identity. We disagree and hold that a corporation owned by the Tribe or an enrolled tribal member residing on the Indian reservation and doing business on the reservation for the benefit of reservation Indians is an enrolled member for the purpose of protecting tax immunity.

Governing Law of State of Incorporation (con't.)

- Congress' primary objective in Indian law for several decades has been to encourage tribal economic independence and development. By finding that incorporation under state law deprives a business of its Indian identity, we would force economic developers on reservations to forego the benefits of incorporation in order to maintain their guaranteed protections under federal Indian law.

Governing Law of State of Incorporation (con't.)

- *Eastern Navajo Industries, Inc. v. Bureau of Revenue*, 552 P.2d 805 (N.M.App. 1976), *cert. denied*, 430 U.S. 959 (1977)

Governing Law of State of Incorporation (con't.)

- Corporation was formed under the N. M. State Business Corporation Act at the instigation and under the auspices of the Navajo Tribal Council, where individual Navajo tribal members held a 51% majority of stock which they purchased with loans from the federal government under a program designed to facilitate Indian self-help.

Governing Law of State of Incorporation (con't.)

- Federal regulations defining the federal loan policy for Indian enterprises and the Navajo Tribal Code specifically authorized the incorporation of an Indian commercial enterprise under state law without a corresponding loss of “Indianness.” 25 U.S.C. §13.

Governing Law of State of Incorporation (con't.)

- New Mexico's State corporate tax (1.7-5.3%) is not applicable to a corporation, located in Indian country, with 51% or more Indian ownership by Indian's from that Indian country.

Governing Law of State of Incorporation (con't.)

Airvator, Inc. v. Turtle Mountain Mfg. Co., 329 N.W.2d 596 (N.D. 1983) *Airvator* does not address the scope of a state's authority to tax Indian commerce. It held that a corporation created under state law is a creature of the state, notwithstanding the fact that the owners of the corporation may be a tribe or tribal members. Thus, the corporation may be sued in state courts as may any other state-created entity and judgment may be obtained against corporate assets.

Section D: Determine State and Federal Taxes Applicable to Your Business

- Federal and State Personal Income Tax
- Federal and State Corporate Income Tax
- State Business and Corporation Privilege Tax
- State Sales and Use Taxes
- Be aware - other taxes may be applicable to your particular business (liquor, cigarettes, etc.)

Section E: Federal Personal Income and Federal Corporate Income Tax for American Indian Business Owners

- Generally, **individual American Indians and their businesses** are subject to federal income taxation, even if their income is earned in Indian Country, **unless exempted by treaty, statute, or Act of Congress.**

Section E: Federal Personal Income and Federal Corporate Income Tax for American Indian Business Owners (con't.)

- Tribal membership does not exempt an Indian from federal taxation. *Choteau v. Burnet*, 283 U.S. 691 (1931); *United States v. Brown*, 824 F. Supp. 124 (S.D. Ohio 1993); IRS Rev. Rul. 54-456; 154-2 C.B. 49.

Unless Exempted, Federal Personal Income Tax Applicable to American Indians

- “The Internal Revenue Code of 1939 contains no provision exempting an individual from the payment of Federal income taxes solely on the ground that he is an Indian.”

Unless Exempted, Federal Personal Income Tax Applicable to American Indians (con't.)

- “Based on the decisions of the Supreme Court ... it is the position of the Internal Revenue Service that exemption from the payment of Federal income tax may not be implied, and that if exemption of Indians from the payment of such tax exists, it must derive plainly from the Federal tax statutes, or from treaties or agreements with the Indian Tribes concerned or some Act of Congress dealing with their affairs.”

Section E: Federal Personal Income and Federal Corporate Income Tax for American Indian Business Owners

- An Indian Nation/Tribe/Pueblo, and any unincorporated business owned by them, are **not** entities subject to federal income taxation. An Indian Nation/Tribe/Pueblo corporation formed by them **may** be subject to federal corporate income tax, depending on the form of the corporation (e.g., incorporated under state law).

Section E: Federal Personal Income and Federal Corporate Income Tax for American Indian Business Owners

The existing Internal Revenue Ruling 94-16, dated March 21, 1994, holds that a corporation organized by a tribe under state law is subject to federal income tax. IRS is supposed to re-visit this ruling.

Allotments

- **Terminology**
- An 'allotment' is a term of art in Indian law, describing either a parcel of land owned by the United States in trust for an Indian ("trust" allotment) or owned by an Indian subject to a restriction on alienation in the United States or its officials ("restricted" allotment).

Allottee

- Holder of a restricted or trust allotment is referred to as an 'allottee.'

Trust and Restricted Allotments

- Trust and restricted allotments are subject to federal restraints on encumbrance and alienation, and are exempt from federal and state taxation during the restricted period.

Trust and Restricted Allotments (con't.)

- An 'encumbrance' is a legal term of art for anything that affects or limits the title of a property, such as mortgages, leases, easements, liens or restrictions.

Trust and Restricted Allotments (con't.)

- The restrictions on encumbrance and alienation apply by operation of law, whether they appear in the patent or other title document.
- Also, the restrictions on encumbrance and alienation are not personal to the allottee, but generally run with the land to the allottee's Indian heirs or devisees.

Exemption by Statute

- One federal statute found to exempt income derived directly from Indian trust or restricted allotted lands from federal and state taxation is the General Allotment Act.

No Federal/State Personal Income Tax on Income Derived Directly by Indian Allotment Owner(s) (Not Third Party) from His/Her/Their Allotted Lands

- In *Squire v. Capoeman*, 351 U.S. 1 (1956), the U.S. Supreme Court held that the personal income of an Indian owner derived directly from his/her restricted Indian allotment was exempt from federal personal income tax in order to fulfill the purposes of the General Allotment Act.

IRS Revenue Bulletin

- The *Capoeman* decision led to the issuance of IRS Revenue Bulletin 1956-1 C.B. 605 and IRS Rev. Rul. 56-342:
- “Income held in trust for or received by the patent holder which is derived directly from allotted and restricted Indian lands while such lands are held by the United States, as trustee, in accordance with section 5 of the General Allotment Act of 1887, 24 Stat. 388, as amended, 25 U.S.C. 348, is exempt from Federal income tax.”

IRS Revenue Bulletin (con't.)

- “Such exempt income includes rentals (including crop rentals), royalties, proceeds of sales of the natural resources of such land, and income from the sale of crops grown upon the land and from the use of the land for grazing purposes. Such income is not includible in computing net earnings from self-employment ...” *See also* Rev. Rul. 67-284, 1967-2 C.B. 55.

No Federal/State Personal Income Tax on Income Derived Directly by Indian Allotment Owner(s) (Not Third Party) from His/Her/Their Allotted Lands

- The federal and state taxation exemptions under *Capoeman* extend to trust allotments located outside Indian reservations. The GAA expressly provides in section 4 that allotments beyond reservation boundaries are to be held under the same terms as reservation allotments.

No Federal/State Personal Income Tax on Income Derived Directly by Indian Allotment Owner(s) (Not Third Party) from His/Her/Their Allotted Lands (con't.)

- Also, *Capoeman* applies to allotments issued pursuant to tribe-specific allotment statutes, regardless of whether the GAA applies to those allotments or not.
- See *Stevens v. Comm'r*, 452 F.2d 741, 744-746 (9th Cir. 1971) (construing Ft. Belknap Allotment Act of March 3, 1921, 41 Stat. 1355); Rev. Rul. 74-13, 1974-1 C.B. 14 (exemption described as applying to restricted lands generally rather than specifically to GAA lands).

No Federal/State Personal Income Tax on Income Derived Directly by
Indian Allotment Owner(s) (Not Third Party) from His/Her/Their
Allotted Lands (con't.)

- The taxation exemption for restricted allotted lands applies when individual trust property is transferred to a subsequent **allottee**,
- whether by gift,
- devise [under will],
- inheritance (*Asenap v. U.S.*, 283 F. Supp. 566 (W. D. Ok. 1968),

**No Federal/State Personal Income Tax on Income Derived Directly by
Indian Allotment Owner(s) (Not Third Party) from His/Her/Their
Allotted Lands (con't.)**

- where the federal government purchases lands for individual Indians which is held in trust solely for their benefit, or
- when restricted allotted land is voluntarily exchanged for restricted allotted land of like value when such exchange is authorized by the Secretary of Interior.
- *See* Rev. Rul. 57-523, 1957-2 C.B. 51; Rev. Rul. 67-284, 1967-2 C.B. 55; Rev. Rul. 74-13, 1974-1 C.B. 14.

No Federal/State Personal Income Tax on Income Derived Directly by
Indian Allotment Owner(s) (Not Third Party) from His/Her/Their
Allotted Lands (con't.)

- There is no federal or state tax exemption for income derived by a third party, other than the allottee(s), from a lease of a restricted or trust Indian allotment. *Wynecoop v. Comm'r*, 76 T.C. 101 (1981) (mineral lease).

Fee Patent Allotted Land Subject to State Taxation

- Under the GAA, however, when a fee patent has been issued to the Indian allotment owner, the allotted land becomes subject to federal and state taxation.

Income from Unallotted Tribal Lands Taxable

- Income of Indian logging subcontractor from logging on reservation lands held taxable. *Fry v. United States*, 557 F.2d 646 (9th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978).

Income from Unallotted Tribal Lands Taxable (con't.)

- Income of tribal member from cattle grazing on tribal trust land held taxable. *Holt v. Commissioner*, 364 F.2d 38 (8th Cir. 1966), *cert. denied*, 386 U.S. 931 (1967).
- Income from tribal members on rents from tribal trust lands held taxable. *Anderson v. United States*, 845 F.2d 206 (9th Cir.), *cert. denied*, 488 U.S. 966 (1988).

Personal Income Taxation of Native Americans by State of North Dakota

- The North Dakota State personal income tax is **not** applicable to enrolled members of a federally-recognized Indian Tribe who live on any Indian reservation in North Dakota and **whose entire income** is derived exclusively from reservation sources. *White Eagle v. Tax Commissioner*, 209 N.W. 2d 621 (N.D. 1973).

Personal Income Taxation of Native Americans by State of North Dakota (con't.)

- “[I]n the absence of an agreement by the Indians residing on the Standing Rock Sioux Reservation accepting jurisdiction of the State of North Dakota to impose income tax upon individual members of the tribe, this State has no jurisdiction to impose such tax.” *White Eagle* at 623. The same is true for the members of the Mandan, Hidatsa, and Arikara Nation.

Personal Income Taxation of Native Americans by State of North Dakota (con't.)

- **Exemption Criteria:** “Guideline, Income Tax, Income Taxation of Native Americans,” N.D. Office of State Tax Commissioner.
- A Native American is exempt from North Dakota income tax if the following criteria apply:
 1. The person is enrolled as a member of a federally-recognized Indian tribe;

Personal Income Taxation of Native Americans by State of North Dakota (con't.)

- **Exemption Criteria (con't.)**

2. The person lives on any Indian reservation located in North Dakota; and

3. The person's income is derived from sources on any Indian reservation located in North Dakota.

If any of these criteria are not met, an American Indian may be subject to North Dakota income tax.

Personal Income Taxation of Native Americans by State of North Dakota (con't.)

- An Indian reservation is defined as the federal law definition of Indian country.
- The term Indian country, 18 U.S.C. § 1151, means:
- (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation;
- (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.

Personal Income Taxation of Native Americans by State of North Dakota (con't.)

- **Living on an Indian Reservation in North Dakota**
- If a Native American lives on an Indian reservation in North Dakota for the entire year, income from the following sources is ***taxable*** by North Dakota:
 - Wages and other compensation for work performed within North Dakota but **outside** the boundaries of an Indian reservation.
 - Income from a business operated within North Dakota but **outside** the boundaries of an Indian reservation, whether a sole proprietorship, partnership, limited liability company or Subchapter S corporation.

Personal Income Taxation of Native Americans by State of North Dakota (con't.)

- Rents, gains, and other income from tangible property that is located within North Dakota but **outside** the boundaries of an Indian reservation in North Dakota.
- Income from gambling activity conducted within North Dakota but **outside** the boundaries of an Indian reservation in North Dakota.

Personal Income Taxation of Native Americans by State of North Dakota (con't.)

- **Living off an Indian Reservation in North Dakota**
- If a Native American does not live on an Indian reservation in North Dakota for any part of the year, the person's entire income is subject to North Dakota income tax. This applies even if part or all of the income is derived from sources on an Indian reservation in North Dakota or sources outside North Dakota.

Personal Income Taxation of Native Americans by State of North Dakota (con't.)

- If a Native American lives off of an Indian reservation in North Dakota for part of the year, the person is subject to North Dakota income tax prorated based on the following:
 - Income derived from any source during the part of the year the person lived off of the reservation;
 - Income derived from sources in North Dakota but **outside** the boundaries of an Indian reservation in North Dakota during the part of the year the person lived on the reservation.

Personal Income Taxation of Native Americans by State of North Dakota (con't.)

- **Nonresident of North Dakota**
- If a Native American is enrolled as a member of a federally-recognized Indian tribe and resides on an Indian reservation ***located outside North Dakota***, income derived from North Dakota sources is subject to North Dakota income tax.
- Income from North Dakota sources includes (1) wages and other compensation for services performed in North Dakota, (2) income from tangible property located in North Dakota, (3) income from a business conducted in North Dakota, and (4) income from gambling activity conducted in North Dakota. This applies even though the source of the income is located on an Indian reservation in North Dakota.

Federal and State Tax Rates

- Federal corporate tax rate - 15-35%
- ND corporate tax rate – 2.6-6.5%
- Federal personal income tax rate – 10%-39.6% - - 39.6 % goes into effect January 1, 2014
- ND personal income tax rate – 2.1% to 5.54%, assessed over five income brackets
- Federal self-employment tax – 12.4% of \$110,100 of SE income for Social Security in 2012; in 2013 will increase to 12.4% of \$113,700 of SE income for Social Security. This is a 3.2% hike over the 2012 wage base of \$110,100. SE income gets taxed at 2.9% for Medicare.

Tax Changes in 2013

- **The Patient Protection and Affordable Care Act (PPACA) and the Health Care and Education Reconciliation Act of 2010 (HCERA)**
 - PPACA and HCERA add a new Medicare Tax on employees
 - PPACA and HCERA add a new Net Investment Tax on individuals
- **Long Term Capital Gains and Qualified Dividends**

Medicare Tax on Employees

- The Patient Protection and Affordable Care Act (PPACA) and the Health Care and Education Reconciliation Act of 2010 (HCERA) make significant changes to the treatment of compensatory income starting in 2013. The PPACA effectively increases the Medicare tax (HI) on employees, but not employers, by .9% for taxpayers over the threshold amounts.

Medicare Tax on Employees (con't.)

- This additional HI will be paid entirely by the employee and is to be withheld from employees, but only to the extent the employee's wages from the employer exceed \$200,000 in a year. This means the employer may disregard the employee's spouse's wages. The employee is liable to the extent the amount is not withheld.

Net Investment Tax on Individuals

- PPACA and HCERA add a new Net Investment Tax on individuals regardless of whether the individual is employed, self employed or not employed, trusts and estates. The tax is 3.8% of the excess of the (a) lesser of (i) Net Investment Income or (ii) modified adjusted gross income over the threshold amount. The threshold amount is \$250,000 for married taxpayers, filing joint, \$125,000 for married individual filing separate and \$200,000 in any other case.

Net Investment Tax on Trade or Business

- In the case of a trade or business, the tax applies if the trade or business is a passive activity with respect to the taxpayer or the trade or business consists of trading financial instruments or commodities. None of the Net Investment Tax is eligible for deduction.

Long Term Capital Gains and Qualified Dividends

- The special tax rates on long term capital gains and qualified dividends will expire December 31, 2012. Starting in 2013, the tax rate on long-term gains will be 20% (or 10% if the taxpayer is in the 15% bracket). Also beginning in 2013, capital gain income for higher bracket taxpayers will be subject to an additional 3.8% Medicare tax.

Incidence of State Tax

- Goodman Oil Co. v. Idaho State Tax Comm'n., 28 P.3d 996 (Idaho 2001)
- Goodman Oil was a licensed distributor of fuel in Idaho as defined by I.C. §63-2401(13). Goodman Oil purchased gasoline from an Exxon Terminal in Spokane, Washington. Sun Transportation, a sister corporation of Goodman Oil, transported the gasoline through the State of Washington directly to a location at the eastern border of the State and the western border of the reservation.

Incidence of State Tax (con't.)

- The gasoline was transported without traveling through any part of Idaho lying outside of the reservation. The Tribe purchased the gasoline at the border of the State of Washington and the reservation. The Tribe paid Sun Transportation to haul the gasoline to the Tribe-owned Benewah Auto Center located on the reservation. Neither the Tribe nor Benewah Auto Center was a licensed distributor of fuel in Idaho.

Incidence of State Tax (con't.)

- The first question to answer in Indian tax cases is who bears the legal incidence of the tax. “If the legal incidence of an excise tax rests on a tribe or on tribal members for sales made inside Indian country, the tax cannot be enforced absent clear congressional authorization.”
- Idaho fuel tax and transfer fee statutes imposed legal incident of tax on Indian Tribe as retailer rather than on distributor, thus tax is invalid.
- Hayden-Cartwright Act did not provide congressional authorization for state to impose fuel tax on sale of fuel to Indians on Indian reservations within state.

Incidence of State Tax (con't.)

- Idaho legislature passed legislation reversing decision in *Goodman* as it would result in the loss of millions of dollars.

State Business and Corporation Privilege Tax

- 1% of net income over \$2000 for operation of any business, trade or profession in North Dakota other than as an employee. No deduction of federal income taxes from gross income.

Section F: ND Sales and Use Taxes - General Information (Applicable to Businesses Outside of Indian Country or Non-Indian Businesses Inside Indian Country for Transactions with Non-Indians)

- **Imposition and Rates - Sales & Use Tax**
- Sales tax is paid by the purchaser and collected by the retailer.
- Sales tax is levied at the following rates:
 - 1 percent on the total receipts from retail sales of natural gas. (1% rate from 1/1/08 until 6/30/09, exempt after 7/1/09)
 - 3 percent on the total receipts from retail sales of ***new*** mobile homes. (***Used*** mobile homes are exempt.)

ND Sales and Use Taxes - General Information (Applicable to Businesses Outside of Indian Country or Non-Indian Businesses Inside Indian Country for Transactions with Non-Indians) (con't.)

- **Imposition and Rates - Sales & Use Tax (con't.)**
 - 5 percent on the total receipts from the leasing or renting of hotel, motel or tourist court accommodations for periods of less than 30 consecutive days.
 - 5 percent on the total receipts from all other taxable retail sales of tangible personal property and services.

ND Sales and Use Taxes - General Information (Applicable to Businesses Outside of Indian Country or Non-Indian Businesses Inside Indian Country for Transactions with Non-Indians) (con't.)

- **Imposition and Rates - Gross Receipts Tax**
- Gross receipts tax is levied at the following rates:
 - 3 percent on the gross receipts from retail sales of new farm machinery and new irrigation equipment used exclusively for agricultural purposes.
 - 7 percent on the gross receipts from retail sales of alcoholic beverages sold for consumption either on or off the premises.

ND Sales and Use Taxes - General Information (Applicable to Businesses Outside of Indian Country or Non-Indian Businesses Inside Indian Country for Transactions with Non-Indians) (con't.)

- **Permits and Reporting**

- Any business or institution making taxable retail sales of tangible personal property or services is required to hold a North Dakota sales, use and gross receipts tax permit. An application to obtain a permit must be submitted to the Registration Section of the Office of State Tax

Commissioner. When a business or institution has a permit, a sales, use and gross receipts tax return is sent to the taxpayer each calendar

quarter (or each assigned reporting period) to report and remit the sales, use and gross receipts tax.

ND Sales and Use Taxes - General Information (Applicable to Businesses Outside of Indian Country or Non-Indian Businesses Inside Indian Country for Transactions with Non-Indians) (con't.)

- ***These returns must be filed each period whether tax is due or not.*** If no tax is due, the return must be filed indicating that no taxable sales or reportable purchases were made for that period. If the return is not filed, the Sales Tax Compliance Section will notify the permit holder that the return is delinquent and that a penalty is due.

ND Sales and Use Taxes - General Information (Applicable to Businesses Outside of Indian Country or Non-Indian Businesses Inside Indian Country for Transactions with Non-Indians) (con't.)

- Use Tax
- Sales tax applies to sales of tangible personal property and certain services to a final user and consumer. Use tax is complimentary to sales tax and is imposed on the use, storage or consumption of tangible personal property in this state unless the goods already have been subjected to sales tax.

ND Sales and Use Taxes - General Information (Applicable to Businesses Outside of Indian Country or Non-Indian Businesses Inside Indian Country for Transactions with Non-Indians) (con't.)

- **Use Tax (con't.)**
- If a business or institution purchases materials, supplies or equipment for resale, the business or institution should **not** pay the tax to the supplier. Instead, the business or institution should collect tax from the customer when the item is sold and remit the tax to the Office of State Tax Commissioner.

ND Sales and Use Taxes - General Information (Applicable to Businesses Outside of Indian Country or Non-Indian Businesses Inside Indian Country for Transactions with Non-Indians) (con't.)

- If a business or institution purchases materials, supplies or equipment for use in its business, the business or institution is required to pay sales tax to the supplier of these items. If the supplier does not hold a North Dakota sales, use and gross receipts tax permit, the tax should not be remitted to the supplier, but should be remitted as a use tax directly to the Office of State Tax Commissioner.

ND Sales and Use Taxes - General Information (Applicable to Businesses Outside of Indian Country or Non-Indian Businesses Inside Indian Country for Transactions with Non-Indians) (con't.)

- **Penalties**
- For returns filed late, a minimum penalty of 5 percent of the tax due or \$5.00, whichever is greater, will be added to the tax due for the first month the return is late. For each additional month or fraction thereof that a return is late an additional penalty equal to 5 percent of the tax due will be assessed up to a maximum of 25 percent of the tax due. Interest is not assessed for the first month the return is delinquent.

ND Sales and Use Taxes - General Information (Applicable to Businesses Outside of Indian Country or Non-Indian Businesses Inside Indian Country for Transactions with Non-Indians) (con't.)

- **Penalties (con't.)**
- Interest of 1 percent of the tax due will be assessed for each month or fraction of a month after the first month that a return is late. Penalty and interest is calculated separately for sales/use tax and gross receipts tax.

ND Sales and Use Taxes - General Information (Applicable to Businesses Outside of Indian Country or Non-Indian Businesses Inside Indian Country for Transactions with Non-Indians) (con't.)

- **Retail Sales-Sales For Resale**
- *A retail sale* is the sale of tangible personal property to a person who is the final user and consumer of the goods. The seller or supplier in this instance is required to collect sales tax on the sale to the final user.

ND Sales and Use Taxes - General Information (Applicable to Businesses Outside of Indian Country or Non-Indian Businesses Inside Indian Country for Transactions with Non-Indians) (con't.)

- **Retail Sales-Sales For Resale**
- *A sale for resale* is made when a dealer or supplier sells to another bona fide retailer for resale. The seller or supplier is not required to collect sales tax from the individual or company making the purchase for resale provided the seller obtains a North Dakota certificate of resale, a Multistate Tax Commission Uniform Sales and Use Certificate, or a certificate of exemption authorized by the Streamlined Sales Tax Agreement from the purchaser.

ND Sales and Use Taxes - General Information (Applicable to Businesses Outside of Indian Country or Non-Indian Businesses Inside Indian Country for Transactions with Non-Indians) (con't.)

- **North Dakota Certificate of Resale**

I hereby certify that I hold _____ Sales and Use Tax Permit Number _____. I am engaged in the business of selling, leasing or renting _____, and that the tangible personal property purchased from _____ is purchased by me for resale.

I further certify that I will report and remit any sales or use tax and any penalties which become due as a result of purchases made from the above seller which are used or consumed by me.

Business Name Business Address

Authorized Signature Date

These certificates are not to be sent to the Office of State Tax Commissioner, but must be retained in the supplier's files to substantiate sales claimed as sales for resale.

ND Sales and Use Taxes - General Information (Applicable to Businesses Outside of Indian Country or Non-Indian Businesses Inside Indian Country for Transactions with Non-Indians) (con't.)

- **Purchases Subject to Use Tax**
- Individuals and businesses that purchase supplies and equipment for use in running a business or for personal use must pay a sales or use tax on these purchases, based on the cost of the items being purchased. If these items are purchased from a firm that does not collect North Dakota sales tax, the purchaser must report the purchase on the *Items Subject to Use Tax* line of the sales, use and gross receipts tax return and pay a use tax on the purchase price. Examples of taxable purchases include office supplies, office equipment, etc.

ND Sales and Use Taxes - General Information (Applicable to Businesses Outside of Indian Country or Non-Indian Businesses Inside Indian Country for Transactions with Non-Indians) (con't.)

- **Delivery To Out-Of-State Residents**
- Delivery to a customer out-of-state constitutes a sale in interstate commerce and is not a taxable sale in North Dakota. For example, if a retailer in North Dakota sells merchandise to an out-of-state resident and, as a condition of the sale, agrees to deliver the merchandise or to have the merchandise delivered to the customer at a point in another state, North Dakota sales tax does not apply. However, the North Dakota retailer may be obligated to collect and remit the tax for the state into which the retailer delivers if the retailer's activities in that state are sufficient to obligate the retailer to that state's tax law.

ND Sales and Use Taxes - General Information (Applicable to Businesses Outside of Indian Country or Non-Indian Businesses Inside Indian Country for Transactions with Non-Indians) (con't.)

- **Delivery To Out-Of-State Residents**
- On sales to out-of-state residents, retailers must be certain that their records contain proof of delivery, such as truck records, bills of lading, statement by the customer, etc. These conditions apply to deliveries into any state or Canadian province.

ND Sales and Use Taxes - General Information (Applicable to Businesses Outside of Indian Country or Non-Indian Businesses Inside Indian Country for Transactions with Non-Indians) (con't.)

- **Delivery Charges Taxable**

- Freight, delivery, and other transportation charges, including shipping and handling charges and setup charges, are always considered to

be part of the selling price. If the sale is taxable, the freight, delivery, and other transportation charges are taxable. If the product being

delivered is exempt from sales tax, then the freight, delivery and other transportation charges are also exempt. Delivery charges billed

directly to the customer by delivery services that are not making the sale of tangible personal property remain exempt from sales and use tax.

ND Sales and Use Taxes - General Information (Applicable to Businesses Outside of Indian Country or Non-Indian Businesses Inside Indian Country for Transactions with Non-Indians) (con't.)

- **Sales to Nonprofit Organizations Are Taxable**
- The total receipts from sales of tangible personal property to nonprofit organizations for their own use are subject to sales tax. Such organizations include Boy Scouts, Girl Scouts, F.F.A., Chambers of Commerce, Lions Clubs and other civic organizations, as well as churches and religious groups.

ND Sales and Use Taxes - General Information (Applicable to Businesses Outside of Indian Country or Non-Indian Businesses Inside Indian Country for Transactions with Non-Indians) (con't.)

- **Sales to Residents of Montana**
- North Dakota sales tax law contains an exemption for residents of Montana, defined by N.D.C.C. § 57-39.2-04(12) as an individual and not a business, from paying sales tax when purchasing tangible personal property within North Dakota. A resident of Montana can take delivery of tangible personal property in North Dakota and can purchase this property without paying the North Dakota sales tax provided the following conditions are met:

ND Sales and Use Taxes - General Information (Applicable to Businesses Outside of Indian Country or Non-Indian Businesses Inside Indian Country for Transactions with Non-Indians) (con't.)

- **Sales to Residents of Montana (con't.)**
 1. The sale is in excess of \$50.00.
 2. The personal property will be taken out of the State of North Dakota and used exclusively outside this state.
 3. The resident of Montana is in North Dakota to make a specific purchase and not as a tourist.
 4. The resident of Montana must sign a certificate of purchase form certifying Montana residency and that the goods will be used outside of North Dakota.

ND Sales and Use Taxes - General Information (Applicable to Businesses Outside of Indian Country or Non-Indian Businesses Inside Indian Country for Transactions with Non-Indians) (con't.)

- Goods purchased by Montana residents must be taken from North Dakota and used entirely outside this state in order to qualify for the exemption. Accordingly, tax must be paid on lodging accommodations, meals, entertainment and similar goods and services which are consumed in North Dakota.

ND Sales and Use Taxes - General Information (Applicable to Businesses Outside of Indian Country or Non-Indian Businesses Inside Indian Country for Transactions with Non-Indians) (con't.)

- **Sales to Canadian Residents**
- Sales to residents of Canada are not exempt from North Dakota sales tax, however, in some cases the Canadian buyer may obtain a refund of North Dakota sales tax paid.

ND Sales and Use Taxes - General Information (Applicable to Businesses Outside of Indian Country or Non-Indian Businesses Inside Indian Country for Transactions with Non-Indians) (con't.)

- **Sales to Contractors**
- North Dakota sales and use tax law regards any contractor who incorporates tangible personal property into real property as the final user and consumer of the property. As a final user and consumer, the contractor is liable for sales or use tax on the purchase price of that property.

ND Sales and Use Taxes - General Information (Applicable to Businesses Outside of Indian Country or Non-Indian Businesses Inside Indian Country for Transactions with Non-Indians) (con't.)

- If a contractor furnishes the seller of construction materials with a completed contractor certificate containing the contractor's license number assigned under the provisions of N.D.C.C. ch. 43-07 and the contractor's sales and use tax number assigned by the State Tax Commissioner, the seller is not required to collect tax on the sale.

ND Sales and Use Taxes - General Information (Applicable to Businesses Outside of Indian Country or Non-Indian Businesses Inside Indian Country for Transactions with Non-Indians) (con't.)

- Any contractor furnishing such a certificate must report those purchases on the sales and use tax return for the reporting period in which the purchases are made and pay the tax to the Office of State Tax Commissioner with that return. Reporting the purchases and paying the tax on a completed job basis is not permitted.

ND Sales and Use Taxes - General Information (Applicable to Businesses Outside of Indian Country or Non-Indian Businesses Inside Indian Country for Transactions with Non-Indians) (con't.)

- **Contractor's Certificate**

- I, the undersigned, am a construction contractor holding North Dakota Contractor's License No. _____ issued by the Secretary of State of the State of North Dakota and North Dakota Sales and Use Tax Permit Number _____ assigned to me by the State Tax Commissioner of the State of North Dakota.

I certify that as a construction contractor, I will report and remit any sales or use tax due directly to the Office of the North Dakota State Tax Commissioner as a result of purchases made by me from _____ (Seller).

Dated this _____ day of _____, _____ at _____.

(Contractor) (Address)

ND Sales and Use Taxes - General Information (Applicable to Businesses Outside of Indian Country or Non-Indian Businesses Inside Indian Country for Transactions with Non-Indians) (con't.)

- **Local Sales and Use Tax**
- In addition to state sales, use and gross receipts taxes, various cities and counties also impose local option sales, use and gross receipts taxes.

ND Sales and Use Taxes - General Information (Applicable to Businesses Outside of Indian Country or Non-Indian Businesses Inside Indian Country for Transactions with Non-Indians) (con't.)

- **Organizational Exemptions for Purchase Activity**
- North Dakota sales and use tax law does not exempt purchases made by nonprofit organizations. Instead, the law details specific organizations which are exempt from sales and use tax. Examples of nontaxable organizations are shown below:

ND Sales and Use Taxes - General Information (Applicable to Businesses Outside of Indian Country or Non-Indian Businesses Inside Indian Country for Transactions with Non-Indians) (con't.)

- **Organizational Exemptions for Purchase Activity (con't.)**

- **Nontaxable**

Federal, state, and local government units

Schools (public and private)

Hospitals, nursing homes, intermediate/basic care facilities licensed by Dept. of Health

Nonprofit voluntary health groups (recognized by National Health Council)

State and local fairs

Nonprofit meal delivery groups for items delivered to consumer

ND Sales and Use Taxes - General Information (Applicable to Businesses Outside of Indian Country or Non-Indian Businesses Inside Indian Country for Transactions with Non-Indians) (con't.)

- **Exemption Certificate Registration and Use**
- Those groups that are exempt from North Dakota sales and use tax should contact the Office of State Tax Commissioner to obtain an “Exemption Certificate.” This certificate should be presented to the supplier when a retail purchase is made and serves to exempt the purchase from sales tax. In the absence of this certificate, the retailer is obligated to charge sales tax. Exemption certificates are available upon application to the Office of State Tax Commissioner.

ND Sales and Use Taxes - General Information

- **Transactions Taxable, Exempt Preempted by Federal Law**
- **Most transactions are taxable, unless there is legislation specifying an exemption or the tax is preempted by federal law.**

ND Sales and Use Taxes - General Information

(con't.)

- **Exemption**

- Legislative exclusion from tax base. Seller **is not** required to report receipts from exempted transactions.

- **Preemption**

- State is precluded by law from imposing the tax on the seller.

Products which Are Exempt from ND Sales Tax

A. Prescription Drugs

B. Oxygen and Anesthesia Gases

C. Newspapers - Newsprint and Printers Ink

D. Commercial Fertilizer

Products which Are Exempt from
ND Sales Tax (con't.)

- **E. Livestock and Poultry Feed**
- **F. Seeds for Planting**
- **G . Fungicides, Herbicides and Insecticides**
- **H. Farm Machinery Repair Parts**
- **I. Gasoline and Combustible Fuels**
subject to either a motor fuels or special fuels tax are not subject to North Dakota sales and use tax.

Products which Are Exempt from ND Sales Tax (con't.)

- J. Containers
- K. Food and Food Products
- L. Bibles, Hymnals, Textbooks and Prayerbooks
- M. Medical Devices and Equipment
- N. Coal
- O. Electricity
- P. Money
- Q. Water
- R. Used Mobile Homes

Products which Are Exempt from ND Sales Tax (con't.)

- S. Magazine Subscriptions
- T. Diabetic and Bladder Dysfunction Supplies
- U. Agricultural By-products for Manufacture or Generation of Steam or Electricity
- V. Ostomy Devices and Supplies

Services which Are Exempt from ND Sales Tax

•Services which are Exempt from Sales Tax

•**A. Transportation Services.** Public transportation companies such as buses, trains, air lines and taxis providing passenger service are not required to collect and remit sales tax on the receipts from these services. Transportation companies such as truck lines, railroads, air freight or moving vans are engaged in the business of transporting personal property and their charges for such service are not subject to sales tax. This exemption does not extend to freight and delivery charges which are rendered in connection with the sale of a product.

•**B. Hospital and Nursing Home Services**

•**C. Repair Services**

•**D. Furnishing Steam**

Conditional Exemptions from ND Sales Tax

•Conditional Exemptions

•**A. Receipts from Vending Machines:** The gross receipts from coin-operated amusement devices also are subject to tax, however, tax is due only on 80 percent of the gross receipts.

•**B. Interstate Commerce:** When tangible personal property is sold and, as an essential part of the sale, the seller is obligated to and actually does deliver such property from a point in North Dakota to the purchaser at a point in another state and if those goods are not to be returned to this state, the sale is made in interstate commerce and is not subject to North Dakota sales tax.

•This is true regardless if the seller, in transporting the goods, does so by means of their own employees or vehicles, or if the retailer places them in possession of a common carrier or with the United States Postal Service for delivery outside this state.

Conditional Exemptions from ND Sales Tax (con't.)

- **C. Motor Vehicles:** Receipts from the sale of any motor vehicle to be used on the streets and highways of North Dakota are not subject to North Dakota sales tax provided that the vehicle has been subjected to the Motor Vehicle Excise Tax.
- **D. Rental of Hotel and Motel Accommodations:** Hotel, motel and tourist court accommodations occupied by the same individual or individuals for residential housing for periods of 30 or more consecutive days are exempt from tax.
- **E . Rental of Mobile Homes**
- **F. Film Rental**

Conditional Exemptions from ND Sales Tax

(con't.)

- **G . Casual Sales:** Sales made by those who are not engaged in the business of selling at retail, that is, the occasional or casual sales made by an individual, are not subject to North Dakota sales tax.
- **H. Sales for Processing or Resale**
- **I . Sales to Residents of Montana**
- **J. Sales to Native Americans**
- **K. Admission Receipts**
- **L. Auctions**
- **M. Finance Leasing Agreements**
- **N. Recreational Travel Trailers**
- **O. Manufacturing, Processing and Recycling Equipment**
- **P. Primary Sector Business:** Telecommunications and computer hardware and software purchased by a new or expanding primary sector business is exempt from tax. The Department of Commerce must approve the primary sector status of the business and the exemption must be approved by the Tax Commissioner's Office.

ND Sales and Use Taxes - General Information (Applicable to Businesses Outside of Indian Country or Non-Indian Businesses Inside Indian Country for Transactions with Non-Indians)

- **Business Site Determines Tax Rate:**
 - For construction, rate is determined by site of construction.
 - Service businesses use tax rate from business office location.
 - Craftsperson who sells at crafts fairs, uses rate where fair is held.
 - A business in a city uses the corresponding county rate.

Sales and Use Tax Collection from Native Americans by State of North Dakota

- ND Guideline Sales Tax, Dec. 2002
- 1. An Indian retailer operating on an Indian reservation cannot be required to collect sales tax from **any** customer, Indian or non-Indian.
- 2. A non-Indian retailer operating on an Indian reservation may not collect sales tax from Indian customers but **must collect** sales tax on sales to non-Indians and remit that tax to the Office of State Tax Commissioner.

Sales and Use Tax Collection from Native Americans by State of North Dakota (con't.)

- 3. Any consumer, Indian or non-Indian, who makes a tax exempt purchase of tangible personal property on an Indian reservation and then uses or consumes the tangible personal property off the reservation is subject to North Dakota use tax. Non-Indian customers who make tax free purchases on the reservation are always subject to use tax, regardless where the product is used.

Sales and Use Tax Collection from Native Americans by State of North Dakota (con't.)

4. Purchases made by American Indians off an Indian reservation are taxable. However, deliveries by a retailer located off a reservation to an American Indian on the reservation are exempt. Deliveries to a non-Indian on an Indian reservation are taxable.

Sales and Use Tax Collection from Native Americans by State of North Dakota (con't.)

- **Sales by an Indian Retailer on an Indian Reservation**
- An American Indian who operates a place of business within the boundaries of an Indian reservation *cannot* be required to collect North Dakota state sales tax on sales made to *any* customer, Indian or non-Indian, as long as the sale occurs on the reservation. Such an Indian retailer *cannot* be required to obtain a North Dakota sales and use tax permit or be required to file sales and use tax returns with the North Dakota Office of State Tax Commissioner as long as the business activity is conducted entirely within the boundaries of the Indian reservation.

Sales and Use Tax Collection from Native Americans by State of North Dakota (con't.)

- Non-Indian customers making purchases from an Indian retailer on an Indian Reservation are always subject to use tax, regardless where the goods are used.

Sales and Use Tax Collection from Native Americans by State of North Dakota (con't.)

- **Sales by a Non-Indian Retailer on an Indian Reservation**
- A non-Indian retailer whose place of business is located within the boundaries of an Indian reservation is required to charge North Dakota sales tax to all non-Indian customers. A non-Indian retailer located on a reservation cannot be required to charge sales tax on sales made to American Indians if the sale takes place on the reservation.

Sales and Use Tax Collection from Native Americans by State of North Dakota (con't.)

A non-Indian retailer is required to hold a North Dakota sales tax permit, is required to collect North Dakota sales tax on all sales to non-Indians and is required to report and remit all sales and use taxes due to the Office of State Tax Commissioner.

Sales and Use Tax Collection from Native Americans by State of North Dakota (con't.)

Proof of Sale to an Indian

- The burden of proof that any retail sale is tax exempt because it is made to an Indian is placed entirely on the retailer. The Office of State Tax Commissioner holds the retailer responsible for adequate records which will identify these exempt sales.

Sales and Use Tax Collection from Native Americans by State of North Dakota (con't.)

The Office of State Tax Commissioner will examine the books and records of each non-Indian retailer operating on an Indian reservation and will expect each retailer to furnish proof that all sales on which tax was not charged are in fact exempt sales. This applies whether the sale is claimed to be exempt as a sale in interstate commerce, a sale for resale or a sale to an Indian.

Sales and Use Tax Collection from Native Americans by State of North Dakota (con't.)

As to non-Indians, in a business where it is customary to have individual sales invoices, the name and address of Indian customers clearly should be shown on the invoice. In the event of an audit by the Office of State Tax Commissioner, these invoices will be reviewed and verified.

- In business places where individual invoices are impractical and only cash register tapes are available, the Office of State Tax Commissioner representatives may contact the retailer and establish a percentage of sales made to Indian and to non-Indian customers.

Sales and Use Tax Collection from Native Americans by State of North Dakota (con't.)

The percentage will be subject to adjustment based on seasonal sales, population shifts, economic factors and other indicators. Once this percentage is established with the Office of State Tax Commissioner, the retailer is authorized to use that percentage to report taxable sales as long as it equals at least the amount of tax collected. If the retailer collects more tax than would have to be paid based on the approved percentage, all of the tax collected must be remitted. If the tax collected is less than that which is due by applying the percentage, tax must be remitted based on the approved percentage and the retailer should request a review of the percentage used.

Sales and Use Tax Collection from Native Americans **by State of North Dakota (con't.)**

Delivery by a North Dakota Retailer, Indian and Non-Indian, Into an Indian Reservation

- A North Dakota retailer whose place of business is located outside the boundaries of an Indian reservation may occasionally make deliveries into an Indian reservation to Indian customers living within the boundaries of that reservation. The retailer may exempt those sales from North Dakota sales tax provided that the retailer actually delivers or has the merchandise delivered by a common carrier to an Indian customer residing within the boundaries of an Indian reservation and has provided proof of such delivery.

Sales and Use Tax Collection from Native Americans by State of North Dakota (con't.)

The mere delivery of merchandise into an Indian reservation does not exempt the goods from North Dakota sales or use tax if the Indian customer is not going to use that merchandise exclusively within the boundaries of the reservation. Sales tax cannot be avoided by simply making delivery on an Indian reservation to an Indian customer when the merchant knows or should know that the customer will use the merchandise off the reservation. In each case, the Office of State Tax Commissioner examiners require proof of delivery by the North Dakota merchant in order to determine the exempt status of such deliveries. Deliveries to non-Indian customers on an Indian reservation are subject to tax.

Sales and Use Tax Collection from Native Americans by State of North Dakota (con't.)

- Native Americans are subject to sales or use tax when taking possession of goods or using goods outside an Indian reservation.

Tribal Taxation

- Tribes have the authority to impose taxes on tribal members, non-member Indians and non-Indians within their Indian country as part of their power to govern and to pay for the costs of self-government. Alternatively, tribes have the power to tax due to their power to exclude non-Indians from their respective reservations. This may not include *fee* land within the reservation owned by non-Indians. *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001).

ND Sales and Use Taxes - Indian Issues

- **Doctrine of Federal Preemption**: the federal government's exclusive authority over relations with Indian Nations/Tribes/Pueblos may preempt state authority either by an explicit congressional statement or because the balance of federal, state, and tribal interests tips in favor of preemption (Indian education, timber & logging, licensed Indian traders, etc.).
- **Doctrine of Infringement on Tribal Sovereignty**: Indian sovereignty may prevent state authority from infringing on the right of Indian Nations/Tribes/Pueblos and members thereof to make their own laws and be ruled by them.

ND Sales and Use Taxes - Indian Issues (con't.)

- Federally Licensed Indian Traders
 - The receipts of a federally licensed Indian trader, as defined in Sections 25 U.S.C. 261-264, from trading with an Indian tribe (or member) on that tribe's territory are exempt from ND sales tax. Applies to property and services.
 - Exemption applies if license required, even if no license issued to vendor.

ND Sales and Use Taxes - Indian Issues

(con't.)

- **Indian Business Located Outside of Indian Country.**
- **Sales tax applies to sales of property and/or services or leases by your business.**

Note: Don't forget exemptions and deductions that apply to all vendors, including those pertaining to certain Indian transactions!

Indian Nation/Tribe/Pueblo Gross Receipts or Sales Tax Ordinance

- Check to determine if Indian Nation/Tribe/Pueblo where you are transacting business has a Gross Receipts or Sales Tax Ordinance applicable to your business transactions.

Thank You For Coming!!

- Please fill out evaluation form.
- Please let us know what other subjects you are interested in.