

SMALL BUSINESS FORMATION FOR AMERICAN INDIAN ENTREPRENEURS

TAXATION ISSUES – COLORADO

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.**

Federal, Tribal and State Taxes

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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.

Section B: Determine Tribal, Federal, State and Local Taxes Applicable to Your Business

- Federal and State Personal Income Tax
- Federal and State Corporate Income Tax
- Tribal Taxes
- Medicare Tax on Employees
- Net Investment Tax on Individuals
- Long Term Capital Gains and Qualified Dividends

- State Sales/Use Tax and Other Taxes
Local (City, County, Special District) Sales/Use Tax and Other
- State Employment Taxes
- Be aware - other taxes may be applicable to your particular business (liquor, cigarettes, gasoline, lodging, admissions, etc.)

Section C: Tribal Taxes

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

Tribal Taxes Tribal Cooperative Tax Credit Agreements

◆ Purpose:

- ◆ To avoid double taxation by State and Indian Tribe, since each may impose its own tax on certain transactions, a transaction is only taxed once, either by the State or the Indian Tribe.

Tribal Cooperative Tax Credit Agreements

- ✦ **YOU MUST LEARN the Tribe tax rules where you are conducting business.**

Source of Tribal Taxing Power

- “The power to tax is a fundamental attribute of tribal sovereignty because it is a necessary instrument of self-government and territorial management.” *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982).

PURPOSES OF TRIBAL TAXATION

- Raise revenue.
- Regulate business – encourage or discourage certain activities based on tax rate.
- Protect tax base.
- Exercise sovereignty.
- No conditions on how tax monies are to be spent by Tribe. Tribe has total discretion on how to spend tax monies collected.

LIMITS ON TRIBAL TAXATION

Tribal tax on non-members on NON-INDIAN FEE LAND within a reservation is invalid.

Atkinson Trading Company, Inc. v. Shirley, 532 U.S. 645 (2001).

Section D: 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 U. S. Supreme Court denied review, it was held that an Indian business that incorporates under state law does not lose its tax immunity (SD and NM). However, in North Dakota it is uncertain due to a 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 – South Dakota

- 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

- 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

- 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 cannot have the racial identity necessary to fall within the *Chickasaw* rule. 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

- 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 – New Mexico

- *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

- Corporation was formed under the State Business Corporation Act at the instigation and under the auspices of the Navajo Tribal Council, where Indians 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

- 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

- New Mexico's State corporate income tax (4.8-7.6%) 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 – North Dakota

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 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. 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). See IRS Rev. Rul. 54-456; 154-2 C.B. 49.

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).

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.

Federal Payroll Taxes

- W-4 - Employer's Withholding Allowance Certificate (Notice of filing status and dependents for federal personal income tax).
- Form 941 – Employer's Quarterly Federal Tax Return.
- W-2 – Annual earnings and taxes withheld for federal personal income tax.
- FICA – Federal Insurance Contributions Act (Social Security and Medicare). Employer matches amount withheld per employee.

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

- “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.”

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

- 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

- 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

- “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**

- 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**

- 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**

- 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

- 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).

Unallotted Tribal Lands

- 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).

Unallotted Tribal Lands

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).

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.

Federal Personal Income Tax Exemptions

- Federal personal income tax **not** applicable to enrolled members of Indian Nation/Tribe/Pueblo on income distributed through tribal trust funds from land claim settlements and judgments – normally made exempt in applicable statute.

Federal Personal Income Tax Exemptions

- Federal personal income tax **not** applicable to enrolled members of Indian Nation/Tribe/Pueblo on income from general welfare payments made from their tribe. 25 U.S.C. s. 2710(b)(2)(B). Usually interpreted to include medical assistance, housing subsidies and educational scholarships.

Federal Personal Income Tax Exemptions

- Federal personal income tax **not** applicable to enrolled members of Indian Nation/Tribe/Pueblo on income from fishing rights related activity. 25 U.S.C. s. 7873(a)(1).

Federal Personal Income Tax Due on Per Capita Payments

- ◆ Federal personal income tax is PAYABLE by enrolled members of Indian Nation/Tribe/Pueblo on per capita payments.

Section F: Federal and State Tax Rates

- Applicable rates, unless exemption applies:
- Federal corporate tax rate - 15-35%
- CO corporate income tax rate – 4.63%
- Federal personal income tax rate – 10%-39.6% - - 39.6 % goes into effect January 1, 2014
- CO personal income tax rate – ___%
- 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), up from 15% and 0%. Also beginning in 2013, capital gain income for higher bracket taxpayers will be subject to an additional 3.8% Medicare tax.

Section G: CO State Taxes

- Personal Income Tax
- Corporate Income Tax
- Sales/Use Tax
- Property Tax
- Other (Excise, severance and other taxes are not specifically addressed in this presentation.)

CO State Personal Income Tax

- Income taxes. An income tax is generally calculated as a percent of income and may include wages, salary, capital gains and dividends.
- Colorado's personal income tax rate is a flat 4.63% of federal taxable personal income.

CO State Corporate Income Tax

- Colorado's corporate income tax rate is a flat 4.63% of federal taxable corporate income. Alternative apportionment formulas are available. Also, there are a number of corporate income tax credits, including an investment tax credit and various enterprise zone tax credits. A number of credits are contingent upon existence of a state budget surplus.

CO State Sales Tax

- A sales tax is generally, calculated as a percentage of the price of an item (tangible personal property) and then added to the price. It is a transactional tax. It is paid by the end-user, the purchaser who has no intent of re-selling item purchased.
- Unless exemption applies, Colorado's 2.9% sales tax is on goods purchased by a business that are not intended for resale by that business. Services are not taxed, only sales of non-food items. Counties, cities and special districts may add to this 2.9% base.
- Colorado Department of Revenue offers free online and face-to-face classes- Sales; Use; Contractor/Manufacturing Industry; Hospitality Industry; Printing/Advertising Industry. Register online.

CO State Sales Tax

- Exemption State Sales/Use Tax (Optional for local jurisdictions) (FYI Brochures with information pertaining to specific topic.)
- -Food for Home Consumption (FYI Sales 4)
 - Machinery and machine tools (FYI Sales 10; DR 1191)
 - Gas, electricity, etc., for residential use (FYI Sales 66)
 - Occasional sales by charitable organizations (FYI Sales 2)

CO State Sales Tax

- Exemption State Sales/Use Tax (Optional for local jurisdictions)
- -Farm Equipment (FYI Sales 75)
- -Pesticides (FYI Sales 76)
- -Food sold through vending machines (FYI Sales 59)
- -Low-emitting vehicles (weight over 10,000 lbs)

CO State Sales Tax

- **Absorbing Tax**
- Sales price cannot be absorbed into amount of selling price of item (does not apply to sales of liquor by drink or vending machine operators).

CO State Sales Tax

- Four taxing jurisdictions in Colorado: State, county, city and special districts.
- Special district - special taxing area: RTD, CD, FD, LID, RTA.
- Home-Rule cities such as Denver and Broomfield collect their own sales taxes.

CO State Sales Tax

- State-Collected; city, county or special district where Colorado Department of Revenue collects sales taxes .
- CO DOR collects all county sales taxes except for Denver and Broomfield.

CO State Sales Tax - Point of Taxation

- Point of Delivery/possession is point of taxation. The destination is regarded as the point of sale and sales tax is collected for the taxing jurisdictions that the seller and buyer share in common.

CO State Sales Tax- Point of Taxation - Common Taxing Jurisdictions

- If seller is located in City of Grand Junction and the physical address is in the City of Grand Junction and the County of Mesa, and the buyer is located in City of Grand Junction and the physical address is in the City of Grand Junction and the County of Mesa, the taxing jurisdictions the parties have in common are the State of Colorado, the City of Grand Junction and the County of Mesa, so the tax rate for all three jurisdictions would apply.

CO State Sales Tax - Point of Taxation - Common Taxing Jurisdictions

- If seller is located in City of Grand Junction and the physical address is in the City of Grand Junction and the County of Mesa, and the buyer is located in City of Aurora and the physical address is in the City of Aurora, and the County of Arapahoe, and the taxes for the Aurora address include Special Districts of RTD, CD and FD, the only taxing jurisdiction the parties have in common is the State of Colorado, so the seller would pay sales tax for the State of Colorado only. The buyer may owe use taxes for City, County and Special Districts if the City, County and Special Districts have use taxes. RTD, CD and FD have use taxes.

CO State Use Tax

- Unless exemption applies, use taxes substitute for sales taxes in cases where an item is purchased for consumption in Colorado from a source outside Colorado or other circumstances where a sales tax was not paid. Colorado Department of Revenue offers free online and face- to-face classes. Register online.

CO State Sales Tax

- A Colorado Sales Tax I.D. Number is required for payors.
- Businesses with a Wholesaler License do not need to pay sales tax on items purchased for use in a product that will be resold to an end user.
- See www.taxview.state.co.us for sales tax rates and sales tax license verification.
- File form CR 0100 with CR DOR. Do not file until you are ready to start conducting business, as once filed, reporting is required whether you have sales or not.

CO State Internet Sales Tax

- Unless exemption applies, Colorado Internet business must collect sales tax on items sold to customers in Colorado. Colorado sales tax is not collected on Internet sales to customers outside of Colorado.

CO State Property Tax

- Unless exemption applies, Colorado state property tax is assessed on any real and/or personal property located in Colorado (land, building, furniture, equipment, etc.) which directly or indirectly produces income within a business. Taxing authority requires and/or performs an appraisal of monetary value of property, and tax is assessed in proportion to that value. In Colorado, property tax assessment is by county.

CO State Property Tax

- Contact the county assessor or treasurer in the county where property is located.

Other CO State Taxes

- An excise tax is generally a flat amount added to the price of a product such as tobacco, alcohol or motor fuel.
- Colorado severance tax is a tax imposed upon nonrenewable natural resources that are removed from the earth. Natural resources that are subject to severance taxation in Colorado include: metallic minerals, molybdenum (ore), oil and gas, oil shale, and coal.

Colorado State Tax Licenses

- Sales Tax License- Required if you sell, rent, or lease tangible personal property in Colorado. A license is also required to rent accommodations for less than 30 days .
- Colorado Retailer License - Required if you sell, rent or lease to the "end user".
- Colorado Wholesalers License - Required if you sell to re-sellers or if you sell non-taxable items.
- Event Licenses - Single or multi-event.
- Local Licenses - May be required in every area where you physically operate a business.

Colorado Tax-Exempt Certificates

- For non-profit, charitable, school, religious or government organizations purchasing tangible personal property when items are to be used in conduct of organization's regular charitable function.
- Fee if you do not have sales tax license is \$8.

Colorado Tax-Exempt Certificates - **Construction**

- Used for purchasing construction and building materials for exempt projects (e.g., charitable, school, religious or government organizations). Issued only to General Contractor. No fee. Application DR 0172.

Section H: City and County of Denver Taxes

- City and County of Denver is a Home-Rule City. Makes and collects its own taxes which include sales, use, lodger's and real and personal property taxes. Tax registration and licenses required.
- Regular sales tax rate: 3.62%
- 1% RTD Regional Transportation District
- •.1% CD Scientific and Cultural Facilities District
- •.1% FD Football Stadium District
- See Denver Combined Rates for other applicable taxes:
<http://www.denvergov.erg/Portals/571/documents/Denver%20Comblned%20Tax%20Rates.pdf>

City and County of Denver and Other Special District Taxes

- RTD Regional Transportation District
- CD Scientific and Cultural Facilities District
- FD Football Stadium District
- LID Local Improvement District Tax
- RTA Rural Transportation Authority
- Other Special District Taxes

City and County of Denver Taxes

- Contact:
- Denver Treasury Division
- 144 W. Colfax Ave., Denver, CO 80202
- (720) 865-7075
- www.denvergov.org/treasury

City and County of Denver Taxes

- Denver Business Assistance Center
- 201 W. Colfax Ave., Denver, CO 80202
(Atrium)
- (720) 913-1715
- www.milehigh.com/business

City Occupational Privilege Taxes/Head Tax

Some cities tax individuals who work within the city limits. This tax is collected through employer and employee contributions. Set up this tax account with the city clerk's office.

- Denver - (303) 640-2644
- Greenwood Village - (303) 773-0252
- Aurora - (303) 695-7090

Section I: CO State Personal Income Tax Applicability to Individual American Indians

In Colorado, any income earned on an Indian reservation by a reservation tribal member (enrolled member) while domiciled on the reservation is exempt from State's personal income tax.

CO State Personal Income Tax Applicability to Individual American Indians

- Casino winnings if won in a casino located on reservation on which tribal member resides when income is received do not constitute taxable income for purposes of Colorado personal income tax.

CO State Personal Income Tax Applicability to Individual American Indians

- Income earned by Native American or on a Native American reservation that is subject to Colorado personal income tax includes:
 - Income earned on a reservation by anyone not living on that reservation;
 - Income earned by a reservation member while working off the reservation;
 - Income earned by a tribal member on a reservation other than the reservation to which they belong and reside;
 - Income earned by a taxpayer who is not a Native American Indian even if they live and work on a reservation.

Section J: CO State Corporate Income Tax
Applicability to Native American Tribal
Member(s) Owned Corporation (Not Located
in Indian Country)

Colorado State Corporate Income Tax

- Unless exemption applies, Colorado State Corporate Income Tax is flat 4.63% of federal taxable corporate income. Alternative apportionment formulas. Also there are number of corporate income tax credits including an investment tax credit and various enterprise zone tax credits. A number of credits are contingent upon existence of a state budget surplus.

- **Section K: CO State Sales Tax- Native American Issues**

CO State Sales Tax- Native American Issues

- Sales of Tangible Personal Property on Indian Reservation
- CO exempts reservation tribal members living on that reservation from 2.9% state sales tax on purchases made on reservation. Special district taxes and state-collected taxes are also exempt. ("Crib Rule")

CO State Sales Tax- Native American Issues

- If a tribal member living on a reservation makes a purchase of tangible personal property outside of reservation or on another tribe's reservation, then item taxable.

CO State Sales Tax - Native American Issues

- Whether retailer is American Indian or not, sales to enrolled tribal members of reservation where business is located on reservation are exempt. Non-tribal members of a particular tribe making a purchase on that tribe's reservation are subject to state sales tax and local and/or county taxes.

CO State Sales Tax - Native American Issues

Native American exempt from CO sales/use tax on motor vehicle if purchaser is enrolled tribal member living on his/her reservation. If vehicle is co-registered and co-titled, exemption extends to spouse.

Section L: CO State Use Tax - Native American Issues

- Does not apply to Native American Indians using tangible personal property on tribal trust lands of which tribe they are a member or Indian allotted restricted or trust lands of which they are the beneficial owner.

Section M: CO State Property Tax
Applicability to Native American Tribal
Member(s) Owned Corporation

**CO State Property Tax Applicability to Native American Tribal Member(s)
Owned Corporation**

- Colorado State property tax applicable to Native American tribal member owned corporation on property subject to State jurisdiction (does not include tribal trust property within exterior boundaries of reservation or restricted or allotted land held in trust or tribal trust lands).

Section N: State Unemployment Tax Act (SUTA)

- Colorado Unemployment Insurance tax is based on the first \$10,000 of annual wages for each employee (2010 rate). The starting rate is 2.52% for new businesses, with a higher starting rate for construction companies. After the first year, the Colorado SUTA tax rate is calculated, based on your past payroll totals and unemployment claims filed by your employees.

State Unemployment Tax Act (SUTA)

- Colorado Unemployment Insurance Operations Tax Branch
- (303) 318-9100
- www.coworkforce.com/UIT

Section O: CO Withholding Tax

- Every employer who withholds a portion of an employee's wages for payment of federal personal income tax must withhold Colorado personal income tax and report it, unless Colorado personal income tax is preempted by law.

Section P: Incidence of State Tax

- *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.”*

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

- 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

- Idaho fuel tax and transfer fee statutes imposed the tax on Indian Tribe as retailer rather than on distributor, thus tax is invalid. The incidence of the tax was on the Tribe **for sales made inside Indian country.**
- 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

- Idaho legislature passed legislation reversing decision in *Goodman* by merely changing the incidence of the tax as it would result in the loss of millions of dollars to the State.

Section Q: Taxes - Indian Issues

- A “**Member Indian**” is an Indian **living** within the Indian Country of the Indian Nation/Tribe/Pueblo **of** which he/she is an enrolled member.
- A “**Non-Member Indian**” is a member of a federally recognized Indian Nation/Tribe/Pueblo but living within the Indian Country of an Indian Nation/Tribe/Pueblo of which he/she is not an enrolled member.

Taxes - Indian Issues

- *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989) (allows concurrent severance (oil and gas) taxation by state and tribe within Indian Country).
- Non-Indians: *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976)
- Non-Member Indians: *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980)

Taxes - Indian Issues

- Case law considers incidence of tax (who bears tax), federal preemption and interference with tribal self-government as precluding state taxation.

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.

Taxes - Indian Issues

- When a Tribe conducts business outside of Indian Country, a state may tax Tribe, unless exempted by Congress. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973).

Thank You For Coming!!

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