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Current Developments in Tribal Taxation Issues and Initiatives

By Wendy Pearson, Of Counsel – Hobbs, Straus, Dean & Walker, LLP



This year we have seen a number of positive developments in the way of tax regulations, rulings and initiatives that favor Tribes and their members. There is still much work to be done and this article is as much a call to action as a summary of the major developments. Here is how 2016 is developing on key issues and initiatives:

I. Treasury Tribal Advisory Committee.

The Tribal General Welfare Exclusion Act of 2014 (GWE Act) created the Tribal Advisory Committee to the Secretary of Treasury. The Committee’s purpose is to “advise the Secretary on matters relating to taxation of Indians.” Pub. L. 113–168, § 3(b)(1). In consultation with this Treasury Tribal Advisory Committee (TTAC), the Secretary is to establish and require training of IRS personnel on federal Indian law and the unique treaty and trust relationship between the federal government and Indian tribal governments. The required training also extends to both IRS personnel and tribal financial officers about implementation of the GWE Act. In that regard, TTAC is specifically required under the GWE Act to define what constitutes “lavish and extravagant” benefits under an Indian tribal government

program. TTAC also sees its role as addressing issues that are brought to it by tribes in relation to interpretation and implementation of the GWE Act. A number of issues have already been brought to their attention, such as IRS delays in issuing refunds from previously taxed GWE benefits and uneven application of the GWE Act by other federal agencies such as the Social Security Administration. TTAC wants to start working officially on these matters now. However, progress has been stymied by the inaction of Congress to make all of its allotted appointments to the committee.

Four of the seven members have been appointed, to date. All three of the Secretary of Treasury’s appointees have been named: Chairman W. Ron Allen of Jamestown S’Klallam tribe, Treasurer Lacey Horn of the Cherokee tribe, and Chief Lynn Malerba of the Mohegan tribe. Congressman Levin appointed Eugene Magnuson of Pokagon Band of Potawatomi Indians. The three remaining appointments are to be made by Rep. Brady of Texas, Sen. Wyden of Oregon and Sen. Hatch of Utah. Reports indicate that Sen. Wyden has apparently identified an eligible candidate who is going through the requisite security screening and vetting process. Tribes are urged to contact their congressional

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- with the Tulalip Tribal Court. He can be reached at his personal email at dpollom42@gmail.com.
- 1 National Indian Gaming Commission, *Growth in Gaming Revenues in Past 10 years 2004-2013*, available at <http://www.nigc.gov/LinkClick.aspx?fileticket=63DH1pii2Z4%3d&tabid=67> (last visited April 22, 2015)
- 2 David O. Stewart, Ropes, & Gray LLP, *Online Gambling Five Years After UIGEA*, American Gaming Association White Paper, one available at http://www.americangaming.org/sites/default/files/uploads/docs/whitepapers/final_online_gambling_white_paper_5-18-11.pdf (last visited April 23rd, 2015)
- 3 25 U.S.C. § 2703 (9).
- 4 31 U.S. §5363
- 5 Order Granting Motion For Temporary Restraining Order and Order To Show Cause, 2, *California v. Iipay Nation of Santa Ysabel*, 3:14-CV-02724-AJB-NLS (S.D. Cal. 2014).
- 6 *Id.* at 2
- 7 *Id.* at 3.
- 8 *Id.*
- 9 *Id.*
- 10 *Id.* at 11.
- 11 *Id.*
- 12 *Id.*
- 13 *Id.* At 11.
- 14 *Id.* at 12.
- 15 *Id.* at 1.
- 16 31 U.S.C. §5362 (10)(A).
- 17 31 U.S.C. §5362 (IV).
- 18 31 U.S.C. §5362 (IV) (C) (II).
- 19 31 U.S.C. §5362 (IV)(C)(I)(II)
- 20 *Iipay Nation of Santa Ysabel*, *supra* note 5 at 13.
- 21 *Id.*
- 22 *Id.*
- 23 *Id.*
- 24 31 U.S.C. §5362.
- 25 31 U.S.C. §5362.
- 26 25 U.S.C. §2703 (4).
- 27 Kevin K. Washburn, NIGC letter “Win Sports Betting” March 13, 2001, Available at http://www.nigc.gov/Reading_Room/Game_Classification_Opinions-old/Other_games/Other_Games-16.aspx
- 28 *Id.*
- 29 *Iipay Nation of Santa Ysabel*, *Supra* note 5 at 13.

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representatives to request that the TTAC appointments be completed by these members of Congress.

On June 10, 2016, current TTAC members made an official request of IRS Commissioner Jack Lew to take action to convene the first TTAC meeting. With four of the seven members appointed, TTAC members believe they have a quorum to begin official activities. Under the committee's charter, Treasury is required to identify the staff person who will conduct the meetings – this has not been done. Thus, tribes are urged also to contact Commissioner Lew and the Department of Treasury to urge them to convene the initial TTAC meeting immediately.

II. Rights of Way Regulations.

In April, 2016, the BIA issued final regulations (25 C.F.R. 169) that comprehensively modify and streamline the rules for obtaining rights of way (ROW) across Indian land. The regulations seek to create consistency as to how ROW's across tribal lands are granted by the BIA. They also codify the tribal consent requirement giving tribes more authority to consent or withhold consent regarding proposed ROW grants. With respect to taxation, the regulations mirror the recent regulatory updates to leases on tribal land. Under the revised regulations, tribes are permitted to levy a tax on permanent improvements within the right of way, on the right of way possessory interest, and on activities within the right of way. Conversely, state and local governments are pre-empted from imposing any such taxes or fees in relation to the rights of way.

The ROW regulations present an important opportunity for tribes to plan for additional tax revenue sources when negotiating rights of way across their land. In order to position themselves to do this, tribes should be creating and updating their tribal tax codes to define and clarify the types of taxes that may be assessed with respect to rights of way. This will require particularized inquiry into the type of rights of way expected to be granted, the activities expected to be conducted within the rights of way, appropriate valuations and tax rates. A good model or starting point may be the current local governmental rates and procedures for assessing and collecting such taxes. Tribal tax codes will also have to be updated to provide adequate procedures for assessment, collection, and taxpayer dispute resolution processes. The operations within the tribe should likewise be augmented to administer the tax provisions of assessment and collection, and to provide for independent reviewing bodies to address dispute resolution.

III. New Guidance on Trust Per Capita Payments under Direct Pay Leases.

Notice 2015-67, issued in September, 2015, clarifies that per capita distributions made to tribes from funds held by the Secretary of the Interior as part of a tribal trust account are excluded from the gross income of tribal members. The funds in the trust account must be from sources which qualify to be deposited into trust per 25 C.F.R. § 115.702. Those include mainly revenue directly derived from the

sale or use of trust property. Importantly, the IRS carved out exceptions to this tax-exempt treatment for revenues which they determine have been misclassified as "trust" revenue. The exceptions set out in Notice 2015-67 for

mischaracterized trust revenue include lease revenue from a tribal enterprise that amounted to essentially the entire net profit of the business, attempting to convert otherwise taxable compensation to a trust per capita distribution, and disguising 50 percent of net gaming revenue as "rent" from a tribal casino. These exceptions are intended to address abusive situations only and not fair-market, arm's-length leasing arrangements.

"Direct pay" leases were overlooked by Notice 2015-67. Under current BIA regulations, the BIA may approve direct payment to a tribe from the leases and contracts' operators rather than depositing these payments into a DOI-maintained tribal trust account. These are approved by the same process or are subject to the same BIA-approved standards as leases and contracts under which the funds are deposited into tribal trust accounts. On May 26, 2016, the IRS issued "Interim Guidance on the Direct Pay of Tribal Lease Funds" clarifying that these leases will also qualify for tax exemption. The last remaining issue is whether HEARTH Act leases (leases paid directly to the Tribe under HEARTH Act delegation authority) will also qualify for the exemption. The IRS is currently evaluating this issue. Tribal advocates have argued that these leases should qualify for the exemption just as they would if the leases were still being administered by the Bureau of Indian Affairs. In the meantime, it is recommended that tribes with direct pay leasing arrangements under HEARTH Act regulations establish policies and practices to prove these funds directly derive from tribal trust land.

IV. Tribal Tax and Investment Reform Act of 2016 – H.R. 4943.

Tribal Tax and Investment Reform Act of 2016 (H.R. 4943) was introduced on April 14, 2016. This legislation would treat Indian tribal governments in the same man-

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TRIBES ARE URGED TO CONTACT THEIR CONGRESSIONAL REPRESENTATIVES TO REQUEST THAT THE TTAC APPOINTMENTS BE COMPLETED BY THESE MEMBERS OF CONGRESS.

ner as state governments for certain federal tax purposes. Currently, the tax code applies rules that make tax benefits and exemptions for governmental entities more restrictive for tribes than for state and local governments. In other cases, the tax treatment of tribal governments has simply been overlooked in the tax code. H.R. 4943 would amend the Internal Revenue Code to address these issues.

The bill would treat Indian tribes the same as states for tax-exempt bond issuances and, importantly, repeal the “essential governmental function” requirement of 26 U.S.C. § 7871. In the area of pensions and employee benefit plans, it would clarify that “governmental plans” include those maintained by Indian tribal governments for their employees and that Section 457 plans (governmental plans) sponsored by tribal governments prior to this bill are grandfathered as eligible employer plans. The bill would also clarify that Indian tribal governments may receive charitable contributions (i.e. deductible contributions under 26 U.S.C. § 170) and receive financial support from tax-exempt Supporting Organizations. The bill improves the effectiveness of tribal child support enforcement agencies by parity of access to the federal parent locator service and federal tax refund offsets. And, finally, the bill clarifies that the adoption tax credit is available for children determined by an Indian tribal government to have special needs. Efforts to find co-sponsors are underway and tribes are encouraged to reach out to their Congressional representatives to support the bill.

V. Proposed Amendments to Indian Trader Statute and Regulations.

Efforts to revise the Indian Trader Regulations at 25 C.F.R. Part 140 have been under way since the beginning of 2016. These regulations have not been updated since 1957; modifying the regulations has been a policy priority of NCAI this year in an effort to address barriers to economic development in Indian Country. Department of Interior (DOI) was keenly receptive to the proposal to amend these regulations. In fact, Assistant Secretary Roberts has identified this effort also as a DOI priority to accomplish before a change of administration. The proposed amendment addresses three parts. First, the proposal would substitute tribal business licensing for federal licensing. Second, the proposal would create a presumption of consent to tribal court jurisdiction. Third, the proposal would pre-empt state taxation on tribal lands, modeled after the recent amendments to the Business Leasing regulations at 25 C.F.R. Part 162, and the new Rights-of-Way regulations at Part 169.

In June, Assistant Secretary Roberts reported on the DOI efforts to amend the Indian Trader regulations. Unfortunately, he said he does not believe DOI can advance proposed regulations to a final rule within the short time-frame left in the administration. DOI, Solicitor’s Office,

and Department of Justice are concerned about whether the Indian Trader Statute, 25 U.S. Code § 262, gives them the authority to delegate licensing of trade to the tribes. However, DOI does plan to publish a policy statement in support of the dual taxation (state tax pre-emption) component of the proposed amendments before January 2017. In the meanwhile, they will continue to analyze what modifications can be made to the regulations. Assistant Secretary Roberts requested that tribes provide any information for consideration as the Department continues to evaluate their options.

The antiquated Indian Trader Statute was also brought to the attention of Congress. On July 14, 2016, Senator Barrasso (Chairman of the Senate Committee on Indian Affairs) and Senator McCain introduced the “Indian Community Economic Enhancement Act of 2016,” S. 3234. Among its provisions is a proposal to amend the Indian Trader Act (25 U.S. Code § 261) to add an authorization for the Secretary of the Interior to waive its licensing authority in favor of a tribe, as follows:

(b) Waiver.—On request of an Indian tribe, the Secretary of the Interior shall waive any applicable licensing requirement under subsection (a), if the Secretary determines that the Indian tribe has enacted tribal laws to govern licensing, trade, or commerce with respect to the Indian tribe or land held by, or in trust for the benefit of, the Indian tribe.

Congress is seeking comments from tribes through July and August on this bill.

VI. ACT Report.

On June 8, 2016, the Advisory Committee on Tax Exempt and Government Entities (ACT) made its public report to the Commissioner of Internal Revenue (IRS) on its recommendations for administrative, procedural and regulatory improvements on issues effecting tax-exempt and government entities. For the Indian Tribal Governments (ITG) division of the IRS, ACT reported its “Survey of Tribes Regarding IRS Effectiveness with Current Topics of Concerns and Recommendations.”

Based on a one-year survey of tribes, tribal organizations and tribal representatives, the ITG subgroup of ACT made specific recommendations to improve communication, training and interaction with tribal governments and their entities. Specifically, ACT recommended the following:

1. ITG should continue its public speaking at the meetings of tribal organizations such as NCAI and NAFOA to update these organizations on

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important tax topics;

2. ITG should continue to present relevant and timely webinars on tax topics;
3. ITG should provide training to its field agents on substantive tax issues, namely the GWE Act;
4. ITG should provide timely regional, face-to-face, training to tribes and tribal entities on substantive tax topics;
5. IRS should exempt tribal governments from the employer mandate under the Affordable Care Act (ACA); and
6. IRS should abandon the proposed payment model under Notice 2015-52 (which requires a plan administrator to remit the “Cadillac” tax on behalf of an employer under the ACA) in favor of allowing employers to calculate and pay tax themselves on any excess benefits provided to employees;
7. IRS should clarify terms and application of the GWE Act.

The ACT recommendations were well received by the IRS. The ITG division is continuing its effort to improve communication with tribes and to clarify the application of substantive tax law to tribes and tribal entities. The ITG division of IRS will be reporting on its latest efforts at the National Intertribal Tax Alliance 18th Annual Tax Conference September 14-15, 2016 at Agua Caliente Casino Resort & Spa.

If you have any questions or comments, please contact Wendy at wpearson@hobbstrauss.com or 425-512-8850.

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