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ATTORNEY GENERAL OPINION NO. 89- 115

Mark A. Burghart
General Counsel
Kansas Department of Revenue
Docking State Office Building
915 S.W. Harrison Street
Topeka, Kansas 66612-1588

Re: Taxation--Kansas Retailers' Sales Tax--
Jurisdiction to Enforce Provisions on Federally
Recognized Indian Reservations

Synopsis: Indian retailers operating on federally recognized reservations selling products which have been imported for sale are subject to the "collect and remit" requirements of the State's retailers' sales tax and cigarette tax acts when the legal incidence of the tax falls on non-Indian purchasers. Though enforcement may be difficult in that we do not believe action to enforce may be brought in state courts, the absence of civil jurisdiction under Public Law 280 and 25 U.S.C. §1322(a) does not preclude the State from requiring collection. Cited herein: K.S.A. 79-3302; K.S.A. 1988 Supp. 79-3310; 79-3321; 79-3408; K.S.A. 79-3409; K.S.A. 1988 Supp. 79-3604; 18 U.S.C. §1343; 25 U.S.C. §1322; 28 U.S.C. §1360.

* * *

Dear Mr. Burghart:

You have requested our opinion regarding whether the State of Kansas has the requisite jurisdiction to enable the Department of Revenue to regulate the collection of sales, cigarette, and

motor fuel taxes on recognized Indian reservations. You state that your request is strictly limited to on-reservation activity and does not encompass the situation where an Indian retailer is operating on other than a federally recognized reservation.

Since its decision in Moe v. Salish and Kootenai Tribes, 425 U.S. 463, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976), the United States Supreme Court has consistently held that states may properly require that such taxes, validly imposed on non-Indian purchasers, be added to the sale price of the tribal retailer, thereby aiding the states' enforcement and collection of the tax.

"The State's requirement that the Indian tribal seller collect a tax validly imposed on non-Indians is a minimal burden designed to avoid the likelihood that in its absence non-Indians purchasing from the tribal seller will avoid payment of a concededly lawful tax. Since this burden is not, strictly speaking, a tax at all, it is not governed by the language of Mescalero [411 U.S. 145, 148, 93 S.Ct. 1267, 36 L.Ed.2d 114, 119 (1973)], dealing with the 'special area of state taxation.' We see nothing in this burden which frustrates tribal self-government [cites omitted], or runs afoul of any congressional enactment dealing with the affairs of reservation Indians. . . ." Moe, 425 U.S. at 483, 48 L.Ed.2d at 112.

The Court went a few steps further in Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980), holding that the state may require Indian retailers to collect sales and cigarette taxes from non-members purchasing at tribal smokeshops even if the tribe, by ordinance, also exacts a tax on such sales. Id. at 154-159. The Court also held that the state could "validly require the tribal smokeshops to affix tax stamps purchased from the State to individual packages of cigarettes prior to the time of sale to nonmembers of the Tribe," id. at 159, and to keep records of both taxable and nontaxable transactions, id. at 159, 160. Finally, the Court held that the state could enforce its validly imposed tax and its collection requirements by seizing

as contraband unstamped cigarettes en route to the reservation.

"Although the cigarettes in transit are as yet exempt from state taxation [because sales by wholesalers to the tribal businesses are concededly exempt] they are not immune from seizure when the Tribes, as here, have refused to fulfill collection and remittance obligations which the State has validly imposed. . . . By seizing cigarettes en route to the reservation, the State polices against wholesale evasion of its own valid taxes without unnecessarily intruding on core tribal interests." Id. at 161, 162.

One point emphasized in Colville was that it was "painfully apparent that the value marketed by the smokeshops to persons coming from outside is not generated on the reservations by activities in which the tribes have a significant interest." Colville, 447 U.S. at 155. The "value" that was marketed, which was not available from non-tribal retailers, was the claimed exemption from state taxes. Compare Indian County, U.S.A., Inc. v. Oklahoma Tax Commission, 829 F.2d 967 (10th Cir. 1987) (recreation afforded by tribal bingo games created, sold and consumed entirely on reservation and thus exempt from taxation).

It is also important to note that in both Moe and Washington v. Colville, the Court focused on the fact that the legal incidence of the tax involved fell on the non-Indian or non-tribe member purchaser. 425 U.S. at 481, 482; 447 U.S. at 142. See Ute Indian Tribe v. State Tax Com'n, Etc., 574 F.2d 1007 (10th Cir. 1978). "Incidence of a tax refers to the party or parties bearing ultimate liability for the tax." Cohen, Handbook of Federal Indian Law, 413, note 72 (1982 Ed.). In California State Board of Equalization v. Chemehuevi Indian Tribe, 474 U.S. 9, 106 S.Ct. 289, 88 L.Ed.2d 9, reh'g denied, 474 U.S. 1077, 106 S.Ct. 839, 88 L.Ed.2d 810 (1985), the Court explained that the pertinent statutes need not expressly state "that the tax is to be passed on to the ultimate purchaser . . . before a State may require a tribe to collect cigarette taxes from non-Indian purchasers and remit the amounts of such tax to the state." 474 U.S. at 11. If the statutory scheme is such that consumers are required to pay the tax whenever the retailer is

untaxable, the legal incidence of the tax falls on the purchaser and thus is validly imposed on sales from Indians to non-Indians and the state may require the Indian retailers to collect the tax.

Clearly the legal incidence of the Kansas retailers' sale tax falls on the ultimate purchaser/consumer. K.S.A. 1988 Supp. 79-3604. Conversely, the legal incidence of the motor fuels tax does not fall on the ultimate consumer. K.S.A. 1988 Supp. 79-3408; K.S.A. 79-3409. Pursuant to K.S.A. 79-3409, it is up to the distributor whether the tax is passed on to the purchaser and the distributor remains liable; the legal incidence, or liability, does not fall on the purchaser. Thus, since states generally cannot tax Indian tribes or their property absent cession of jurisdiction or other federal statutes permitting it, the State of Kansas may not impose or collect motor-fuel taxes on or from Indians on federally recognized Indian reservations. See Mescalero Apache Tribe v. Jones, 411 U.S. 145, 93 S.Ct. 267, 36 L.Ed.2d 114 (1973); McClanahan v. Arizona Tax Commission, 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973); Bryan v. Itasca County, 426 U.S. 373, 96 S.Ct. 2102, 48 L.Ed.2d 710 (1976); Moe v. Salish and Kootenai Tribes, supra.

It is less clear where the legal incidence of Kansas' cigarette tax falls. Pursuant to K.S.A. 79-3302 and K.S.A. 1988 Supp. 79-3310 the tax is to be collected from the wholesale or retail cigarette dealer who first sells, distributes or conveys the cigarettes in the State of Kansas. However, it is generally unlawful for any person to possess more than 200 cigarettes without the required tax indicia being affixed. K.S.A. 1988 Supp. 79-3321(a). Thus, the State may hold the ultimate purchaser liable for non-payment of the tax in some circumstances. Further, as a practical matter, the cigarette tax is traditionally passed on to the consumer. It is therefore our opinion that the legal incidence of the cigarette tax in Kansas falls on the ultimate purchaser, and the State may require Indian retailers to collect and remit the tax.

It is been suggested that since Kansas has never assumed civil jurisdiction on Indian reservations pursuant to 28 U.S.C. §1360 (commonly referred to as Public Law 280) or 25 U.S.C. §1322(a) (the Indian Civil Rights Act of 1968), the State is without jurisdiction to enforce a requirement that Indian retailers collect cigarette and sales taxes. [Kansas was granted criminal jurisdiction pursuant to 18 U.S.C. §3243. This jurisdiction has been held to be concurrent with federal

criminal jurisdiction. State v. Nioce, 239 Kan. 127 (1986).] We do not believe that assumption of civil jurisdiction under either of these statutes would enhance enforcement of the collection requirements, or that failure to assume jurisdiction under one these statutes would necessarily preclude the State from imposing the collect and remit requirements on Indian retailers.

The United States Supreme Court discussed the scope of jurisdiction afforded by Public Law 280 and, to a lesser extent, 25 U.S.C. §1322(a) in Bryan v. Itasca County, supra.

"The primary concern of Congress in enacting Pub. L. 280 that emerges from its sparse legislative history was with the problem of lawlessness on certain Indian reservations, and the absence of adequate tribal institutions for law enforcement. . . . Thus, provision for state criminal jurisdiction over offenses committed by or against Indians on the reservations was the central focus of Pub. L. 280 and is embodied in §2 of the Act, 18 U.S.C. §1162." 426 U.S. at 379, 380.

The section of Public Law 280 consenting to state civil jurisdiction is believed to have been added as somewhat of an afterthought. See Goldberg, Public Law 280: The Limits of State Jurisdiction Over Reservation Indians, 22 U.C.L.A. L. Rev. 535, 543, 544 (1975). In any event, the Court concluded that the grant of civil jurisdiction under Public Law 280 was confined to private causes of action. Bryan v. Itasca, 426 U.S. at 383-385. The scope of state civil jurisdiction assumed under 25 U.S.C. §1322(a) was also found to be limited to private causes of action:

"[T]he legislative history of Title IV makes it difficult to construe §4 jurisdiction acquired pursuant to Title IV as extending general state civil regulatory authority, including taxing power, to govern Indian reservations." Id. at 387.

See also, Cohen, supra at 363-364; Israel & Smithson, Indian Taxation, Tribal Sovereignty and Economic Development, 49 N.D.L. Rev. 267, 290-297 (1973); Attorney

General Opinion No. 82-221. We do not believe enforcement by a state of its tax collection requirements would be deemed a private cause of action, and therefore assumption of jurisdiction under Public Law 280 or 25 U.S.C. §1322(a) would do nothing to further those goals.

It is interesting to note that the United States Supreme Court has not thoroughly discussed the degree or type of civil jurisdiction necessary to enforce tax collection and record keeping requirements. In Washington v. Confederated Tribes of the Colville Indian Reservation, supra, the Court found that the state of Washington had validly assumed civil jurisdiction over the tribes involved. However, the Court did not appear to make such a finding a prerequisite to the state's ability to require collection by Indian retailers of cigarette and sales taxes, the legal incidence of which falls on the non-member purchaser. 447 U.S. at 164. See Confederated Tribes of the Colville Indian Reservation, 446 F.Supp. 1339, 1345 (1978) (the tribes apparently raised the question of jurisdiction as a separate issue, not connected with the state's authority to require collection). Further, since Public Law 280 and 25 U.S.C. §1322(a) do not authorize state imposition of regulatory or taxing authority in and of themselves, it would seem to make little difference whether a state has jurisdiction under these provisions for such purposes. Finally, the state involved in Moe v. Salish and Kootenai Tribes, supra, did not have Public Law 280 or 25 U.S.C. §1322(a) civil jurisdiction at the time the case was decided. Montana had attempted to assume jurisdiction under Public Law 280 in 1966. Mont. Rev. Code Ann. §§83-802, 83-806 (1966). However, the United States Supreme Court held that Montana had not properly assumed such jurisdiction in Kennerly v. District Court of Montana, 400 U.S. 423, 91 S.Ct. 480, 27 L.Ed. 507 (1971). Montana had done nothing further to assume jurisdiction under 25 U.S.C. §1322(a) between 1971 and 1976, the year in which Moe was decided. See Cohen, supra, at 363, 363, notes 125, 127. The Court of Appeals of Arizona has specifically held that "[t]he State may tax non-Indians and non-Indian property within the reservation even though the State has not expressly assumed jurisdiction over the reservation pursuant to Public Law 83-280 (18 U.S.C. §1162) (1970) and 28 U.S.C. §1360 (1970)." Arizona Department of Revenue v. Hane Construction Co., Inc., 564 P.2d 932, 934 (Az. 1977). See also Cohen, supra, at 413-416.

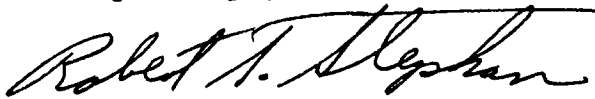
We conclude, therefore, that assumption of civil jurisdiction under Public Law 280 or 25 U.S.C. §1322(a) is not necessary to

enable the State of Kansas to require Indian retailers to collect and remit sales and cigarette taxes validly imposed on non-Indian purchasers.


Having determined that Indian retailers are subject to the State's sales and cigarette tax collection requirements, a question remains as to what measures the State can use to enforce those requirements. As noted above, the United States Supreme Court has condoned seizure of unstamped cigarettes en route to reservations even though the cigarettes were as yet untaxable. Availability of this method of enforcement becomes questionable if the cigarettes are deemed tribal property and the tribe has not waived sovereign immunity. Chemehuevi Indian Tribe v. California State Board of Equalization, 492 F.Supp. 55 (N.D. Cal. 1979), aff'd in relevant part, rev'd in part on other grounds, 757 F.2d 1047 (9th Cir. 1985). We do not believe, however, that these cigarettes would be deemed tribal property, see Colville, 447 U.S. at 155, and this should not be a problem when dealing with Indian-owned businesses not directly connected with a tribal government. See Nevada Attorney General Opinion No. 89-2.

In conclusion, Indian retailers operating on federally recognized reservations selling products which have been imported for sale are subject to the collect and remit requirements of the State's retailers' sales tax and cigarette tax acts when the legal incidence of the tax falls on non-Indian purchasers. The State may enforce such requirements through methods not involving State court action.

Very truly yours,



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