



\*525.0010\*

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April 14, 1981

This letter is in response to your inquiry of February 20, 1981, concerning the property tax ramifications of Indian allotted land. Specifically, you ask the following questions:

1. Do Indians living on reservation land have a right to a property tax exemption if they are living on their own allotted land or that of another Indian?
2. Would any such exemption apply to improvements, land, or both?
3. Does a developer of reservation property under a lease from the Indians have a taxable possessory interest?
4. Are Indians subject to the change of ownership requirements of Revenue and Taxation Code Section 480, et seq?

In Agua Caliente Band of Mission Indians v. County of Riverside, 442 F2d 1184 (1971), the court discussed the legal status of the Indian land in the Palm Springs area. The Secretary of Interior allotted to the Agua Caliente Band of Mission Indians (hereinafter the Band) over 26,000 acres in the Palm Springs area. The legal title to the lands is in the United States in trust.

According to 25 USCA 465, when title to land is taken in the name of the United States in trust for an Indian tribe or individual Indian, the land and rights are exempt from state and local taxation. The reason for this exemption is discussed in Agua Caliente Band of Mission Indian v. County of Riverside, supra, at p. 1185, where the court, citing Federal Indian Law, Department of Interior, 1958, stated:

Perhaps the most frequent reason stressed by the courts for the exemption of Indian property from State taxation is the Federal Instrumentality doctrine. The doctrine in its application to Indians and Indian property is founded upon the premise that the power and duty of governing and protecting tribal Indians is primarily a Federal function and that a state cannot impose a tax which will substantially impede or burden the functioning of the Federal Government.

The Federal Instrumentality doctrine prohibits a tax imposition on The Band that would not be allowed on the government. As a result, courts have interpreted the exemption to apply to a use tax, but not an income tax derived from the land. See Mescalero Apache Tribe v. Jones 411 US 145 (1973). An Indian is thus exempt from the direct taxation of federal land. It is the opinion of the Board that a member of The Band is not subject to tax if he resides on the land held in title by the United States in trust. We believe a tax imposed on The Band in any form relating to the occupancy of Federal land, whether allotted to them individually or not, would substantially frustrate the intent of Congress at 25 USCA 465.

The next question concerns the extent of the exemption. The Supreme Court addressed the issue in Mescalero Apache Tribe v. Jones, supra at p. 125, wherein it stated in pertinent part:

[U]se of permanent improvements upon land is so intimately connected with use of the land itself that an explicit provision relieving the latter of state tax burdens must be construed to encompass an exemption of the former.

The third question concerns the ability to impose a property tax on a possessory interest of the master lessee-developer. Aqua Caliente Band of Mission Indians v. County of Riverside, supra, held the imposition of a property tax on a possessory interest of a lessee was valid. The court stated that The Band was entitled to no more protection than the Federal Government. The court cites United States v. City of Detroit 355 US 466 (1958) where it was held that a tax similar to the California possessory interest tax was imposed properly upon a lessee of the Federal Government. (See also United States v. Fresno County, 429 US 452; Fort Mojave Tribe v. San Bernardino County, 543 F2d 1253 (1976)).

The sublease by the developer to the individual member of The Band does not relieve the developer of his burden under the law. In Ohrbach's Inc. v. County of Los Angeles 190 Cal. App. 2d 575 (1961), the plaintiff leased property to a tax-exempt organization. The court held the plaintiff was not relieved of his duty under the law, wherein it stated:

If the leasehold interest of the state was exempt from taxation, it would not follow that the owner or lessor would also be entitled to such an exemption with respect to the leased portion.

The final question concerned the application to The Tribe of the change of ownership statement and its pertinent enforcement sections, Revenue and Taxation Code Section 480, et seq. Our research indicated no case directly on point, however, Confederated Tribes of Colville v. State of Washington, 446 F. Supp. 1339 (1978), contained an approach which is somewhat parallel to the current situation. The case involved the state's authority to require individuals conducting business on reservations to register with the state taxing agency, collect and remit sales taxes when applicable, and keep records detailing taxable and non-taxable sales transactions.

The court found the state has an interest insuring the collection of taxes validly imposed on non-Indians. To achieve this interest, the state has some regulatory power over reservation Indians concerning on-reservation transactions with non-Indians. The extent of the regulation must be such that it is "reasonably necessary to ensure payment of taxes which it does have power to impose..." while "...minimizing the impact on Indians..." See Confederated Tribes at pp. 1372 - 73.

The court analyzed the regulations differently for taxable and non-taxable transactions. A taxable transaction would occur when the legal incidence of the tax falls on a non-Indian. When regulating a taxable transaction, the court stated at p. 1373: "The state is merely entering into an area in which it has recognized, albeit very limited, power. Such regulations are presumed reasonably necessary...."

In the area of California Property Tax Law, a reappraisable event generally occurs upon a sale or disposition of property. The legal incidence of this tax falls upon the purchaser/owner. Thus when an Indian sells to a non-Indian a reappraisable transaction occurs and the state has an interest in the sale and clearly may require the change of ownership form from the non-Indian purchaser.

A non-taxable (reappraisable) event occurs when the legal incidence of the tax falls on the Indian. In requiring application of Revenue and Taxation Code Section 480 to Indians in such situation.

"the state is placing a burden upon Indian[s]...with respect to transactions over which it normally would have no power and which pertains only indirectly to taxable sales." The regulation must be reasonably necessary to insure payment of taxes over which it does have the power to regulate; i.e., a sale to non-Indians. The burden of proof is on the State. The court stated the need to create an audit trail to prevent fraudulent tax avoidance may be enough to uphold the record keeping requirement. However, the same may not be true in the property tax field. Because the change of ownership forms are required of every purchaser, the state has a means to insure reappraisal and collection of taxes from non-Indians. It is entirely possible a court of law would find the change of ownership requirements inapplicable to the Tribe. In any event, the issue is yet to be decided. Assuming Revenue and Taxation Code Section 480, et seq. are upheld, the applicability of the enforcement provisions is also indoubt. In Confederated Tribes, the court expressly withheld decision on the matter of enforcement provisions because it stated it had no reason to assume the Indians would not comply. Any opinion on the validity of the enforcement provisions would be pure speculation. However, I personally think they would be unenforceable.

Finally, we spoke with Mr. William Wirtz of the U. S. Attorney's Office in Sacramento. He stated their office would "probably" not oppose an attempt to get The Tribe to comply with the change of ownership forms; however, he indicated a strong possibility of litigation over the enforcement section. He suggested you get together with The Tribe and attempt to arrange voluntary compliance with the section.

If you have any further inquiries, please let me know.

Very truly yours,

Glenn L. Rigby  
Assistant Chief Counsel

(AT) GLR:jlh

bc:



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July 10, 2003

Honorable Charles W. Leonhardt, Assessor  
Plumas County Assessors Office  
520 Main St., Room 205  
Quincy, CA 95971-9114

**Re: Improvements on Indian Trust Lands**

Dear Mr. Leonhardt:

This is a response to your letter of July 9, 2002 to Assistant Chief Counsel Kristine Cazadd in which you requested an opinion about assessment of structures that have been constructed upon lands which are jointly held in trust by the federal government and in patented fee. We apologize for the delay in responding to your inquiry, however, other Board prescribed matters have occupied our time. The general rule is that improvements are either subject to tax or not depending on the nature of the underlying real property. For the reasons set forth below, we conclude that improvements on land held in fee by Indian persons, are subject to tax. Improvements on land held in trust for Indians by the United States government are exempt from tax because the state lacks jurisdiction to assess federal land.

In your letter and our recent conversation, you provided facts as follows: structures have been constructed upon certain allotted lands that are owned in part by an individual Indian in fee simple and with the remainder held in trust by the United States government for other related Indian family members. Family member A owns an undivided 28/270<sup>th</sup> interest in patented fee simple and the balance of the interests are held in trust. A base year value has been established and is currently assessed on the fee simple land. Family member A previously constructed a dwelling and related improvements that were exempted from assessment on unspecified grounds. It is unclear whether these improvements are located on A's land held in fee or on trust land. Additional dwelling structures have been constructed by other family members and have not yet been either assessed or exempted. It is possible that some improvements may benefit the fee owner but are located on trust land. Finally, you believe that a non-tribal Indian or a non-Indian lessee may occupy one or more of the dwellings.

The owners of the land contend that all of the improvements are exempt because they are "on Indian lands." You have inquired how to determine whether the real property, "additional occupancies [lessees] and improvements" are taxable and what criteria, if any, are utilized to determine whether an exemption would apply. You have also asked how to determine the identities of the occupants, i.e. whether they are one of the allottees, another tribal member, or a non-Indian.

### **Law and Analysis**

It is well settled that, unless federal law expressly waives immunity, a state has no jurisdiction over Indian-owned property located on a reservation for taxation purposes. McLanahan v. Arizona State Tax Comm'n (1973) 411 U.S. 164, 169. Pre-emption is grounded in the Indian Commerce Clause, Article 1, section 8, clause 3 of the United States Constitution which grants Congress broad powers to regulate Indian tribal affairs. White Mountain Apache Tribe v. Bracker (1980) 448 U.S. 136, 142. However, federal law does permit some state and local taxation under certain circumstances.

The principles governing the question of taxation of Indian lands are set forth in several U.S. Supreme Court decisions which have established the boundaries of state authority to tax real and personal property owned by Indians or located on reservation land. The taxing authority must be weighed against the historical backdrop that the Indian tribes “were once independent and sovereign nations, and that their claim of sovereignty long predates that of our own government.” McLanahan v. Arizona State Tax Comm'n (1973) 411 U.S. 164, 173. Statutes imposing duties or burdens on Indians will be construed liberally in favor of the Indians. Montana v. Blackfoot Tribe (1987) 471 U.S. 759. Thus any determination of taxability must be carefully made.

#### **Federal law does not pre-empt all local property tax**

##### **1. What real property on an Indian reservation is subject to ad valorem property tax?**

Real property held in fee by an individual Indian or by the tribe, as opposed to land held in trust, is subject to ad valorem property tax. Title to Indian lands is held in a variety of forms which have evolved over the last 150 years of federal law. A key change occurred with the enactment of the Indian General Allotment Act of 1887 (“Dawes Act”). The Dawes Act set a policy of dividing tribal lands into small parcels and “allotting” them to individual Indians. The Act provided that each allotment would be held by the United States in trust for at least 25 years before a fee simple patent would be issued to the allottee. [Section 5 of the Act, 25 USCS §348]. The Act was amended in 1906 (the “Burke Act”) to clarify that upon expiration of the trust period and receipt of a patent in fee, Congress intended that the allottee would be subject to state jurisdiction, including taxation.

The policy of allotment ended in 1934 with the passage of the Indian Reorganization Act (“IRA”)[25 USCS §461 et seq.]. The IRA stopped further allotments and extended indefinitely the existing periods of trust applicable to lands previously allotted, but not yet fee-patented. It also provided for the restoration of unallotted surplus Indian lands to tribal ownership and for acquiring land, on behalf of tribes, either inside or outside reservation boundaries. Such acquired land is held in fee, unless or until the United States agrees to grant trust status following application by the landowner. Because of the inheritance provisions of the original treaties or allotment acts, ownership of many of the allotments held in trust have become fractionated. In 1983, Congress enacted the Indian Land Consolidation Act which attempted to resolve the problem of tiny fractional interests in Indian land by, *inter alia*, providing that when an individual owner dies, an interest of 2% or less in a tract of land will escheat to the tribe.

As a consequence of the shifting Congressional policies, individual Indians or Indian tribes may own realty on or off the reservation, and may hold title in fee or the land may be held in trust by the United States for the benefit of an individual Indian or tribe. The United States Supreme Court has held that state taxation of Indian owned land must be expressly authorized by federal law and has held that property taxation of land held in fee is so authorized. [Yakima v. Confederated Tribes (1992) 502 U.S. 251, 258. (“[A]bsent cessation of jurisdiction or other federal statutes permitting it” a State may not tax reservation lands or reservation Indians, quoting Mescalero v. Apache Tribe v. Jones (1973) 411 U.S. 145 , 148)]; see also Montana v. Blackfoot Tribe (1987) 471 U.S. 759 (Congress must be “unmistakably clear” if it authorizes state taxation of Indian lands).

However, based on these and other U.S. Supreme Court opinions, and the explicit provisions of the IRA, any land held in trust by the Department of the Interior through the Bureau of Indian affairs for tribes or individual Indians is exempt from real and personal property taxation as such property is considered owned by the United States and, thus, immune from taxation. [Annotation No. 525.0030 attached]. As early as 1906, the Supreme Court found such express authority for taxation of **fee-patented land** in the Dawes Act. [Goudy v. Meath (1906) 203 U.S. 146, 149]. The Burke Act of 1906 codified the Court’s decision. [See, Yakima, 502 U.S. at 264]. Therefore because the undivided fractional interest in real property owned by Family member A is held in fee, it is subject to property tax, and assignment of a base year value was appropriate [Yakima 502 U.S. 251, 270; Annotation No. 525.0013 attached]. The IRA is also current authority for exempting from state taxation lands held in trust by the United States<sup>1</sup>. [25 USCS §465].

### **Improvements are taxable if the underlying land is taxable**

#### 2. Are improvements located on Indian lands are subject to ad valorem property tax?

Improvements<sup>2</sup> located on real property held in fee by an individual Indian or by the tribe, as opposed to land held in trust, are subject to ad valorem property tax. Conversely, if the improvements are upon land held in trust for an individual Indian or tribe they are exempt from local assessment and taxation. [U.S. v. Rickert, (1902) 188 US 432, 441-443; Annotation No. 525.0010 attached]. In Rickert, the Court held that to allow state taxation of improvements annexed to Indian trust land would defeat the purpose of the allotment policy. According to that policy, the allottees were expected to improve and cultivate the land. Thus, if the improvements

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<sup>1</sup> Section 465 of the IRA is explicit and provides, in relevant part: “The Secretary of the interior is hereby authorized, in his [sic] discretion, to acquire any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments for the purpose of providing land for Indians Title to any lands or rights acquired pursuant to [this Act] shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.”

<sup>2</sup> “Improvements” are defined in section 105: to include:

“(a) All buildings, structures, fixtures, and fences erected on or affixed to the land. All fruit, nut bearing or ornamental trees and vines, not of natural growth, and not exempt from taxation, except the date palms under eight years of age.”

were subject to tax lien foreclosure and sale it would frustrate the policy whereby the Indians were entitled to the protection and care of the federal government.

However, the view that permanent improvements are subject to taxation on the same basis as the underlying real property was reaffirmed in 1973 by the United States Supreme Court in Mescalero. The Supreme Court examined a use tax imposed by a state on an improvement (a ski lift) to property outside the reservation, leased by an Indian tribe from the United States for operation of a ski resort. In that case, the improvements at issue were held to be exempt because they were located on land owned by the federal government (albeit outside the reservation) and used in an exempt purpose by the tribe as authorized by the IRA. Notably, the Court commented in dicta that if these permanent improvements were on the tribe's tax-exempt land, they "would certainly be immune from the State's ad valorem property tax" because use of the permanent improvements is "so intimately connected" with the land. Thus, "an explicit provision relieving the latter of state tax burdens must be construed to encompass an exemption for the former." Mescalero, 411 U.S. 145, 158.

Your facts pose a rather unique challenge in that the fee interest is part of an undivided allotment otherwise held in trust. Because the fractional fee interest has not been partitioned, there is not a clear and direct ownership connection between any of the improvements and a particular ownership interest in the underlying land. Your office is unable to identify and link a particular structure to any particular ownership interest based on its location within the allotted land. Although we recognize the difficulty in assessing undivided ownership interests in both land and improvements, we suggest that the advice published in Letter to Assessors Nos. 85/85 and 86/04 may be of some assistance in this regard.

3. Is it possible to attribute ownership of an improvement (dwelling) to the owner of an undivided fee interest in the entire parcel of land?

Yes, Section 2188.2 permits assessment of improvements to one who is not the owner of the underlying land. Section 2188.2 provides, in relevant part:

Whenever improvements are owned by a person other than the owner of the land on which they are located, the owner of the improvements or the owner of the land may file with the assessor a written statement before the lien date attesting to their separate ownership, in which event the land and improvements shall not be assessed to the same assessee....

The California Court of Appeals has held that an assessment of improvements to a lessee was valid even though the land was assessed to the landlord and he owned the improvements. Valley Fair Fashions, Inc. v. Valley Fair, 245 Cal.App.2d 614 (1<sup>st</sup> Dist. 1966). The Court construed Section 405 as specifically authorizing assessment to one who possesses or controls, but does not own, the property. [245 Cal. App.2d at 616]. The Court also rejected a tenant's argument that Section 2188.2 requires assessment of improvements to the landowner in the absence of a written statement of separate ownership. The section "in no way modified section 405, which continues specifically to authorize assessment to the party possessing or controlling the property." [245 Cal. App.2d at 617; see also T.M. Cobb Co. v. County of Los Angeles, 16 Cal. 3d 606, 626 (1976). The decisions in neither case appear to rest on the lessor-lessee status of the parties.

Therefore, the Courts have found that section 405 provides an assessor with discretion to determine that a dwelling is “possessed” or “controlled” by a person who is not the owner of the underlying land. If the assessor determines that a particular improvement located on land held jointly by different individuals with undivided fractional interests is, in fact, owned by one of those individuals, the assessor may separately assess the improvement and that individual’s interest in the land. Based on the case law and section 405, it is our opinion that if Family member A owns the dwelling at issue in your facts, pursuant to section 2188.2 the assessor may assess that structure to Family member A and his taxable fee simple interest in the underlying land. (See also 4/7/94 Eisenlauer opinion, enclosed.)

**Non-Indian lessees of exempt Indian land may be subject to possessory interest tax**

4. Are non-tribal Indians or non-Indian occupants of dwellings on exempt tribal lands subject to property tax?

Yes, a non-tribal Indian or non-Indian who leases exempt tribal lands, or improvements thereon, may be subject to property tax on the value of the possessory interest. [Agua Caliente Band of Mission Indians v. County of Riverside (1971 9<sup>th</sup> Cir.) 442 F.2d 1184, 1186].

Section 107(a) defines a possessory interest as “Possession of, claim to, or right to possession of land or improvements that is independent, durable and exclusive of rights held by others in the property, except when coupled with ownership of the land or improvements in the same person.” The Ninth Circuit Court of Appeals held that a possessory interest tax is valid even on lands held in trust for Indians. The Court described a possessory interest tax as a tax on the use of property and is different from tax on property itself. Therefore, it is permissible unless federal law explicitly forbids it. [Agua Caliente, 442 F.2d 1184, 1186].

The Court of Appeals conceded that Indian lands held in trust are an instrumentality of the United States and states cannot tax the United States without consent of Congress. However, an individual Indian or tribe, as beneficial owner of trust land, is entitled to no more protection than the United States itself and a possessory interest tax is permissible on lessees of property of the federal government. [Agua Caliente, 442 F. 2d 1184, 1186 citing United States v. City of Detroit (1958) 355 US 466 (holding that the city could impose a possessory interest tax on a lessee of federal land); see also Annotation No. 525.0017 attached].

When land is held in trust by the United States, it is held for the use and benefit of the identified individual Indian or Indian tribe. [25 USCS §348]. It follows, therefore, that the real property tax exemption only applies to the individual tribal Indian or the particular Indian tribe. Thus, a possessory interest held by an individual tribal Indian or the particular Indian tribe would also be exempt from that tax. By clear implication, if the possessory interest is owned or controlled by either a non-tribal Indian or non-Indian then the law provides no exemption. [Agua Caliente, 442 F.2d at 1187].

The test is a factual one: Who has “possession of, claim to, or right to possession of land or improvements that is independent, durable and exclusive of rights held by others in the property” and is not among the owners or beneficiaries of the land trust held by the United States? Based on the foregoing analysis, it is our opinion that if a non-tribal Indian or non-Indian has a possessory interest in a dwelling or other structure on the allotted land, then they would be subject to a property interest tax and a separate assessment may be made under Section 2190.

5. How does an assessor determine whether property owned by Indians is taxable?

Although we have no legal expertise in the area of Indian law, we provide the following information for your consideration. The Indian status of an individual Indian can generally be verified by a tribal identification card issued by either the tribe or the Bureau of Indian Affairs. In the alternative, the tribe may issue a letter which verifies the Indian's individual membership in the tribe and/or the individual's residence on Indian lands. You could match the letter with an additional photo identification. With regard to Indian organizations, a letter from the tribe verifying that the organization is formed under tribal authority and is owned by that Indian tribe has been considered acceptable. In the case of an Indian corporation, the BOE has also reviewed the articles of incorporation. [Sales and Use Tax Annotation 305.0023.400 (8/5/97)]. These methods of verification may be used provided that the individual Indian or Indian tribe will cooperate with the assessor.

It is important to note that a problem may arise if the individual or organization does not respond or cooperate with an inquiry by an assessor for identification and verifying documents. While the assessor is authorized to request the information, the assessor may lack authority to enforce such a request to an individual Indian or a tribe on the reservation. Both the Ninth Circuit Court of Appeals and the U.S. Supreme Court have held that states may impose certain sales or transaction taxes on non-Indians on the reservation. [Washington v. Confederated Tribes, 447 U.S. 134 (1980) (upheld state sales taxes on purchases by non-tribal members, as well as state recordkeeping requirements for the tax); Yavapai-Prescott Indian Tribe v. Scott, 117 F.3d 1107 (9<sup>th</sup> Cir. 1997) (state can impose business transaction tax on sales by non-Indians to non-Indians on the reservation)]. The Washington v. Confederated Tribes case, which upholds recordkeeping by tribes as to taxes borne by non-Indians, logically implies some ability of the state to obtain the records it is allowed to require. On the other hand, when approving the state's seizure of unstamped contra band cigarettes in transit to the reservation, the Court noted it was "significant" that the seizure occurred off the reservation where state power is "considerably more expansive" than within reservation boundaries. [447 U.S. 134, 162].

The view that states are very limited in enforcing a records request on a reservation was enhanced by the Ninth Circuit Court of Appeals in Bishop Paiute Tribe v. County of Inyo. [291 F.3d 549 (9<sup>th</sup> Cir. 2002) cert. granted 123 S.Ct. 618 (2002)]. The Court of Appeals found that a county sheriff had no authority to execute a state court search warrant on the reservation for casino employment records related to an investigation by the state into welfare fraud. The tribe had sued a county, a county district attorney, and a sheriff, asserting sovereign immunity from state processes. The case was reversed and remanded in May 2003 by the U.S. Supreme Court [123 S.Ct. 1887 (2003)]. The Court's order was directed at determining whether the tribe had any standing to bring an action for damages against a state official for violating the tribe's sovereign immunity. The Court's remand requests a finding of whether any express federal law gives rise to a tribal action for declaratory and injunctive relief from a state's criminal process. This action leaves the law currently unclear.

The final outcome of the Bishop Paiute case might not resolve your question. The facts involved a criminal investigation as opposed to a tax inquiry and, therefore, the state's interest in obtaining records for a criminal investigation would be higher and may be governed specifically by existing federal law. The remand decision does not expressly reverse the reasoning that execution of the warrant is improper, nor does it address whether an individual Indian may

qualify as a "person" who can assert standing to claim a violation of his or her rights by turnover of records. This is a case to watch in an evolving area.

Therefore, it is our opinion that you should request an individual Indian, or Indian tribe, or Indian organization for documentation of their status as an Indian or Indian entity, as well as residence on Indian land. Appropriate types of documentation were discussed above. However, if you do not receive cooperation from the Indian or tribe, then the county may have no legal jurisdiction to enforce the request, leaving it to assessor discretion as to whether taxable interests exist.

The views expressed in this letter are only advisory in nature; they represent the analysis of the legal staff of the Board of Equalization based on present law and the facts set forth herein, and are not binding on any person or public entity.

Sincerely,

*/s/ Melanie M. Darling*

Melanie M. Darling  
Senior Tax Counsel

Enclosures: Annotation Nos. 525.0010, 525.0013, 525.0017  
LTA Nos 85/85, 86/04  
Eisenlauer Letter 4/7/94

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cc: Mr. David Gau, MIC: 63  
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