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Fax No. (916) 323-3387

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September 1, 1995

The Honorable Gary L. Orso
Riverside County Assessor
Principal Appraiser, Larry W. Ward
County Administrative Center
4080 Lemon Street, 6th Floor
Riverside, CA 92502-2204

In Re: Property Tax Exemption for Partnership 51% Indian-Owned.

Dear Mr. Ward:

This is in response to your letter of January 30, 1995, to Mr. Richard Ochsner, in which you request our opinion regarding the assessability of fixtures and personal property located on an Indian reservation and owned by a general partnership wherein the partner owning 51% of the total partnership interests is a native American Indian. The following facts are provided for purposes of our analysis:

1. A general partnership, Murray's Ready Mix, (hereinafter "MRM") was formed on December 13, 1992, by two individuals, one of whom is named on the California Judgment Fund Roll of California Indians and who owns 51% of the total partnership interests. MRM operates a business on an Indian reservation under a lease with the Indian tribe to extract sand and gravel from the reservation land.
2. MRM's fixtures and personal property were assessed for \$105,855 on the unsecured roll in Riverside County, and MRM has appealed the 1993 assessment on the ground that such property is located on Indian reservation land and is immune from taxation under the holdings of Moe v. Confederated, Salish and Kootenai Tribes, 425 U.S. 463 (1976) and Bryan v. Itasca County, 426 U.S. 373 (1976).

Legal counsel for MRM has contended that based on the two U.S. Supreme Court cases cited above, the property of MRM is

immune from taxation because it is located on a reservation and is owned by a partnership where the majority (51%) owner is an Indian. You question whether these or any other cases mandate that immunity extends to this partnership as an entity or alternatively, to the percentage of the partnership owned by the Indian partner. In your view, these cases do not relate to California partnerships and do not support MRM's assessment appeal for immunity of its property. For the reasons hereinafter explained, we agree with your opinion on this matter.

Immunity Does Not Extend to All Indian Enterprises and Indian Lands.

As you are aware, Section 1 of Article XIII in the California Constitution states that all property is taxable unless otherwise provided in the Constitution or the laws of the United States. Federal lands and all property "owned by the United States," including Indian lands and personal property, are immune from taxation by states and their political subdivisions unless otherwise authorized by federal statute. Thus, the determinative issue here is whether the MRM partnership, by virtue of its 51% Indian ownership, is owned by or under the jurisdiction of the United States.

It has long been established that states have no authority to tax Indian reservation lands, or Indian income from activities carried on within the boundaries of the reservation, sales to Indians on reservation lands, or the personal property owned by Indians on Indian lands. Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973), Moe v. Confederated, Salish and Kootenai Tribes, 425 U.S. 463 (1976). The existence of federal jurisdiction over such lands precludes state or local taxation absent congressional consent. McClanahan v. Arizona State Tax Commission, 411 U.S. 172, 36 L.Ed.2d, 129, 93 S.Ct. 1257, (1973).

However, federal jurisdiction ends, and states do have the right to impose taxes on non-Indian lands and non-Indian persons. In Mescalero Apache Tribe v. Jones, supra, the Supreme Court held that personal property acquired for use in conjunction with a ski resort, owned and operated by an Indian partnership on land outside the reservation, was not under the authority of federal law and was, therefore, taxable. In regard to non-Indian persons, several Supreme Court decisions have determined that federal jurisdiction, even inside reservation lands does not extend to non-Indians. This was the holding in Moe v. Confederated, Salish and Kootenai Tribes, supra, one of the cases cited by MRM's counsel. The Court concluded that while Indians operating a "smoke shop" on the reservation were immune from personal property tax, they were not immune from a state's

requirement to impose sales tax on cigarette sales made to non-Indian purchasers. In the other case cited by MRM's counsel, Bryan v. Itasca County, there was no question that the property (mobile home) was under 100% ownership by an Indian person and was located on Indian land, and the Supreme Court rejected the State of Minnesota's authority to levy a personal property tax. The sole question in the case was whether an ambiguous federal statute, §4 of Pub.L. 280, 28 USC §1360 [28 USCS §1360], which granted the states jurisdiction over civil actions by or against reservation Indians, included a grant of taxing authority to the states. The Court concluded that where there is no "clear termination language" expressed on the face of the statute indicating that Congress had intended to terminate the traditional Indian immunity from state taxation, the established precedent in earlier cases must stand:

"This is so because . . . Indians stand in a special relation to the federal government from which the states are excluded unless Congress has manifested a clear purpose to terminate [a tax] immunity and all states to treat Indians as part of the general community.' Oklahoma Tax Commission v. United States, 319 US 598, 613-614. 87 L Ed 1612, 63 S Ct 1284 (1943) (Murphy, J. dissenting.)."

Based on the foregoing cases, we agree with the general statement of MRM's counsel that Moe v. Confederated, Salish and Kootenai Tribes, supra, and Bryan v. Itasca County, supra, represent the Indian tax immunity principle that "personal property owned by a tribal member and located on a reservation is not subject to state [estate] taxation." (Application for Changed Assessment, attachment 10h.) Our disagreement, however, is with two assumptions made by MRM's counsel: (1) that all fixtures located on Indian lands are not taxable by the states, and (2) that "personal property owned by a tribal member" also includes personal property of business partnerships partly owned by Indians.

With regard to fixtures, federal statutes and case law dealing with personal property owned by Indians may not be applicable to real property (fixtures) owned by Indians. Moe v. Confederated, Salish and Kootenai Tribes, supra, and Bryan v. Itasca County, supra, are cases dealing with personal property; whereas, property tax law classifies a fixture as a real property improvement. (Assessors are required to identify, segregate, and properly categorize real property improvements as "fixtures" or "structures" consistent with Revenue and Taxation Code Section 105 and Property Tax Rule 122.5.) In County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation, 502 U.S. 251, 116 L.Ed.2d 687. 112 S.Ct. 683, (1992) the subject was

Indian lands exclusively. The Supreme Court held that Congress made clear its intent, under the provisions of the General Allotment Act (25 U.S.C. §349), to permit the states and counties to impose ad valorem tax on Indian-owned fee-patented lands. The Court reasoned that since the General Allotment Act authorized the transfer of lands in fee to individual Indians, which lands they were thereafter free to convey, Congress did not intend to hold the lands immune from taxation. Thus, the Court upheld ad valorem taxation based upon its interpretation of section 6 of the General Allotment Act that it expressed an "unmistakably clear intent" [by Congress] to subject the fee owner (Indian or non-Indian) to state laws.

The question which the Court did not answer, however, was whether Congress likewise made clear its intent to permit state taxation of Indian lands not patented under the General Allotment Act, but allotted to Indians under other laws and treaties. The United States Court of Appeals answered this question in Lummi Indian Tribe v. Whatcom County, Wash., 5 F.3d 1355 (9th Cir.1993). The Lummi Indian tribe argued that it was entitled to a refund of ad valorem taxes, interest and penalties collected on fee reservation lands in the State of Washington because such lands were patented under a treaty with the United States and not under the General Allotment Act as in Yakima Nation. The court first restated the general rule expressed in Yakima Nation that "A state cannot tax reservation lands or reservation Indians unless Congress has made its intention to [authorize state taxation] unmistakably clear." (Lummi Indian Tribe, p.1357.) The court then went on to explain that in Yakima Nation, the Supreme Court found "unmistakably clear intent to tax fee-patented land," and the basis for its decision was that "the land's alienable status determines its taxability." Ibid. Thus, Lummi held that it made no difference whether the fee land was allotted by treaty or under the General Allotment Act, since "...it is taxable once restraints against alienation expire." Ibid.

¹ Section 6 provides: At the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, ...then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside ... Provided, That the Secretary of the Interior may, in his discretion, and he is authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restriction as to sale, incumbrance, or taxation of said land shall be removed..." 25 U.S.C. §349.

The Lummi tribe argued on the other hand that any lands held by a tribe, even those in fee, are not alienable under the Indian Nonintercourse Act, 25 U.S.C. §177, which specifically provides that

"No purchase, grant, lease or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution."

The Court held that the two lines of cases interpreting and applying the Indian Nonintercourse Act did not support the Lummi's argument. In the first line of cases where the Act applied, the land purchases were made for or by tribes during the 1800's and the lands had subsequently been conveyed to the United States in trust for the tribes. The court stated that Lummi parcels, in contrast, were held in fee by the Tribe, which purchased them in the 1970's and 1980's, and the United States approved their alienation. In the second line of cases, the Court pointed out that only Pueblo lands were involved, and Congress has repeatedly enacted restrictions to protect Pueblo lands against alienation. In dismissing the argument, the court concluded,

"No court has held that Indian land approved for alienation by the federal government and then reacquired by a tribe again becomes inalienable. To the contrary, courts have said that once Congress removes restraints on alienation of land, the protections of the Nonintercourse Act no longer apply." Ibid., p.1359.

Thus, Lummi held that if Indian lands are approved for alienation by the federal government, they are also taxable. For tribes which seek immunity from state taxation of their lands, the court noted that the federal government has provided a means in 25 U.S.C. §465 (1988), whereby Indians may convey land in trust to the government and thus remove land from the state tax rolls; and the Bureau of Indian Affairs, in deciding whether to accept new land in trust, must consider the economic effect on the state in removing the property from taxation.

As fee Indian lands are taxable, it follows that privately-owned fixtures annexed to such lands or to Indian lands are also taxable. Per Revenue and Taxation Code Section 105, subdivision (a), the assessor is mandated to determine which articles are fixtures, and therefore, improvements, constituting part of the realty. In our view, privately-owned fixtures are like fee Indian lands. It follows also that fee lands and fixtures owned

by non-Indians are taxable. As the available information indicates that MRM owns the fixtures in question, the fixtures owned by MRM on this Indian reservation are assessable to it as an owner of real property.

With regard to the personal property issue, the Supreme Court has consistently and soundly rejected the idea that Indian tax immunity extends to any and all Indian enterprises. In Mescalero Apache Tribe v. Jones, supra, on p. 119, (at 36 L Ed p 119), the Court stated:

At the outset we reject - as did the state court - the broad assertion that the Federal Government has exclusive jurisdiction over the Tribe for all purposes and that the State is therefore prohibited from enforcing its revenue laws against any tribal enterprise 'whether the enterprise is located on or off tribal land.' Generalizations on this subject have become particularly treacherous. The conceptual clarity of Mr. Chief Justice Marshall's view on Worcester v. Georgia, 6 Pet 515, 556-556, 8 L Ed 483 (1832) has given way to more individualized treatment of particular treaties and specific federal statutes, including statehood enabling legislation, as they, taken together, affect the respective rights of States, Indians, and the Federal Government. See McClanahan v. Arizona Tax Commission, 411 US 164, 36 L Ed2d 129, 93 S Ct 1257, Organized Village of Kake v. Egan, 369 US 60, 71-73, 7 L Ed 2d 573, 82 S Ct 562 (1962).

The upshot has been the repeated statements of this Court to the effect that even on reservations state laws may be applied unless such application would interfere with reservation self-government or would impair a right granted or reserved by federal law.

Accordingly, states have over the years taxed Indians and Indian tribes for businesses conducted on federal lands with non-Indians, Indian businesses on non-Indian lands, and non-Indian businesses on Indian lands (see, for example, Palm Springs Spa, Inc. v. County of Riverside, 18 Cal.App.3d 372, 95 Cal.Rptr. 879 (1971)). Consistent with these decisions, the personal property owned by MRM is assessable to it as an owner of personal property.

MRM Partnership is Not an Indian and Not Immune from Assessment.

MRM is a private California business partnership with its office in the County of Riverside and its property located on the Indian reservation from which it obtains sand and gravel. There

is no evidence indicating that MRM is an agent, agency, or instrumentality of the governing body of the Indian tribe or the United States. There is no evidence that MRM is qualified under any federal regulations which specifically mandate that an Indian partnership under state law must be considered for all purposes as an "Indian" and immune from state taxation. While several federal regulations do exist which authorize federal loans and grants to "Indian-owned" business enterprises, we find no authority indicating that these regulations are to be applied to the ethnicity of a partnership for purposes of state/local tax immunity. There is no federal regulation which provides that a majority Indian partner who qualifies thereunder for a federal loan or grant, automatically entitles the partnership to be treated as an "Indian" for purposes of tax immunity.

By way of example, in the Indian Financing Act of 1974, (Code of Federal Regulations §§1451-1543), certain "economic enterprises," which may include corporations, partnerships, or other organizations, are deemed to be "Indian-owned", if the quantum of Indian ownership is 51% or more. The Act defines the term "Indian," in §1452, subdivision (b), in pertinent part, as "any person who is a member of any Indian tribe, band, group, pueblo, or community which is recognized by the Federal Government as eligible for services from the Bureau of Indian Affairs...". And the term "economic enterprise" is described in subdivision (e) as:

(e) "Economic enterprise" means any Indian-owned (as defined by the Secretary of Interior) commercial, industrial, or business activity established or organized for the purpose of profit: Provided that such Indian ownership shall constitute not less than 51 per centum of the enterprise.

Under these provisions, even if MRM were deemed to be "Indian-owned," the classification is established for purposes of channeling certain financing resources to it, not for the purpose of determining its tax immunity. This is manifested in the language of the Act whereby the term "Indian" is defined as a person, and "economic enterprise" is not included within that definition. Rather, "economic enterprise" is defined as a business activity, which, to qualify under the provisions of the Act, the "economic enterprise" must simply be "Indian-owned." If Congress had intended to establish that certain businesses, including partnerships and corporations, organized under state law must be considered as "Indians," it could have easily stated so in this or other federal regulations.

No authority has been cited, nor has any federal law been found establishing that an "Indian partnership" organized under

the California Uniform Partnership Act, and engaged in private enterprise (non-governmental activity) is immune from California property tax. Moreover, as previously noted MRM is not a unit or extension of the tribal government of the Indian reservation on which it is located, performing the functions of Indian self-government under federal jurisdiction. MRM is a general partnership subject to the sovereign power of the State of California.

Under California Corporations Code Sections 15001 - 15045, a partnership is a creature of the law and for most purposes has a "legal personality" separate and distinct from its owners/partners. In Section 15006, a partnership is "an association of two or more persons to carry on as co-owners of a business for profit." Under the definitions in Section 15002, a "Person" includes "individuals, partnerships, corporations, limited liability companies, and other associations." A statement of partnership, in the name of the partnership, signed, acknowledged and verified by two or more of the partners may be recorded in the office of the county recorder of any county establishing the existence of a partnership (Section 15010.5.) Thus, the general rule for California partnership purposes, as it is for property tax purposes is to treat the partnership as a "person" separate from its partners. See Barbara G. Elbrecht Memorandum, December 18, 1985, attached. See also the change in ownership provisions of the Revenue and Taxation Code, of which Section 64 expressly categorizes partnerships as "legal entities," and in which, in the definition of "person" in Section 19, partnerships have been included as "persons."

Based on the foregoing, we conclude that the property of a partnership is not immune from taxation merely because the majority partner is an Indian. Under California property tax law, it is the partnership as an entity which holds title to the partnership assets (property), which partnership is a separate "person" and must establish its own immunity (if any) distinct from its partners. The basis for this conclusion is the concept called the "separate entity theory" discussed in the Elbrecht Memorandum cited above. This theory is the foundation for the enactment of the change in ownership statutes regarding transfers to and from legal entities. Although the Legislature adopted certain change in ownership exclusions, as in Section 62, subdivision (a)(2) where it is necessary to disregard the partnership entity in determining whether each individual partner has exactly the same ownership interests both before and after a transfer, this has never been the law for determining whether a partnership is immune from property taxation. The California Constitution provides tax immunity for the federal government, as previously noted, and contains no provision either for

recognizing a private business partnership as an instrumentality of the government or for disregarding the partnership entity and treating Indian partners as the owners of its real or personal property. To conclude otherwise would require a California Court of Appeals or Supreme Court decision or an amendment to the California Constitution.

Finally, we note that pursuant to Property Tax Rule 302, the function and jurisdiction of an assessment appeals board is limited to the duties and exercise of powers described therein and the "board has no jurisdiction to grant or deny exemptions or to consider allegations that claims for exemption from property taxes have been improperly denied."

Our opinion is, of course, advisory only and is not binding on your office, or the assessor or the assessment appeals board of any county. Our intention is to provide courteous and helpful responses to inquires such as yours. Suggestions that help us to accomplish this objective are appreciated.

Sincerely,



Kristine Cazadd
Tax Counsel

KEC

cc: Mr. John Hagerty, MIC:63
Mr. Richard Johnson, MIC:64
Ms. Jennifer Willis, MIC:70

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