

INTER-TRIBAL STUDY GROUP

ON TRIBAL/STATE RELATIONS

April 8, 1980
TAXATION BY INDIAN TRIBES

by Tom P. Schloser

When tribes choose to impose taxes, there are several areas which they must consider. Taxation by the State of Washington or the Federal Government is a hotly disputed matter which is now in litigation. Aside from the implications of this litigation, there are many questions a tribe must ask in terms of its own taxation power. Why might a tribe impose taxes? What powers does a tribal government have to tax persons or businesses on its reservation? What types of taxes are possible? What are the most desirable forms of a tax ordinance and its administration?

1. Why might a tribe impose taxes? Taxation by a tribe, just like taxation by any other government, is politically unpopular. The members of the tribe are likely to oppose a tribal governmental decision to impose taxes. Yet many tribes are choosing to tax. Perhaps the best reason for doing so is because a tribal government may need new revenue for particular projects. It may be that new tribal services are being planned and funding from non-reservation sources cannot be obtained. For example, some tribes impose a fish tax which is used to fund tribal fisheries enforcement and enhancement projects.

A tribe may use taxes to encourage or discourage certain activities on the reservation. For example, a tribe may use taxes for employment incentives by exempting businesses which employ tribal members from high tax rates.

Some tribal governments impose taxes to preempt state tax authority on the reservation. This motivation is based on the principle that states cannot engage in actions which interfere with tribal self-government, or as the United States Supreme Court said in *Williams v. Lee*, "absent governing acts of Congress, the question has always been whether the State action infringed on the right of reservation Indians to make their own laws and be ruled by them."

Recently, in *Moe v. Confederated Kootenai and Salish Tribes of the Flathead Reservation*, the United States Supreme Court upheld the power of the State of Montana to require Indian retailers to collect State cigarette sales tax when sales were made to non-Indians on the reservation. In that case, the Tribe imposed no tax on sales to non-Indians on the reservation and the Supreme Court found that there was no interference with tribal self-government under the facts of the case. Since that case was decided in April 1976, other tribes have successfully argued that the State cannot impose a

fishing license fee on-reservation, if the tribe issues licenses and charges fees to non-Indians for the same activity. Thus, many Indian lawyers have argued that where a tribe taxes a transaction on-reservation the State will be barred from taxing the same transaction. Lawyers, therefore, have suggested, as they did at the NCAI convention in 1976, that tribal imposition of taxes is the only way to avoid the imposition of State taxes after the Moe decision. This is not a very pleasant alternative, for the conclusion being drawn is that it is impossible for reservation transactions to remain untaxed; the choice is between taxing by the State or taxing by the Tribe.

However, it is not clear that even tribal taxation of a transaction will prevent State taxation. The 9th Circuit (Federal) Court of Appeals has recently decided a case against the Fort Mohave Tribe, rejecting their attempt to prevent State taxation by imposing a tribal tax. Consequently, a tribe cannot be sure that imposing tribal tax will prevent the application of State taxing authority on the reservation.

Another reason a tribe may choose to tax is to affect the distribution of federal revenue sharing funds to a tribe. A tribe may be able to increase its revenue sharing grants substantially by raising revenue through a tribal tax.

2. What powers does a tribal government have to tax persons or businesses on its reservation? Few people in Indian Country doubt that a sovereign Indian tribe has the power to impose and collect taxes within its jurisdiction. The majority of court cases on this question have upheld the power of tribes to tax. For example, in a 1906 case the Creek Nation imposed a tax on non-Indians for the privilege of doing business on their reservation. The business was located on fee land. The Court held:

"The jurisdiction to govern the inhabitants of a country is not conditioned or limited by title of the land which they occupy in it, or by the existence of municipalities there in endowed with the power to collect taxes for city purposes, and to enact and enforce municipal ordinances ... (T)he authority of the Creek Nation to prescribe the terms upon which non-citizens may transact business within its borders did not have its origin in an act of Congress, treaty, or agreement of the United States. It was one of the inherent and essential attributes of its original sovereignty. It was a natural right of the people, indispensable to its autonomy as a distinct Tribe or nation, and it must remain an attribute of its government until by agreement of the nation itself or by the superior power of the republic it is taken from it ... (E)very original attribute of the government of the Creek Nation still exists intact which has not been destroyed or limited by acts of Congress or by the contracts of the Creek Tribe itself."

The *Buster v. Wright* case is strong authority for the tribal power to tax. Other cases since 1906 have upheld the power of the tribe to impose taxes on both Indians and non-Indians on the reservation. Yet, the taxing power is only one aspect of the larger question of tribal jurisdiction, and the

jurisdiction of tribes over non-Indians on the reservation is still subject to attack in the Courts. For example, the 9th Circuit Court of Appeals only recently upheld the power of the Suquamish Tribe to arrest and prosecute a non-Indian committing an offense on trust land. A similar case involving an incident on fee patent land is yet to be decided and the whole subject is being submitted to the United States Supreme Court for review.

Before asserting the power to tax, the government must first look at its tribal constitution. The tribal constitution may disclaim authority over certain transactions or certain persons on a reservation. In this case, the tribal government can not lawfully tax those transactions or persons. This rule is illustrated by the case of *Quechan v. Roe* in which the tribal Constitution did not provide for actions against non-Indians in tribal court. As a consequence, the federal court decided that the Quechan Tribe had not chosen to exercise any jurisdiction over non-Indians on the reservation. In addition to specific limitations in a constitution, some BIA drafted constitutions require a referendum of the tribe before taxes can be imposed. Of course, many require BIA approval of all ordinances.

3. Sources of tribal tax structure. Once a tribe has examined its constitution and finds that it has the power to tax, several considerations go into drafting a tax ordinance. The first consideration is the revenue needs of the tribe: how much revenue will the tribal tax raise? The revenue is determined by multiplying the tax base by the tax rate, but either one of these factors can change. The base can grow smaller as inflation erodes it, or as businesses move away from the reservation. The tax rate, too, can be varied by the tribe. It's also important for the tribe to consider the potential sources of revenue on the reservation. There may be a wide variety of business activities on the reservation and if the tribe chooses a tax which affects only a few of them it may cause them to leave the reservation. Some economists say that this sort of selective taxation results in the economy sliding away from the activity which is taxed. Other activities may not be able to escape taxation easily. For example, some reservations have resource-related businesses, such as coal mining and gravel pit operations. These operations cannot physically leave even if they are taxed, but they may be forced to shut down if overtaxed. Other reservations have activities which operate on the reservation because of the locational advantage of the reservation. As an example, many Western Washington reservations border on Puget Sound or on major navigable rivers, or have railroad lines running through the reservation. Reservations may also offer locational advantages based on the tax benefits which they can confer. For example, if a reservation has lower business taxes than adjacent areas outside the reservation, this difference in tax benefits may attract businesses to locate on the reservation.

4. Choice of Tax. Several different types of taxes are available to the tribe; all of these taxes have distinctly different effects on the tribal economy as a whole. The tribe might impose a net income tax, which can be a highly progressive tax. This tax may be aimed at those persons on the reservation

who have the ability to pay a tax. It is also possible for a net income tax to exempt low income residents from taxation. A difficulty with a net income tax, however, is that creation of a series of exemptions can be very complex. One way to simplify this problem is to impose a net income tax based on a percentage of the federal income tax paid by individuals or businesses. This method may be an option the tribe would consider if cooperation from the Federal Internal Revenue Service can be obtained.

The gross receipts tax, or business and occupation tax is another possible tax. This tax is a major source of revenue for the State of Washington. Economists dislike this tax, however, because it is highly regressive: a business and occupation tax will be assessed against a business whether it makes a profit or not. Business and occupation tax affects some businesses much more seriously than others. For example, a grocery store which has a high total sales but a small profit margin will be subject to a large amount of business and occupation tax because its gross receipts are high. The amount the store pays for goods is also high, so the tax is not very well related to the ability of the business to pay. An advantage of the business and occupation tax is that forms for the taxpayer to complete are simple and enforcement may be less difficult.

Another type of tax which may be used is the sales tax, which is simple to compute but, again, its effect falls more heavily on persons who do not have the ability to pay the tax. A family having an annual income of \$4,000 may spend \$2,000 a year on food and other items which are subject to sales tax. On the other hand, a family with a \$25,000 income may spend only \$3,000 a year for food and thus pay nearly the same amount of sales tax that the poorer family was required to pay. By creating exemptions in the sales tax ordinance for purchases made with food stamps, etc., it may be possible to equalize the effects of the sales tax somewhat. An advantage of the sales tax is that it is simple to compute and that its revenue base expands with inflation.

A use tax is similar to a sales tax, although it usually applies to transactions which take place outside the jurisdiction. A car purchased in Oregon and licensed in Washington will be charged an amount equal to the Washington sales tax, although technically it will be a tax for the privilege of using the vehicle within the State. It is a use tax. Unfortunately, a use tax ordinance can be quite difficult to enforce because it is not always possible to know when a taxpayer has engaged in a transaction somewhere outside of the tribe's jurisdiction, which might be subject to the tax when the purchase is brought onto the reservation.

Property taxes can be imposed on either personal property or on real estate, but a taxpayer who owns property does not necessarily have the ability to pay a tax. This tax is relatively simple to enforce against fee patent land, but because of statutory protection for trust property, a tribe may find it difficult

to enforce the tax against trust land.

Another tax option is the value-added tax. Calculation of the tax is relatively difficult, but it is, overall, a fair tax. For example, a business on the reservation manufacturing fishing nets may buy nylon, floats and other materials for use in its product. The value-added tax is computed by subtracting the cost of the original materials from the cost of the finished product to determine the value which the manufacturer has added to his product.

License fees may also be a form of taxation on the reservation. A tribe may charge license fees to businesses based upon the number of employees, the size of the business, or the type of the business. License fees are relatively simple to administer, but, they may not have the revenue-generating capability of other types of tribal taxes.

5. Desirable features of tribal taxes. The tax selected by the Tribe should include several characteristics. First, a tribe should probably consider only one or two new taxes. Enforcement of any new tax is difficult for a tribe because of lack of understanding and misinformation among taxpayers. Successfully imposing four or five different types of taxes at once is virtually impossible.

Second, the tribe should develop a tax ordinance which is as simple and easy to understand as possible. The ordinance should probably be no longer than one or two pages, and definitions, administration, hearings and appeal procedures can be put into the accompanying regulations. While a longer ordinance may be more complete, it imposes burdens on taxpayers and on the tribal government itself to read and interpret the ordinance.

Third, taxpayers should be able to easily understand how the tax works and not be burdened by complicated record keeping or reporting requirements. This is related to the difficulties of a lengthy ordinance. A complex statute may impose on taxpayers the costs of hiring an attorney or specialist to read the statute and explain what a taxpayer is required to do.

Another desirable characteristic of a tax is that the tribal tax collectors should be able to assess the amount of taxes due without complicated calculations and without having to require a wide variety of information. For this reason, it may be advisable to impose a tax which requires only one or two figures from each taxpayer; for example a tax based on the amount of gross sales of a business.

In addition, the tax system should always be as fair as possible, which means that the greatest tax burdens should be borne by those people who have the greatest ability to pay a tax. It also means that the tax should not be one which distorts economy of the reservation by forcing desirable businesses to

leave because of high taxes.

An additional desirable characteristic is that the tribal tax should be one which is familiar to people on the reservation. If the tax is easy to understand and familiar because of everyday dealings with state or federal government, it is likely to meet less public opposition than a strange new tax. In addition, if taxes on the reservation are significantly lower than off the reservation, it may be more simple for a businessman to see the tax advantages of locating on the reservation if the taxes imposed by the tribe and by the jurisdictions outside the reservation are of the same type. If that is the case, he need only compare the rates of the two taxes without having to decide whether the taxes are applied to different tax bases.

Finally, the tribal tax should be capable of ousting the State tax. This is related to the theory discussed previously: State taxes may not be permitted on reservations where the tribe has imposed a tax, if the State tax interferes with the right of the tribe to make their own laws and be governed by them. In order to show interference with tribal self-government, the two taxes probably will have to have the same "incidence," that is to say, the taxes must attach to the same activities. From an economic point of view, this requirement makes little sense because imposing any tax on a business will lead a business to raise its prices to pay the tax if it can do so. An income tax has the same effect as imposing a business and occupation tax in this sense. Yet, courts use this requirement in a very technical sense, and, before a judicial finding of "double taxation" will be reached, it is clear that the two taxes must be identical.

6. Administering the tribal tax. When a tribe decides on the appropriate taxation methods, it must have available trained personnel to administer the new programs. In many cases, administration may be handled by the Secretary of the Tribe, although the tribe may wish to establish a tribal department of revenue or taxation.

In addition, the tribe must develop an enforcement plan for collection of taxes. This program will be spelled out in the ordinance and will include a procedure for obtaining an administrative judgement against the taxpayer. This may be done, for example, by the tribal department of revenue filing an assessment in tribal court stating the amount of tax owed by the taxpayer and the method of computation used. In addition, the tax ordinance should provide that the filing of an assessment creates a lien on the property of the taxpayer. That is to say, the filing of the assessment gives notice to other persons that the tribe's claims for tax revenues have priority over other creditors whose claims against the same property arise later. The enforcement plan should provide, also, for public notice of the tribe's claim, and a procedure for seizing and selling property of recalcitrant taxpayers, if necessary. The enforcement plan must also provide an appeals procedure for taxpayers who feel that the assessment was improperly computed. Finally, enforcement plans will probably include criminal penalties for taxpayers who,

for example, refuse to keep adequate records or to make records available to the tribe as required by the tax ordinance.

7. Concluding notes. Tribes have many good reasons to consider taxation. One of the key motives recently has been the desire to preempt State taxing authority on the reservation. In this regard, it appears that the decision in Moe puts tribes to the choice of either permitting the State to tax on the reservation or taking the initiative and imposing tribal taxes, thereby arguing that the State cannot impose its taxes consistently with Federal law. If a tribe wants to impose taxes, it should examine its constitution to determine whether or not it indeed has the power to tax. The tribe should also determine its revenue needs and sources of revenue on the reservation. The council should then consider the types of taxes available, the effects of the taxes -- both positive and negative -- on the tribal people, and the characteristics which are desirable in choosing a taxing ordinance. The tribe should also provide a tribal court system and a tax administrative ability so that the tribe's assertion of jurisdiction over its reservation will be immune from any attacks in non-Indian courts.

THE FOURTH WORLD DOCUMENTATION PROJECT

A service provided by

The Center For World Indigenous Studies

www.cwis.org

Originating at the Center for World Indigenous Studies,
Olympia, Washington USA

© 1999 Center for World Indigenous Studies

(All Rights Reserved. References up to 500 words must be referenced to the Center for World Indigenous Studies and/or the Author)

Copyright Policy

Material appearing in the Fourth World Documentation Project Archive is accepted on the basis that the material is the original, unoccupied work of the author or authors. Authors agree to indemnify the Center for World Indigenous Studies, and DayKeeper Press for all damages, fines and costs associated with a finding of copyright infringement by the author or by the Center for World Indigenous Studies Fourth World Documentation Project Archive in disseminating the author(s) material. In almost all cases material appearing in the Fourth World Documentation Project Archive will attract copyright protection under the laws of the United States of America and the laws of countries which are member states of the Berne Convention, Universal Copyright Convention or have bi-lateral copyright agreements with the United States of America. Ownership of such copyright will vest by operation of law in the authors and/or The Center for World Indigenous

Studies, Fourth World Journal or DayKeeper Press. The Fourth World Documentation Project Archive and its authors grant a license to those accessing the Fourth World Documentation Project Archive to render copyright materials on their computer screens and to print out a single copy for their personal non-commercial use subject to proper attribution of the Center for World Indigenous Studies Fourth World Documentation Project Archive and/or the authors.

Questions may be referred to:

Director of Research
Center for World Indigenous Studies
PMB 214
1001 Cooper Point RD SW Suite 140
Olympia, Washington
98502-1107 USA
360-754-1990
www.cwis.org
usaoffice@cwis.org

OCR Software provided by Caere Corporation