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TAXATION: STATE POSSESSORY INTEREST TAX

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Can a county or state acting under state law validly impose possessory interest tax upon leases of Indian trust land to non-Indians when the tribe is subject to the Indian Reorganization Act?

Recent federal cases, *Fort Mojave Tribe v. County of San Bernardino*[1] and *Agua Caliente Band of Mission Indians v. County of Riverside*,[2] hold that an imposition of possessory interest tax on non-Indian lessees does not violate the Indian Reorganization Act and is not invalid as being an infringement upon a tribe's right to govern itself.

Historically, the Federal Constitution referred to "Indians not taxed."[3] The Framers of the Constitution, as a general policy, intended that Indians not be taxed. However, certain Indians were. It developed through history that those Indians who had severed their tribal relations and moved into the American mainstream of life were subject to taxation.[4] These Indians who paid state taxes were included in the local and federal representative franchise.

Along with the historical concept that not all Indians or Indian activities are exempt from tax, Congress in 1953 "saw fit" to pass Public Law 280.[5] It provides, *inter alia*, for the extension of state criminal and civil jurisdiction over Indian country. In addition, the law specifically provides that the grant of civil jurisdiction precludes taxation of "any real or personal property . . . belonging to any Indian or any Indian tribe" . . . .[6] The Supreme Court held in *Bryan v. Itasca County*[7] that Public Law 280 has left traditional tax immunities intact despite a transfer of civil jurisdiction to certain states. In *Oklahoma Tax Commission v. Texas Co.*[8] the Court ruled that there was no tax immunity for non-Indian lessees prior to the passage of Public Law 280. And in the *Fort Mojave Tribe* case, the court said, "Therefore, Public Law 280 provides no support for the argument that immunity should be extended to non-Indian lessees of Indian land."[9] However, the impact of Public

1. 543 F.2d 1253 (1976).
2. 442 F.2d 1184 (1971).
3. U.S. CONST. art. I § 2; U.S. CONST. amend. XIV, § 2.
4. *See Ex parte* Crow Dog, 109 U.S. 556 (1883), with regard to Indian severance of tribal relations.
5. Pub. L. 83-280, 28 U.S.C. § 1360 (1970).
6. 28 U.S.C. § 1360(b) (1970).
7. 426 U.S. 373 (1976).
8. 336 U.S. 342 (1948).
9. Fort Mojave Tribe v. County of San Bernardino, 543 F.2d 1253, 1257 (1976), *cert. denied*, 430 U.S. 983 (1977).

Law 280 will be of continuing importance so far as it affects the extent to which the assumption of such jurisdiction constitutes a license to tax.

The Supreme Court in *McClanahan v. Arizona Tax Commission*[10] held that in the absence of congressional consent, states are preempted from taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation. "The court specifically did not deal with 'exertions of state sovereignty over non-Indians who undertake activity on Indian reservations'."[11] To permit non-Indians to enjoy taxation immunity was held not to be in line with congressional intent in *Warren Trading Post v. Arizona Tax Commission.*[12]

In *Williams v. Lee,*[13] the Court devised what it called the "*Williams* test." Basically, the test is that a state statute is valid if it does *not* seriously infringe on the right of reservation Indians to make their own laws and be ruled by them. *Williams* held that "[A]bsent 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."[14] In other words, the *Williams* test was designed to resolve the conflict by providing that the state could protect its interest up to the point where tribal self-government might be affected. The Supreme Court reiterated in *McClanahan,* "In these [conflicts] situations, both the tribe and State could fairly claim an interest in asserting their respective jurisdiction,"[15] and the *Williams* test is to be applied on an individual case-by-case basis.

In spite of the fact that many courts have refused to apply the *Williams* test,[16] in *Fort Mojave Tribe v. County of San Benardino,*[17] the court held that the interference with Indian self-government by imposing a possessory interest tax on their leases is not serious enough to involve an issue of state infringement under the *Williams* test.[18] The court states that no Indian or Indian land is being subjected to *direct* state court process. The only effect of the tax on the Indians will be the indirect one of perhaps reducing the revenues they will receive from the leases as a result of their in-

10. 411 U.S. 164 (1973).
11. *Id.* at 1260.
12. 380 U.S. 685 (1965).
13. 358 U.S. 217 (1958).
14. *Id.* at 220.
15. 411 U.S. 164, 179 (1973).
16. Williams v. Lee, 358 U.S. 217 (1958).
17. 543 F.2d 1253 (1976).
18. 358 U.S. 217 (1958).

ability to market a tax exemption, yet such an indirect economic burden cannot be said to threaten the self-governing ability of the tribe.[19] However, would not this taxing burden indirectly be placing the Indian lessors at a disadvantage? Sellers must be in an equal position at the marketplace to be competitive.

The question that must be asked is: Does a reduction of revenue affect the self-governing ability? An answer by analogy could be if the Treasury Department of the United States suddenly had competition in collection of taxation revenue from another government agency, would that affect Treasury's purpose as the primary collection department for the nation's funds? Yes, of course it would. Although the Treasury Department would still be able to function, it would not have the sole responsibility, and therefore its ability and purpose would be thwarted or reduced. Tribes would be put in much the same position.

The court dealt with the plaintiff's "double taxation" assertion in the *Fort Mojave Tribe* case by concluding that,

> The assertion that "double taxation," resulting from the imposition of a tax both by the county and the tribe, impairs the ability of the tribe to levy its tax is not persuasive. There is no improper double taxation here at all, for the taxes are being imposed by two different and distinct taxing authorities. The tribe faces the same problem other taxing agencies confront when they seek to impose a tax in an area already taxed by another entity having taxing power. We hold that the uncertain economic burden here imposed on the tribe's ability to levy a tax does not interfere with their right to self-government.[20]

The Court's contention is in line with well-established authority. Upholding "double taxation" is nothing new to the Supreme Court.[21] The Court upheld the validity of a cigarette sales tax on reservation sales to non-Indians, while invalidating the imposition of such a tax on sales to tribe members. When sales were made to non-Indians, the Court found that it was "the non-Indian consumer or user who saves the tax and reaps the benefits of the tax exemption."[22]

19. Fort Mojave Tribe v. County of San Bernardino, 543 F.2d 1253, 1258 (1976), *cert. denied*, 430 U.S. 983 (1977).
20. *Id.*
21. Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463, 483 (1976).
22. *Id.* at 481.

A more subtle argument made by the plaintiffs in the *Agua Caliente*[23] and *Fort Mojave*[24] cases was that the enforcement of the tax represented a direct encumbrance on the land. The procedures available under state law to collect the tax could result in a direct cloud on their title and an unlawful encumbrance on Indian real property.[25] The issue was held moot in *Agua Caliente* because no attempt was made to seize or sell any of the property that was encumbered.[26] The court artfully dodged the issue. However, in the *Fort Mojave Tribe* case, counsel for the Indians gave details of several situations in which notice of seizure was made and one case in which the sale was advertised before the lessee finally paid the tax. Questionably, the court said that there have been no completed tax sales and it is highly unlikely that any injuries to Indian rights will occur.[27] The reasons given for the court's confidence with respect to the future were two statutes, Sections 415 and 476 of Title 25 of the United States Code. The first requires the approval of the Secretary of the Interior of any lease of restricted Indian lands, while the second explicitly gives the lands. "We have no reason to believe these sales are contrary to the wishes of the Secretary and the Indians. These statutes, designed to protect Indians, do not render the county powerless to enforce the tax here involved against the lessee."[28]

It is apparent the federal court is evading the issue or placing the burden on the Secretary of the Interior and the tribes, and this is unnecessary. Theoretically, the penalty that the state would impose for nonpayment of possessory interest tax, according to the State Taxation Code, would be a direct encumbrance on the land.[29] This, however, would be an unauthorized encumbrance of federal lands.[30] In addition to dodging this issue, the court also used circular reasoning in taking the position that the encumbrance upon the land would never occur because the Secretary of Interior

23. Agua Caliente Band of Mission Indians v. County of Riverside, 442 F.2d 1184 (1971).

24. Fort Mojave Tribe v. County of San Bernardino, 543 F.2d 1253 (1976), *cert. denied* 430 U.S. 983 (1977).

25. CAL. REV. & TAX CODE §§ 2951-64 (1974).

26. Agua Caliente Band of Mission Indians v. County of Riverside, 442 F.2d 1184, 1189 (1971).

27. Fort Mojave Tribe v. County of San Bernardino, 543 F.2d 1253 (1976), *cert. denied,* 430 U.S. 983 (1977).

28. *Id.* at 1259.

29. CAL. REV. & TAX CODE §§ 2951-63 (1974).

30. "Unauthorized" in this sense means not made with consent of Congress or the Secretary of Interior. Fort Mojave Tribe v. County of San Bernardino, 543 F.2d 1253 (1976), *cert. denied,* 430 U.S. 983 (1977).

and tribes would not allow it. But the reason for the Secretary and the tribes not allowing it is because it is illegal to do so.[31] Obviously, if it is illegal to encumber, the Court should act to prevent any action that could lead to an encumbrance.

In the *Fort Mojave Tribe* case, the leading case on the issue of possessory interest tax, the court ignored the encumbrance argument and held that the California possessory interest tax is valid as applied to the non-Indian lessees of land within the Fort Mojave Indian Reservation and the judgment of the district court was affirmed.[32] The petition for certiorari was filed by the counsel for the Indians on January 24, 1977, and the Supreme Court denied certiorari on April 25, 1977.[33]

Although the general rule is that the state is preempted from taxation as to Indians, applicable federal statutes must be analyzed in conjunction with Supreme Court cases to determine whether there is a taxing exception to the general rule. The possessory interest tax is one of these exceptions. The courts have held that a possessory interest tax is valid as applied to the non-Indian lessees of land within an Indian reservation, even though this tax will reduce the tribe's revenue. Furthermore, the fact that a tribe falls under the Indian Reorganization Act[34] makes no difference. The possible encumbrance of the Indian land has not been persuasive to the courts.

In the *Fort Mojave Tribe* case, the court appears to make the mistake of not being able to differentiate between who is paying the tax and what is being taxed, and hinges its decision on the former. The plaintiffs are, in reality, indirectly paying the tax by a smaller return on their leased land.

31. 25 U.S.C. §§ 415, 476 (1970).
32. Fort Mojave Tribe v. County of San Bernardino, 543 F.2d 1253, 1259 (1976), *cert. denied*, 430 U.S. 983 (1977).
33. *Id.*
34. 25 U.S.C. §§ 461-79 (1970).