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Possible Tax Benefits Relating to the Lease of Native American Tribal Land - An Important Clarification for All Parties Subject to a Lease on Tribal Land

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Although many state and local governments believe that they have the right to tax the leasehold interests that non-Indians may hold in Tribal lands, a federal law went into effect in 2013 clarifying that such taxation, as well as many other charges by state and local governments, is prohibited by federal law. More specifically, newly clarified federal regulations provide that state and local governments may not impose their taxes on property (e.g., no property taxes), activities (e.g., no sales and use tax), or interests associated with leased Indian trust or restricted land ("Tribal Land"), without regard to whether the party leasing the Tribal Land is a non-Indian. Some tribal governments are using these regulations to challenge municipalities that have historically sought to tax lease activities on tribal lands, and these actions could yield refunds of taxes wrongly collected by a municipality.

This Alert briefly highlights the amendments to section 162 of Title 25 of the Code of Federal Regulations entitled "Residential Business, and Wind and Solar Leases on Indian Land" (the "Lease Regulations") relating to taxes and is intended to both: (A) inform Tribes of the new Lease Regulation for the purpose of increasing their financial opportunities; and (B) alert non-tribal taxpayers to the fact that they may be entitled to certain tax refunds if they recently paid such unlawful taxes to a state or local government.[1]

Source and Responsibility For New Lease Regulation

For nearly all purposes, extended non-Indian use of lands held in Trust for Native American lands must be done through a lease approved by the Tribe and the Bureau of Indian Affairs ("BIA"). The BIA is one of the oldest bureaus in the Federal Government and was responsible for the drafting of the very comprehensive Lease Regulations for Indian lands.[2] The new Lease Regulations, in addition to providing important clarifications regarding the ability of state and local governments to tax leases on Tribal Land, also fundamentally alter BIA's handling of lease approvals by, among other things, minimizing BIA's role in the lease process as well as providing the BIA tight deadlines (e.g., 30 days) to issue decisions on residential and business leases.[3] Most

[1] The BIA's long-standing mission is "to enhance the quality of life, to promote economic opportunity, and to carry out the responsibility to protect and improve the trust assets of American Indians, Indian tribes and Alaska Natives. See "Bureau of Indian Affairs, Who We Are, available at http://www.bia.gov/WhoWeAre/BIA/index.htm.
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[3] See Bureau of Indian Affairs, BIA Fact Sheet, available at http://www.bia.gov/cs/groups/public/documents/text/idc-037328.pdf, for a complete description of the changes under the Leasing Regulations.

importantly, by limiting the role of the BIA in the leasing of Tribal Land, the Lease Regulations provide more deference to tribes in such matters.

Purpose of New Lease Regulations

The Preamble to the Final Regulations (25 CFR 162.017), states that "the purpose of residential, business, and WSR [wind and solar resource] leasing on Tribal Lands is to promote Indian housing and to allow Tribal Landowners to use their land profitably for economic development, ultimately contributing to tribal well-being and self-government." The Preamble goes on to note that "[c]ongress intended to maximize income to Indian landowners and encourage all types of economic development on Indian lands." Thus, "[a]ssessment of State and local taxes would obstruct Federal policies supporting tribal economic development, self-determination, and strong tribal governments."[4]

New Lease Regulations – Taxation

The new Lease Regulations relating to taxation, (25 CFR 162.017) is comprised of three subsections. Each of the three subsections contains the list of improper charges by State or local governments (e.g., fees, taxes, assessments, levies, or other charges). Each subsection is considered below.

- Inability to Tax Permanent Improvements on the Leased Land

Subsection (a) 162.017 states that "[s]ubject only to applicable Federal law, permanent improvements on the leased land, without regard to ownership of those improvements, are not subject to any fee, tax, assessment, levy, or other charge imposed by any State or political subdivision of a State." (Emphasis added.) Improvements, however, may be subject to taxation by the particular Indian tribe.

The Preamble to Section 162.017 reasons that "a property tax on the improvements burdens the land, particularly if a State or local government were to attempt to place a lien on the improvement." The State or local government imposition of such a burden contradicts the sovereignty of the Tribal Lands.

- Inability to Tax Activities Under a Lease Conducted on the Leased Land

Subsection (b) of 162.017 states that "[s]ubject only to applicable Federal law, activities under a lease conducted on the leased premises are not subject to any fee, tax, assessment, levy, or other charge (e.g., business use, privilege, public utility, excise, gross revenue taxes) imposed by any State or political subdivision of a State." Activities, however, may be subject to taxation by the particular Indian tribe.

The Preamble provides a very broad definition of "activities," citing the importance of keeping the value of the tribal economic activity on the Tribal Land. Specifically referenced is state sales tax. Regulation drafters reasoned that State and local taxes undermine the objectives of federal regulations that govern these leases.

- Inability to Tax Leasehold or Possessory Interests

The final subsection (c) of Section 162.017 states that "[s]ubject only to applicable Federal law, the leasehold or possessory interest is not subject to any fee, tax, assessment, levy or other charge imposed by any State or political subdivision of a State." Leasehold or possessory interests, however, may be subject to taxation by the particular Indian tribe.

[4] *Id.*

The Preamble to Section 162.017 reasons that "[t]he ability of a tribe or individual Indian to convey an interest in trust or restricted land arises under the Federal law, not State Law; Federal legislation has left the State with no duties or responsibilities for such interests, even recordation (25 U.S.C. 5) and the leasehold interest is exhaustively regulated by this rule."

Conclusion – Action Steps

The Lease Regulations are intended to increase efficiency and transparency of the BIA in, among other things, the lease approval process on Tribal Land. Coupled with more guidance on the limits to taxation of non-Indians arising from the lease of Tribal Land, the new regulations should provide a big benefit for Tribes economically.

Furthermore, the BIA has stated its position that the Lease Regulations are merely a clarification of existing law. Thus, as a clarification, the Lease Regulations are viewed as retroactive (i.e., this is what the law has always said). As such, non-Indian taxpayers who believe they may have been unlawfully assessed tax by a State or local government in connection with a lease on Tribal Land should act immediately. Claims for refunds made to State and local tax authorities have certain important time limits precluding a refund if made after the applicable statute of limitations to claim such refund.

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