

PRIVATE TAXPAYER RULING LR02-004

April 29, 2002

The following private taxpayer ruling is in response to your request of March 18, 2002. Your letter requests a determination whether ..., being fifty-one percent ("51%") owned by enrolled members of the ... Indian Community, is subject to the Arizona transaction privilege tax on its business activities conducted on the ... Indian Community's reservation whether with enrolled members of the Indian Community or with non-members.

Statement of Facts:

The following is a restatement of the facts presented in your letter. ... operates a Chevron service station and convenience store within the ... Indian Community. ... revenues are derived principally from the sale of merchandise by the convenience store and the sale of gasoline by the service station. ... convenience sales are comprised of groceries, beverages, deli items, candy and snacks, tobacco products, health and beauty items, automotive products and other non-food merchandise. ... also derives revenues from fees on ATM transactions.

On October 1, 2001, ... exercised its option to become a member in ..., and purchased additional membership units. As a result 51% of the issued and outstanding membership interests of ... are owned and controlled by is an Arizona limited liability company that is owned and controlled entirely by enrolled members of the ... Indian Community. Both ... and ... are treated as partnerships for federal and state income tax purposes so that all items of gain and loss flow through to the individual members. Accordingly, at least 51% of the membership interests of ... are owned and controlled by enrolled members of the ... Indian Community.

The Ground Sublease requires ..., as the sublessee, to "pay the appropriate taxing authorities, when and as the same became due and payable, all taxes, assessments, licenses, fees, and other like charges levied during the lease term upon or against the Sublease Premises, all interest therein and property thereon."

In addition to the stated facts, ... provided documentation, including an Operating Agreement. Provisions from this agreement will be cited below.

Your Position:

It is your position that ... business activities that take place within the ... Indian Community, are taxable to the ... Indian Community, and that, under applicable case law and the Arizona

Department of Revenue's Transaction Privilege Tax Ruling TPR 95-11, ... is not subject to the Arizona transaction privilege tax. Rather, the Company is paying the ... transaction privilege tax currently at the rate of 7.7%, to the ... Indian Community.

Applicable Statutory Authority:

Arizona Revised Statutes (A.R.S.) § 42-5008 levies a transaction privilege tax measured by the amount or volume of business transacted by persons on account of their business activities. The tax is levied upon any person who exercises the privilege of engaging in a business activity that falls under any of the seventeen business classifications enumerated in A.R.S. § 42-5010 *et seq.*

A.R.S. § 42-5061 defines "selling at retail" as a sale for any purpose other than for resale in the regular course of business. All sales of tangible personal property are subject to tax unless specifically exempted by statute. The tax base for the retail classification is the gross proceeds of sales or gross income derived from the business.

Discussion and Analysis:

Arizona's transaction privilege tax is a tax on the privilege of conducting business in the State of Arizona. It is a tax on the seller, not on the purchaser. The seller may pass the burden of the tax on to the purchaser; however, the seller is ultimately liable to Arizona for the tax. The Arizona transaction privilege tax is imposed under 17 separate business classifications, including retail sales of tangible personal property. Additionally, county excise taxes "piggyback" the imposition of the state's transaction privilege tax. All sales that are subject to the transaction privilege tax are also subject to applicable county excise taxes.

In general, Arizona's transaction privilege tax applies to the gross income derived from being engaged in a business on an Indian reservation within Arizona if the activities of the business fall under a taxable business classification. Arizona Transaction Privilege Tax Ruling TPR 95-11 provides information regarding the taxation of activities that are performed on Indian reservations. In accordance with Arizona Transaction Privilege Tax Ruling TPR 95-11, Arizona's transaction privilege tax does not apply to business activities performed by businesses owned by an Indian tribe, a tribal entity or an individual tribal member if the business activity takes place on the reservation which was established for the benefit of the tribe.

Federal Preference Law

It is your position that the business activities of ... are not taxable under Arizona's transaction privilege tax because it is 51% Indian-owned. As you pointed out, the term "Indian-owned" is not defined for purposes of state taxation. However, you submit that ... qualifies as such under

federal laws and regulations. Specifically, you rely on the Indian Self-Determination and Education Assistance Act provided at 25 U.S.C. §§ 450-458, the definition of economic enterprise provided in 28 C.F.R. 286.1, and the Indian Financing Act of 1974 at 28 U.S.C. § 1452(e).

In summary, federal law defines "Indian economic enterprise" as "any Indian-owned (as defined by the Secretary of the Interior) commercial, industrial, or business activity established or organized for the purpose of profit: [P]rovided, [T]hat such Indian ownership shall constitute not less than 51 per centum of the enterprise." 25 U.S.C. § 1452(e).

Under federal preference laws it is clear that an assertion of ownership is not enough. The Indian members must actually control the organization. The definition of Indian ownership is further explained in 25 C.F.R. § 286.3. The regulation provides:

[C]orporations or partnerships shall be at least fifty-one percent owned by eligible Indians or an eligible Indian tribe. This Indian ownership must actively participate in the management and operation of the economic enterprise by representation on the board of directors of a corporation or cooperative association proportionate to the Indian ownership which will enable the Indian owner(s) to control management decisions. ... The legal organization documents shall provide safeguards which will prevent Indian ownership and control from decreasing below fifty-one percent. ... Partnerships will be evidenced by written partnership agreements which show the percentage of Indian ownership, role and authority in making management decisions in controlling the operation of the economic enterprise.

25 C.F.R. § 286.3.

In addition to ownership and control, federal law states that there must be participation and earnings accruing to the Indian membership. The Bureau of Indian Affairs has defined an "Indian economic enterprise" as any business entity which "(1) is at least 51 percent owned by one or more Indian(s) or an Indian tribe; and (2) one or more of those owners must be involved in daily business management of the economic enterprise; and (3) the majority of the earnings of which must accrue to such Indian person(s)." *Chattin/Ashton, Inc., A Joint Venture*, B-274956 (January 15, 1997); see *Arrowhead Construction, Inc./FNF Construction, Inc.*, B-251707, B-251708, 8 CGEN ¶ 107, 514 (April 19, 1993). There must be a clear demonstration of control and involvement in the daily management of the business. *Matter of Yellowhorse Joint Venture*, B-252072, 8 CGEN ¶ 107, 603 (June 2, 1993).

The Enrolled Indian Members do not Have Control of the Company

The fact that an Indian-owned company owns a majority of the stock is not enough. Based on the facts provided, ... is not an Indian-owned business because the Indian owned entity is not involved in the day to day business and affairs of Rather pursuant to the Operating Agreement ("the Agreement"),

[T]he day-to-day business and affairs of the Company shall be managed exclusively by its Manager. ...

The initial Manager of the Company shall be. ...

The Manager shall direct, manage and control the day-to-day business of ..., shall have full and complete authority, power and discretion to make any and all decisions and to do any and all things which the Manager deems appropriate to accomplish the business and objectives of the Company. No Member other than a Member who is also a Manager shall have the authority to act for or bind the Company.

First Amended and Restated Operating Agreement of ..., Management, Article 5, page 9.

Nowhere does the Agreement grant ... the authority to act for In fact, the Agreement specifically states that no Member other than a Member who is also a Manager (...) shall have the authority to act for or bind

The Manager has complete authority regarding decisions concerning the day to day management and operation of ..., including, but not limited to, the hiring and firing of personnel, the purchase of materials or merchandise, the maintenance of books and records, and the management of all other activities necessary or convenient in the operation of the business of In addition, all bank accounts shall be opened, and controlled by the Manager.

Another factor showing that ..., does not control ... is that unanimous consent of the members is required making decisions for most events including, but not limited to, all other management authority not specifically delegated to the Manager.

Reliance on the Percent of Ownership is Merely Form Over Substance

The Supreme Court has held that income is exempt from taxation when it is (1) earned on an Indian reservation, (2) by an enrolled member of an Indian tribe, (3) who lives on the reservation of the tribe in which the member is enrolled. *McClanahan v. State Tax Comm'n of Ariz.*, [411 U.S. 164](#) (1973). ... does not claim that ... is itself an enrolled member.

The general rule is that a corporation is an entity distinct from its stockholders. *Michigan Carpenters Council Health & Welfare Fund v. C.J. Rogers, Inc.*, 933 F.2d 376, 384 (6th Cir. 1991). This is particularly true when a corporation is examined for tax purposes. See *King v. Commissioner of Internal Revenue*, 458 F.2d 245 (6th Cir. 1972). Moreover, this general rule is not influenced regardless of the fact that enrolled members may own all of the corporation's stock. See *Whipple v. Commissioner of Internal Revenue*, 373 U.S. 193 (1963) (citing *Dalton v. Bowers*, 287 U.S. 404 (1932)). Therefore, ... ownership entirely by enrolled members of the ... Indian Community, does not mean that it is an enrolled member. Consequently, ... 51% ownership of ... does not automatically make ... an enrolled member.

A corporation's immunity from state taxes is not determined by the percentage of its shares that are owned by Indians who qualify for immunity. While on paper ... may appear to be Indian-owned, reliance on the percent of ownership is merely form over substance.

Conclusion and Ruling:

The following ruling is given based on the facts presented in your request.

According to the facts provided in your letter of March 18, 2002, the department rules that ... is not an Indian-owned business and therefore the business activities of ... are taxable under Arizona's transaction privilege tax. The conclusion in this private taxpayer ruling does not extend beyond the facts as presented in the request for a private taxpayer ruling dated March 18, 2001.

This response is a private taxpayer ruling and the determinations herein are based solely on the facts provided in your request. The determinations are subject to change should the facts prove to be different on audit. If it is determined that undisclosed facts were substantial or material to the department's making of an accurate determination, this taxpayer ruling shall be null and void. Further, the determination is subject to future change depending on changes in statutes, administrative rules, case law or notification of a different department position.

The determinations in this private taxpayer ruling are only applicable to the taxpayer requesting the

ruling and may not be relied upon, cited nor introduced into evidence in any proceeding by a taxpayer other than the taxpayer who has received the private taxpayer ruling.