

Taxation on the Navajo Nation

Sutin, Thayer & Browne Navajo Law Conference

Albuquerque, New Mexico

November 16, 2018

Presenter

Raymond C. Etcitty, General Counsel
Navajo Nation Gaming Enterprise

Taxation Quotes

...but in this world nothing can be said to be certain, except death and taxes

Benjamin Franklin

The conclusion is, that there must be interwoven, in the frame of the government, a general power of taxation, in one shape or another.

Federalist No. 30, Concerning the General Power of Taxation (Alexander Hamilton)

The power of taxing people and their property is essential to the very existence of government.

James Madison

Taxes are what we pay for a civilized society.

Oliver Wendell Holmes Jr.

Taxes, after all, are dues that we pay for the privileges of membership in an organized society.

Franklin D. Roosevelt

Tribes and Taxes: What's Happening Today

Tribes using their status to collect taxes to generate revenues

Navajo Tax Commission

Office of the Navajo Tax Commission

Kayenta Township

Tribes using their status to avoid taxes to generate revenues

Tribes are marketing their tax exemption status

Tribes are lessen impacts of state and federal taxes on tribe and tribal members by creating businesses within Indian lands

Elements of Taxation

Types of Taxes

Excise or Sales (tax on activities)

Income (tax on income)

Ad valorem (tax on value, property)

Others types: progressive, regressive, exportation, tolls, fees, etc.

Legal Incidence – who is legally responsible for paying the tax

Excise taxes

Buyer

Seller

Ad Valorem – owner

Economic burden - Who bears the burden of the tax; “pass through”

Nexus

Connection between tax and what is taxed

Elements of Taxation (cont.)

Pyramiding of Taxation is when a general consumption or transaction tax (like a sales tax or the gross receipts tax) is charged on business inputs (business-to-business sales) and becomes embedded as part of the cost of the ultimate goods or services sold to the consumer.

Example: Natural resources taxes; or construction company buys engineering services which tax is charged.

- Cost of engineering services includes accounting services which is taxed.

- Cost of accounting services includes printing services which is taxed.

- Cost of the printing services includes business supplies which is taxed

Elements of Taxation (cont.)

Multiple taxation arises when different governments tax the same transaction or activity or wealth. This occurs when governmental jurisdictions overlap each other. Examples:

- Income taxes (Federal Government and States)

- Fuel or gasoline taxes

- Tobacco taxes

Multiple taxation of a good or service within Indian country by a state government and tribal government known as “Dual Taxation.” Both governments will tax the non-member or non-member business - **Cotton Petroleum v. New Mexico**, 490 U.S. 163 (1989)

Governmental Authority to Tax

Federal Government (U.S. Constitution)

Art. 1, Section 8

16th Amendment

Limitations

Bill of Rights, takings, due process, etc.

State Governments

State Constitutions

U.S. Constitution (limitations)

Commerce Clause

Limitations (Bill of Rights, takings, due process, etc.)

Governmental Authority to Tax (cont.)

Navajo Nation and other Indian tribes (Sovereign authority)

Washington v. Colville, 447 U.S. 134 (1980)

Chief among the powers of sovereignty recognized as pertaining to an Indian tribe is the power of taxation. Except where Congress has provided otherwise, this power maybe exercised over member of the tribe and over non-members, so far as such non-members may accept privileges of trade, residence, etc., to which taxes maybe attached as conditions. [Opinion of the Solicitor of the Department of the Interior, 55 I.D. 14, 46 (1934)]

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982)

The power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management. This power enables a tribal government to raise revenues for its essential services. Id 137.

Governmental Authority to Tax (cont.)

Navajo Nation and other Indian tribes (Sovereign authority)

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982)

The power does not derive solely from the Indian tribe's power to exclude non-Indians from tribal lands. Instead, it derives from the tribe's general authority, as sovereign, to control economic activity within its jurisdiction, and to defray the cost of providing governmental services by requiring contributions from persons or enterprises engaged in economic activities within that jurisdiction. Id 137.

Governmental Authority to Tax (cont.)

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982)

The petitioners avail themselves of the "substantial privilege of carrying on business" on the reservation. Mobil Oil Corp. v. Commissioner of Taxes, 445 U. S. 425, 445 U. S. 437 (1980); Wisconsin v. J. C. Penney Co., 311 U. S. 435, 311 U. S. 444-445 (1940). They benefit from the provision of police protection and other governmental services, as well as from "the advantages of a civilized society" that are assured by the existence of tribal government. Exxon Corp. v. Wisconsin Dept. of Revenue, 447 U. S. 207, 447 U. S. 228 (1980) (quoting Japan Line, Ltd. v. County of Los Angeles, 441 U. S. 434, 441 U. S. 445 (1979)). Numerous other governmental entities levy a general revenue tax similar to that imposed by the Jicarilla Tribe when they provide comparable services. Under these circumstances, there is nothing exceptional in requiring petitioners to contribute through taxes to the general cost of tribal government. [Footnote 5] Cf. Commonwealth Edison Co. v. Montana, 453 U. S. 609, 453 U. S. 624-629 (1981); id. at 453 U. S. 647 (BLACKMUN, J., dissenting); Mobil Oil Corp. v. Commissioner of Taxes, supra, at 445 U. S. 436-437.

Governmental Authority to Tax (cont.)

Navajo Nation and other Indian tribes (Sovereign authority)

Recent Cases and Limitations:

Montana v. U.S., 450 U.S. 544 (1981)

Montana Test

An exception to the general rule of tribal authority over non-members

Strate v. A-1 Contractors, 520 U.S. 438 (1997)

Montana Test (the exception became the general rule)

“Gatekeeping Right”

Atkinson v. Shirley, 532 U.S. 645 (2001)

Limited Merrion (taxation is an aspect of a sovereign government)

Reaffirm Montana and Strate (Montana Test)

Governmental Authority to Tax (cont.)

Atkinson v. Shirley, 532 U.S. 645 (2001)

Although we extracted from our precedents “the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe,” 450 U.S., at 565, we nonetheless noted in *Montana* two possible bases for tribal jurisdiction over non-Indian fee land. First, “[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements.” *Ibid.* Second, “[a] tribe may . . . exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.” *Id.*, at 566.

Governmental Authority to Tax (cont.)

Atkinson v. Shirley, 532 U.S. 645 (2001)

We therefore do not read *Merrion* to exempt taxation from *Montana*'s general rule that Indian tribes lack civil authority over nonmembers on non-Indian fee land. Accordingly, as in *Strate*, we apply *Montana* straight up. Because Congress has not authorized the Navajo Nation's hotel occupancy tax through treaty or statute, and because the incidence of the tax falls upon nonmembers on non-Indian fee land, it is incumbent upon the Navajo Nation to establish the existence of one of *Montana*'s exceptions.

Navajo Nation Taxes

Navajo Nation

Possessory Interest Tax (1978)

Business Activity Tax (1978)

Oil & Gas Severance Tax (1985)

Hotel Occupancy Tax (1992)

Tobacco Product Tax (1995)

Fuel Excise Tax (1999)

Sales Tax (2001)

Junk Food Tax (2014)

Alcohol Tax (2016)

*** No Navajo Nation Use Tax***

Possessory Interest Tax (PIT)

A tax on the value of a possessory interest granted by the Navajo Nation.

Possessory interests are leases (coal, oil, gas), and rights-of-way.

Common appraisal methods are used to place a market value, then multiplied by a taxable value, and a tax rate of 3% is then applied to that value.

Possessory interests with a value less than \$100,000 are not taxed.

The PIT is assessed annually on August 1st, with one-half of the payment due November 1 and the other May 1.

Business Activity Tax

A tax on the net source gains (gross receipts less deductions) from the sale of Navajo goods or services, with the legal incidence on the seller.

Navajo goods and services are all goods produced, processed, or extracted, and all services performed within the Navajo Nation.

The taxable source gains are calculated by taking the gross receipts from the sale of such goods or services and subtracting out certain deductions.

The BAT was largely replaced by the Sales Tax.

The net source gains are then taxed at 5%.

Oil & Gas Severance Tax

A tax on the removal of oil and/or gas from any lands located within the Nation.

The first purchaser of the product is responsible for filing and paying the tax, although the owner remains secondarily liable.

The tax rate is 4%.

Monthly returns are due 45 days after the end of the month.

Hotel Occupancy Tax

A tax on the amount paid for the rental of a room. The legal incidence is the person paying for the room. The hotel is responsible for collecting the tax, filing forms and paying the tax.

8% tax on all rooms rented.

Navajo Nation employees and delegates on business are exempt.

HOT is reported quarterly with returns due 90 days after the quarter.

Discount of 1% if taxpayer files and pays early.

Tobacco Product Tax

The tax on the sale of tobacco products within the Nation.

Tax rate is per pack of cigarettes, with the rate for cigars and smokeless tobacco calculated slightly differently.

Tax is collected at the distributor level. Licenses are issued to distributors and retailers.

Monthly returns due 45 days after the end of the month.

Fuel Excise Tax

The tax is imposed when fuel is imported within the Nation. The tax is 18¢ per gallon.

The tax is administered similar to state fuel taxes. Refiners, Distributors, Carriers and Retailers all provide reports. Distributors file fuel manifests, which specify the delivery of fuel. Distributors file and pay the tax on a monthly basis.

Discount of 0.5% of gallons reported if timely filed and paid.

The revenues are dedicated to Navajo Nation roads.

Navajo Sales Tax

Tax rate is 6%

The tax, which will replace parts of the BAT, is similar to state gross receipts taxes. The tax is imposed on all sales of goods or services within the Nation, with the legal incidence on the seller. Certain categories of sales are exempt

The tax revenue are dedicated to government development fund, Judicial/Public Safety Facilities, Scholarship Fund, Economic Development Fund, NTUA, and General Fund

Junk Food Tax

Tax rate is 2%

The tax is upon of all minimal-to-no-nutritional value food item(s) sold.

The tax revenue are dedicated to Community Wellness Development Projects.

Alcohol Tax

Tax rate is 2%

The tax is upon alcohol products.

The tax revenue are dedicated to the Division of Public Safety.

Uniform Tax Administration Statute

These codes and regulations provide the essentials components of the tax program.

They provides definitions, due dates, audit ability, calculation of tax, interest and penalties, statute of limitations, appeal process, etc.

They also provides the appeal procedures.

Navajo Tax Commission

Plan of Operation, 2 N.N.C. §3351.

Five Member Commission

Appointed by President

Confirmed by Naabik'iyáti' Committee

Members:

Loretta Largo

Pearline Kirk

Mark Graham

Shana Barehand

Office of the Navajo Tax Commission

Administration Department

This department provides administrative and support services for the office

Comprised of Executive Director and Support staff (Receptionists, Secretary, etc.)

Legal Department

This department handles all legal issues of the Office, which includes provides legal advice, handling tax cases and appeals, etc.

Comprised of Tax Attorney (in-house)

This in-house tax attorney works very closely with the Department of Justice.

Office of the Navajo Tax Commission (cont.)

Accounting Department

This department is responsible for maintaining records and information on the taxes, and maintaining the office budget.

This department is comprised of Accountants

Compliance Department

This department is responsible for enforcing voluntary taxpayer compliance through office and desk audits, taxpayer education, and monitoring taxpayer filings

This department is comprised of Tax Compliance Officers

Office of the Navajo Tax Commission (cont.)

Audit Department

This department performs field audit examinations of taxpayer financial documents

This department is comprised of Tax Auditors

Valuation Department

This department is responsible for determining the taxable value under the Possessory Interest Tax

This department is comprised of Minerals Assessment/Specialist

FY 2007 - 2017 Tax Revenue Collections

	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012	FY 2013	FY 2014	FY 2015	FY 2016	FY 2017
Possessory Interest	31,467,214	31,501,789.78	33,004,044	29,749,531	32,737,604	36,595,284	38,311,613	35,141,254	34,941,327	29,416,796	25,430,973
Business Activity	13,287,366	11,748,134.44	10,487,369	7,785,563	9,059,838	7,638,058	8,240,433	6,329,603	7,768,990	3,910,277	6,523,937
Oil & Gas Severance	6,958,830	10,858,617.00	8,804,030	7,510,359	9,897,236	9,769,503	9,273,443	10,049,784	6,268,328	3,498,297	4,533,822
Tobacco Products	153,418	206,577.52	341,950	144,509	215,121	366,692	606,512	330,385	391,413	227,674	548,705
Sales – Non-Retail	12,861,018	19,157,088.62	23,196,910	21,470,346	28,300,585	30,905,204	29,999,059	33,565,923	40,304,605	49,398,286	44,683,259
Hotel Occupancy	1,039,300	1,134,991.38	1,925,901	1,513,349	1,631,867	1,459,180	1,635,030	1,890,394	1,938,508	1,488,990	1,546,220
Fuel Excise	12,868,606	13,807,378.04	13,332,548	13,363,381	14,732,250	14,605,548	13,841,494	12,534,371	12,987,794	12,515,702	13,208,779
Sales – Retail	5,367,624	7,426,875.94	6,799,922	7,587,175	7,927,180	7,699,417	8,645,365	10,530,378	10,320,721	10,422,204	10,525,768
Junk Food	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	334,083	1,887,323	1,828,011
Alcohol	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	65,414	91,591
Total	84,003,375	95,841,453	97,892,676	89,124,213	104,501,681	109,038,886	110,552,949	110,372,092	115,255,769	112,830,963	108,921,065



Kayenta Tax Ordinances

Hotel Occupancy Tax

Tax upon buyer; Owner collects and remits

Tax rate is 8%

Effective October 1, 2011

Business Sales Tax

Tax upon purchaser

Tax rate is 6% (tax increased from 5%, June 1, 2018)

Effective January 19, 1996

Model Tax Ordinance (Navajo Chapters)

Chapters have attempted to impose chapter taxes, but were unsuccessful for failure to comply with:

Local Governance Act, 26 N.N.C. §103(E)(8):

E. Chapters may adopt the following ordinances pursuant to §2001 of this Act.

...

8. Local taxes, pursuant to a local tax code developed by the Navajo Tax Commission and approved by the Navajo Nation Council.

Tuba City Sales Tax??

Federal Taxes

Federal Income Tax

- Individuals

- Companies

Federal Excise Taxes

- Fuel

- Tobacco

- Alcohol

- Health Care Related (Affordable Care Act)

- Airline Tickets

- Variety of commodities and services

Arizona Taxes within Navajo Nation

Transaction Privilege Tax

Income Tax

Property Tax

Fuel Excise Tax

Tobacco Luxury Tax

Liquor Luxury Tax

Use Tax

Other Taxes

New Mexico Taxes within Navajo Nation

Gross Receipts Tax & Compensating Tax

Income Tax

Tobacco Product Tax and Cigarette Tax

Oil & Gas Industry (Oil and Gas Conservation Tax, Oil and Gas Emergency School Tax, Oil and Gas Ad Valorem Production Tax, Natural Gas Producers Tax, Oil and Gas Equipment Ad Valorem Tax, Resources Excise Taxes, Severance Tax, Oil and Gas Production Tax)

Other Taxes

Utah Taxes within Navajo Nation

Sales Tax & Use Tax

Income Tax

Property Tax

Motor and Special Fuel Tax

Cigarette and Tobacco Tax

Beer Tax

Severance Tax (Oil, Gas and Mining)

Other taxes

Federal Preemption

Sales/Gross Receipt Tax - Sales to Indian tribes, are exempt from state taxes if the transaction takes place on Indian lands.

State Income Tax - Indian members (Navajos) are exempt from state income tax, if:

The income derived within member's Indian Reservation (Navajo lands); and

The member (Navajo) resides on the Indian reservation (Navajo lands)

NOTE: States are also limited by U.S. Constitution, Commerce Clause BUT see South Dakota vs. Wayfair, ____ U.S. ____ (2018)

Nontaxable Transaction/Exemption Certificate

The seller obtains a certificate from state taxation department. Certificate allows seller to deduct those gross receipts when determining taxable gross receipts.

Navajo Nation government and entities are not obtaining state forms.

This means buyer is able to purchase goods or service free from gross receipt tax that is normally passed on to buyer.

Certificate is kept in business files.

Arizona (Form 500)

New Mexico (Type 9)

Utah (TC-721G)

Resolving “Dual Taxation”

Tribal tax credits

State tax credits

Tribal State Intergovernmental Agreements (See NM-Tribal Agreements)

Federal intervention (Federal Traders Statute, federal preemption, etc.)

See, **Tulalip Tribes v. Washington**, Case 2:15-cv-00940-BJR (W.D. Wash., October 4, 2018)

NM/Tribal Tax Sharing Agreements

The Tax Sharing Agreements provide that if a pueblo, tribe or nation grants a 25% credit against its tax and meets other specified conditions, the state grants a 75% credit against state and local gross receipts tax due from taxpayers who are subject to both taxes (Section 7-9-88.1 NMSA 1978). The taxpayers therefore pay the same tax as they would under state and local taxes alone – dual taxation is eliminated. Tribal taxes apply only to businesses operating on land owned by a tribe or held by the United States in trust for the tribe.

Section 9-11-12.1 NMSA 1978 authorizes the Department to enter into agreements with the following pueblos, tribes or nations to collect any gross receipts tax they impose:

NM/Tribal Tax Sharing Agreements (cont.)

Acoma Pueblo

Cochiti Pueblo

Isleta Pueblo

Jemez Pueblo

Laguna Pueblo

Nambe Pueblo

Picuris Pueblo

Pojoaque Pueblo

Sandia Pueblo

San Felipe Pueblo

San Ildefonso Pueblo

Ohkay Owingeh Pueblo (formerly San Juan Pueblo)

Santa Ana Pueblo

Santa Clara Pueblo

Kewa Pueblo (formerly Santo Domingo Pueblo)

Taos Pueblo

Tesuque Pueblo

Zia Pueblo

Zuni Pueblo

The 19 New Mexico Pueblos acting collectively

Jicarilla Apache Nation

Mescalero Apache Tribe

Navajo Nation-State Tax Agreements

AZ Tobacco Tax - State tax credit and Intergovernmental Agreement (IGA)

AZ Fuel Excise Tax – IGA

AZ Transaction Privilege Tax/Navajo HOT and BAT – IGA

NM Fuel Excise Tax – State tax credit and IGA

NM Corporate Income Tax/Navajo BAT – Reciprocal state corporate tax credit against BAT

NM Gross Receipt Tax and Severance Tax/Navajo BAT –Reciprocal state tax credits and Navajo BAT credits for coal extraction

Texas Fuel Tax - IGA

Utah Gasoline Tax – State tax credit and IGA

Utah Sales Tax on Lodging – State tax credit and IGA

California Fuel Tax – IGA

Navajo Nation-owned Entities

Note: Instead of resolving “Dual Taxation” and other limitations, the Navajo Nation appears to create Navajo Nation-owned entities:

- Navajo Times Publishing, Inc.

- Navajo Tribal Utility Authority

- Navajo Housing Authority

- Navajo Agricultural Products Industry

- Navajo Engineering and Construction Authority

- Navajo Arts & Crafts Enterprise

- Diné College

- Navajo Technical University

Navajo Nation-owned Entities (cont.)

Navajo Nation Hospitality Enterprises

Navajo Nation Shopping Center, Inc.

Native Broadcast Enterprises

Navajo Nation Oil & Gas Co.

Diné Development Corporation

Navajo Nation Gaming Enterprise

Navajo Transitional Energy Company

Naat'áanii Development Corporation

South Dakota vs. Wayfair, ____ U.S. ____ (2018)

South Dakota amended sales tax to collected taxes on out-of-state online retailers.
Issue: Do businesses have to collect state sales taxes on online transactions?

In 5-4 split, the Court held that physical presence is no longer required for a state to impose sales tax on retailers. This expressly overturned **Quill Corp. v. North Dakota**, in which the Court ruled remote sellers would have to collect state sales taxes only if they had a physical presence in a state, like a warehouse or office.

Potential Impacts: States and tribes will be able to require retailers to collect state sales taxes on transactions, regardless of physical presence. Billions of dollars in additional taxes for retailers and for governments collecting the taxes

Current and Pending Tax Cases

Washington State Department of Licensing v. Cougar Den, Inc., 392 P.3d 1014 (2017) *cert. granted*

Tulalip Tribes v. Washington, Case 2:15-cv-00940-BJR (W.D. Wash., October 4, 2018)

Citizen Potawatomi Nation v. Oklahoma, 881 F.3d 1226 (10th Cir. 2018), *cert. pending*

United States v. King Mountain Tobacco Company, Inc., U.S. Court of Appeals for the Ninth Circuit, No. 14-36055

Seminole Tribe of Florida v. Leon Biegalski, U.S. Court of Appeals for the Eleventh Circuit, No. 18-12094

Flandreau Santee Sioux Tribe v. Andy Gerlach et al., U.S.D.C. South Dakota, Southern Division, No. 14-4171

Future of Taxes within Navajo Nation

Application of South Dakota vs. Wayfair, ____ U.S. ____ (2018) among states and tribes
Internet taxes

Closure of Navajo Generating Station and Kayenta Mine

Development of Chapter and Township taxes

Coordination of Navajo taxes throughout Navajo Nation

Resolution of “Dual Taxation”

Federal intervention

Further Intergovernmental Agreements

Income Tax/Payroll Tax?

Re-examine Navajo taxes upon groceries

Links to Taxes within the Navajo Nation

Navajo Nation taxes - <http://www.tax.navajo-nsn.gov/>

Kayenta taxes - <http://kayentatownship-nsn.gov/Home/index.php/permits-and-codes>

Arizona taxes - <https://azdor.gov/>

New Mexico taxes - <http://www.tax.newmexico.gov/>

Utah taxes - <https://tax.utah.gov/>

United States - <https://www.irs.gov/>