International Municipal Lawyers Association
2015 Annual Conference
Las Vegas, Nevada

Tuesday, October 6, 2015

Tribal Law

By:
Gary F. Brownell
Sonosky, Chambers, Sachse, Mielke
& Brownell, LLP
Albuquerque, New Mexico

©2015 International Municipal Lawyers Association. This is an informational and educational report distributed by the International Municipal Lawyers Association during its 2015 Annual Conference, held October 3-7, 2015 in Las Vegas, NV. IMLA assumes no responsibility for the policies or positions presented in the report or for the presentation of its contents.

TRIBAL–STATE/MUNICIPAL INTERGOVERNMENTAL AGREEMENTS ON TAXATION

A TRIBAL COUNSEL'S PERSPECTIVE

Gary F. Brownell, Partner
Sonosky, Chambers, Sachse, Mielke & Brownell, LLP

Overview – The Problem and the Role of Tax Agreements

- The Complexity of Applicable Law
  - Land Status, See, e.g. County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation, 502 U.S. 251 (1992)
  - Incidence, See, e.g. Okla. Tax Commission v. Chickasaw Nation, 515 U.S. 450 (1995)
  - Nature of the Specific Transaction, See, e.g. Wagnon v. Prairie Band Potawatomi Nation, 546 U.S. 95 (2005)
  - Despite the Development of the Law and the Identification of the Applicable Principles in the Cases, Much Ground for Dispute Remains, See, e.g. The Tulalip Tribes and The Consolidated Borough of Quil Ceda Village v. the State of Washington, United States District Court for the Western District of Washington, Case No. 2:15-CV-00940; Seminole Tribe of Florida v. Florida, __ F.3d __, 2015 WL 5023891 (11th Cir 2015); Flandreau Santee Sioux Tribe v. Andy Gerlach, United States District Court for the District of South Dakota, Case No. CV-14-4171

Overview – The Problem and the Role of Tax Agreements

- State-Tribal Relations
  - What is the Level of Trust and Cooperation on Jurisdictional Matters Generally?
  - What Historical Baggage Does Each Side Carry From Their Past Experience With The Other?

- The Perspective of the State and Its Subdivisions
  - Need for Uniformity of Taxation
  - Need for Tax Revenue to Fund Services
  - Concerns that Special Tax Rules for Tribal Transactions Could Lead to Opportunities for Abuse

Overview – The Problem and the Role of Tax Agreements

- The Tribal Perspective
  - Tribal Efforts to Establish an Adequate Tax Base are Constrained By Application of State Taxes in Indian County – The Double Tax Dilemma
  - Need for Tax Revenues to Fund Tribal Services
  - The Law does Not Adequately Recognize the Value of the Tribal Economic Contribution within and without Indian County
- A Mutually Negotiated and Accepted Tax Agreement Provides a Means of Resolving or at Least Mitigating the Underlying Issues
  - Provides a Measure of Closure on Agreed Terms
  - Avoids the Time and Expense of Litigation
  - Allows the Parties to Move Forward without concession of their respective positions

Types of Taxes Addressed and Issues Specific to Each

- Realty Taxes – Payments In Lieu of Tax Agreements
  - Examples
    - Taxation Compact between The Southern Ute Indian Tribe, La Plata County and The State of Colorado – available as incorporated in authorizing Legislation at CO St § 24-61-102
    - Revenue Agreement Between The County of Isabella and The Saginaw Indian Tribe of Michigan – available at https:turtletalk.files.wordpress.com/2010/11/exhibit-m-county-revenue-sharing-agreement.pdf

Types of Taxes Addressed and Issues Specific to Each

- Purposes
  - Fee to Trust – e.g. Saginaw Chippewa-County of Isabella Agreement
  - Dispute Over Authority to Tax – e.g. Southern Ute – La Plata County Agreement
  - Cooperation on Development of Adjacent Indian and Non-Indian Lands

Types of Taxes Addressed and Issues Specific to Each

- Basis of Assessment
  - Applicable Mill Rate or Fraction Thereof
  - Negotiated Amount
  - Other
- Value of Property For Purposes of Assessment
  - As Assessed by Municipal Assessor
    - Present Assessment at Time of Agreement
    - Revalue upon Future Development
  - Appraised by Agreed Source
  - Other

Types of Taxes Addressed and Issues Specific to Each

- Schedule of Payment
  - One Time
  - Annual
  - Other
- Cooperation of Tribe Concerning Assessment and Collection of Tax on Non-Indians with Possessory Interests
  - Reporting
  - Access to Tribal Lands

Types of Taxes Addressed and Issues Specific to Each

- Realty Taxes – Service Agreement as Alternative to PILOT
  - Who Provides Services to a Particular Parcel or Parcels
    - Tribal Services
    - State Services
    - Services Indirectly Benefitting the Parcel
  - Basis for Valuing and Paying Cost of Services
    - Direct Cost of Service
    - Treatment of Overhead
    - Tax Rate or Fraction of Tax Rate

Types of Taxes Addressed and Issues Specific to Each

- Services That Do Not Benefit the Tribe But Which are Reflected in Tax Rate
  - Political/Administrative
  - Services that Benefit Areas or Constituencies Other Than the Tribe and its Land

- What services does tribe provide and use?
  - What service burdens do tribal services relieve the municipality from?
  - What services does the tribe provide on its own so that it does not utilize services offered by municipality?
  - Fair Apportionment of Services and Cost.

Types of Taxes Addressed and Issues Specific to Each

- Sales/Gross Receipts Taxes – Cooperation and Sharing Agreements
  - Examples
    - Tax Agreements Between the State of Michigan and Individual Michigan Tribes – available at http://www.ncai.org/initiatives/partnerships-initiatives/ncai-tax-initiative/examples-of-tribal-tax-codes-tax-agreements-other-resources
    - Cooperative Agreements Between New Mexico Taxation and Revenue Department and Individual Tribes available at http://www.tax.newmexico.gov/tribal-cooperative-agreements.aspx

Types of Taxes Addressed and Issues Specific to Each

- Application Based on Location
  - Indian County – Reservation and Tribal Lands
  - Outside of Indian County
  - Special Status of Certain Lands Under Agreement
- Treatment of Sales By the Tribe / Tribal Entity / Tribal Members
  - Definition of Tribal Entity
  - Incidence
  - New Mexico Approach
  - Michigan Approach
  - Alternative Approaches

Types of Taxes Addressed and Issues Specific to Each

- Sales To a Tribe / Tribal Entity / Tribal Members
  - Location and Incidence
  - New Mexico Approach
  - Michigan Approach
  - Alternative Approaches
- Tax Sharing
  - New Mexico Approach
  - Michigan Approach
  - Alternative Approaches

Types of Taxes Addressed and Issues Specific to Each

- Tax Rate – Coordination of Tribal and State Rates Within Relevant Jurisdictional Boundaries
- Documentation of Exemptions

Types of Taxes Addressed and Issues Specific to Each

- Fuel & Cigarette Taxes – Collection and Sharing Agreements
  - Incidence, Location & Value Added Issues
  - Sales to Tribes/Tribal Entities/Tribal Members
    - Refund Mechanisms
    - Quota Mechanisms
    - Alternative Approaches

Types of Taxes Addressed and Issues Specific to Each

- Sales to Non-Members
  - Tax Sharing
  - Collection
    - Tribal Assistance
    - Precollection

Issues Common to All Forms of Tribal State Tax Agreement

- Sovereign Immunity
  - State
  - Tribe
  - Waiver
  - Scope and Limitations on Waivers

Issues Common to All Forms of Tribal State Tax Agreement

- Dispute Resolution and Enforcement
  - Forum
    - Court
    - Arbitration
  - Enforcement of Obligation to Arbitrate and Arbitration Awards
  - Review of Awards and Judgments
  - Limitations on Enforcement

Issues Common to All Forms of Tribal State Tax Agreement

- Waiver of Exhaustion of Tribal Remedies
- Governing Law

Issues Common to All Forms of Tribal State Tax Agreement

- Term and Rights to Terminate Agreement
- Reservation of Rights and Legal Positions
- Administrative Mechanics
- Confidentiality
- Consultation