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OFFICE OF THE  
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Phoenix, Arizona

December 7, 1977  
**LAW LIBRARY**  
**ARIZONA ATTORNEY GENERAL**  
Re: 77-231 (R76-177)

Dear Mr. Gilliam:

You have requested a legal opinion from this office regarding exemption of Indians from aircraft taxes. Your specific concern was whether two Indians (one an enrolled member of the Red Lake Chippewa Tribe residing on the Colorado River Indian Reservation, the other a Hopi tribal member residing on the Hopi Reservation) could claim exemption from aircraft lieu taxes and registration fees. Both aircraft presumably are based within the reservations.

Article 20, Sec. 5 of the Arizona Constitution provides, in part:

[N]o taxes shall be imposed by this State on any lands or other property within an Indian Reservation owned or held by any Indian. . . .

This provision was construed in 1969 Ariz. Atty. Gen. Op. No. 69-11 at p. 24, which opinion dealt with the question of whether an in lieu tax could be imposed upon an automobile owned by a Navajo Indian residing on the Navajo Reservation.

In interpreting the foregoing constitutional provision, the opinion stated:

The in lieu tax is a tax upon property, and because motor vehicles owned or held on an Indian Reservation by Indians constitute 'other property within an Indian Reservation owned or held by any Indians', the County Assessor may not lawfully assess the in lieu taxes upon such vehicles as a condition to registration thereof. (Emphasis in original.)

1969 Ariz. Atty. Gen. Op.  
No. 69-11 at 25.

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The opinion also held, however, that when a reservation Indian uses an automobile within the state of Arizona but beyond the exterior boundaries of the reservation, the vehicle must be properly registered under the laws of Arizona and that the county assessor should charge the applicable registration fee plus any penalty. Moreover, the opinion was specifically limited to vehicles owned by an enrolled member of a recognized tribe whose legal residence was within the boundaries of an established, approved and recognized Indian reservation. This result is supported by one of the most recent pronouncements of the United States Supreme Court in this area, Moe v. The Confederated Salish and Kootenai Tribes of the Flathead Reservation, 425 U.S. 463, 96 S.Ct. 1634, 1639 (1976), discussed infra.

At this point, however, it is necessary to examine the further question of whether or not reservation Indian tax immunity is limited to enrolled members of the tribe residing on the reservation for whose benefit it was created, or whether it extends to Indians, who, although physically present on the reservation, are enrolled members of another tribe. Stated otherwise, the question becomes: does tribal affiliation affect taxability?

Only a few cases have considered this question. In Fox v. Bureau of Revenue, 87 N.M. 261, 531 P.2d 1234 (1975), cert. denied, 424 U.S. 933 (1976), the New Mexico Court of Appeals held that an enrolled member of the Oklahoma Comanche Tribe of Indians who resided and worked upon the Navajo Reservation in New Mexico was exempt from the New Mexico income tax. After asserting that the decision in McClanahan v. Arizona State Tax Commission, 411 U.S. 164 (1973) was virtually identical but for the "tribal affiliation" issue, the court stated that in the few cases that had thus far considered the question, tribal affiliation had been held irrelevant to taxability as long as there was the ". . . coalescence of the two facts--status as [an] Indian and situs on a reservation." 531 P.2d at 1235. The McClanahan case, supra, held that the Arizona income tax did not apply to the income of an enrolled member of the Navajo Tribe who resided and earned all of her income on the Navajo Reservation in Arizona.

The court in the Fox case, supra, cited and relied upon, among other cases, State of Arizona ex rel, Merrill v. Turtle, 413 F.2d 683 (9th Cir. 1969), cert. denied, 396 U.S. 1003 (1970), which held that Arizona lacked jurisdiction to grant extradition of a Cheyenne Indian from Oklahoma living on the Navajo Reservation in Arizona. That case, however, was not

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decided upon any theory that the Cheyenne Indian himself was immune from Arizona's attempted exercise of extradition jurisdiction over him. Rather, Arizona's attempted extradition was held to be in conflict with the right of the Navajo Indian Tribe to make its own laws and be ruled by them, since the Navajo Tribal Council had itself enacted its own extradition laws, which laws permitted extradition only to the States of Arizona, Utah and New Mexico, but not Oklahoma.

In this regard, although the United States Supreme Court has not yet directly considered the question, it has recently made an observation having a bearing on this issue. In Moe v. The Confederated Salish and Kootenai Tribes of the Flathead Reservation, supra, it was held that an Indian cigarette vendor located on an Indian reservation could not be required to comply with Montana cigarette tax laws as to his sales to reservation Indians, although he could be so required to comply as to his sales to non-Indians on the reservation. But the Court observed, 96 S.Ct. at 1645, n. 16:

The District Court noted two further distinctions within its ruling. It extended its holding [i.e., of exemption] to sales of cigarettes to Indians living on the Flathead Reservation irrespective of their actual membership in the plaintiff Tribe. The State has not challenged this holding, and we therefore do not disturb it. (Emphasis added.)

An examination of that portion of the Moe decision, supra, relating to on-reservation sales by Indians to Indians reveals that the foregoing comment by way of footnote was unnecessary to support the main holding. Thus, it would seem that the comment might well be susceptible of the interpretation that, if the State of Montana had challenged the tax exemption as to sales to Indians who were not members of the Confederated Salish and Kootenai Tribes, a different result would have been obtained.

Indeed, just such a result was recently stated in Topash v. Commissioner of Revenue, a decision of the State of Minnesota Tax Court of Appeals (CCH Minnesota State Tax reporter ¶ 200-795, December 3, 1976). There, the holding was that an Indian enrolled in the Tulalip Tribe of Washington who resided upon the Red Lake Indian Reservation in Minnesota and worked thereon for the Bureau of Indian Affairs was subject to the Minnesota income tax. Mr. Topash was not an enrolled member of the Red Lake Band of Chippewa Indians.

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The rationale of the Topash case, supra, was that in the decisions of Bryan v. Itasca County, 426 U.S. 373, 96 S.Ct. 2102 (1976) and McClanahan v. Arizona State Tax Commission, supra, the Supreme Court had restricted its language to a recognition of limited tax immunity for enrolled members of a tribe living on the reservation created and set aside for the benefit of that tribe. The Bryan case, supra, held that Minnesota could not impose its property tax upon the property of an enrolled member of the Chippewa Tribe located on land held in trust for the tribe on the Leech Lake Reservation in Minnesota notwithstanding the fact that Minnesota had adopted Public Law 83-280, which law permitted the state to assume civil jurisdiction over Indians on reservations within that state.

Thus, the Supreme Court's frequently stated concern that tribal Indians' rights of self-government must be preserved was not frustrated, since there was no way that the imposition of state income taxes on non-Red Lake Indians, such as Bernard W. Topash, could interfere with the Red Lake Band's rights of self-government.

This reasoning finds further support in the decision in Kahn v. Arizona State Tax Commission, 16 Ariz. App. 17, 490 P.2d 846 (1971), appeal dismissed (lack of substantial federal question), 411 U.S. 941 (1973). It was there held that, among other things, the adverse economic burdens borne by the Navajo Tribe as a result of the imposition of the state income tax upon a non-Indian employee of the tribe (not an enrolled member) were insufficient to void the tax. The Kahn decision, supra, was cited in the Topash case, supra.

Returning to your initial question, therefore, with regard to the Hopi Indian living on the Hopi Reservation, and in conformity with 1969 Ariz. Atty. Gen. Op. No. 69-11, his airplane would be exempt from the aircraft lieu tax as long as it was based upon that reservation and, if flown beyond the boundaries of that reservation, did not acquire a different off-reservation taxable situs. Use of the aircraft beyond the reservation's boundaries would require that it be registered and that the nominal, non-discriminatory registration fee be paid.

As for the Red Lake Chippewa Indian on the Colorado River Indian Reservation, although the law is presently in a state of flux, since the United States Supreme Court has not yet squarely addressed this question and in view of the

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fact that the Fox decision, supra, emanated from a judicial appellate court rather than an administrative quasi-judicial tribunal as in the Topash decision, supra, that aircraft would also be exempt from the aircraft lieu tax subject, however, to the same limitations and qualifications previously discussed with regard to the Hopi Indian's airplane.

While it might well be persuasively argued that, as a matter of federal law, the United States Constitution does not mandate that Indian immunities from state jurisdiction on reservations be extended to Indians who are not tribal members, Article 20, Section 5 of the Arizona Constitution provides that no taxes shall be imposed by the State of Arizona upon any lands or other property within an Indian reservation " . . . owned or held by any Indian. . . ." (Emphasis added.) Although the Arizona Supreme Court has discussed this provision, it has not yet squarely dealt with the "tribal affiliation" issue.

For example, in Harrison v. Laveen, 67 Ariz. 337, 196 P.2d 456 (1948), Justice Udall quoted that portion of Article 20, Section 5 in question, then observed, 67 Ariz. at 342:

The Ninth Circuit Court of Appeals in the case of United States v. Porter, 22 F.2d 365 [(9th Cir. 1927)], has upheld the right of the state of Arizona to tax tribal Indians for property owned by them which is located off the reservation, but the state's right to tax their property on the reservation has, for the present, been expressly prohibited by . . . [Article 20, Section 5]. (Emphasis added.)

The language used by Justice Udall suggests that, in fact, tribal affiliation might be required under Article 20, Section 5. And yet, the specific employment of the term " . . . any Indian . . . " in the constitution, in the absence of a more definite statement on the issue by the Arizona Supreme Court, militates against such a conclusion. The most recent Arizona Supreme Court decision, Francisco v. State, 113 Ariz. 427, 556 P.2d 1 (1976) does not discuss the problem.

Returning, therefore, to the airplanes here in question, a registration requirement would arise only if the Indian used the aircraft beyond the boundaries of the respective Indian reservations. Thus, no attempt to extend the application of a state law to an Indian within an Indian reservation

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would occur within the meaning of Francisco v. State, supra. That case held that the Pima County Sheriff was without jurisdiction to serve process upon a Papago Indian residing on the Papago Indian Reservation. Since Mr. Francisco was a Papago Indian located on the Papago Reservation, the "tribal affiliation/state law exemption" question was not in issue.

In the event that either the United States Supreme Court or the Arizona Supreme Court hands down an opinion dealing with this "tribal affiliation/state law exemption" issue, we will advise you of the changes, if any, that would have to be made in the foregoing opinion.

Your second question concerns whether the Navajo Housing Authority (hereinafter "NHA") can properly claim exemption from aircraft lieu taxes and registration fees under A.R.S. § 28-1761.B. That statute provides:

Aircraft owned and operated exclusively in the public service by the federal government, by the state or by any political subdivision thereof, or by the civil air patrol, or owned and held by a bona fide aircraft dealer solely for the purposes of sale shall be registered, but no tax or registration fee shall be paid on such aircraft.

The NHA is a body corporate created by the Navajo Tribe and authorized in the Navajo Tribal Code, Title 6, §§ 351-376. The NHA is to take steps necessary to make the benefits of Federal public housing laws available to the Navajo Tribe. Section 366 of the code gives the NHA powers to contract, sue or be sued, etc., as a corporate body. The Navajo Tribe, however, is not liable for any of the debts or obligations of the NHA. The NHA has the power to contract with the Federal Government and lease land from the Navajo Tribe. Interestingly, Section 372 creates a tax exemption for the property of the NHA as follows:

The property of the Authority is declared to be public property used for essential public and governmental purposes and such property and the Authority are exempt from all taxes and special assessments of the [Navajo] Tribe.  
(Emphasis added.)

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From the foregoing facts, it seems apparent that the NHA aircraft in question do not fit the definition of ". . . aircraft owned and operated exclusively in the public service by the federal government . . ." (Emphasis added). Clearly, the NHA is not the federal government, but is an Indian entity created by the Navajo Tribal Council. Moreover, even if the NHA were to argue that it was a "federal instrumentality," which is doubtful upon the facts as presented in your opinion request, the clear demise of the federal instrumentality doctrine vis a vis Indians and Indian enterprises as articulated by the United States Supreme Court in Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973) demonstrates that this approach, without more, would not resolve the question.

The fact that the NHA may not be entitled to assert the exemption provisions of A.R.S. § 28-1761(B), however, is not entirely dispositive of the question. The provisions of the Arizona Constitution, Article 20, Sec. 5, exempt from taxation property within an Indian reservation owned or held by an Indian. Upon the same rationale as discussed in 1969 Ariz. Atty. Gen. Op. No. 69-11, supra, 1971 Ariz. Atty. Gen. Op. No. 71-39 held that neither the State of Arizona nor its political subdivisions could levy ad valorem property taxes upon Indian-owned electrical generating and transmission facilities which are located on an Indian reservation, although such taxes could be levied upon such property if it were located off the reservation. The opinion states:

By virtue of the enabling legislation and the ordinance incorporated within the Constitution of Arizona (i.e., Article 20, Sec. 5), it is clear that the state and its inferior political subdivisions are prohibited from levying any kind of tax on any property within an Indian reservation owned or held by any Indian.

1971 Ariz. Atty. Gen. Op.  
No. 71-39 at 114.

Although it is somewhat unclear from the opinion, it seems safe to assume that the electrical generating and transmission facilities involved in the 1971 opinion were owned either by an Indian tribe itself or an Indian enterprise created and authorized by the tribal council rather than by

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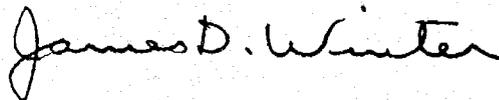
an individual Indian. By acknowledging the applicability of Article 20, Sec. 5 to the fact situation then under consideration, the opinion must necessarily be read as concluding that the term "indian" as used in Article 20, Sec. 5 applies not only to individual Indians, but to Indian tribal enterprises as well.

This conclusion seems warranted under the decision in United States v. Holliday, 70 U.S. 407 (1865). There, the United States Supreme Court held that Article 1, Sec. 8, Cl. 3 of the United States Constitution (i.e., the Commerce Clause) governing the regulation of commerce with Indian tribes meant the regulation of commerce with the individuals composing such tribes.

For the foregoing reasons, it is the opinion of this office that the NHA is exempt from registration fees and the aircraft lieu tax insofar as any airplanes it may own are based and operated by the NHA wholly within an Indian reservation. If the airplanes are to be flown within the State of Arizona but beyond the exterior boundaries of the reservation, the NHA would have to register the planes and pay the nominal, nondiscriminatory registration fee (cf. 1969 Ariz. Atty. Gen. Op. No. 69-11, supra). The NHA would still, however, be able to claim exemption from the aircraft lieu tax.

Sincerely,

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