STATE OF CONNECTICUT

DEPARTMENT OF REVENUE SERVICES

TWENTY-FIVE SIGOURNEY STREET HARTFORD, CONNECTICUT 06106

RULING NO. 2002-3

SALES AND USE TAXES
ADMISSIONS TAX
MOTOR VEHICLE FUELS TAX
APPLICATION TO A FEDERALLY RECOGNIZED INDIAN TRIBE LOCATED IN CONNECTICUT

FACTS:

A federally recognized Indian tribe (hereinafter the "Tribe") located in Connecticut has inquired as to the appropriate tax[1] treatment of a variety of transactions to which the Tribe is a party.[2] These transactions take place either within or outside of "Indian country of the Tribe."[3]

ISSUES:

1. Whether sales by the Tribe within Indian country of the Tribe of tangible personal property not produced within Indian country of the Tribe to other than enrolled members of the Tribe are subject to Connecticut sales tax.

2. Whether sales by the Tribe within Indian country of the Tribe of tangible personal property to enrolled members of the Tribe are subject to Connecticut sales or use tax.

3. Whether sales by the Tribe of meals that are prepared and served within Indian country of the Tribe are subject to Connecticut sales tax.

4. Whether sales by the Tribe of lodging (i.e., rooms or other accommodations) located within Indian country of the Tribe are subject to Connecticut sales tax.

5. Whether sales by the Tribe of entertainment that is produced within Indian country of the Tribe, including when the Tribe contracts to have a third party produce an entertainment event at facilities developed and operated by the Tribe within Indian country of the Tribe, are subject to Connecticut admissions tax.

6. Whether tangible personal property or services (including food, non-alcoholic beverages or lodging) given by the Tribe within Indian country of the Tribe to patrons of the Tribe as gifts, prizes or as complimentary or partially complimentary privileges are subject to Connecticut sales or use tax.

7. Whether purchases of tangible personal property by the Tribe where title to the tangible personal property passes to the Tribe within Indian country of the Tribe or rentals of tangible personal property by the Tribe where delivery of the tangible personal property is made to the Tribe within Indian country of the Tribe are subject to Connecticut sales or use tax.

8. Whether purchases of tangible personal property by the Tribe where title to the tangible personal property passes to the Tribe outside of Indian country of the Tribe or rentals of tangible personal property by the Tribe where delivery of the tangible personal property is made to the Tribe outside of Indian country of the Tribe are subject to Connecticut sales or use tax if such tangible personal property is ultimately used within Indian country of the Tribe.

9. Whether purchases by the Tribe of motor vehicles where title to the motor vehicles passes to the Tribe within Indian country of the Tribe or leases by the Tribe of motor vehicles where delivery of the motor vehicles is made to the Tribe within Indian country of the Tribe are subject to Connecticut sales tax.

10. Whether purchases by the Tribe of enumerated services wherever performed, if the benefit of such services is realized by the Tribe, are subject to Connecticut sales or use tax.

11. Whether purchases of tangible personal property outside of Indian country of the Tribe by contractors or subcontractors of the Tribe for use in projects for the Tribe within Indian country of the Tribe are subject to Connecticut sales or use tax.

12. Whether sales by the Tribe outside of Indian country of the Tribe of tangible personal property and services, including lodging and entertainment, are subject to Connecticut sales, use or admissions tax.

13. Whether fuel delivered to the Tribe within Indian country of the Tribe is subject to Connecticut motor vehicles fuels tax (and any other related tax) when the fuel is used in tribally owned or leased motor vehicles that are garaged within Indian country of the Tribe and are either (1) specially-equipped or (2) dedicated exclusively to an essential governmental purpose (other than gaming).

RULINGS:

1. Sales by the Tribe within Indian country of the Tribe of tangible personal property not produced within Indian country of the Tribe to other than enrolled members of the Tribe are subject to Connecticut sales tax and the Tribe, as a retailer, must collect and remit such tax to the State.

2. Sales by the Tribe within Indian country of the Tribe of tangible personal property to enrolled members of the Tribe are not subject to Connecticut sales tax. However, purchases by an enrolled member of the Tribe within Indian country of the Tribe will be subject to use tax if the enrolled member purchases the tangible personal property with the intention of using it outside of Indian country of the Tribe and actually so uses its.

3. Sales by the Tribe of meals that are prepared and served within Indian country of the Tribe are not subject to Connecticut sales tax because the value of the meals is generated within Indian country of the Tribe[4].

4. Sales by the Tribe of lodging (i.e., rooms or other accommodations) located within Indian country of the Tribe are not subject to Connecticut sales tax because the value of the lodging is generated within Indian country of the Tribe.

5. Sales by the Tribe of entertainment that is produced within Indian country of the Tribe, including when the Tribe contracts to have a third party produce an entertainment event at facilities developed and operated by the Tribe within Indian country of the Tribe, are not subject to Connecticut admissions tax.

6. Tangible personal property or services (including food, non-alcoholic beverages or lodging) given by the Tribe within Indian country of the Tribe to patrons of the Tribe as gifts, prizes or as complimentary privileges are not subject to Connecticut use tax because the burden of the use tax falls directly on the Tribe. However, to the extent such tangible personal property or services are given by the Tribe to patrons of the Tribe on a partially complimentary basis, the consideration received by the Tribe for the non-complimentary portion of the tangible personal property or services will be subject to Connecticut sales tax as provided herein.

7. Purchases of tangible personal property by the Tribe where title to the tangible personal property passes to the Tribe within Indian country of the Tribe or rentals of tangible personal property by the Tribe where delivery of the tangible personal property is made to the Tribe within Indian country of the Tribe are not subject to Connecticut sales tax. However, such purchases or rentals will be subject to Connecticut use tax if the Tribe purchases or rents the tangible personal property with the intention of using it outside of Indian country of the Tribe and actually so uses it.

8. Purchases of tangible personal property by the Tribe where title to the tangible personal property passes to the Tribe outside of Indian country of the Tribe or rentals of tangible personal property by the Tribe where delivery of the tangible personal property is made to the Tribe outside of Indian country of the Tribe are not subject to Connecticut sales or use tax provided the Tribe complies with the provisions of Conn. Gen. Stat. §§12-407(6) or 12-408c and the tangible personal property is ultimately used solely within Indian country of the Tribe.

9. Purchases by the Tribe of motor vehicles where title to the motor vehicles passes to the Tribe within Indian country of the Tribe or leases by the Tribe of motor vehicles where delivery of the motor vehicles is made to the Tribe within Indian country of the Tribe are not subject to Connecticut sales tax.

10. Purchases by the Tribe of enumerated services wherever performed, if the benefit of the services is realized by the Tribe, are not subject to Connecticut sales or use tax unless such services are to real or tangible personal property located outside of Indian country of the Tribe or to property intended to be used outside of Indian country of the Tribe.

11. Purchases of tangible personal property outside of Indian country of the Tribe by contractors or subcontractors of the Tribe for use in projects for the Tribe within Indian country of the Tribe are not subject to Connecticut sales or use tax provided the contractors or subcontractors comply with the provisions of Conn. Gen. Stat. §§12-407(6) or 12-408c.

12. Sales by the Tribe outside of Indian country of the Tribe of tangible personal property and services, including lodging and entertainment, are subject to Connecticut sales, use or admissions tax.

13. Fuel delivered to the Tribe within Indian country of the Tribe is not subject to Connecticut motor vehicle fuels tax or to Connecticut sales tax provided the fuel is used in tribally owned or leased motor vehicles that are garaged within Indian country of the Tribe and are either (1) specially-equipped or (2) dedicated exclusively to an essential governmental purpose (other than gaming).

DISCUSSION:

The United States Supreme Court has consistently ruled that states are without power to tax Indian reservations and the Indians on them without clear congressional authorization to do so. "[A]bsent cession of jurisdiction or other federal statutes permitting it . . . a state is without power to tax reservation lands and reservation Indians." Oklahoma Tax Commission v. Chickasaw Nation, 515 U.S. 450, 458 (1995) (quoting County of Yakima v. Confederated Tribes and Bands of Yakima Nation, 502 U.S. 251, 258 (1992) (citation omitted)). This general rule is even stronger when dealing with state jurisdiction to tax. "In the special area of state taxation of Indian tribes . . . the [Court] has adopted a *per se* rule" against state jurisdiction. California v. Cabazon Band of Mission Indians, 480 U.S. 202, 215 n. 17 (1987). Application of this *per se* or "categorical" rule to situations where a state is attempting to levy a tax on an Indian tribe depends, however, on where the legal incidence of the state tax falls. Oklahoma Tax Commission v. Chickasaw Nation, at 458. Thus, "[t]he initial and frequently dispositive question in Indian tax cases . . . is who bears the legal incidence of the tax." Id.

According to the United States Supreme Court:

> If the legal incidence of an excise tax rests on a tribe . . . for sales made inside Indian country, the tax cannot be enforced absent clear congressional authorization. But if the legal incidence of the tax rests on non-Indians, no categorical bar prevents the enforcement of the tax . . . and . . . the State may impose its levy . . . .

Id. at 459. Therefore, a determination of where the legal incidence of a state tax falls will dictate whether application of such tax will be categorically barred or whether a court will apply a federal preemption test[5] and balance the respective state, federal and tribal interests. Consequently, for purposes of this Ruling, it must first be determined where the legal incidences of the Connecticut sales and use, admissions and motor vehicle fuels taxes fall.

The Connecticut sales tax is imposed on retailers of tangible personal property or enumerated services for the privilege of making taxable sales in Connecticut. See Conn. Gen. Stat. §12-408(1). Although Connecticut law requires retailers to collect and remit the sales tax, Connecticut law provides that retailers must collect reimbursement for the tax from consumers (hereinafter "purchasers"). See Conn. Gen. Stat. §12-408(2). In determining where the legal incidence of a tax falls, the United States Supreme Court in Oklahoma Tax Commission v. Chickasaw Nation held that the "legal incidence" of a tax falls on the party to which, under the taxing statute, the tax burden is ultimately passed on, even if the tax is to be charged and collected by another person making the sale to such party. Oklahoma Tax Commission v. Chickasaw Nation, at 457-462. Under this analysis, the legal incidence of the Connecticut sales tax clearly falls on purchasers, not retailers.

The corollary to the sales tax is the use tax.[6] The use tax is imposed "on the storage, acceptance, consumption or any other use in this state of tangible personal property purchased from any retailer for storage, acceptance, consumption or any other use in this state . . . ." Conn. Gen. Stat. §12-411(1). Although certain retailers[7] may be required to collect the use tax from purchasers, liability for the use tax rests ultimately with the purchasers. Therefore, under the holding in Oklahoma Tax Commission v. Chickasaw Nation, in those situations where state law requires purchasers to self-assess and remit the use tax, the burden of the use tax falls exclusively on the purchasers. Thus, like the Connecticut sales tax, the legal incidence of the Connecticut use tax falls on purchasers, not retailers.

Subject to certain exemptions, Conn. Gen. Stat. §12-541 imposes a ten percent tax on the admission charge to any place of amusement, entertainment or recreation. Places of amusement, entertainment or recreation include, but are not limited to, theaters, motion picture shows, auditoriums where lectures and concerts are given, amusement parks, fairgrounds, race tracks, dance halls, ball parks, stadiums, amphitheaters, convention centers, golf courses, miniature golf courses, tennis courts, skating rinks, swimming pools, bathing beaches, gymnasiums, auto shows, boat shows, camping shows, home shows, dog shows and antique shows. See Conn. Gen. Stat.

§12-540(3). Under Connecticut law, the admissions tax is imposed upon the person making the admission charge. See Conn. Gen. Stat. §12-541(b). Like the sales tax, however, Connecticut law provides that the person making the admissions charge must collect reimbursement for the tax from the purchaser. Id. Therefore, under the holding in Oklahoma Tax Commission v. Chickasaw Nation, the legal incidence of the Connecticut admissions tax falls on purchasers, not on persons making the admissions charges.

The Connecticut motor vehicle fuels tax is an excise tax imposed on distributors, as that term is defined in Conn. Gen. Stat. §12-455a(a). Distributors pay motor vehicle fuels tax to the State of Connecticut "for the account of the purchaser or consumer." Conn. Gen. Stat. §12-458(a)(2). In addressing the application of the motor vehicle fuels tax, the Connecticut Supreme Court has determined that "the plain intent of the legislature was to impose the burden of the [motor vehicle fuels] tax upon the motor vehicle fuel purchaser or user, and to make the distributor responsible only for its collection and payment." Wesson, Inc. v. Hychko, 205 Conn. 51, 55-56, 529 A.2d 714, 716 (1987). Therefore, in light of the Connecticut Supreme Court's holding in Wesson, Inc. v. Hychko and in accordance with the United States Supreme Court's holding in Oklahoma Tax Commission v. Chickasaw Nation, the burden of the motor vehicle fuels tax falls on purchasers, not distributors.

Applying this analysis to the facts of this Ruling, the Department has determined that, in the following situations, the legal incidence of the tax falls on the Tribe and, as such, recognizes that the application of the tax is categorically barred. These issues are discussed below with reference to their Ruling number.

2. Sales by the Tribe within Indian country of the Tribe of tangible personal property to enrolled members of the Tribe are not subject to sales tax. However, purchases by an enrolled member of the Tribe within Indian country of the Tribe will be subject to use tax if the enrolled member purchases the tangible personal property with the intention of using it outside of Indian country of the Tribe and actually so uses it.

In this situation, the legal incidence of the Connecticut sales tax falls on enrolled members of the Tribe who are making purchases within Indian country of the Tribe. Although this Ruling does not apply to transactions involving enrolled members of the Tribe, the Department has long recognized that "[w]hen the legal incidence of [a] tax is found to be on a tribe or its members for a sale within Indian country, state taxation of the transaction is categorically prohibited." Ruling No. 95-11 at p. 4. Ruling No. 95-11 also stated, however, that "purchases made by the Tribe or its members in Indian country may be subsequently subject to use tax if the property is intended to be used in Connecticut outside of Indian country at the time of sale and then is so used." Id. at p. 3. Therefore, consistent with Ruling No. 95-11 and in accordance with established principles of federal Indian law, sales made by the Tribe within Indian country of the Tribe of tangible personal property to enrolled members of the Tribe are not subject to sales tax, but purchases by an enrolled member of the Tribe within Indian country of the Tribe will be subject to use tax if the

enrolled member purchases the tangible personal property with the intention of using it outside of Indian country of the Tribe and actually so uses it.

6. Tangible personal property or services (including food, non-alcoholic beverages or lodging) given by the Tribe within Indian country of the Tribe to patrons of the Tribe as gifts, prizes or as complimentary privileges are not subject to Connecticut use tax because the burden of the use tax falls directly on the Tribe. However, to the extent such tangible personal property or services are given by the Tribe to patrons of the Tribe on a partially complimentary basis, the consideration received by the Tribe for the non-complimentary portion of the tangible personal property or services will be subject to Connecticut sales tax as provided herein.

In this situation, the Tribe is giving away goods and services within Indian country of the Tribe to patrons[8] of the Tribe and is not being reimbursed for such tangible personal property or services. By distributing tangible personal property and services on a fully complimentary basis, the Tribe, under Connecticut law, is making a taxable use of the tangible personal property and services and as such is liable for use tax on the purchase price of the tangible personal property or the retail value of the services. Because the legal incidence of the use tax falls on the Tribe, however, the tax is categorically barred. On the other hand, when the Tribe distributes tangible personal property or services on a partially complimentary basis, the Tribe makes a taxable use of only a portion of the tangible personal property or services and is the retailer of the non-complimentary portion of such tangible personal property or services. Consequently, because the legal incidence of the sales tax, with respect to the non-complimentary portion of the tangible personal property and services, falls on purchasers, not retailers, the consideration received by the Tribe for the tangible personal property or services will be subject to the sales tax as provided herein.

7. Purchases of tangible personal property by the Tribe where title to the tangible personal property passes to the Tribe within Indian country of the Tribe or rentals of tangible personal property by the Tribe where delivery of the tangible personal property is made to the Tribe within Indian country of the Tribe are not subject to Connecticut sales tax. However, such purchases or rentals will be subject to Connecticut use tax if the Tribe purchases or rents the tangible personal property with the intention of using it outside of Indian country of the Tribe and actually so uses it.

As discussed above, the legal incidence of the sales tax falls on purchasers. Here, not only is the Tribe the purchaser but the transactions take place within Indian country of the Tribe. In such situations, the Department has long recognized that "[w]hen the legal incidence of [a] tax is found to be on a tribe or its members for a sale within Indian country, state taxation of the transaction is categorically prohibited." Ruling No. 95-11 at p. 4. Accordingly, because the legal incidence of the sales tax falls on the Tribe when it purchases tangible personal property where title to the tangible personal property passes to the Tribe within Indian country of the Tribe or when it rents tangible personal property where delivery of the tangible personal property is made to the Tribe

within Indian country of the Tribe, the tax is barred. However, Ruling No. 95-11 also stated that "purchases made by the Tribe or its members in Indian country may be subsequently subject to use tax if the property is intended to be used in Connecticut outside of Indian country at the time of sale and then is so used." Id. at p. 3. Likewise, with regard to rentals of tangible personal property where delivery of the tangible personal property takes place within Indian country of the Tribe, Ruling No. 95-11 stated that "[s]uch rentals will not be subject to use tax as long as the Tribe or its members do not rent the property with the intent to use it outside of Indian country and then so use it." Id. at p. 4. Therefore, consistent with Ruling No. 95-11 and in accordance with established principles of federal Indian law, purchases of tangible personal property by the Tribe where title to the tangible personal property passes to the Tribe within Indian country of the Tribe or rentals by the Tribe of tangible personal property where delivery of the tangible personal property is made to the Tribe within Indian country of the Tribe will be subject to use tax if the Tribe purchases or rents the tangible personal property with the intention of using it outside of Indian country of the Tribe and actually so uses it.

9. Purchases by the Tribe of motor vehicles where title to the motor vehicles passes to the Tribe within Indian country of the Tribe or leases by the Tribe of motor vehicles where delivery of the motor vehicles is made to the Tribe within Indian country of the Tribe are not subject to Connecticut sales tax.

As discussed above, the legal incidence of the sales tax falls on purchasers. Here, not only is the Tribe the purchaser but the transactions take place within Indian country of the Tribe. In such situations, the Department has long recognized that "[w]hen the legal incidence of [a] tax is found to be on a tribe or its members for a sale within Indian country, state taxation of the transaction is categorically prohibited." Id. Accordingly, because the legal incidence of the sales tax falls on the Tribe when it purchases motor vehicles where title to the vehicles passes to the Tribe within Indian country of the Tribe or when it leases motor vehicles where delivery of the vehicles is made to the Tribe within Indian country of the Tribe, the tax is barred.

10. Purchases by the Tribe of enumerated services wherever performed, if the benefit of the services is realized by the Tribe, are not subject to Connecticut sales tax unless such services are to real or tangible personal property located outside of Indian country of the Tribe or to property intended to be used outside of Indian country of the Tribe.

In Connecticut, taxable services are generally enumerated in Conn. Gen. Stat. §12-407(2)(i). These enumerated services fall into three categories: services to real property, services to tangible personal property and "other" services. The Sales and Uses Taxes Act, Conn. Gen. Stat. §12-406 *et seq.*, generally imposes sales and use taxes on these services only when some benefit or use of the service is realized in Connecticut. When applying this general rule to services to real and tangible personal property,[9] the benefit of such services is considered to be realized at the location of the property. Therefore, if the real or tangible personal property is located in Indian country of the Tribe, the benefit of the services to the property is realized by the Tribe within Indian country

of the Tribe and, because the legal incidence of the tax falls on the Tribe within Indian country of the Tribe, the tax on the services must fall. However, if the intended use of the property is outside of Indian country of the Tribe or if the property to which the services are performed is located outside of Indian country of the Tribe, the services, although received by the Tribe, are realized outside of Indian country of the Tribe and therefore are subject to Connecticut sales or use tax.

Unlike services to real or tangible personal property, the benefit of "other" services[10] often is realized at a location other than where the services are performed. For purposes of this ruling, services purchased by the Tribe in connection with the operation of its Tribal government may be performed outside of Indian country of the Tribe. However, regardless of where performed, the Department recognizes that services purchased by the Tribe in connection with the operation of its Tribal government are realized by the Tribe at the seat of its Tribal government (i.e., within Indian country of the Tribe). Therefore, because the benefit of these services, like the services to real and tangible personal property located within Indian country of the Tribe, are realized by the Tribe within Indian country of the Tribe and the legal incidence of the tax falls on the Tribe within Indian country of the Tribe, the tax on such services must fall.

13. Fuel delivered to the Tribe within Indian country of the Tribe is not subject to Connecticut motor vehicle fuels tax or to Connecticut sales tax provided the fuel is used in tribally owned or leased motor vehicles that are garaged within Indian country of the Tribe and are either (1) specially-equipped or (2) dedicated exclusively to an essential governmental purpose (other than gaming).

In light of Conn. Gen. Stat. §12-458(a)(2) and the Connecticut Supreme Court's holding in Wesson, Inc. v. Hychko, 205 Conn. 51, 529 A.2d 714 (1987), it is clear that the burden of the motor vehicle fuels tax falls on purchasers, not distributors. In this case the Tribe is purchasing motor vehicle fuel. Furthermore, the fuel is being delivered to the Tribe within Indian country of the Tribe. In such situations, the Department has long recognized that "[w]hen the legal incidence of [a] tax is found to be on a tribe or its members for a sale within Indian country, state taxation of the transaction is categorically prohibited." Ruling No. 95-11 at p. 4. Accordingly, because the legal incidence of the motor vehicle fuels tax falls on the Tribe when it purchases fuel that is delivered to the Tribe within Indian country of the Tribe and used in tribally owned or leased motor vehicles that are garaged within Indian country of the Tribe and are either (1) specially-equipped or (2) dedicated exclusively to an essential governmental purpose (other than gaming), the tax is barred.

Conn. Gen. Stat. §12-412(15) provides an exemption from sales tax for motor vehicle fuel. Conn. Gen. Stat. §12-412(15), in pertinent part, exempts "[s]ales of and the storage, use or other consumption in this state of motor vehicle fuel (A) for use in any motor vehicle licensed or required to be licensed to operate upon the public highways of this state, whether or not the [motor vehicle fuels tax] has been paid on such fuel." Therefore, any fuel that is purchased by the Tribe and used in motor vehicles that are "licensed or required to be licensed to operate upon the

public highways" of Connecticut will be exempt from sales tax pursuant to Conn. Gen. Stat. §12-412(15).

With respect to four of the remaining issues addressed by this Ruling, the Department has determined that the legal incidence of the tax in those situations does not fall on the Tribe. Accordingly, the determination of the proper tax treatment requires a balancing of the respective state, federal and tribal interests. These issues are discussed below with reference to their Ruling number.

1. Sales by the Tribe within Indian country of the Tribe of tangible personal property not produced within Indian country of the Tribe to other than enrolled members of the Tribe are subject to Connecticut sales tax and the Tribe, as a retailer, must collect and remit such tax to the State.

As discussed previously, "[t]he initial and frequently dispositive question in Indian tax cases . . . is who bears the legal incidence of the tax." Oklahoma Tax Commission v. Chickasaw Nation, at 458. In this situation, the Tribe is the retailer, not the purchaser. Therefore, having determined that the legal incidence of the sales tax falls on purchasers, not retailers, the burden of the sales tax in this situation does not fall on the Tribe and, thus, is not categorically barred. Therefore, the Department must balance the respective state, federal and tribal interests to determine whether the sales tax will apply in this situation.

When balancing the respective state, federal and tribal interests, the Department recognizes that it must find that the State's interest in imposing its tax outweighs the Tribe's and the federal government's interest in tribal self-government in order to impose the tax. To this end, the United States Supreme Court has stated:

> While the Tribes do have an interest in raising revenues for essential governmental programs, that interest is strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services. The State also has a legitimate governmental interest in raising revenues, and that interest is strongest when the tax is directed at off-reservation value and when the taxpayer is the recipient of state services.

Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 156-57 (1980). Thus, it appears that tribal interests will be considered strongest when the transactions being taxed are connected to or derived from Indian country or from tribal resources or services. In contrast, tribal interests will be less substantial where the tribe simply imports a finished product into Indian country and resells it to non-tribal members for use outside of Indian country.

In several United States Supreme Court cases involving state taxation of retail sales of cigarettes by a tribe, where tribal retailers sold to non-tribal purchasers, the legal incidence of the sales tax fell on the non-tribal purchasers, and the products sold were manufactured outside of Indian country, state sales taxes have been deemed valid. Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. at 155-57; Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation, 425 U.S. 463, 482-83 (1976). According to the United States Supreme Court, where the tribe is simply "marketing an exemption from state taxation to persons who would normally do their business elsewhere," and the value is not generated on the reservation, the sales tax will be upheld. Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. at 155.

This analysis has been applied by several federal circuit courts in the context of retail sales of other tangible personal property within Indian country. Yavapai-Prescott Indian Tribe v. Scott, 117 F.3d 1107, 1112 (9th Cir. 1997), cert. denied, 522 U.S. 1076 (1998) (room rentals and food and beverage); Gila River Indian Community v. Waddell, 91 F.3d 1232, 1236 (9th Cir. 1996) (tickets and concessionary items); Salt River Pima-Maricopa Indian Community v. Arizona, 50 F.3d 734, 736 (9th Cir. 1995), cert. denied, 516 U.S. 868 (1995) (retail goods at shopping mall); and Indian Country U.S.A., Inc. v. Oklahoma, 829 F.2d 967, 984, 986-87 (10th Cir. 1987) (sales tax on bingo activities). In each of these cases, the courts focused on the tribe's role and contribution to the value of the tangible personal property purchased and sold within Indian country.

In light of the United States Supreme Court cigarette tax cases and the application and interpretation of those cases by several federal circuit courts, the Department recognizes that if the tangible personal property being sold by a tribe to non-tribal members within Indian country of a tribe is produced and consumed within Indian country of the tribe, the state tax will be preempted. However, if the tangible personal property is simply imported into Indian country of a tribe and sold for off-reservation use, and the tribe has only minimal involvement, the Department recognizes that the state has a legitimate governmental interest in taxing such tangible personal property and, as a result, the tribe must collect and remit the tax on the tangible personal property sold.

In this situation, the Tribe is making retail sales of tangible personal property within Indian country of the Tribe to non-tribal members. Therefore, as explained previously, the burden of the sales tax does not fall on the Tribe. Rather, the legal incidence of the sales tax falls directly on the non-tribal members who are making purchases within Indian country of the Tribe. Furthermore, the tangible personal property being sold by the Tribe is not produced within Indian country of the Tribe. The tangible personal property is simply being imported into Indian country of the Tribe and is being resold to non-tribal members for use outside of Indian country of the Tribe. Consequently, after balancing the respective state, federal and tribal interests involved, it is clear that the Tribe has added minimal value, if it added any value at all, to the tangible personal property and the State's tax is "directed at off-reservation value." Washington v. Confederated

Tribes of the Colville Indian Reservation, 447 U.S. at 156-57. Therefore, consistent with the United States Supreme Court cigarette tax cases and the application and interpretation of those cases by several federal circuit courts, the sales tax will apply to these transactions.

3. Sales by the Tribe of meals that are prepared and served within Indian country of the Tribe are not subject to Connecticut sales tax because the value of the meals is generated within Indian country of the Tribe.

4. Sales by the Tribe of lodging (i.e., rooms or other accommodations) located within Indian country of the Tribe are not subject to Connecticut sales tax because the value of the lodging is generated within Indian country of the Tribe.

In both of these situations, the Department must again balance the state, federal and tribal interests involved to determine whether the Connecticut sales tax will apply. As previously explained, when balancing the respective state, federal and tribal interests the Department must make a "particularized inquiry into the nature of the state, federal, and tribal interests at stake" and recognizes that it must find that the State's interest in imposing its tax outweighs the Tribe's and the federal government's interest in tribal self-government in order to impose the tax. White Mountain Apache Tribe v. Bracker, 448 U. S. 136, 145 (1980). Relying on the United States Supreme Court cigarette tax cases and the application and interpretation of those cases by several federal circuit courts, the Department, in undertaking the balancing, must apply the following principles: if the tangible personal property being sold by a tribe to non-tribal members within Indian country of a tribe is produced and consumed within Indian country of the tribe, the state tax will be preempted. However, if the tangible personal property is simply imported into Indian country of a tribe and sold for off-reservation use, and the tribe has only minimal involvement, the state will have a legitimate governmental interest in taxing such tangible personal property and, as a result, the tribe must collect and remit the tax on the tangible personal property sold.

Although the legal incidence of the tax in both of these situations (i.e., the sales of meals[11] and lodging) falls directly on the purchasers, the value of the meals and lodging being sold by the Tribe is being produced and consumed within Indian country of the Tribe. Moreover, the Tribe is heavily involved in the production of the meals and lodging and this involvement significantly contributes to the value of the meals and lodging. Most notably, the Tribe built, owns and operates all the restaurants at which the meals are served and all the facilities where lodging is provided, tribal employees prepare and serve all meals and the Tribe regulates food inspections and workplace and occupational safety. Accordingly, the Department recognizes that a substantial portion of the value of the meals and lodging is being generated within Indian country of the Tribe and that the Tribe is heavily involved in and contributes to the generation of that value. Therefore, when balancing the respective state, federal and tribal interests involved, it has been determined that the Tribe's interests outweigh the State's interests. Consequently, sales of meals and lodging by the Tribe within Indian country of the Tribe will not be subject to Connecticut sales tax.[12]

12. Sales by the Tribe outside of Indian country of the Tribe of tangible personal property and services, including lodging and entertainment, are subject to Connecticut sales, use or admissions tax.

In this situation, the Tribe is making sales of tangible personal property and services outside of Indian country of the Tribe. The general rule in these situations is that such activities will be subject to nondiscriminatory state taxes. Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973). In Mescalero Apache Tribe v. Jones, the United States Supreme Court upheld a gross receipts tax on an off-reservation ski resort business wholly owned by a tribe, stating: "Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State." Id. at 148-49. The Department recognized this general principle in Ruling No. 95-11:

> Indian tribes and their members, unlike the governments of the State of Connecticut or the United States, do not enjoy exemption and/or constitutional immunity from state taxation wherever in Connecticut they happen to be when otherwise taxable sales are made. Instead, the exemption from sales tax depends both on the identity of the purchasers (Indian tribes and their members) and where the sales to them take place (within Indian country). Implicit in the Supreme Court's bright-line test in Chickasaw Nation is the recognition that when Indians are on their own federally-recognized land they are generally beyond the jurisdictional reach of the states within which they are situated; but the land itself, without the tribe, and the Indians themselves, without the land, are not necessarily beyond the states' reach. Thus when title to tangible personal property is transferred to a tribe or its members at a Connecticut location outside of Indian country . . . the imposition of sales tax on such transaction is not federally preempted.

Ruling No. 95-11 at p. 2. Therefore, in light of the United States Supreme Court's holding in Mescalero Apache Tribe v. Jones, sales by the Tribe outside of Indian country of the Tribe of tangible personal property and services, including lodging and entertainment, are subject to sales, use or admissions tax.

However, as noted previously, there are exemptions to the admissions tax. See Conn. Gen. Stat. §12-541(a). One such exemption is Conn. Gen. Stat. §12-541(a)(3), which exempts charges "to any event . . . all of the proceeds from which inure exclusively to an entity which is exempt from federal income tax under the Internal Revenue Code, provided such entity actively engages in and assumes the financial risk associated with the presentation of such event." Because the Tribe is an entity that is exempt from federal income tax,[13] any sales of entertainment made by the Tribe, whether such sales are made within or outside of Indian country of the Tribe, will be exempt provided the financial benefits and the risk of the event inure to the Tribe.

With respect to the remaining issues addressed in this Ruling, the Department need not make a determination as to where the legal incidence of the tax falls. These remaining issues are discussed below and make reference to their Ruling number.

5. Sales by the Tribe of entertainment that is produced within Indian country of the Tribe, including when the Tribe contracts to have a third party produce an entertainment event at facilities developed and operated by the Tribe within Indian country of the Tribe, are not subject to Connecticut admissions tax.

As stated previously, the Tribe is an entity that is exempt from federal income tax. Consequently, any sales of entertainment made by the Tribe, whether such sales are made within or outside of Indian country of the Tribe, will be exempt from the Connecticut admissions tax provided the financial benefits and the risk of the event inure to the Tribe. See Conn. Gen. Stat. §12-541(a)(3).

8. Purchases of tangible personal property by the Tribe where title to the tangible personal property passes to the Tribe outside of Indian country of the Tribe or rentals of tangible personal property by the Tribe where delivery of the tangible personal property is made to the Tribe outside of Indian country of the Tribe are not subject to Connecticut sales or use tax provided the Tribe complies with the provisions of Conn. Gen. Stat. §§12-407(6) or 12-408c and the tangible personal property is ultimately used solely within Indian country of the Tribe.

In this situation, the Tribe is making purchases[14] of tangible personal property outside of Indian country of the Tribe. Just as when the Tribe is making sales of tangible personal property or services outside of Indian country, the general rule in these situations is that such activities will be subject to nondiscriminatory state taxes. Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148. Consequently, in light of Mescalero Apache Tribe v. Jones, purchases of tangible personal property by the Tribe where title to the tangible personal property passes to the Tribe outside of Indian country of the Tribe or rentals of tangible personal property by the Tribe where delivery of the tangible personal property is made to the Tribe outside of Indian country of the Tribe will be subject to tax in Connecticut. However, provided the Tribe complies with the provisions of Conn. Gen. Stat. §12-407(6) or Conn. Gen. Stat. §12-408c, the Tribe may avail itself of these specific exclusions and the transactions will not be subject to tax.

Conn. Gen. Stat. §12-407(6) excludes from the definition of "storage" and "use"

> keeping, retaining or exercising any right or power over tangible personal property shipped or brought into this state for the purpose of subsequently transporting it outside the state for use thereafter solely outside the state, or for the purpose of being processed, fabricated or manufactured into, attached to or incorporated into, other tangible personal property to be transported outside the state and thereafter used solely outside the state.

For purposes of Conn. Gen. Stat. §12-407(6), the Department considers Indian country of the Tribe to be "outside" of Connecticut. Therefore, if the Tribe purchases or rents tangible personal property from outside Connecticut, keeps or retains the property in Connecticut and subsequently transports the property into Indian country of the Tribe for use solely within Indian country of the Tribe, the Connecticut use tax does not apply.

Similar to Conn. Gen. Stat. §12-407(6) is Conn. Gen. Stat. §12-408c, which is also known as The "Buy Connecticut" Provision. See **Special Notice 2001(5)**, *The "Buy Connecticut" Provision*. Conn. Gen. Stat. §12-408c allows taxpayers carrying on a trade, occupation, business or profession in Connecticut to request refunds of sales and use taxes paid on tangible personal property that is purchased from Connecticut retailers and is eventually shipped out of Connecticut for exclusive use outside Connecticut. See Conn. Gen. Stat. §12-408c(a). It also allows the Commissioner of Revenue Services to issue permits that enable qualified purchasers to purchase such property without payment of the sales and use taxes otherwise imposed by Chapter 219 of the Connecticut General Statutes. See Conn. Gen. Stat. §12-408c(b).

To satisfy the statutory requirements of Conn. Gen. Stat. §12-408c, the tangible personal property must be purchased from Connecticut retailers and subsequently shipped[15] outside of Connecticut for use solely outside of Connecticut. As with Conn. Gen. Stat. §12-407(6), the Department considers Indian country of the Tribe to be outside of Connecticut for purposes of both the refund and exemption permit portions of Conn. Gen. Stat. §12-408c. See **Special Notice 2001(5)** at p. 4. Therefore, if, in accordance with Conn. Gen. Stat. §12-408c(b), the Tribe is issued a permit by the Department, it may purchase or rent tangible personal property from a Connecticut retailer exempt from sales or use tax and keep or retain the property in Connecticut, provided it eventually ships the property into Indian country of the Tribe for use solely within Indian country of the Tribe. If the Department does not issue the Tribe a permit, the Tribe may utilize the refund portion of Conn. Gen. Stat. §12-408c and file a claim for refund of the sales or use tax it paid on such property.

11. Purchases of tangible personal property outside of Indian country of the Tribe by contractors or subcontractors of the Tribe for use in projects for the Tribe within Indian country of the Tribe are not subject to Connecticut sales or use tax provided the contractors or subcontractors comply with the provisions of Conn. Gen. Stat. §§12-407(6) or 12-408c.

This issue was addressed by Ruling No. 95-11, which held that "[w]hen title to tangible personal property passes outside of Indian country or delivery of rented property is taken outside of Indian country, such sales or rentals are subject to sales and use taxes, whether made directly to the Tribe or to a contractor." Ruling No. 95-11 at p. 6. After the issuance of Ruling No. 95-11, however, the Connecticut General Assembly enacted Conn. Gen. Stat. §12-408c. See 1997 Conn. Pub. Acts 243, §48. As explained previously, the Department, in administering this provision, has recognized Indian country of the Tribe to be outside of Connecticut for purposes of Conn. Gen. Stat. §12-408c. See **Special Notice 2001(5)** at p. 4. Given the fact that the language of Conn.

Gen. Stat. §12-408c is nearly identical to the language of Conn. Gen. Stat. §12-407(6), the Department has likewise recognized Indian country of the Tribe to be outside of Connecticut for purposes of Conn. Gen. Stat. §12-407(6).

Consequently, tangible personal property purchased by contractors or subcontractors of the Tribe outside Connecticut that is brought into Connecticut and subsequently shipped into Indian country of the Tribe for use solely within Indian country of the Tribe is not subject to use tax. See Conn. Gen. Stat. §12-407(6). Similarly, contractors or subcontractors of the Tribe which, in accordance with Conn. Gen. Stat. §12-408c(b), are issued a permit by the Department, may purchase or rent tangible personal property from a Connecticut retailer exempt from sales or use tax and keep or retain the property in Connecticut, provided they eventually ship the property into Indian country of the Tribe for use solely within Indian country of the Tribe. If the Department does not issue a contractor or subcontractor of the Tribe a permit, the contractor or subcontractor may utilize the refund portion of Conn. Gen. Stat.§12-408c and file a claim for refund of the sales or use tax it paid on such property.

LEGAL DIVISION
April 15, 2002

---

[1] All references to "tax" in this ruling are to Connecticut State taxes under Title 12 of the Connecticut General Statutes.

[2] This ruling does not address and, therefore, does not apply to transactions involving retail tenants of the Tribe or to transactions involving enrolled members of the Tribe.

[3] The term "Indian country" is defined in 18 U.S.C. §1151. For purposes of this ruling, the Department has determined that Indian country of the Tribe means only that land that has been taken into trust by the United States for the benefit of the Tribe.

[4] All references in this ruling to meals include non-alcoholic beverages.

[5] The United States Supreme Court has recognized that Congress has broad power to regulate tribal affairs under the Indian Commerce Clause of the United States Constitution. See Article I, Section 8. The United States Supreme Court has stated that this congressional authority and the semi-independent position of Indian tribes has given rise to two independent but related barriers to the assertion of state regulatory authority over tribal reservations. The first barrier is that federal law may preempt the exercise of state authority. The second barrier is that state authority may unlawfully infringe on the right of reservation Indians to make their own laws and be ruled by them. The United States Supreme Court has stated that the two barriers are independent because either, standing alone, can be a sufficient basis for holding a state law inapplicable to an activity undertaken by a Tribe on its reservation. See Phillip Geller, J.D., *Validity, Under Federal Constitution, Statutes, and Treaties, of State or Local Tax as Affected by Its Imposition on Indians, Their Property or Activities, or in Connection with an Indian Reservation – Supreme Court Cases*, 73 L. Ed. 2d 1506 annot. at 1510. While the Department recognizes these two barriers to state regulation over Indian tribes, for purposes of this ruling, a detailed analysis and discussion of each barrier is not required. Because each of the transactions addressed by this ruling involve a federally recognized tribe, the Department need only consider these barriers when balancing the respective state, federal and tribal interests after it has been determined that the legal incidence of the applicable tax does not fall on the Tribe.

[6] Although the sales and use taxes are closely related, the use tax exists apart from the sales tax. Hartford Parkview Associates Limited Partnership v. Groppo, 211 Conn. 246, 255-6, 558 A.2d 993 (1989); see also William Raveis Real Estate, Inc. v. Commissioner, Conn. Super. Ct. Tax Sess. (Shea, STR), No. CV-91-0387235-S (January 5, 1995). The

two taxes "are different in conception . . . [and] are assessments upon different transactions . . . ." International Business Machines Corp. v. Brown, 167 Conn. 123, 129, 355 A.2d 236 (1974). The sales tax is imposed on a retailer "for the privilege of making any sale" in Connecticut and may therefore only be imposed on sales made in this state; the use tax is imposed on the use of an item when it is "purchased . . . for use" in Connecticut and is actually so used, and may be imposed on items purchased anywhere. While the "taxable moment" of the sales tax on sales of tangible personal property occurs when title to the property passes from seller to purchaser, and can be fixed in both time and space on that basis, the imposition of the use tax involves a purchase, wherever made, together with an element of intent to use the property in Connecticut by the purchaser, followed by action upon that intent by the purchaser. Magic II, Inc. v. Dubno, 206 Conn. 253, 537 A.2d 998 (1988); Stetson v. Sullivan, 152 Conn. 649, 211 A.2d 685 (1965).

[7] Out-of-state retailers that are engaged in business in Connecticut **must** register with the Department to collect Connecticut tax. "Engaged in business in this state" means either the selling and leasing of tangible personal property in Connecticut or the rendering of taxable services in Connecticut. Engaged in business in Connecticut includes, but is not limited to, the following acts or methods of transacting business:

- maintaining, occupying or using, permanently or temporarily, directly or indirectly, through a subsidiary or agent any office, place of distribution, sales or sample room or place, warehouse, storage point or other place of business, or
- having any representative, agent, salesman, canvasser or solicitor operating in Connecticut for the purpose of selling or leasing, delivering or taking orders for tangible personal property or services.

Out-of-state retailers that are not engaged in business in Connecticut, but that make out-of-state sales or leases of tangible personal property for use, storage or other consumption in Connecticut or render taxable services in Connecticut, may also register with the Department for authorization to collect tax. Conn. Agencies Regs. §12-426-22.

[8] For purposes of this ruling, patrons of the Tribe do not include enrolled members of the Tribe.

[9] Examples of services to real or tangible personal property include, but are not limited to: services to industrial, commercial or income-producing real property, repair services to motor vehicles, electrical repair services, locksmith services, landscaping and horticulture services, maintenance services and janitorial services.

[10] Examples of "other" services include: business analysis, management, management consulting and public relations services, computer and data processing services and services by employment agencies and agencies providing personnel services.

[11] Conn. Gen. Stat. §12-412(13) defines "meal" to mean "food products which are furnished, prepared or served in such a form and in such portions that they are ready for immediate consumption."

[12] The general tax rate is 6% for the sale of tangible personal property and enumerated services in Connecticut. However, sales of lodging in Connecticut are taxable at a rate of 12%. See Conn. Gen. Stat. §12-408. Conn. Gen. Stat. §12-408, in pertinent part, provides that "[f]or the privilege of making any sales, . . . at retail, in this state for a consideration, a tax is hereby imposed on all retailers at the rate of six per cent of the gross receipts of any retailer from the sale of all tangible personal property sold at retail or from the rendering of any services . . . except, in lieu of said rate of six per cent, (A) at a rate of twelve per cent with respect to each transfer of occupancy, from the total amount of rent received for such occupancy of any room or rooms in a hotel or lodging house for the first period not exceeding thirty consecutive calendar days."

[13] In a private letter ruling, the Internal Revenue Service ruled that the Tribe constitutes an Indian tribal government under 26 USC §7701(a)(40).

[14] Conn. Gen. Stat. §12-407(7)(f) includes within the definition of "purchase" "any leasing or renting of tangible personal property."

[15] For purposes of both the refund and exemption permit portions of Conn. Gen. Stat. §12-408c, tangible personal property that is purchased from Connecticut retailers **must** be shipped out of Connecticut within three years from the date of purchase.