

# **SMALL BUSINESS FORMATION FOR AMERICAN INDIAN ENTREPRENEURS**

**TAXATION ISSUES – NEW MEXICO**

**2015**



# Disclaimer

◆ **The information provided is for informational purposes only, does not constitute legal advice or create an attorney-client relationship, and may not apply to all circumstances. If legal advice or other expert assistance is required, the services of a competent professional person should be sought.**

# Topics

## Federal and State Taxes

- Section A: Preface
- Section B: Four Primary State Taxes
- Section C: Governing Law of State Corporation
- Section D: Determine State and Federal Taxes Applicable to Your Business
- Section E: Income and Corporate Franchise Taxes
- Section F: Gross Receipts Tax - General Information
- Section G: Gross Receipts Tax - Indian Issues
- Section H: Compensating Tax and Withholding Tax

# Section A: Preface

**Business License and Permit Requirements along with Tax Rules Applicable to Indian Owned Businesses Vary.**

**A "Rigid Rule" of State Taxing Powers In Indian Country Does Not Exist.**

# CAUTION

- ◆ New Mexico Taxation and Revenue Department has Cooperative Agreements Regarding Gross Receipts Tax with following Ten Pueblos/Tribes/Nations:
  - ◆ Jicarilla Apache Nation
  - ◆ Pueblos of Cochiti, Laguna, Nambe, Ohkay Owingeh, Picuris, Pojoaque, Santo Domingo (Kewa), Sandia, Santa Clara, Tesuque, and Taos
  - ◆ Santa Fe Indian School
  - ◆ Albuquerque Indian School Property

# New Mexico Tribal Cooperative Tax Credit Agreements

## ◆ PURPOSE:

- ◆ To avoid double taxation by State and Indian Nation, Tribe or Pueblo, since each may impose its own gross receipts tax on certain transactions, a transaction is only taxed once, either by the State or the Indian Nation/Tribe/Pueblo.

# New Mexico Tribal Cooperative Tax Credit Agreements

- ◆ Under Credit Agreement either:
- ◆ State collects gross receipts tax for fee (e.g., <3.6%), keeps 25% as its share and remits remainder to Indian Nation/Tribe/Pueblo; or
- ◆ Indian Nation/Tribe/Pueblo collects gross receipts tax, keeps 75% as its share and remits remainder to the State.

# New Mexico Tribal Cooperative Tax Credit Agreements

- ◆ **The Nation/Tribe/Pueblo that has entered into a Tax Cooperative Agreement with the State of New Mexico may require you to report to EITHER the Nation/Tribe/Pueblo or the State of New Mexico Department of Taxation and Revenue OR BOTH.**

# New Mexico Tribal Cooperative Tax Credit Agreements

- ◆ **YOU MUST LEARN the Nation/Tribe/Pueblo tax rules where you are conducting business. You must use reservation situs code on CRS Form or Tribe will not get tax monies it is due.**

# Source of Tribal Taxing Power

- ◆ “The power to tax is a fundamental attribute of tribal sovereignty because it is a necessary instrument of self-government and territorial management.” *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982).

# PURPOSES OF TRIBAL TAXATION

- ◆ Raise revenue.
- ◆ Regulate business – encourage or discourage certain activities based on tax rate.
- ◆ Protect tax base.
- ◆ Exercise sovereignty.
- ◆ No conditions on how tax monies are to be spent by Tribe. Tribe has total discretion on how to spend tax monies collected.

# LIMITS ON TRIBAL TAXATION

Tribal tax on non-members on NON-INDIAN FEE LAND within a reservation is invalid.

*Atkinson Trading Company, Inc. v. Shirley*, 532 U.S. 645 (2001).



# Section B: Four Primary NM State Taxes

- ◆ Personal Income Tax
- ◆ Gross Receipts Tax
- ◆ Real Property Tax
- ◆ Severance Tax

# Section C: Governing Law of State Corporation

States have tried to impose state tax liability on Indian businesses that have incorporated under state law. In two cases, where the U. S. Supreme Court denied review, it was held that an Indian business that incorporates under state law does not lose its tax immunity (SD and NM). However, in North Dakota it is uncertain due to a 1983 case regarding jurisdiction, not taxation per se.

Due to questions of state governing authority, as well as for tax considerations, tribes and tribal members generally find the use of state-chartered entities not as desirable as entities created under tribal law.

# Governing Law of State Corporation – South Dakota

## ◆ Pourier v. South Dakota Dept. of Revenue (2004)

658 N. W. 2d 395, rehearing denied (April 1, 2003), rehearing granted in part, opinion vacated in part on rehearing by 674 N. W. 2d 314 (S. D. 2004), cert. denied, 124 S. Ct. 2400 (U.S.S.C. 2004)

# Governing Law of State Corporation

- ◆ Loren Pourier is an enrolled member of the Oglala Sioux Tribe and a resident of the Pine Ridge Indian Reservation in South Dakota. Muddy Creek Oil and Gas, Inc. ("Muddy Creek") is a **South Dakota corporation** whose sole shareholder and president is Pourier. The corporation's principal place of business is Pine Ridge. Muddy Creek purchased gas in Nebraska and trucked it to Pine Ridge for resale to consumers including reservation residents. The South Dakota Department of Revenue imposed a State motor fuel tax on Muddy Creek which is the basis of challenge in this case.

# Governing Law of State Corporation

- ◆ The Department claims that Muddy Creek cannot meet the threshold requirement of being either the Tribe or an enrolled member of the Tribe because as a corporation, it cannot have the racial identity necessary to fall within the *Chickasaw* rule. We disagree and hold that **a corporation owned by the Tribe or an enrolled tribal member residing on the Indian reservation and doing business on the reservation for the benefit of reservation Indians is an enrolled member for the purpose of protecting tax immunity.**

# Governing Law of State Corporation

- ◆ Congress' primary objective in Indian law for several decades has been to encourage tribal economic independence and development. By finding that incorporation under state law deprives a business of its Indian identity, we would force economic developers on reservations to forego the benefits of incorporation in order to maintain their guaranteed protections under federal Indian law.

# Governing Law of State Corporation – New Mexico

- ◆ *Eastern Navajo Industries, Inc. v. Bureau of Revenue*, 552 P.2d 805 (N.M.App. 1976), *cert. denied*, 430 U.S. 959 (1977)



# Governing Law of State Corporation

- ◆ Corporation was formed under the State Business Corporation Act at the instigation and under the auspices of the Navajo Tribal Council, where Indians held a 51% majority of stock which they purchased with loans from the federal government under a program designed to facilitate Indian self-help.

# Governing Law of State Corporation

- ◆ Federal regulations defining the federal loan policy for Indian enterprises and the Navajo Tribal Code specifically authorized the incorporation of an Indian commercial enterprise under state law without a corresponding loss of "Indianness." 25 U.S.C. §13.

# Governing Law of State Corporation

- ◆ New Mexico's State corporate income tax (4.8-7.6%) is not applicable to a corporation, located in Indian country, with 51% or more Indian ownership by Indian's from that Indian country.

# Governing Law of State Corporation – North Dakota

*Airvator, Inc. v. Turtle Mountain Mfg. Co.*, 329 N.W.2d 596 (N.D. 1983) *Airvator* does not address the scope of a state's authority to tax Indian commerce. **It held that a corporation created under state law is a creature of the state,** notwithstanding the fact that the owners of the corporation may be a tribe or tribal members. Thus, the corporation may be sued in state courts as may any other state-created entity and judgment may be obtained against corporate assets.

# **Section D: Determine State and Federal Taxes Applicable to Your Business**

- ◆ **Federal and State Personal Income Tax**
- ◆ **Federal and State Corporate Income Tax**
- ◆ **State Corporate Franchise Tax**
- ◆ **State Gross Receipts and Compensating Taxes**
- ◆ **Medicare Tax on Employees**
- ◆ **Net Investment Tax on Individuals**
- ◆ **Long Term Capital Gains and Qualified Dividends**
- ◆ **Be aware - other taxes may be applicable to your particular business (liquor, cigarettes, gasoline, lodging, admissions, etc.)**

## Section E: Federal Personal Income and Federal Corporate Income Tax for American Indian Business Owners

- ◆ Generally, individual American Indians and their businesses are subject to federal income taxation, even if their income is earned in Indian Country, unless exempted by treaty, statute, or Act of Congress. Tribal membership does not exempt an Indian from federal taxation. *Choteau v. Burnet*, 283 U.S. 691 (1931); *United States v. Brown*, 824 F. Supp. 124 (S.D. Ohio 1993). See IRS Rev. Rul. 54-456; 154-2 C.B. 49.

# Federal Personal Income and Federal Corporate Income Tax for American Indian Business Owners

- ◆ An Indian Nation/Tribe/Pueblo, and any unincorporated business owned by them, are **not** entities subject to federal income taxation. An Indian Nation/Tribe/Pueblo corporation formed by them **may** be subject to federal corporate income tax, depending on the form of the corporation (e.g., incorporated under state law).

# **Federal Personal Income and Federal Corporate Income Tax for American Indian Business Owners**

The existing Internal Revenue Ruling 94-16, dated March 21, 1994, holds that a corporation organized by a tribe under state law is subject to federal income tax. IRS is supposed to re-visit this ruling.

# Federal Payroll Taxes

- ◆ **W-4 - Employer's Withholding Allowance Certificate (Notice of filing status and dependents for federal personal income tax).**
- ◆ **Form 941 – Employer's Quarterly Federal Tax Return.**
- ◆ **W-2 – Annual earnings and taxes withheld for federal personal income tax.**
- ◆ **FICA – Federal Insurance Contributions Act (Social Security and Medicare). Employer matches amount withheld per employee.**

## Unless Exempted, Federal Personal Income Tax Applicable to American Indians

- ✦ **”The Internal Revenue Code of 1939 contains no provision exempting an individual from the payment of Federal income taxes solely on the ground that he is an Indian.”**

## Unless Exempted, Federal Personal Income Tax Applicable to American Indians

- ◆ **"Based on the decisions of the Supreme Court ... it is the position of the Internal Revenue Service that exemption from the payment of Federal income tax may not be implied, and that if exemption of Indians from the payment of such tax exists, it must derive plainly from the Federal tax statutes, or from treaties or agreements with the Indian Tribes concerned or some Act of Congress dealing with their affairs."**

# Allotments

## ◆ Terminology

- ◆ An 'allotment' is a term of art in Indian law, describing either a parcel of land owned by the United States in trust for an Indian ("trust" allotment) or owned by an Indian subject to a restriction on alienation in the United States or its officials ("restricted" allotment).

# Allottee

- ◆ Holder of a restricted or trust allotment is referred to as an 'allottee.'



# Trust and Restricted Allotments

- ◆ Trust and restricted allotments are subject to federal restraints on encumbrance and alienation, and are exempt from federal and state taxation during the restricted period.

# Trust and Restricted Allotments

- ◆ An 'encumbrance' is a legal term of art for anything that affects or limits the title of a property, such as mortgages, leases, easements, liens or restrictions.

# Trust and Restricted Allotments

- ◆ The restrictions on encumbrance and alienation apply by operation of law, whether they appear in the patent or other title document.
- ◆ Also, the restrictions on encumbrance and alienation are not personal to the allottee, but generally run with the land to the allottee's Indian heirs or devisees.

## Exemption by Statute

- ◆ One federal statute found to exempt income derived directly from Indian trust or restricted allotted lands from federal and state taxation is the General Allotment Act.

**No Federal/State Personal Income Tax on Income Derived Directly by Indian Allotment Owner(s) (Not Third Party) from His/Her/Their Allotted Lands**

- ◆ In *Squire v. Capoeman*, 351 U.S. 1 (1956), the U.S. Supreme Court held that the personal income of an Indian owner derived directly from his/her restricted Indian allotment was exempt from federal personal income tax in order to fulfill the purposes of the General Allotment Act.

# IRS Revenue Bulletin

- ◆ The *Capoeman* decision led to the issuance of IRS Revenue Bulletin 1956-1 C.B. 605 and IRS Rev. Rul. 56-342:
- ◆ "Income held in trust for or received by the patent holder which is derived directly from allotted and restricted Indian lands while such lands are held by the United States, as trustee, in accordance with section 5 of the General Allotment Act of 1887, 24 Stat. 388, as amended, 25 U.S.C. 348, is exempt from Federal income tax."

# IRS Revenue Bulletin

- ◆ **”Such exempt income includes rentals (including crop rentals), royalties, proceeds of sales of the natural resources of such land, and income from the sale of crops grown upon the land and from the use of the land for grazing purposes. Such income is not includible in computing net earnings from self-employment ...” See also Rev. Rul. 67-284, 1967-2 C.B. 55.**

**No Federal/State Personal Income Tax on Income Derived Directly by Indian Allotment Owner(s) (Not Third Party) from His/Her/Their Allotted Lands**

- ◆ The federal and state taxation exemptions under *Capoeman* extend to trust allotments located outside Indian reservations. The GAA expressly provides in section 4 that allotments beyond reservation boundaries are to be held under the same terms as reservation allotments.

**No Federal/State Personal Income Tax on Income Derived Directly by Indian Allotment Owner(s) (Not Third Party) from His/Her/Their Allotted Lands**

- ✦ Also, *Capoeman* applies to allotments issued pursuant to tribe-specific allotment statutes, regardless of whether the GAA applies to those allotments or not.
- ✦ See *Stevens v. Comm'r.*, 452 F.2d 741, 744-746 (9<sup>th</sup> Cir. 1971) (construing Ft. Belknap Allotment Act of March 3, 1921, 41 Stat. 1355); Rev. Rul. 74-13, 1974-1 C.B. 14 (exemption described as applying to restricted lands generally rather than specifically to GAA lands).

**No Federal/State Personal Income Tax on Income Derived Directly by Indian Allotment Owner(s) (Not Third Party) from His/Her/Their Allotted Lands**

- ◆ The taxation exemption for restricted allotted lands applies when individual trust property is transferred to a subsequent **allottee**,
- ◆ whether by gift,
- ◆ devise [under will],
- ◆ inheritance (*Asenap v. U.S.*, 283 F. Supp. 566 (W. D. Ok. 1968)),

**No Federal/State Personal Income Tax on Income Derived Directly by Indian Allotment Owner(s) (Not Third Party) from His/Her/Their Allotted Lands**

- ◆ where the federal government purchases lands for individual Indians which is held in trust solely for their benefit, or
- ◆ when restricted allotted land is voluntarily exchanged for restricted allotted land of like value when such exchange is authorized by the Secretary of Interior.
- ◆ See Rev. Rul. 57-523, 1957-2 C.B. 51; Rev. Rul. 67-284, 1967-2 C.B. 55; Rev. Rul. 74-13, 1974-1 C.B. 14.

**No Federal/State Personal Income Tax on Income Derived Directly by Indian Allotment Owner(s) (Not Third Party) from His/Her/Their Allotted Lands**

- ◆ There is no federal or state tax exemption for income **derived by a third party, other than the allottee(s)**, from a lease of a restricted or trust Indian allotment. *Wynecoop v. Comm'r*, 76 T.C. 101 (1981) (mineral lease).

# Unallotted Tribal Lands

- ◆ Income of Indian logging subcontractor from logging on reservation lands held taxable. *Fry v. United States*, 557 F.2d 646 (9<sup>th</sup> Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978).

# Unallotted Tribal Lands

Income of tribal member from cattle grazing on tribal trust land held taxable. *Holt v. Commissioner*, 364 F.2d 38 (8<sup>th</sup> Cir. 1966), *cert. denied*, 386 U.S. 931 (1967).

Income from tribal members on rents from tribal trust lands held taxable.

*Anderson v. United States*, 845 F.2d 206 (9<sup>th</sup> Cir.), *cert. denied*, 488 U.S. 966 (1988).

# Fee Patent Allotted Land Subject to State Taxation

- ◆ Under the GAA, however, when a fee patent has been issued to the Indian allotment owner, the allotted land becomes subject to federal and state taxation.

# Federal Personal Income Tax Exemptions

- ◆ Federal personal income tax **not** applicable to enrolled members of Indian Nation/Tribe/Pueblo on income distributed through tribal trust funds from land claim settlements and judgments – normally made exempt in applicable statute.

# Federal Personal Income Tax Exemptions

- ◆ Federal personal income tax **not** applicable to enrolled members of Indian Nation/Tribe/Pueblo on income from general welfare payments made from their tribe. 25 U.S.C. s. 2710(b)(2)(B). Usually interpreted to include medical assistance, housing subsidies and educational scholarships.

# Federal Personal Income Tax Exemptions

- ◆ Federal personal income tax **not** applicable to enrolled members of Indian Nation/Tribe/Pueblo on income from fishing rights related activity. 25 U.S.C. s. 7873(a)(1).



# **Federal Personal Income Tax Not Due on Certain Per Capita Payments**

- ◆ Pursuant to 25 U.S.C. § 1407, none of the funds that are distributed per capita or held in trust pursuant to a plan approved under 25 U.S.C. § 1401 et. seq, including all interest and investment income accrued on the funds while held in trust, are subject to federal income taxes.

# Federal and State Tax Rates

- ◆ Applicable rates, unless exemption applies:
- ◆ Federal corporate tax rate - 15-35%
- ◆ NM corporate income tax rate – 4.8% - 7.6%
- ◆ Federal personal income tax rate – 10%-39.6% -  
- 39.6 % goes into effect January 1, 2014
- ◆ NM personal income tax rate – 1.7-4.9%
- ◆ Federal self-employment tax – 12.4% of  
\$110,100 of SE income for Social Security in  
2012; in 2013 will increase to 12.4% of \$113,700  
of SE income for Social Security. This is a 3.2%  
hike over the 2012 wage base of \$110,100. SE  
income gets taxed at 2.9% for Medicare.

# Tax Changes in 2013

## – The Patient Protection and Affordable Care Act (PPACA) and the Health Care and Education Reconciliation Act of 2010 (HCERA)

- ✦ PPACA and HCERA add a new Medicare Tax on employees
- ✦ PPACA and HCERA add a new Net Investment Tax on individuals

## – Long Term Capital Gains and Qualified Dividends



# Medicare Tax on Employees

- ◆ The Patient Protection and Affordable Care Act (PPACA) and the Health Care and Education Reconciliation Act of 2010 (HCERA) make significant changes to the treatment of compensatory income starting in 2013. The PPACA effectively increases the Medicare tax (HI) on employees, but not employers, by .9% for taxpayers over the threshold amounts.

# Medicare Tax on Employees (con't.)

- This additional HI will be paid entirely by the employee and is to be withheld from employees, but only to the extent the employee's wages from the employer exceed \$200,000 in a year. This means the employer may disregard the employee's spouse's wages. The employee is liable to the extent the amount is not withheld.

# Net Investment Tax on Individuals

- PPACA and HCERA add a new Net Investment Tax on individuals regardless of whether the individual is employed, self employed or not employed, trusts and estates. The tax is 3.8% of the excess of the (a) lesser of (i) Net Investment Income or (ii) modified adjusted gross income over the threshold amount. The threshold amount is \$250,000 for married taxpayers, filing joint, \$125,000 for married individual filing separate and \$200,000 in any other case.

# Net Investment Tax on Trade or Business

- In the case of a trade or business, the tax applies if the trade or business is a passive activity with respect to the taxpayer or the trade or business consists of trading financial instruments or commodities. None of the Net Investment Tax is eligible for deduction.

# Long Term Capital Gains and Qualified Dividends

- ◆ The special tax rates on long term capital gains and qualified dividends will expire December 31, 2012. Starting in 2013, the tax rate on long-term gains will be 20% (or 10% if the taxpayer is in the 15% bracket), up from 15% and 0%. Also beginning in 2013, capital gain income for higher bracket taxpayers will be subject to an additional 3.8% Medicare tax.

# NM State Gross Receipts Tax

## Rates

- ◆ The gross receipts tax rate varies throughout the State from 5.125% to 8.6875%. The total rate is a combination of rates imposed by:
  - ◆ 1. The State,
  - ◆ 2. The counties, and
  - ◆ 3. The municipalities.

# State Personal Income Tax for American Indian Business Owners

- ◆ State personal income tax **not** applicable to enrolled members of Indian Nation/Tribe/Pueblo **who lived** on the lands of Indian Nation/Tribe/Pueblo of which they are member and **whose entire income** is derived wholly from reservation sources. *O'Cheskey v. Hunt*, 512 P.2d 961 (N.M. 1973).
- ◆ New Mexico State personal income tax is applicable to (i) the portion of income earned by Indian taxpayer who lives in his/her Indian Country but earns income outside of the taxpayer's Indian Country or (2) Indian taxpayer who does not live in his/her Indian Country but earns income in or outside of the taxpayer's Indian Country.

# State Personal Income Tax for American Indian Business Owners

- ◆ Indian living or working outside of his/her Indian Country is sufficient nexus to allow state to impose its personal income tax to period Indian taxpayer lived outside of Indian Country and/or worked outside of Indian Country.

# State Corporate Income Tax for American Indian Business Owners

- ◆ New Mexico state corporate tax not applicable to corporation with 51% or more Indian ownership, located in Indian Country of Indian owners who have 51% or more ownership. See *Eastern Navajo Industries, Inc. v. Bureau of Revenue*, 552 P.2d 805 (N.M.App. 1976), cert. denied, 430 U.S. 959 (1977).

# NM State Corporate Franchise Tax

- ◆ Not imposed on income but is imposed on corporation engaged in the transaction of business in, into or from New Mexico, or deriving any income from property or employment in New Mexico. \$50 per year.

# Incidence of State Tax

- ◆ *The first question to answer in Indian tax cases is who bears the legal incidence of the tax. "If the legal incidence of an excise tax rests on a tribe or on tribal members for sales made inside Indian country, the tax cannot be enforced absent clear congressional authorization."*

# Incidence of State Tax

- ◆ **Goodman Oil Co. v. Idaho State Tax Comm'n., 28 P.3d 996 (Idaho 2001)**
- ◆ Goodman Oil was a licensed distributor of fuel in Idaho as defined by I.C. §63-2401(13). Goodman Oil purchased gasoline from an Exxon Terminal in Spokane, Washington. Sun Transportation, a sister corporation of Goodman Oil, transported the gasoline through the State of Washington directly to a location at the eastern border of the State and the western border of the reservation.

# Incidence of State Tax

- ◆ The gasoline was transported without traveling through any part of Idaho lying outside of the reservation. The Tribe purchased the gasoline at the border of the State of Washington and the reservation. The Tribe paid Sun Transportation to haul the gasoline to the Tribe-owned Benewah Auto Center located on the reservation. Neither the Tribe nor Benewah Auto Center was a licensed distributor of fuel in Idaho.

# Incidence of State Tax

- ◆ Idaho fuel tax and transfer fee statutes imposed the tax on Indian Tribe as retailer rather than on distributor, thus tax is invalid. The incidence of the tax was on the Tribe **for sales made inside Indian country.**
- ◆ Hayden-Cartwright Act did not provide congressional authorization for state to impose fuel tax on sale of fuel to Indians on Indian reservations within state.

# Incidence of State Tax

- ◆ Idaho legislature passed legislation reversing decision in *Goodman* by merely changing the incidence of the tax as it would result in the loss of millions of dollars to the State.



## **Section F: NM Gross Receipts Tax - General Information**

### **Gross Receipts Tax**

- ◆ Gross receipts is the total amount of money or the value of other consideration received from selling property, from leasing property, or from performing services in New Mexico, or from selling services performed outside New Mexico the product of which is initially used in New Mexico.
- ◆ Prevalent practice – pass the tax to the customer.

# NM Gross Receipts Tax

- ◆ Tax on privilege of transacting business in State of New Mexico. Attaches at time of sale or lease or performance of services.
- ◆ Paid by Seller of goods or services or leases of property, not Buyer.

# NM Gross Receipts Tax

- ◆ Transactions Taxable, Exempt, Deductible or Preempted by Federal Law
- ◆ Most transactions are taxable, unless there is legislation specifying an exemption or a deduction from tax or the tax is preempted by federal law.

# NM Gross Receipts Tax

## ◆ **Exemption**

- Legislative exclusion from tax base. Seller **is not** required to report receipts from exempted transactions.

## ◆ **Deduction**

- Seller **is required** to report receipts, but may deduct the amount before calculating tax liability. Taxpayer must retain substantiation when claiming a deduction.

## ◆ **Preemption**

- State is precluded by law from imposing the tax on the seller.

# NM Gross Receipts Tax

## ◆ Common Exemptions (Receipts Not Taxable or Reportable).

- The sale or lease of livestock, poultry and other domestic farm animals.
- The sale of unprocessed agricultural products by the grower or producer.
- The feeding or pasturing of livestock.
- The sale of tangible personal property by itinerant vendors.
- Gross receipts **by** not-for-profit organizations are exempt.

# NM Gross Receipts Tax

## Common Deductions (Receipts Reportable But Deductible Before Calculating Tax Liability).

- Sales of property or services or leases to a person with a billing address outside New Mexico (e.g., catalog or Internet sales). This exemption may be closed in the future.
- The sale of tangible personal property at wholesale for later resale.
- Sale of construction material if the sale is made to a person engaged in the construction business.
- Sales or leasing property and performing services to a qualified film production company.

# **NM Gross Receipts Tax**

## **Common Deductions (Continued)**

### **(Receipts Reportable But Deductible Before Calculating Tax Liability).**

- The sale of feed for livestock, fish raised for human consumption, poultry, or animals raised for their hides or pelts to a person regularly engaged in the business of ranching or raising animals for their hides or pelts.
- The sale of seeds, roots, bulbs, plants, soil conditioners, fertilizers, insecticides, herbicides, fungicides or water for irrigation purposes to a person regularly engaged in the business of farming.
- Warehousing, threshing, cleaning, growing, cultivating or harvesting agricultural products.

# NM Gross Receipts Tax

## ◆ Credits

In general, subject to certain limitations, if tax paid to another state or Indian Nation/Tribe/Pueblo.

◆ Gross Receipts Tax Schedule specifies rates for New Mexico Counties and Indian Nations/Tribes/Pueblos that have entered into New Mexico Tribal Cooperative Tax Credit Agreements.

# NM Gross Receipts Tax

## ◆ Business Site Determines Tax Rate:

- For construction, rate is determined by site of construction.
- Service businesses use tax rate from business office location.
- Craftsperson who sells at crafts fairs, uses rate where fair is held.
- A business in a city uses the corresponding county rate.

# NM Gross Receipts Tax

- ◆ **CRS Form - Combined Reporting System**: combines reporting of gross receipts, compensating and withholding taxes on one form.
- ◆ **Short and Long Forms**
- ◆ **Long Form** – more than 3 business locations or require more than 3 lines.

# NM Gross Receipts Tax

- ◆ You must file continuously once you file with State even if you have no receipts. **Automatic penalty for non-filing - \$5.00.** May report and pay online with credit card.
- ◆ Report changes with Business Tax Registration Update Form – moving, going out of business, etc.
- ◆ Filing status may be monthly, quarterly, semi-annual or seasonal. Monthly is required if you report an average of \$200 or more in total tax per month. Report and payment due 25 days after the last day in the report period. Schedule is in CRS-1 Filer's Kit.

# NM Gross Receipts Tax

- ◆ Electronic Funds Transfer payment required if you owe \$25,000 or more.
- ◆ May amend your report. If done within one year, no penalty. Interest due on any underpayment.
- ◆ May seek refund.
- ◆ Taxpayer is subject to audit.

# NM Gross Receipts Tax

- ✦ Taxpayer is subject to stiff penalties and interest.
- ✦ Penalties – Prior to January 1, 2008, 2% per month of total tax due. Maximum penalty is 10%. Minimum penalty is \$5. After January 1, 2008, maximum penalty increases to 20% of the tax due or a minimum of \$5.00, whichever is greater.
- ✦ Prior to January 1, 2008, interest is calculated per day at .041% of total tax due. About 15% on annual basis. Under \$1, not assessed. After January 1, 2008, use rate established for individual income tax purposes by the U.S. Internal Revenue Code (IRC).
- ✦ Even if gross receipts is zero, you must file or you will be assessed \$5 penalty.

# NM Gross Receipts Tax

- ✦ **Non-Taxable Transaction Certificate ("NTTC")**
- ✦ Purpose of NTTC is to avoid multiple taxation of a single transaction. Can apply for and execute NTTC's online to report deductions. May receive five at a time. Must use original State form, do not duplicate. Each NTTC has its own number.
- ✦ Generally, supplies purchased to be incorporated into product for re-sale, which will be subject to gross receipts tax, qualify for **deduction** by seller from New Mexico gross receipts tax (example: jewelry components, not tools (\$5000 cap per year) to be incorporated into a piece of jewelry that will be sold upon completion, subject to gross receipts tax). Obtain an NTTC online and give to seller once – seller and buyer are obligated to keep transaction information (e.g., Hobby Lobby, Michael's, etc.).

# NM Gross Receipts Tax

## ✦ NTTC's (Continued)

- ✦ Generally, services and materials for re-sale qualify for **deduction** from New Mexico gross receipts tax if final sale is subject to gross receipts tax (example: payment from a general contractor to a sub-contractor for building cabinets in house where finished house will be sold and materials are used in construction of house). General contractor will give NTTC to subcontractor. **Get it up front.**
- ✦ **Uniform Multi-State Jurisdictional NTTC** available through [www.mtc.gov](http://www.mtc.gov). Example – buy property in Georgia which is component of final product which will be sold by NM business owner - give Georgia business a Multi-State Jurisdictional NTTC so you don't have to pay Georgia gross receipts tax.

# NM Gross Receipts Tax

## ◆ Types of NTTC's

- Type 2 – tangibles for resale
- Type 5 – services for resale
- Type 6 – construction contractor's materials and services
- Type 9 – tangibles purchased by non-profit and government agencies
- Type 15 – tangibles purchased by qualified federal contractors

# Section G: NM Gross Receipts Tax - Indian Issues

- ✦ **"Indian tribe"** means an Indian nation, tribe or pueblo, including:
    - ✦ (1) any political subdivision, agency or department of that Indian nation, tribe or pueblo;
    - ✦ (2) any incorporated or unincorporated enterprise of the Indian nation, tribe or pueblo; and
    - ✦ (3) any corporation required to be considered an Indian and therefore a member of the Indian Nation, tribe, or pueblo under *Eastern Navajo Industries, Inc. v. Bureau of Revenue...*"
- Section 3.2.4.7 NMAC

# NM Gross Receipts Tax - Indian Issues

- ✦ The term Indian country, 18 U.S.C. § 1151, means:
- ✦ (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation;
- ✦ (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state; and
- ✦ (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

# NM Gross Receipts Tax - Indian Issues

## ✦ Dependent Indian Community

- ✦ Whether a particular geographical area is a dependent Indian community depends on a consideration of several factors. These include:
  - ✦ (1) whether the United States has retained title to the lands which it permits the Indians to occupy and authority to enact regulations and protective laws respecting this territory;
  - ✦ (2) the nature of the area in question, the relationship of the inhabitants of the area to Indian tribes and to the federal government, and the established practice of government agencies toward the area;
  - ✦ (3) whether there is an element of cohesiveness manifested either by economic pursuits in the area, common interests, or needs of the inhabitants as supplied by that locality; and
  - ✦ (4) whether such lands have been set apart for the use, occupancy and protection of dependent Indian peoples.

# NM Gross Receipts Tax - Indian Issues

- ◆ A "**Member Indian**" is an Indian **living** within the Indian Country of the Indian Nation/Tribe/Pueblo **of** which he/she is an enrolled member.
- ◆ A "**Non-Member Indian**" is a member of a federally recognized Indian Nation/Tribe/Pueblo but living within the Indian Country of an Indian Nation/Tribe/Pueblo of which he/she is not an enrolled member.

# NM Gross Receipts Tax - Indian Issues

- ◆ **Receipts of "Qualifying Business" from transaction occurring within their Indian Country are exempt from NM gross receipts tax.**
- ◆ "Qualifying Business" is a business that:
- ◆ (a) is physically located within Indian Country of Indian Nation/Tribe/Pueblo; and
- ◆ (b) is 50% or more owned by individuals who are enrolled members of the Indian tribe within whose territory the business is located, provided that Indian spouse of an enrolled member is considered an enrolled member of that Indian tribe. Section 3.4.4.9 NMAC

# NM Gross Receipts Tax - Indian Issues

- ◆ **IF you are an (1) an "Indian Member"; or (2) a "Qualifying Business" and you are conducting business ONLY on your Indian Nation/Tribe/Pueblo lands, and ONLY with your Nation/Tribe/Pueblo or enrolled Members thereof you are NOT subject to NM gross receipts tax or NM gross receipts tax reporting requirements. \*\*\*This is a very narrow exemption. ("Crib Rule")**

# NM Gross Receipts Tax - Indian Issues

- ◆ IF you are an (1) an "Indian Member"; or (2) a "Qualifying Business" and you are conducting business ONLY on your Indian Nation/Tribe/Pueblo lands, BUT with non-Indians or non-member Indians you ARE subject to NM gross receipts tax and NM gross receipts tax reporting requirements on those transactions.

# NM Gross Receipts Tax - Indian Issues

- ◆ *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989) (allows concurrent severance (oil and gas) taxation by state and tribe within Indian Country).
- ◆ Non-Indians: *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976)
- ◆ Non-Member Indians: *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980)

# NM Gross Receipts Tax - Indian Issues

- ◆ IF you are an (1) an "Indian Member"; or (2) a "Qualifying Business" and your Nation/Tribe/Pueblo has entered into a Tax Cooperative Agreement with the State of New Mexico, you ARE subject to Nation/Tribe/Pueblo taxes and its reporting requirements.

# NM Gross Receipts Tax - Indian Issues

- ◆ **Case law** considers incidence of tax (who bears tax), federal preemption and interference with tribal self-government as precluding state taxation.
- ◆ **New Mexico State Statute and Regulations** regarding Preemption of Certain Transactions with Indian Nations/Tribes/Pueblos, members thereof and Qualifying Businesses.
- ◆ **New Mexico Bulletin** – Palace of the Governors, Indian Market, etc.
- ◆ **New Mexico Revenue Rulings**

# NM Gross Receipts Tax - Indian Issues

- ✦ **Doctrine of Federal Preemption:** the federal government's exclusive authority over relations with Indian Nations/Tribes/Pueblos may preempt state authority either by an explicit congressional statement or because the balance of federal, state, and tribal interests tips in favor of preemption (Indian education, timber & logging, licensed Indian traders, etc.).
- ✦ **Doctrine of Infringement on Tribal Sovereignty:** Indian sovereignty may prevent state authority from infringing on the right of Indian Nations/Tribes/Pueblos and members thereof to make their own laws and be ruled by them.

# NM Gross Receipts Tax - Indian Issues

- ◆ When a Tribe conducts business outside of Indian Country, a state may tax Tribe, unless exempted by Congress. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973).



# NM Gross Receipts Tax - Indian Issues

## ✦ Case Law

- ✦ *Arizona Dept. of Revenue v. Blaze Const. Co., Inc.*, 526 U.S. 32 (1999).
- ✦ *New Mexico Taxation and Revenue Dept. v. Laguna Industries, Inc.*, 855 P.2d 127 (N.M. 1993).
- ✦ *Bien Mur Indian Market Center, Inc. v. Taxation and Revenue Dept., State of N.M.*, 772 P.2d 885 (N.M.App. 1988).
- ✦ *Ramah Navajo School Bd., Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832 (1982) (federal preemption case, stating a "rigid rule" of state taxing powers in Indian Country does not exist).
- ✦ *Mescalero Apache Tribe v. O'Cheskey*, 625 F.2d 967 (10<sup>th</sup> Cir. 1980), cert. denied, 450 U.S. 959 (1981).
- ✦ *Eastern Navajo Industries, Inc. v. Bureau of Revenue*, 552 P.2d 805 (N.M.App. 1976), cert. denied, 430 U.S. 959 (1977).
- ✦ *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973).
- ✦ *O'Cheskey v. Hunt*, 512 P.2d 961 (N.M. 1973).

# NM Gross Receipts Tax - Indian Issues

- ◆ Receipts from selling tangible personal property or services (including construction services) or leasing property to (1) an Indian Nation/Tribe/Pueblo or (2) "Member Indian" thereof or (3) "Qualifying Business" **ON** the Indian Country **OF** the Indian Nation/Tribe/Pueblo or "Member Indian" or "Qualifying Business" thereof, including receipts by public utilities from sales of electricity, natural gas, water and telecommunication services **are not subject to the NM gross receipts tax.** Gross receipts for these transactions **are reportable to the State** by a non-exempt seller, but most importantly, are deductible.

# NM Gross Receipts Tax - Indian Issues

For sale of tangible personal property by any NM business: if the delivery is made in Indian Country and at least two of the following occurred in Indian Country of (1) the Indian/Nation/Tribe/Pueblo or (2) "Member Indian" or (3) "Qualifying Business" thereof, gross receipts tax is preempted: (i) sale was solicited in Indian Country; (ii) contract was entered into in Indian Country; or (iii) payment was made in Indian Country. Gross receipts for these transactions by a non-exempt seller are reportable, but most importantly, are deductible.

# NM Gross Receipts Tax - Indian Issues

## ◆ Federally Licensed Indian Traders

- The receipts of a federally licensed Indian trader, as defined in Sections 25 U.S.C. 261-264, from trading with an Indian tribe (or member) on that tribe's territory are exempt from NM gross receipts tax. Applies to property and services.
- Exemption applies if license required, even if no license issued to vendor.

# NM Gross Receipts Tax - Indian Issues

- ◆ **“Non-Member Indian” Business Located Inside Indian Country but Outside of Their Indian Country.**
- ◆ **Taxable Transactions (File CRS-1):**  
**Receipts from sales of property and/or services or leases:**
  - to non-Indians
  - “Non-Member Indians” (unless spouse is “Member Indian”) or
  - Indian Nation/Tribe/Pueblo other than one where you are located.

# **NM Gross Receipts Tax - Indian Issues**

- ◆ **Indian Business Located Outside of Indian Country.**
- ◆ **Taxable Transactions (File CRS-1):**  
**Gross receipts tax applies to sales of property and/or services or leases by your business.**  
**Note: Don't forget exemptions and deductions that apply to all vendors, including those pertaining to certain Indian transactions!**

# **Indian Nation/Tribe/Pueblo Gross Receipts Tax Ordinances**

- ◆ **Check to determine if Indian Nation/Tribe/Pueblo where you are transacting business has a Gross Receipts Tax Ordinance applicable to your business transactions.**

# Section H: NM Compensating Tax

- ◆ IF you are an (1) Indian Nation/Tribe/Pueblo; or (2) an "Indian Member"; or (3) a "Qualifying Business" and you are using property on your Indian Nation/Tribe/Pueblo lands, you are NOT subject to NM compensating tax or NM compensating tax reporting requirements.

# NM Compensating Tax

- ◆ Imposed on value of property purchased out of state for business use and brought into New Mexico, that would have been subject to NM gross receipts tax if purchased in NM.
- ◆ Applies to tangible personal property or service acquired using a NTTC and later used by buyer for personal use (beauty salon – shampoo).

# NM Compensating Tax

- ◆ Protects NM businesses from unfair competition.
- ◆ "Buyer pays."
- ◆ 5.125% on certain property used in New Mexico and 5% on certain services used in New Mexico

# NM Withholding Tax

- ◆ Every employer who withholds a portion of an employee's wages for payment of federal personal income tax must withhold New Mexico personal income tax and report it on the CRS-1 Form, unless New Mexico personal income tax is preempted by law.

# **NM Personal Income Tax and Gross Receipts Tax Are Two Distinct Tax Programs**

- ◆ **Persons who are self-employed and are not exempt from NM state personal income tax make estimated state income tax payments using the NM PIT-ES (NM Individual Estimated Tax Payment Voucher). They do not report withholding tax on their wages on the CRS-1 Form.**

# Thank You For Coming!!

- ◆ Please fill out evaluation form.
- ◆ Please let us know what other subjects you are interested in.