

Cite as Det. No. 93-317, 14 WTD 067 (1994).

BEFORE THE INTERPRETATION AND APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition)	<u>D E T E R M I N A T I O N</u>
For Refund of)	
)	No. 93-317
)	
. . .)	Registration No. . . .
)	FY. . ./Audit No. . . .

[1] RULE 192: INDIANS -- INDIAN TRIBES -- TRIBAL CORPORATIONS -- CORPORATIONS -- USE TAX. The fact that a corporation organized under the laws of the state of Washington is wholly owned by registered members of a federally recognized Indian tribe within Washington, does not imbue that corporation with the tax exempt status of a tribally chartered corporation.

[2] RULE 192: INDIANS -- CORPORATIONS -- USE TAX -- TRANSACTIONS WITHIN AN INDIAN RESERVATION. A Washington corporation that takes delivery of tangible personal property within an Indian reservation, or that receives services performed within an Indian reservation, is liable for retail sales tax on the value of the goods or services. If the corporation fails to pay the sales tax, it is liable for use tax on the value of the same goods or services.

Headnotes are provided as a convenience for the reader and are not in any way a part of the decision or in any way to be used in construing or interpreting this Determination.

NATURE OF ACTION:

A Washington corporation, wholly owned by enrolled members of an Indian tribe, appealed the assessment of use tax on consumables and capital assets because the corporation is exempt from Washington taxes since its owners are enrolled members of an Indian tribe, and because it took delivery of the goods within the boundaries of the Indian tribe's reservation.

FACTS:

Gray, A.L.J. -- The taxpayer is a Washington corporation. All of the taxpayer's shareholders are enrolled members of a Washington Indian tribe (the tribe). The taxpayer is not chartered by the tribe. The Department of Revenue (Department) audited the taxpayer for the period January 1, 1989 through September 30, 1992. The Department assessed the taxpayer use tax and audit interest which has been paid in full. The Department assessed the use tax on the value of certain items of tangible personal property, services and capital assets that the taxpayer purchased but for which the taxpayer did not pay retail sales tax. The taxpayer appealed to the Department's Interpretation & Appeals Division.¹

The tribe's reservation is a federally recognized reservation. The taxpayer arranged for delivery of the goods to a location within the reservation. At least some of the services were performed outside the tribe's reservation. The taxpayer believed that the purchases were exempt from Washington's retail sales tax because its shareholders were enrolled members of the tribe and because delivery of the goods occurred within the tribe's reservation.

The taxpayer argued that:

[it] is constitutionally protected and is entitled to do business with the [the tribe] on its reservation without the imposition of use taxes or sales taxes by the state of Washington.

The taxpayer cited Eastern Navajo Industries v. New Mexico Bureau of Rev., 552 P.2d 805 (1976), IRS Rev Rul 81-295, and IRS Letter Ruling 9122072 to support this argument. The taxpayer cited numerous other cases involving challenges to the imposition of state taxes on non-Indian businesses doing business with Indian tribes; e.g., White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980).

ISSUES:

Whether the Department may assess use tax against a Washington corporation:

- a. when the shareholders of the corporation are registered members of an Indian tribe, and
- b. where delivery of the goods to the corporation occurred within the Indian tribe's reservation?

¹Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410.

DISCUSSION:

[1] The Department has previously held that a state corporation, even if owned by Indians, is subject to B&O tax and sales tax. Determination No. 89-121, 7 WTD 225 (1989). In that particular case, the corporation was chartered by an Indian tribe and also registered as a corporation with the state. The Department adheres to that position. Eastern Navajo Industries v. New Mexico Bureau of Rev., supra, is not persuasive and would appear to constitute a major exception to the general rule that a corporation is an entity separate from its shareholders.

Eastern Navajo Industries was a New Mexico corporation that appealed a tax assessment against it for building houses on part of the Navajo Reservation for the Navajo Housing Authority. The housing authority was created and organized under Navajo Indian tribal ordinances. Fifty-one percent of the stock in Eastern Navajo Industries was owned by individual Navajo Indians.

The New Mexico Court of Appeals relied heavily upon the fact that the shareholders of Eastern Navajo Industries bought stock with loans from the federal government under a program to facilitate Indian self-help and that funds used by the Navajo Housing Authority to form the corporation were obtained from the Indian Business Development Fund. The New Mexico Court also relied upon 25 C.F.R. § 80.12, a regulation that administered the Indian Business Development Fund. It provided:

80.12 Indian groups. Any group of eligible individual Indians which may legally engage in private enterprise may apply for a grant. This includes Indian corporations organized under Federal or State law and, if authorized to enter contracts on behalf of an Indian tribe, those organizations commonly known as "Tribal enterprises," which are economic enterprises. However, for Indian corporations, fifty-one percent [51%] or more of the stock must be owned by eligible Indians or by an Indian tribe.

The New Mexico Court concluded that federal regulations "defining federal loan policy for Indian enterprises and the Navajo Tribal Code" specifically included Indian enterprises incorporated under state law without a corresponding loss of "Indianness." Eastern Navajo Industries, 552 P.2d at 808. Under New Mexico law, courts may disregard the separateness of a corporation from that of its shareholders when necessary for the interests of the public or for the protection or enforcement of the rights of membership. Eastern Navajo Industries, 552 P.2d at 809. Then, using the federal regulations and a public policy argument for disregarding the corporation, the Court said:

25 C.F.R., § 80.12, *supra*, explicitly requires consideration of the ethnicity of the stockholders of corporations who would qualify under its terms: ". . . for Indian corporations, fifty-one percent [51%] or more of the stock must be owned by eligible Indians or by an Indian tribe." Under this federal standard, taxpayer is an Indian corporation.

To disregard the ethnicity of taxpayer's shareholders would be to fail to recognize the specific directives of the Indian Business Development Fund Act. That is to say we must look beyond the taxpayer's corporate form to the fact that 51% of its stock is owned by individual Navajo Indians. Consequently, there is no alternative but to view the assessment by the Bureau of Revenue as a tax upon Indians doing business upon an Indian land or reservation.

Eastern Navajo Industries, 552 P.2d at 809. The Court held that Eastern Navajo Industries was an "Indian entity, according to federal definition," and that the assessment against the corporation accordingly should be cancelled. Eastern Navajo Industries, 552 P.2d at 810. A dissenting opinion in the case criticized the majority for declaring that an "Indian corporation," incorporated under New Mexico state law, was exempt from the gross receipts tax because the payment of the tax was a severe economic burden on an Indian tribe, and said the decision was unsupported by authority. Eastern Navajo Industries, 552 P.2d at 811.

We believe that Eastern Navajo Industries should be distinguished from the facts presented by the taxpayer. The taxpayer presented no facts that the taxpayer was incorporated "at the instigation and under the auspices of" the tribe, or that the tribe could have incorporated a tribal corporation during the years covered by the audit period, or that any of the stock purchases by the shareholders of the taxpayer were made possible through loans from the federal government, such as was done through the Indian Business Development Fund in Eastern Navajo Industries. The decision in Eastern Navajo Industries, *supra*, was criticized for the same reasons in Airvator, Inc. v. Turtle Mountain Mfg. Co., 329 N.W.2d 596, although the issue in that case was whether a state court had jurisdiction over a corporation in which 51% of the stock was owned by Indian shareholders.

The taxpayer is simply a Washington corporation. The fact that the shareholders are registered members of an Indian tribe does not make the taxpayer like a tribal corporation. As a general rule, corporations have a separate legal identity. Seattle International Corp. v. Commerce and Industry Ins. Co., 24 Wn. App. 108, 600 P.2d 612 (1979). This is not an absolute rule:

The corporate entity is disregarded and liability assessed against shareholders in the corporation when the corporation has been intentionally used to violate or evade a duty owed to another.

Morgan v. Burks, 93 Wn.2d 580, 585, 611 P.2d 751 (1980).

The taxpayer also argued that IRS Rev Rul 81-295 supported its position. A revenue ruling is an official interpretation of the internal revenue laws, related statutes, tax treaties, and regulations applying the law to a set of facts, but it is not binding on the courts and is also limited in that a taxpayer must determine for himself whether the facts in a particular revenue ruling are "substantially the same" as those set forth in the revenue ruling. Saltzman, IRS Practice and Procedure (1981 ed), 3-16 to 3-19.

IRS Rev Rul 81-295 held that a federally chartered Indian tribal corporation shares the same tax status as the Indian tribe and is not taxable on income from activities carried on within the boundaries of the reservation. IRS Rev Rul 81-295 does not assist the taxpayer here because the revenue ruling is limited to "federally chartered Indian tribal corporations." The taxpayer is not a federally chartered Indian tribal corporation.

We were unable to locate a copy of IRS Letter Ruling 9122072, but the taxpayer represented that the letter ruling said that the same logic contained in the IRS Rev Rul 81-295 should be applied to "state chartered tribal corporations; i.e., a tribal corporation chartered under state law is exempt from Federal taxation." With regard to a letter ruling, "only the taxpayer to whom the ruling was issued may rely upon it. Taxpayers other than the one to whom the ruling was issued simply may not rely upon a letter ruling." Saltzman, IRS Practice and Procedure (1981 ed), 3-45.

The taxpayer's petition is denied on the issue of whether it is exempt from use tax because of the identity of its shareholders.

[2] The second issue is whether the taxpayer is exempt from the use tax because delivery of the goods took place within the tribe's reservation. WAC 458-20-192 (Rule 192) provides that:

Sales to persons other than Indians are subject to the retail sales tax irrespective of where delivery or rendition of services takes place.

It is undisputed that the taxpayer is not a tribal corporation, and we have held above that the identity of the taxpayer's shareholders does not make the taxpayer an Indian corporation. The taxpayer is a "person other than an Indian" for purposes of

Rule 192. The fact that some of the services were performed, or that the goods were delivered, within the Indian tribe's reservation is inconsequential. The use tax is due. The taxpayer's petition is denied on this issue.

DECISION AND DISPOSITION:

The taxpayer's petition is denied.

DATED this 27th day of December, 1993.