

Cite as Det No. 10-0307R, 31 WTD 7 (2012)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Correction of)	<u>FINAL</u>
Assessment of)	<u>D E T E R M I N A T I O N</u>
)	
)	No. 10-0307R
...)	
)	Registration No. . . .
)	Document No. . . . /Audit No. . . .
)	Docket No. . . .

RULE 192: RETAIL SALES TAX – TAX EXEMPTION – INDIAN OWNED CORPORATIONS. Rule 192(5)(d) provides a limited tax exemption on business conducted by an Indian owned corporation on the tribal lands of the corporation’s enrolled member. The tax exemptions set forth in Rule 192(5)(a) and (b) are only applicable to specified activities of Indians and Indian tribes and do not apply to Indian owned corporations.

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.

Eckholm, A.L.J. – The taxpayer, an Indian owned corporation operating as a general contractor, seeks reconsideration of Det. No. 10-0307. We affirm the holding in Det. No. 10-0307, that the taxpayer’s purchase of capital assets and routing delivery of those assets through Indian country to the taxpayer’s plant outside Indian country does not qualify for exemption under WAC 458-20-192 (Rule 192), and deny the petition.¹

ISSUE

Do the Rule 192(5)(a) and (b) exemptions for retail sales tax and use tax apply to an Indian owned corporation qualifying under Rule 192(d)?

FINDINGS OF FACT

The facts as set out in Det. No. 10-0307 are restated below for the reader’s convenience:

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

[Taxpayer] is a general contractor The Audit Division (Audit) of the Department of Revenue (Department) conducted a compliance audit of the taxpayer's business activities for excise tax purposes for the period January 1, 2005 through December 31, 2008. Audit issued a tax assessment to the taxpayer for \$. . ., consisting of: \$. . . deferred retail sales tax and/or use tax for capital asset purchases of heavy construction equipment and motor vehicles; \$. . . motor vehicle tax; and \$. . . interest. The assessment remains unpaid.

The taxpayer appeals the assessment asserting that the capital asset purchases are exempt from retail sales tax pursuant to Rule 192(5). The taxpayer claims the exemption is allowable because: the capital assets were delivered in Indian country; delivery was to the tribal lands of the enrolled member who is the majority owner of the corporation; and the capital assets were partially used in Indian country. Audit responds that routing the purchased capital assets through the [tribal lands of the enrolled member] where the taxpayer has no business presence does not constitute delivery in Indian country; the capital assets were not purchased for, or delivered to, a project in Indian country; and the taxpayer is headquartered in [a city outside Indian country in] Washington, and therefore, does not conduct its business in Indian country.

The taxpayer's plant and business offices are located in [a city outside Indian country in] Washington. The corporation is owned by [a] family. Fifty-two percent of the corporate shares are owned by [a family member who is] an enrolled [tribal] member. [Other family members] own the remaining shares. The taxpayer does not have any offices or employees located on the [tribal] lands [of the enrolled member]. During the audit period, the taxpayer made capital asset purchases totaling \$. . . . When purchasing the equipment, the taxpayer provided the seller the address for a parking lot on [tribal] land [of the enrolled member] in . . . Washington, and directed the seller to deliver the equipment by one of three methods:

- The taxpayer directs the equipment seller's shipper to transport the equipment to a parking lot on [tribal] land [of the enrolled member], then the same shipper, under contract now by the taxpayer, is directed to immediately transport the equipment to the taxpayer's plant in [a city outside tribal lands] (this is the most frequently used method);
- The taxpayer directs the equipment seller or the seller's shipper to transport the equipment to a parking lot on [tribal] land [of the enrolled member], off-load the equipment, and then the taxpayer contracts with a different shipper to transport the equipment to its . . . plant [in a city outside tribal lands]; or
- The taxpayer directs the equipment seller or seller's shipper to transport the equipment to a parking lot on [tribal] land [of the enrolled member], and then one of the taxpayer's employees meets the seller or shipper in the parking lot and transports the equipment to its . . . plant [in a city outside tribal lands].

The parking lot on the [tribal] land [of the enrolled member] in . . . Washington, is [a considerable number of] miles from the taxpayer's . . . plant [in a city outside tribal lands]. None of the capital assets were specifically purchased for work on a . . . project [for the tribe of the majority shareholder] or other Indian project. The [vast] majority of the taxpayer's work . . . is on non-Indian contracts. The majority of the taxpayer's Indian contracts are with [a] tribe [other than the tribe on whose lands Taxpayer's equipment is delivered]. At the hearing, the taxpayer referenced [a very small number of] contracts [with the tribe on whose lands Taxpayer's equipment is delivered] during the audit period and indicated that its work on those contracts was a small percentage of its total contracts for the audit period.

At the hearing the taxpayer was forthright and candid about the capital asset purchases. The taxpayer indicated that for years they did not attempt to take advantage of the Rule 192 tax exemptions but were advised by their accountants that they could claim the exemptions if they took delivery [on the tribal lands of the enrolled member]. The taxpayer indicated if they had not received this advice from their accountants, they would not have incurred the expense of routing delivery through [those tribal lands].

Det. No. 10-0307 held that the taxpayer was not eligible for exemption from tax under Rule 192:

The taxpayer asserts that its purchase and delivery of the equipment to the enrolled member's tribal lands, and partial use of the equipment on projects on other tribal lands (and to a limited extent on the [tribal] lands [of the enrolled member]), qualifies the purchases for exemption from retail sales tax under Rule 192(5)(a)(i). Rule 192(5)(a)(i) applies to "Indians" and "Indian tribes." Indian owned corporations are not encompassed within the definition of "Indian." *See* Rule 192(2)(a), set forth above. The taxpayer's capital asset purchases are not exempt from retail sales tax under Rule 192(5)(a)(i).

The exemption available to the Indian owned corporation is set forth in Rule 192(5)(d). Rule 192(5)(d) does not contain an exemption from retail sales tax for purchases of tangible personal property similar to that set forth in Rule 192(5)(a)(i). Rule 192(5)(d) exempts "business conducted in Indian country" and is limited to business activity conducted on the enrolled member's tribal lands. The taxpayer's purchase of capital assets for use in its contracting business, and routing delivery of those assets through Indian country to the taxpayer's plant outside Indian country, does not constitute "business conducted in Indian country" exempt from tax under Rule 192(5)(d).

The taxpayer disagrees with our conclusion in Det. No. 10-0307 that Rule 192(5)(a) and (b) apply only to Indians and tribes and do not apply to Indian owned corporations. The taxpayer asserts:

Det. No. 10-0307 holds that the definition in subsection (5)(d) applies only to section (5), but not its other subsections. This is in error. Subsection (5)(d), like section (5), does not limit its application to any particular tax and therefore applies, like section (5), to the use

tax. Subsection (5)(d) is a definition that applies equally to all sections in the rule. If its application was limited merely to section (5), it would state so, but it does not.

This is consistent with the rules of statutory construction ... Under the rules of statutory construction, it must be assumed that the Legislature intended exactly what it said in creating a statute and effect must be given to all of the language:

In construing a statute, we seek to ascertain and give effect to the legislature's intent. *Duke v. Boyd*, 133 Wn.2d 80, 87, 942 P.2d 351 (1997). When statutory language is clear, we assume that the legislature "meant exactly what it said" and apply the plain language of the statute. *Duke*, 133 Wn.2d at 87 ... In interpreting and construing a statute, we must give effect to all of the language, rendering no portion meaningless or superfluous. *City of Seattle v. State*, 136 Wn.2d 693, 698, 965 P.2d 619 (1998).

Stroh Brewery Company v. Department of Revenue, No. 24944-8-II, (Slip Op., January 12, 2001).

In writing WAC 458-20-192(5), the Department "meant what it said" by noting that the exclusion applies to "all taxes" including the use tax. Det. No. 10-0307 renders section (5) superfluous by not applying the definition of subsection (5)(d) to the use tax. In addition, Det. No. 10-0307 enlarges subsection 5(d) by denying its application to any other parts of section (5), when the subsection itself does not include this limitation. Accordingly, Det. No. 10-0307 both renders key phrases superfluous and enlarges the rule. Either way, this is not consistent with the language of the rule.

Supplement to Reconsideration Petition,² dated December 28, 2010, at page 2.

Audit submitted a response providing, in summary:

. . . it is our opinion that sales and use tax is due on the purchase of the vehicles and equipment. The mere driving through a parking lot on the [tribal lands of the enrolled member] with equipment purchased on a flatbed trailer, in no way constitutes delivery on Indian land, and it is absurd to think so. There are no references to *drive by* in any RCW or WAC with regard to equipment delivery. In addition, the headquarters of the taxpayers is located in [a city outside tribal lands in] Washington, which is not located in Indian country, which is a fair distance from the [tribal lands of the enrolled member]. Sales and use tax is due and payable on all vehicles purchased which are routed through the [tribal lands of the enrolled member].

² Following the deadline for submission of supplemental information in this matter, the Department received correspondence from an attorney entitled, "Supplemental Petition for Reconsideration of Det. No. 10-0307". The attorney was not previously identified as a taxpayer representative in this matter but indicates he had been engaged as a consultant on reconsideration. In summary, the supplemental petition argues that the treatment of Indians and Indian owned corporations under Rule 192 is identical.

ANALYSIS

In *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 172, 93 S.Ct. 1257 (1973), the U. S. Supreme Court articulated the tradition of tribal sovereignty against which issues of a state's authority over Indian tribes, their members, and activity in Indian country must be considered. The court said:

It must always be remembered that the various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty long predates that of our own Government. Indians today are American citizens. They have the right to vote, to use state courts, and they receive some state services. But it is nonetheless still true, as it was in the last century, that "the relations of the Indian tribes living within the borders of the United States . . . [is] an anomalous one and of a complex character. . . . They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided." *United States v. Kagama*, 118 U.S. at 381-382.

(Footnotes omitted.) With respect to excise taxes specifically, the U.S. Supreme Court has held that the Constitution and laws of the United States prohibit a state from imposing an excise tax where the legal incidence of the tax is on the Indian tribe or its members for transactions occurring within the tribe's reservation. *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 453, 115 S.Ct. 2214 (1995); *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 480-81, 96 S.Ct. 1634 (1976). Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 147-8, 93 S.Ct. 1267 (1973). Rule 192 embodies these principles. In Washington, "[e]xcept for treaty fishery activity, Indians conducting business outside of Indian country are generally subject to tax (e.g., the B&O, the public utility tax, retail sales tax)." Rule 192(6)(a).

Tax treatment of Indian owned corporations conducting business in Indian country – Rule 192(5)(d).

In response to changing circumstances the Indian sovereignty doctrine has undergone considerable evolution since first articulated by Chief Justice Marshall in *Worcester v. Georgia*, 31 U.S. 515 (1832). One question the courts have not settled is whether a state must treat a state-chartered corporation entirely owned by Indians the same as an Indian for purposes of state taxation within the reservation of the owners' tribe. The U.S. Supreme Court has not directly addressed the question, nor has any other court whose decisions are binding on Washington directly addressed the question. In jurisdictions where the question has been addressed there is a

split of opinion.³ The Department promulgated its policy regarding the tax treatment of Indian owned corporations conducting business in Indian country in Rule 192(5)(d), which it added to Rule 192 as part of rule amendments made in 2001. Subsection (5)(d) provides:

(d) Corporations or other entities owned by Indians. A state chartered corporation comprised solely of Indians is not subject to tax on business conducted in Indian country if all of the owners of the corporation are enrolled members of the tribe except as otherwise provided in this section. The corporation is subject to tax on business conducted outside of Indian country, subject to the exception for treaty fishery activity as explained later in this rule. Similarly, partnerships or other entities comprised solely of enrolled members of a tribe are not subject to tax on business conducted in Indian country. In the event that the composition includes a family member who is not a member of the tribe, for instance a business comprised of a mother who is a member of the Chehalis Tribe and her son who is a member of the Squaxin Island Tribe, together doing business on the Chehalis reservation, the business will be considered as satisfying the "comprised solely" criteria if at least half of the owners are enrolled members of the tribe.

The adoption of subsection (5)(d) was a policy choice of the Department and is not required by federal law or the Indian sovereignty doctrine. The adoption of subsection (5)(d) was actually a change in policy for the Department. Prior to the 2001 amendments to Rule 192, the Department's policy in regards to Indian owned corporations conducting business in Indian

³ See C. Joseph Lennihan, "State Taxation in Indian Country: When is a Tribal Corporation 'Indian' ", 17-JUL J. Multistate Tax'n 18 at 4-6, 2007 WL 2035142 (2007); *United States v. State Tax Comm'n*, 505 F.2d 633 (5th Cir. 1974) (alternative holding), held that a state-chartered corporation wholly owned by a tribe was taxable for reservation activities. *Eastern Navajo Indus., Inc. v. Bureau of Revenue*, 89 N.M. 369, 552 P.2d 805 (N.M. Ct. App.), cert. denied, 90 N.M. 7, 558 P.2d 619 (1976), cert. denied, 430 U.S. 959 (1977), held that a state-chartered corporation that was 51% Indian owned should be treated the same as an Indian for purposes of state taxing jurisdiction within a reservation. *Baraga Products, Inc. v. Commissioner of Internal Revenue*, 971 F. Supp. 294 (W.D. Mich. 1997), dealt with the state tax status of a non-Indian corporation owned by a tribal member and operating completely within the reservation. The federal court in Michigan held that the corporation could not take on the form of its shareholder in order to reduce its tax liability. The court opined, 971 F. Supp. at 296: "because a corporation is a legal fiction owing its existence to state law, [plaintiff corporation] is . . . not the legal equivalent of a member of the tribe." In *Pourier v. S.D. Dept. of Revenue*, 658 N.W.2d 395 (2003), the Supreme Court of South Dakota rejected the *Baraga* analysis, and held that a corporation formed under state law and owned by the tribe or an enrolled tribal member residing on the Indian reservation and doing business on the reservation for the benefit or reservation Indians is an enrolled member for the purpose of protecting tax immunity. In *Flat Center Farms, Inc. v. Montana*, 310 Mont. 206, 49 P.3d 578 (2002), cert. denied 537 U.S. 1046, 123 S.Ct. 622 (2002), the Supreme Court of Montana held that Montana's corporation license tax could not be imposed on an Indian-owned, state-chartered corporation which did business entirely within a reservation. The court noted the state's argument that the corporation was an entity distinct from its shareholders, but found the distinction not determinative. See also Rev. Rul. 94-16, 1994-1 C.B. 19 (1994), in which the IRS took the position that although a tribal-chartered corporation is exempt from federal income tax with respect to operating a commercial business, the tribe is not exempt when it operates a business through an ordinary state-chartered corporation. See also *J&M Smokehouse, Inc. v. Department of Rev.*, BTA Docket No. 45331 (1996), in which the Board of Tax Appeals opined that if the question of a tribe's tax immunity cannot be made to turn on the particular form in which the tribe chooses to conduct its business, logic would seem to compel the conclusion that the choice is also irrelevant to the question of an individual Indian's tax immunity. The BTA's decision, however, was based on construction of a treaty.

Country was addressed in published Department determinations. Those determinations held that Indians who chose the state-chartered corporate form of business organization abandoned their right to be exempt from privileges granted them as Indian persons under Rule 192, even if the corporation was entirely owned by Indians and also chartered by its owners' tribe. Det. No. 93-317, 14 WTD 67 (1994); Det. No. 89-121, 7 WTD 225 (1989); Det. No. 88-324, 6 WTD 309 (1988). There are no published determinations addressing the issue since the adoption of subsection (5)(d).

Applicable principles of statutory interpretation.

Rules of statutory construction apply to administrative rules and regulations. *State v. Burke*, 92 Wn.2d 474, 478, 598 P.2d 395 (1979). If an administrative rule or regulation is clear on its face, its meaning is to be derived from the plain language of the provision alone. *Cannon v. Dep't of Licensing*, 147 Wn.2d 41, 56, 50 P.3d 627 (2002). We look no further than the plain language of a facially unambiguous administrative regulation. *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 807, 16 P.3d 583 (2001). A regulation is unambiguous if it is susceptible to one reasonable interpretation after considering the entire statutory scheme, including related regulations. *Dep't of Labor & Indus. v. Gongyin*, 154 Wn.2d 38, 45, 109 P.3d 816 (2005). "Courts may not read into a statute matters that are not in it and may not create legislation under the guise of interpreting a statute." *Kilian v. Atkinson*, 147 Wn.2d 16, 21, 50 P.3d 638 (2002)(footnote omitted).

A specific statutory provision prevails over a general provision. *Pannell v. Thompson*, 91 Wn.2d 591, 597, 589 P.2d 1235 (1979). Courts give preference to the more specific and more recently enacted statute. *Gorman v. Garlock, Inc.*, 155 Wn.2d 198, 210, 118 P.3d 311 (2005); *Tunstall v. Bergeson*, 141 Wn.2d 201, 211, 5 P.3d 691, 697 (2000). Regulatory definitions apply and any undefined terms are given their ordinary definition as defined in the dictionary. *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 423, 120 P.3d 56 (2005). "[R]egulations are interpreted as a whole, giving effect to all the language and harmonizing all provisions." *Cannon*, 147 Wn.2d at 57. We are also compelled to "avoid readings of statutes that result in unlikely, absurd, or strained consequences." *Glaubach v. Regence Blueshield*, 149 Wn.2d 827, 833, 74 P.3d 115 (2003).

There are special statutory construction canons applicable in Indian law. The U.S. Supreme Court has long held that statutes are to be construed liberally in favor of the Indians. *DeCoteau v. District County Court*, 420 U.S. 425, 447, 95 S.Ct. 1082, 1094 (1975). The Department has incorporated this canon of statutory construction in Rule 192 in regards to statutes and treaties. Specific to statutes, the rule provides that "[s]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." Rule 192(1)(b)(ii). In applying this canon over the years, the U.S. Supreme Court has clearly stated the limits of this canon of liberal construction:

The canon of construction regarding the resolution of ambiguities in favor of Indians, however, does not permit reliance on ambiguities that do not exist; nor does it permit disregard of the clearly expressed intent of Congress.

South Carolina v. Catawba Indian Tribe, Inc., 476 U.S. 498, 506, 106 S.Ct. 2039, 2044 (1985); see *DeCoteau*, 420 U.S. 425 at 447; *Oregon Dep't of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 774, 105 S.Ct. 3420, 3432 (1985); *Andrus v. Glover Construction Co.*, 446 U.S. 608, 619, 100 S.Ct. 1905, 1911 (1980).

Rule 192(5)(d)'s Exemption for Indian owned corporations or other entities.

As summarized above, the taxpayer disagrees with our conclusion in Det. No. 10-0307 that the exemptions set forth in Rule 192(5)(a) and (b) apply only to Indians and tribes and do not apply to Indian owned corporations. The taxpayer asserts that subsection (5)(d) is a definitional provision to be applied to the exemptions contained in subsections (5)(a) and (b). The taxpayer also asserts that the Department erred in concluding that Rule 192(5)(d) does not apply to use tax. The taxpayer misinterprets our holding and Rule 192. We did not conclude in Det. No. 10-0307 that subsection (5)(d) does not apply to use tax; we concluded that the retail sales tax and use tax provisions as set forth in (5)(a) and (b) only apply to Indians and tribes and do not apply to Indian owned corporations. The taxpayer is correct that subsection (5)(d) defines Indian owned corporations, but it does so to define the Indian owned entity that qualifies for the exemption set forth in subsection (5)(d), i.e., that Indian owned corporations are exempt from tax on "business conducted in Indian country." If we review the language of Rule 192(5) in light of the principles of statutory interpretation set forth above, it is evident that subsection (5)(d) is a specific, narrow exemption from tax applicable only to Indian owned corporations conducting business on the tribal lands of the enrolled member.

Rule 192(5) provides:

(5) Enrolled Indians in Indian country. Generally. The state may not tax Indians or Indian tribes in Indian country. For the purposes of this rule, the term "Indian" includes only those persons who are enrolled with the tribe upon whose territory the activity takes place and does not include Indians who are members of other tribes. An enrolled member's spouse is considered an "Indian" for purposes of this rule if this treatment does not conflict with tribal law. This exclusion from tax includes all taxes (e.g., B&O tax, public utility tax, retail sales tax, use tax, cigarette tax). If the incidence of the tax falls on an Indian or a tribe, the tax is not imposed if the activity takes place in Indian country or the activity is treaty fishing rights related activity (see subsection (6)(b) of this rule). "Incidence" means upon whom the tax falls. For example, the incidence of the retail sales tax is on the buyer.

As the title to this section indicates, it sets forth generally the taxation of enrolled Indians in Indian country. The umbrella statement that, "[t]he state may not tax Indians or Indian tribes in Indian country," is a requirement of federal law and tribal sovereignty, as we have explained above. Section (5) goes on to provide:

- that an Indian⁴ includes only those persons who are enrolled with the tribe upon whose territory the activity takes place;
- that an Indian does not include Indians who are members of other tribes;
- that an Indian includes an enrolled member's spouse, if not in conflict with tribal law;
- that the exclusion from tax includes all taxes;
- that if the incidence of the tax falls on an Indian or a tribe, the tax is not imposed if the activity takes place in Indian country or the activity is treaty fishing rights related activity (see subsection (6)(b) of the rule).

Subsections (5)(a) and (b) of Rule 192 go on to further define the restriction on the state's ability to tax Indians and tribes in Indian country. Specific to the imposition of the retail sales tax and use tax, the rule provides:

(a)(i) **Retail sales tax - tangible personal property - delivery threshold.** Retail sales tax is not imposed on sales to *Indians* if the tangible personal property is delivered to the member or tribe in Indian country or if the sale takes place in Indian country. For example, if the sale to the member takes place at a store located on a reservation, the transaction is automatically exempt from sales tax and there is no reason to establish "delivery."

(ii) **Retail sales tax - services.** The retail sales tax is not imposed if the retail service (e.g., construction services) is performed for the *member or tribe* in Indian country. In the case of a retail service that is performed both on and off Indian country, only the portion of the contract that relates to work done in Indian country is excluded from tax. The work done for *a tribe or Indian* outside of Indian country, for example road work that extends outside of Indian country, is subject to retail sales tax.

(b) **Use tax.** Use tax is not imposed when tangible personal property is acquired in Indian country *by an Indian or the tribe* for at least partial use in Indian country. For purposes of this rule, acquisition in Indian country creates a presumption that the property is acquired for partial use in Indian country.

(Emphasis added.) Subsections (a) and (b) are specific to Indians and tribes. Subsection (d) is the tax exemption for Indian owned corporations or other entities adopted by the Department in 2001. As discussed earlier, subsection (5)(d) embodies a policy choice by the Department. This subsection sets forth the tax exemption available to Indians when they conduct business through a state chartered corporation, partnership or other entity. Subsection (5)(d) is appropriately contained in section 5 of Rule 192, which pertains to enrolled Indians in Indian country *generally*. Subsection (5)(d) pertains to the taxation of enrolled Indians in Indian country *specific* to the circumstance when enrolled Indians choose to conduct business through a qualifying corporation or other entity.

⁴ Rule 192(2) defines "Indian" as follows:

- (a) "Indian" means a person on the tribal rolls of an Indian tribe. A person on the tribal rolls is also known as an "enrolled member" or a "member" or an "enrolled person" or an "enrollee" or a "tribal member."

Rule 192(5)(d) defines a qualifying Indian owned corporation or other entity as follows:

- a state chartered corporation, partnership or other entity;
- owned solely by Indians where either:
 - all the owners are enrolled members of the tribe; or
 - the corporate ownership includes a family member who is not a member of the tribe, and at least half of the owners are enrolled members of the tribe.

Rule 192(5)(d)'s exemption from tax for a qualifying Indian owned corporation or other entity:

- is limited to business conducted on the enrolled member's tribal lands⁵; and
- does not include business conducted outside of the enrolled member's tribal lands, subject to the exception for treaty fishery activity as explained later in the rule.

In applying the principles of statutory construction set forth above, it is apparent that subsection (5)(d) is a specific exemption for Indian owned entities as those entities are defined within. The language of subsection (5)(d) is not ambiguous. The provision clearly specifies the activity subject to tax exemption: business conducted in Indian country. If subsection (5)(d) were simply a definition, as suggested by the taxpayer, the limitation that the exemption applies to business conducted in Indian country, and the tandem limitation that the exemption does *not* apply to business conducted outside of Indian country, would be rendered superfluous because section (5) already contains those limitations. The Department did not add "Indian owned entities" to the definition of "Indian"⁶ when it amended Rule 192, but instead chose to set forth the exemption for those entities in subsection (5)(d). If the Department had intended to treat Indian owned entities exactly the same as Indians, it could have amended the meaning of "Indian" set forth in section (5), as summarized above.

We may not read words into the rule where they do not exist under the guise of interpretation. *Kilian*, 147 Wn.2d at 20. The exemption contained in subsection (5)(d) is more specific than the general exemption pertaining to Indians and tribes contained in section (5) and subsections (5)(a) and (b). In addition, subsection (5)(d) was enacted more recently than the other provisions. The more specific and recently enacted provision is given preference if there is any perceived conflict among the provisions. *Gorman.*, 155 Wn. 2d at 210; *AOL, LLC v. Dep't of Revenue*, 149 Wn. App. 533, 549, 205 P.3d 159 (2009). The canon of statutory construction requiring provisions to be construed liberally in favor of Indians does not require an interpretation in conflict with the plain meaning of the language employed. "A canon of construction is not a license to disregard clear expressions of tribal and congressional intent." *Dep't of Game v. Puyallup Tribe, Inc.*, 86 Wn.2d 664, 673, 548 P.2d 1058 (1976) quoting *DeCoteau v. District County Court*, 420 U.S. 425, 447, 95 S.Ct. 1082, 1094 (1975).

As we identified in Det. No. 10-0307, the inquiry is whether the taxpayer's method of delivery of capital assets constitutes "business conducted in Indian country."

⁵ As explained in Det. No. 10-0307, the exemption in Rule 192(5)(d) for business conducted in Indian country is limited to business conduct on the enrolled member's tribal lands.

⁶ As recognized in Det. No. 10-0307, the Department also did not add Indian owned corporations and other entities to the definition of "Indian" set forth in Rule 192(2)(a).

Business conducted in Indian country.

The term “business conducted” is not defined in Rule 192. “Business” is defined in Title 82.04 RCW (business and occupation (B&O) tax) as including:

. . . all activities engaged in with the object of gain, benefit, or advantage to the taxpayer or to another person or class, directly or indirectly.

RCW 82.04.140. “Engaging in business” is defined as:

. . . commencing, conducting, or continuing in business and also the exercise of corporate or franchise powers as well as liquidating a business when the liquidators thereof hold themselves out to the public as conducting such business.

RCW 82.04.150.

In *Budget Rent-a-car, Inc. v. Dep’t of Revenue*, 81 Wn.2d 171, 173, 500 P.2d 764 (1972), the Supreme Court applied the above definitions in reviewing whether the Department correctly imposed B&O tax on Budget Rent-a-car’s (Budget’s) sales of late-model automobiles back to the dealers from which they were originally purchased. The issue was whether the sales were “casual or isolated sales . . . made by a person who is not engaged in the business of selling the type of property involved,” and therefore exempt from B&O tax. *See* RCW 82.04.040(2); WAC 458-20-106. The court found that in turning over virtually all of its rental cars, regularly and in the ordinary course of business, Budget was engaged in the “business” (as defined by RCW 82.04.140) of selling a particular type of property as an important phase of its business activities. *Budget Rent-a-car*, 81 Wn.2d at 174. The court concluded that:

... under RCW 82.04.140, the regular sale of all rental automobiles constituting as they do an integral part of the taxpayer's business, “with the object of . . . advantage to the taxpayer”, by statutory definition, puts the taxpayer in the “business” of selling the items, and, therefore, within the terms of the statute levying the tax.”

Id. at 176. Though the issue in *Budget Rent-a-car* involved the determination of whether the sales at issue were “casual or isolated” sales, the court’s interpretation of the term “business” in reaching its conclusion is instructive. The court applied the definition of “business” contained in RCW 82.04.140 in finding that the taxpayer’s sale of the cars was a regular, important phase of its business activities and integral part of its business. The circumstances here are different. The taxpayer frankly stated that the only reason it routes delivery through [the tribal lands of the enrolled member, a considerable distance] from its . . . plant [outside of tribal lands], is to avoid paying the retail sales tax. The taxpayers stated that they have no business offices on [tribal] lands [of the enrolled member] and that the purchase and delivery of the equipment and vehicles were not for the purpose of performing a contract on [the tribal] land [of the enrolled member]. [The majority shareholder] has a post office box on the tribal lands that [was] obtained to facilitate bidding projects with [tribe on whose lands taxpayer’s equipment was delivered] but

that the post office box address is not a business address for the taxpayer. The taxpayer stated that in order to have a location address on [tribal] lands [of the enrolled member] to provide to the seller for delivery of the equipment and vehicles, they provide the address of the . . . tribal business offices parking lot, even though the taxpayer has no business location at, or relationship to, those offices.

We find that the taxpayer's purchase and routed-delivery of the capital assets during the three year audit period is not a regular or integral part of the taxpayer's construction business, and does not fall within the definition of "business" set forth in RCW 82.04.140. Though the avoidance of tax may be a financial advantage to the taxpayer, we find these orchestrated deliveries do not constitute conducting "business" as defined by RCW 82.04.140. Even under the expansive definition of "business" and construing Rule 192 liberally in favor of the taxpayer, we do not find that the routing of delivery of capital assets through tribal lands to avoid tax is "business conducted" on tribal lands qualifying for the exemption set forth in Rule 192(5)(d). We deny the taxpayer's petition.

DECISION AND DISPOSITION

Taxpayer's petition is denied.

Dated this 10th day of May 2011.