

# CATAWBA INDIAN NATION



## **Tax and Investment Benefit Survey:**

**An Overview of Tax Advantages  
Available to the Catawba Nation and  
its Business Partners**



**February 1, 2016**

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## ***Executive Summary***

The Catawba Indian Nation ("the Tribe") is the only federally-recognized tribe within the state of South Carolina. The Tribe has 2800 members and its Reservation is located in York County. As a federally-recognized tribe, the Tribe maintains a government-to-government relationship with the United States, exercises sovereign authority over its members and territory and has access to federal programs promoting economic development on Indian reservations.

Although Catawba Indians have lived on their ancestral lands along the banks of the Catawba River for at least 6000 years, in the 1950s the Tribe's federal trust relationship was severed under the national policy known as termination. In the 1970s, the Tribe sought restoration of its federal status and the return of lands taken by the state of South Carolina. Twenty years later, pursuant to a settlement with the State and the federal government, the Catawba's relinquished claims to lands in exchange for federal recognition and funding for economic development, education, social services, and land purchases. The settlement was legislatively adopted by Congress through the Catawba Indian Tribe of South Carolina Land Claims Settlement Act of 1993 ("the Settlement Act") and by the State through the South Carolina Catawba Indian Claims Settlement Act ("the State Act").

The tenets of federal Indian law and the terms of the federal and state Settlement Acts govern the application of federal and state tax laws and economic development programs available to the Tribe. While this intersection of federal tax law, federal Indian law and the provisions of the federal and state Settlement Acts create a complex legal framework for economic development, the Tribe is committed to harnessing the valuable tax and investment benefits that this framework makes available to the Tribe, its members and its business partners. The accompanying study discusses the taxation and economic development elements of the legal framework, while this executive summary lists several of the advantages offered under that framework.

Income of the Tribe (and its Tribal Corporations) is not subject to federal, state or local tax. Under IRS Revenue Ruling 94-16, income earned by the Tribe and its tribal corporations organized under Section 17 of the Indian Reorganization Act (IRA) is not subject to federal tax regardless of whether that income is generated on or off reservation. The provisions of the State Act expressly exempt the Tribe and tribal entities from state and local income tax.

The Indian Tribal Governmental Tax Status Act of 1982 applies to the Tribe and its political subdivisions. Under that Act, the Tribe is treated in the same manner as states and their political subdivisions in many areas of federal tax law. For example, the Tribe, its agencies and departments may receive charitable donations that are tax-deductible by the donor. Additionally, the Tribe may issue tax-exempt governmental bonds.

The Tribe's Reservation lands held in trust are not subject to state and local real property taxes. All nonresidential buildings and improvements owned by the Tribe on the Reservation are exempt from state and local real property taxes. The Tribe has authority to levy tribal property taxes on buildings, fixtures, improvements, and personal property located on the Reservation and corresponding authority to abate or waive these tribal taxes.

Tribal property made available to its business partners through a narrowly-tailored license agreement would not be subject to state and local taxation. Under the State Act, however, a private lessee of tribal property would be subject to state tax.

Purchases made by the Tribe for tribal governmental functions are exempt from state and local sales and use taxes. SC Code § 27-16-130(H)(1).

Retail sales made on the Reservation are exempt from state and local sales taxes. A special tribal sales tax applies to on Reservation retail sales at the rate equivalent to the state and local sales tax that would otherwise apply. The tribal sales tax does not apply to retail sales occurring on the Reservation as a result of delivery from outside the Reservation when the gross proceeds of a sale are one hundred dollars or less.

The Tribe is also eligible for several federal economic development and loan guarantee programs and its business partners are eligible for federal and state tax credits. These federal programs include the Reservation's HUBZone designation, Enterprise Zones and Foreign Trade Zones. Among the federal tax credits available to the Tribe's business partners are the New Markets Tax Credit, accelerated depreciation under the Accelerated Cost Recovery System, and the Indian Employment Credit. State tax credit programs include the South Carolina Motion Picture Incentive Act and the Community Development Tax Credit program.

These taxation and economic development advantages are discussed in detail in this tax and investment benefit survey. This survey also addresses legal and programmatic conditions and limitations where applicable. The appendix includes additional materials, including an illustrative scenario identifying considerations and provisions that would be taken into account as the Tribe examines economic development options that maximize revenue generating opportunities in a particular commercial context.



# **Tax and Investment Benefit Survey**

## **An Overview of Tax Advantages available to the Catawba Nation and its Business Partners<sup>1</sup>**

### ***Introduction***

The Catawba Indian Nation ("the Tribe") is a federally-recognized tribe whose federal trust relationship was restored by Congress through the Catawba Indian Tribe of South Carolina Land Claims Settlement Act of 1993 (Settlement Act). 25 U.S.C. §§ 941–941n. As a recognized tribe, under the U.S. Constitution and numerous federal laws, treaties and federal court decisions, the Catawba Nation has the power and responsibility to enact laws regulating the conduct and affairs of tribal members within its territory. The Tribe provides a broad range of governmental services to their citizens, including education, transportation, public utilities, health, economic assistance, and domestic and social programs. Like states and local governments, the Tribe, as a political body, is not subject to federal income tax.

As a sovereign government, the Tribe has the right and authority to tax economic activity within its territories. Given the limited tax base, however, the Tribe also relies upon the operation of its own enterprises and economic development activities to generate revenues to meet and supplement vital programs and services. The Settlement Act, as well as the South Carolina Catawba Indian Claims Settlement Act ("the State Act") each contains specific provisions governing the manner that federal and state tax laws and economic development programs may apply to the Tribe. As a result, the Catawba Nation's economic development activities are impacted by this complex intersection of federal tax law, federal Indian law and the specific provisions of the federal and state Settlement Acts.

The discussion below examines the intersection of these federal and state laws to provide an overview of the tax and investment benefits available to the Tribe, its members and its business partners. Although the terms of the Settlement and State Act demarcate areas where certain Catawba-specific rules govern instead of the general federal Indian law provisions, both the applicable general Indian tax provisions and the specific Catawba provisions offer advantages to the Tribe consistent with its governmental status and the federal policy promoting tribal self-determination and self-government. Like other tribes, however, the Tribe faces challenges, including poverty and historic traumas, such as the dispossession from its homelands, the termination of the Tribe and forced assimilation. Overcoming these challenges is made more difficult when competing and sometime conflicting layers of law and regulation add costs that can burden tribal initiatives or chill potential partnerships and investments from outside enterprises.

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<sup>1</sup> This document was prepared for the Catawba Nation by the law firm of Hobbs Straus Dean & Walker, LLP. Its principal authors are Michael Willis and Greg Smith with assistance from Katie Klass and Lisa Meissner. This booklet provides an overview of applicable provisions of law related to economic development, including matters of federal, state and local taxation. The booklet itself does not provide or purport to provide tax advice and the discussion in this booklet should not be relied upon as tax advice.

The discussion in the six subject areas set forth in this document is intended to respond to the Tribe's request for greater clarity on the manner these various laws fit together to provide a framework from which the Catawba Nation can more effectively advance its economic development and tribal government activities.

In reviewing the intersection of applicable tax and investment provisions, the Settlement Act includes terms that suggest that the federal and state law provisions operate at the same level of priority.<sup>2</sup> Importantly, however, other terms of the Settlement Act establish an order of priority when these intersecting laws conflict.<sup>3</sup> For instance, the Federal Tax Code is understood to predominate above all other provisions. *See* 25 U.S.C. § 941n, which provides:

"Notwithstanding any provision of the State Act, the Settlement Agreement, or this subchapter (including any amendment made under section 941m(f) of this title), nothing in this subchapter, the State Act, or the Settlement Agreement-(1) shall amend or alter title 26, as amended, or any rules or regulations promulgated thereunder, or (2) shall affect the treatment under title 26 of any person or transaction other than by reason of the restoration of the trust relationship between the United States and the Tribe."

Section 1 of this report discusses the federal tax code provisions and their applicability to the Tribe. That Section explains that although the federal tax code applies to the Tribe, general principles of federal Indian tax law developed through precedent established by federal court cases, such as those with regard to the preemption of state taxation, do not. Instead, many of those tax protections are expressly set out in the State Act and are treated as exceptions to the general rule under the State Act that the Tribe and its members are subject to state and local tax. *See* SC Code § 27-16-130(A). These statutory exceptions are discussed in detailed in Section 2 of this document. Among the exceptions are the following:

- The tribe and tribal entities are exempt from state and local income tax
- Tribal members employed by the Tribe to perform governmental functions on the Reservation are not subject to state and local income tax
- Tribal members are exempt from state and local tax on income earned from the sale of Catawba pottery and artifacts made by Catawba members

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<sup>2</sup> *See* 25 U.S.C. § 941m(e) ("Consistent with the provisions of section 941b(a)(2) of this title, the provisions of South Carolina Code Annotated, section 27-16-40, and section 19.1 of the Settlement Agreement are approved, ratified, and confirmed by the United States, and shall be complied with in the same manner and to the same extent as if they had been enacted into Federal law").

<sup>3</sup> Specifically, the federal Settlement Act terms apply when they conflict with the state settlement act or settlement agreement. Meanwhile, the state settlement act governs over the settlement agreement. 25 U.S.C. § 941m(b). Although federal Indian laws passed after October 27, 1993, will generally apply to the Tribe, any such law that would affect or preempt state laws relating to the Tribe's lands would not displace Settlement Act terms unless the new law specifically applies to South Carolina. 25 U.S.C. § 941m(c); *see also* 25 U.S.C. § 941l (stating that the Indian Gaming Regulatory Act "shall not apply to the Tribe").

- Per Capita Trust Fund payments are not subject to state or local income taxes on distributions
- Lands held in trust are not subject to state and local real property taxes
- Buildings owned by the Tribe on the Reservation are not subject to state and local real property taxes
- Personal property owned by the Tribe and used solely on the Reservation is exempt from state and local personal property taxes.
- Motor vehicles owned by the Tribe are exempt from state and local personal property taxes, even when used off the Reservation.
- Residences on the Reservation, subject to specified conditions, are exempt from all state and local property tax levies
- Purchases made by the Tribe for tribal governmental functions are exempt from state and local sales and use taxes
- Retail sales made on the Reservation are exempt from state and local sales taxes. (A tribal sales tax applies).

While the Settlement and State Act provide specific terms regarding the Tribe's authority to tax its members and non-members, the Tribe also has its inherent authority to tax transactions occurring on trust lands. *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982); *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 417 U.S. 195 (1985). The State Act contains additional terms that clarify the Tribe's tax authority over non-members. Section 3 of this report sets forth the Tribe's taxation authority under statutory and case law.

The Settlement Act also expressly makes certain federal statutes applicable to the Tribe to facilitate economic development, including: Title VII of the Housing and Community Development Act, 25 U.S.C. § 941m(d), and the Foreign Trade Zones Act, 25 U.S.C. § 941m(d). Section 4 of this report summarizes these and other federal economic development programs available to the Tribe. Furthermore, federal tax credit programs are available to the Tribe on the same terms as are available to other federally-recognized Indian tribes. These programs are set forth in Section 5 of this report. Meanwhile, state tax credit programs available to the Tribe to that could be utilized to generate revenue and create jobs are discussed in Section 6 of this report.

### ***Section 1. The Tribe and its Federal Tax Immunities, Exclusions and Credits***

Explicit terms in the Catawba Land Claims Settlement Act (25 U.S.C. § 941n) provide that the federal tax code fully applies to the Tribe and its members. The clarifying terms in this provision explain that the federal tax code, amendments to the tax code, and "any rules or regulations promulgated thereunder" apply to "any person or transaction" regardless of any terms set forth in the Settlement Act, the State Act or the Settlement Agreement."<sup>4</sup> As a result, the tax code and the IRS rules and Treasury regulations interpreting and implementing the tax code take priority over other laws relating to the Tribe, its members and transactions of the Tribe and its

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<sup>4</sup> 25 U.S.C. § 941n states as follows: "...nothing in this subchapter, the State Act, or the Settlement Agreement-(1) shall amend or alter title 26, as amended, or any rules or regulations promulgated thereunder, or (2) shall affect the treatment under title 26 of any person or transaction other than by reason of the restoration of the trust relationship between the United States and the Tribe."

members.<sup>5</sup> The only "exception" to this predominance of the federal tax laws is for matters governing "the restoration of the trust relationship between the United States and the Tribe." 25 U.S.C. § 941n.

a. Federal Immunities & Exemptions

**1. Income earned by the Tribe is not subject to federal tax regardless of where that income is generated. (IRS Revenue Ruling 94-16)**

In IRS Revenue Ruling 94-16, the IRS concluded that Indian tribes are not taxable entities. IRS Rev. Rul. 94-16, 1994-1 C.B. 19. Under this ruling, the income earned by a tribe, regardless of whether that income is generated on reservation or off reservation, is not taxable by the federal government. *Id.* ("Because an Indian tribe is not a taxable entity, any income earned by an unincorporated tribe, regardless of the location of the business activities that produced the income, is not subject to federal income tax.") This Revenue Ruling applies to the Tribe as it is official guidance published by the IRS to interpret and implement the tax code. *See* 25 U.S.C. § 941n. An IRS Revenue Ruling serves as an official rule that taxpayers may rely upon regarding the IRS' determination of how the federal tax law applies to a specific set of facts.<sup>6</sup> With respect to the income earned by the Catawba Indian Nation, IRS Revenue Ruling 94-16 is the governing federal tax law.

**2. Income earned by the Tribe's Section 17 Corporation is not subject to federal tax regardless of where that income is generated. (IRS Revenue Ruling 94-16)**

Revenue Ruling 94-16 further clarified that a tribe's immunity from federal tax also extends to tribal corporations organized under Section 17 of the Indian Reorganization Act (IRA). *See id.* (citing Revenue Ruling 81-295, 1981-2 C.B. 15, relying on *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 157, n.13 (1973)). Those rulings held that an Indian tribal corporation organized under Section 17 of the IRA shares the same tax status as the Indian tribe. IRS Revenue Ruling 94-16 further clarified that the federal tax immunity of a Section 17 corporation applies to revenue generated outside the reservation. Like the Tribe, the IRS explained, the location of the Section 17 corporation's income (whether on or off reservation) has no bearing on its federal tax status. As a result, "*any income* earned by [a Section 17]

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<sup>5</sup> The sources of federal tax law start with the Internal Revenue Code (IRC), enacted by Congress in Title 26 of the United States Code (26 U.S.C.). Treasury regulations (26 C.F.R.), also referred to as the Federal tax regulations, provide the official interpretation of the IRC by the Department of the Treasury. In addition to these regulations, the IRS also publishes other forms of *official tax guidance*, including revenue rulings, revenue procedures, notices, and announcements.

<sup>6</sup> As the IRS explains, "[a] revenue ruling is an official interpretation by the IRS of the Internal Revenue Code, related statutes, tax treaties and regulations. It is the conclusion of the IRS on how the law is applied to a specific set of facts. Revenue rulings are published in the Internal Revenue Bulletin for the information of and guidance to taxpayers." IRS, "Understanding IRS Guidance - A Brief Primer" ([www.irs.gov/uac/Understanding-IRS-Guidance-A-Brief-Primer](http://www.irs.gov/uac/Understanding-IRS-Guidance-A-Brief-Primer)).

corporation, *regardless of the location of the business activities that produced the income*, is not subject to federal income tax." IRS Rev. Ruling 94-16 (emphasis added). This ruling applies to the Section 17 corporation(s) of the Catawba Indian Nation.

**3. Income earned by tribally-owned corporations chartered under tribal law may be immune from federal tax under some circumstances, but that tax treatment remains uncertain.**

Tribally chartered corporations wholly owned by an Indian tribe are largely exempt from state regulation. These corporations, depending where they operate, are more likely to be immune from taxation than state-chartered corporations. The IRS has issued *unofficial* guidance (through private letter rulings) that considered certain tribally chartered entities as the same as the tribe for tax purposes because those entities functioned as an "integral part" of an Indian tribe. *See* Karen Atkinson and Kathleen Nilles, *Tribal Business Structure Handbook* (2008) at III-6.

Nevertheless, the federal tax status of tribal law corporations remains uncertain. Revenue Ruling 94-16 discussed tribally-chartered corporations but did not clarify the federal tax treatment of those entities. The IRS has acknowledged the uncertainty associated with the federal tax treatment of tribal law corporations since 1996, when Treasury and IRS first stated that they were reviewing this question. In 2001, Treasury and IRS promised to issue guidance, but despite the topic's listing on the IRS's Priority Guidance Plan for many years, such guidance has been delayed. *See* National Taxpayer Advocate, *Annual Report to Congress 2013, "Indian Tribal Taxpayers: Inadequate Consideration of Their Unique Needs Causes Burdens,"* at 7; *see also* Priority Guidance Plan (2006-2007).<sup>7</sup> The Taxpayer Advocate described the IRS delay in issuing guidance as "another broken promise" and pointed out the IRS could treat tribal corporations just like tribes under the federal tax rules (based on the "integral part" analysis of the private letter rulings), but simply has not done so.<sup>8</sup> *Id.*

**4. Income earned by a tribally-owned corporation chartered under state law is subject to federal income tax, regardless of the location of the activity generating the income.**

Revenue Ruling 94-16 explained that a state law chartered corporation owned by a tribe is not provided the tax advantages that the tribe itself and Section 17 corporations enjoy, but is subject to federal income tax. *See* IRS Rev Ruling 94-16 ("... a corporation organized by an Indian tribe under state law does not share the same tax status as the tribe for federal income tax purposes and is subject to federal income tax on any income earned, regardless of the location of the business activities that produced the income").

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<sup>7</sup> Available at <http://www.irs.gov/pub/irsutl/2006-2007gp.pdf>.

<sup>8</sup> The National Taxpayer Advocate explained, "Historically, a series of IRS rulings has exempted from tax certain entities that are integral parts of governments, which as such are themselves tax-exempt. This patchwork of rulings could affect a variety of entities, including recent forms such as charter schools, as well as enterprises of tribes."

b. Application of the Indian Tribal Governmental Tax Status Act of 1982

As noted above, the Catawba Land Claims Settlement Act specifically provides that the federal tax code fully applies to the Tribe and its members. *See* 25 U.S.C. § 941n. The State Act also expressly confirms that that "The Indian Tribal Government Tax Status Act, 26 U.S.C. Section 7871, applies to the Tribe and its Reservation for South Carolina income tax purposes to the same extent as provided in the federal implementing legislation." SC Code § 27-16-130(K). Additionally, the Catawba Indian Nation is a federally recognized Indian tribe that is listed in IRS Revenue Procedure 2002-64 as an organization that may be treated as a government entity in accordance with Section 7871.

The Indian Tribal Governmental Tax Status Act of 1982 was enacted as part of the tax code in order to treat Indian tribal governments and their subdivisions in certain circumstances in the same manner that federal tax law treats states and their political subdivisions. 26 U.S.C. § 7871. Congress recognized that both state and tribal governments perform similar functions for their citizens and sought to make the tax treatment of these governments more equitable. *See* S.Rept. 97-646, at 11 (1982). ("[I]n order to facilitate these efforts of Indian tribal governments that exercise such sovereign powers, it is appropriate to provide these governments with a status under the Internal Revenue Code similar to what is now provided for the governments of the States of the United States."); *see also* Yule Kim, Congressional Research Service, The Indian Tribal Governmental Tax Status Act (2007).<sup>9</sup> While the Act provides favorable tax treatment in several areas, as explained in detail below, those benefits are limited to the specific situations set forth in the statute and several limitations and restrictions apply to tribal governments that do not apply to their state counterparts. The Act includes the provisions that follow.<sup>10</sup>

**1. Charitable Contributions, Estate Donations and Gift taxes –  
26 U.S.C. § 7871(a)(1)**

Charitable donations made to Indian tribal governments are deductible from federal income, estate, and gift taxes. 26 U.S.C. § 7871(a)(1)(A), (B), (C). These gifts, however, must be made for "exclusively public purposes," in the same manner that this restriction applies to state governments. S. Rep. No. 97-646, at 15.

In a letter to Chief Donald Rogers in 2008, the IRS discussed the applicability of Section 7871 to the Tribe and pointed out that the Tribe "is eligible to receive charitable contributions

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<sup>9</sup> Available at

<http://congressionalresearch.com/RL34290/document.php?study=The+Indian+Tribal+Governmental+Tax+Status+Act+An+Overview>

<sup>10</sup> There are other provisions, not discussed in detail here, whereby the Act treats tribes like states in several other ways, such as authorizing the application of the unrelated business income tax to tribal colleges (§ 7871(a)(5)); permitting tribal employees to exclude contributions to certain retirement plans from their gross income for federal income tax (§ 7871(a)(6)(B); § 403(b)(1)(A)(ii)); and making expenditures that seek to influence tribal government legislation to the tax on excessive lobbying expenditures (§ 7871(a)(7)(A)).

that are deductible for federal income, estate, and gift tax purposes by the donor."<sup>11</sup> In that letter the IRS explained that private charitable foundations request proof of tax-exempt and tax-deductible status as part of a grant application in order to comply with their restrictions under the tax code, but that, "[p]rivate foundation grants to governmental units for public or charitable purposes are not subject to these restrictions."<sup>12</sup> The letter advises that when a private foundation seeks documentation proving the Tribe's tax status the Tribe may reference Section 7871 of the code to note that the Tribe is treated as a state for the purpose of deductibility of contributions under Section 170(c)(1) of the code (as authorized by Section 7871(a)(1)(A)).

## **2. Federal Excise Taxes - 26 U.S.C. § 7871(a)(2)**

The IRS has held that "Indian tribal governments have no inherent exemption from federal excise taxes." Rev. Rul. 94-81, 1994-2, C.B. 412 (citing *Federated Tribes of the Warm Springs Reservation of Oregon v. Kurtz*, 691 F.2d 878 (9th Cir.1982)). As a result, unless a specific statutory exemption applies, Indian tribal governments must purchase taxable articles or services on a tax-paid basis and must pay tax on their sale or use of taxable articles or services. *Id.*

Congress has provided Indian tribal governments with exemptions from certain federal excise taxes similar to the exemptions applicable to states. *See* 26 U.S.C. § 7871(a)(2)(A)-(D).<sup>13</sup> The applicable exceptions from excise taxes include the following exemptions from taxes:

- fuel used *exclusively* by the tribal government or its subdivisions;
- a manufacturers' excise taxes for products sold to a tribal government or its subdivisions;
- communication taxes if the communication services or facilities are furnished for the use of a tribal government or its subdivisions; and
- the highway use tax for any use of a highway motor vehicle used by a tribal government or its subdivisions. 26 U.S.C. § 7871(a)(2)(A)-(D).

The tribal exemptions, however, are expressly limited to transactions that involve "the exercise of an essential governmental function of the Indian tribal government." 26 U.S.C. § 7871(b); Rev. Rul. 94-81, 1994-2, C.B. 412. As a result of the Act, purchases made in furtherance of an essential governmental function will qualify for an exemption when there is a provision in the act covering the transaction. Rev. Rul. 94-81, 1994-2, C.B. 412. The IRS has also observed that even if a statutory provision in the Act expressly grants an exemption, if the

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<sup>11</sup> Letter from Rose Jones, Indian Tribal Government Specialist to Chief Donald Rodger of July 18, 2008, at page 1.

<sup>12</sup> *Id.*, at 2 (noting that grants to governments for charitable purposes are not taxable expenditures under Section 53.4942(a)-3(a) of the Treasury regulations and that certification of 501(c)(3) status "is not legally required when the prospective grantee is a governmental unit and the grant is for qualifying (public or charitable) purposes."

<sup>13</sup> The applicable exemptions in 7871(a)(2):

(A) chapter 31 (relating to tax on special fuels),

(B) chapter 32 (relating to manufacturers excise taxes),

(C) subchapter B of chapter 33 (relating to communications excise tax),

(D) subchapter D of chapter 36 (relating to tax on use of certain highway vehicles).

item was *purchased for the purpose of resale to consumers, that purchase is not eligible for the exemption because a purchase for resale does not serve an essential governmental function.* See *id.*; see also Yule Kim, Congressional Research Service, The Indian Tribal Governmental Tax Status Act (2007).

### **3. Deductions for Local (Tribal) Taxes – 26 U.S.C. §7871(a)(3)**

Under Section 164 of the Internal Revenue, taxpayers may deduct from their federal income taxes those payments they make to state, local and foreign governments for real property, personal property and income taxes. Under Section 7871(a)(3), payments made by taxpayers to tribal governments for certain taxes are deductible from federal income taxes in the same manner as state (local and foreign) taxes. Under this section of the tax code the taxes imposed by tribal government and their subdivisions are treated as local taxes and are fully deductible. These taxes include real property taxes, personal property taxes and income taxes.

### **4. Tax-Exempt Tribal Bonds (26 U.S.C. § 7871(a)(4) and (c)) and Tribal Economic Development Bonds (TEDBonds) (26 U.S.C. § 7871(f))**

The Indian Tribal Government Tax Status Act establishes tribal government authority to issue tax-exempt bonds in a manner similar to states. Tax-exempt financing lowers financing costs for tribes while making the investment appealing to bondholders. As the interest earned by the bondholder is excluded from their gross income, the tribal government is able to pay lower yields bondholders and the investors benefit from the after-tax value of their investment.

Under current law, Congress has limited the type of projects tribes may finance with tax-exempt bonds. Tribal governments may use "governmental bonds" to finance a project that furthers an "essential governmental function" or issue "private activity bonds" to finance certain commercial activities, but those private activity bonds are generally *not* tax-exempt. See Yule Kim, Congressional Research Service, The Indian Tribal Governmental Tax Status Act (2007).

*Governmental bonds.* The "essential governmental functions" standard limits tribes to issuing governmental bonds only for functions "customarily" performed by states and local governments with general taxing powers. 26 U.S.C. § 7871(e). As such, tribal "governmental" bonds are subject to a restrictive standard that does not apply to states and local governments.<sup>14</sup> Furthermore, in order for a tax-exempt bond to be issued for an essential governmental function, "substantially all" ( 90% or more) of the proceeds of the bond must go to the essential governmental function. 26 U.S.C. § 7871(c)(1). Although states and municipalities frequently use tax-exempt bonds for the development of facilities that generate revenue or serve the public, such as convention centers, gaming facilities, public golf courses and swimming pools, etc., Treasury and the IRS have not allowed tribes to use tax-exempt bond authority for the

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<sup>14</sup> The IRS essential governmental functions test evaluates (1) whether many state or local governments practice the activity, (2) whether state or local governments have practiced the activity for a long period of time, and (3) whether the activity is industrial or commercial. See I.R.S. Tech. Adv. Mem. 200704019 (October 24, 2006).



development of gaming facilities or gaming-related infrastructure or tribally-owned golf courses.<sup>15</sup>

*Private Activity bonds.* States and their political subdivisions can authorize the issuance of tax-exempt "qualified private activity" bonds to finance a variety of projects that have a private business use, for example, the construction of qualified residential rental projects.<sup>16</sup> This option is generally not available to tribal governments. The only exception allowing for tribes to issue tax-exempt qualified private activity bonds involves financing construction of certain manufacturing facilities on lands held in trust by the United States. 26 U.S.C. § 7871(c)(3)(B). To qualify, 95 percent or more of the bond proceeds must be used to acquire, construct, or improve property that is part of a manufacturing facility that will be owned and operated by the tribe on located on lands held in trust by the United States for the benefit of the tribe. 26 U.S.C. § 7871(c)(3)(B)(i).

In the American Recovery and Reinvestment Act of 2009 (ARRA), Congress established a new (and temporary) Tribal Economic Development Bond (TEDBond) program, which is now codified as 26 U.S.C. § 7871(f). The TEDBond program was authorized to remain in effect until the \$2 billion bond authority is exhausted. As of December 1, 2015, the volume cap limit is \$272.9 million, well below the \$2 billion limit. The IRS updates the volume cap on its website every two to three months. *Please see* <https://www.irs.gov/Tax-Exempt-Bonds/Published-Volume-Cap-Limit-for-Tribal-Economic-Development-Bonds>.

Congress created the TEDBond in order to provide tribes with the opportunity to issue bonds for economic development on the same terms as states and local governments. In particular, the "essential government functions" requirement does not apply to the TEDBond program. *See* 26 U.S.C. § 7871(f)(2)(A) ("notwithstanding subsection (c) [the essential government function limitation], such bond shall be treated for purposes of this title in the same manner as if such bond were issued by a State"). The bonds are a loan, not a grant, and must be paid back as principal plus interest. In other words, a tribe is not receiving money from the federal government under this program. Rather, a tribe is receiving the authority to borrow a set amount – the TED Bond allocation – from private investors by issuing bonds.

Issuance of a bond is subject to three specific requirements. First, the financed project must be located on a reservation. This designation encompasses "Indian reservations, public domain Indian allotments, former Indian reservations in Oklahoma, and land held by incorporated Native groups, regional corporations, and village corporations under the ANCSA." 26 U.S.C. § 7871(f)(3)(B)(ii) (adopting the definition of "reservation" stated in 25 U.S.C. § 1452(d)). Second, property physically used in gaming or for housing or conducting Class II or Class III gaming activities is disqualified, *unless* the building in which gaming activities are taking place has a structurally independent foundation, outer walls, and roof. IRS Notice 2009-51 (July 13, 2009). Third, a tribe must apply to the IRS and receive a TEDBond allocation

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<sup>15</sup> *See* I.R.S. Tech. Adv. Mem. 200704019 (October 24, 2006) (explaining that the issuance of bonds to finance industrial or commercial facilities was not an essential governmental function. Activities customarily financed with governmental bonds, such as schools, roads, and governmental buildings, did fall within the scope of the definition).

<sup>16</sup> *See* CRS Report RL31457, *Private Activity Bonds: An Introduction*, by Steven Maguire.

before issuing such bonds to private investors. Tribes are currently limited to receiving the greater 20% of the total unallocated volume cap or \$100 million. IRS Notice 2012-48 (July 30, 2012).

The IRS allocates the available volume cap on a first-come, first-served basis by order of the submission date. The application must describe the project for § 7871(f) qualification, estimate the expected project cost and financing sources, include a plan of financing, and certify the project's location and non-gaming purposes. IRS Notice 2012-48 at Section 3(f). A tribe can submit: (a) a single application that covers multiple projects; (b) individual applications on a project-by-project basis; or (c) a joint project application "provided the project is located entirely on one or more of the reservations of any of the Indian tribal governments receiving an allocation to such project." *Id.* at Section 3(m). It is important to note that a tribe has only 180 days to issue the proposed bonds after receiving an allocation. *Id.* at Section 4(g)-(h). Failure to do so results in a forfeiture of the allocation. A tribe may then reapply for the same allocation, however, the quantity of available funds is not guaranteed. It is therefore critical that tribes have a financing plan in hand before applying for a project to better ensure a project is accomplished.

Congress, in ARRA, also required Treasury to submit a report to Congress on the effects of the TEDBond program and to make recommendations as to whether the existing tribal tax-exempt bond program should eliminate the essential government functions standard. In its December 2011 report, Treasury recommended that the TEDBond program be made permanent (and that the \$2 billion cap be removed, but that the restriction from financing gaming facilities or off-reservation facilities remain the same).<sup>17</sup> With respect to governmental bonds, Treasury recommended several provisions to increase flexibility in the use of tribal governmental bonds and specifically recommended that the "essential governmental functions" standard should be repealed.<sup>18</sup> The Obama Administration has included these recommendations in annual budget submissions. Additionally, Section 3 of the Tribal Tax and Investment Reform Act of 2013 (H.R. 3030) included the repeal of the essential government functions standard, however, Congress has not taken action on these recommendations.

## **5. Tribal Charitable Foundations – 26 U.S.C § 7871(a)(7)(B)**

The Act permits tribes to be treated like states for purposes of exemptions from certain requirements and taxes applicable to private foundations. The way this provision has been drafted, however, does not provide tribes with the same advantages provided to states. When the tribal government or an IRS recognized political subdivision of a tribal government operates as a public charity, the tax advantages provided to states apply.

These benefits, however, do not extend to nonprofit entities formed and funded by a tribe for charitable purposes in the same manner that they do for state-formed and -funded nonprofit organizations. Section 5 of the Tribal Tax and Investment Reform Act of 2013 (H.R. 3030) was introduced in the previous Congress to address this disparity. That section would treat tribal government funding as "public support" for purposes of Code section 170(b)(1)(A)(vi) and

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<sup>17</sup> Department of the Treasury, Report and Recommendations to Congress regarding Tribal Economic Development Bond provision under Section 7871 of the Internal Revenue Code (Dec. 2011).

<sup>18</sup> *Id.*, at 2.

would treat charitable organizations formed to support the charitable and public purposes of Indian tribal governments just like similar organizations formed to support state and local governments under Internal Revenue Code Section 509(a)(3). H.R. 3030 was not enacted. As result, § 7871 charitable organizations formed as part of a tribal government (a non-profit entity, § 17 corporation, political subdivision, etc.) receive the full benefit of the § 170 charitable contributions rules, however, separate private entities formed independently of a tribal government do not. Charitable entities that are not part of the Tribe would need to comply with § 501 rules for charitable organizations.

The IRS Internal Revenue Manual provides additional guidance on the current law governing § 7871 tax exemptions for tribal entities. Internal Revenue Manual, Part 7, Chapter 25: Section 3.12.19.01 (02-23-1999). According to the Manual, § 7871 tax benefits may extend to federally recognized tribes, their political subdivisions, *and* a "variety of Native American related organizations" including § 17 tribal corporations, entities formed under state law by a tribal government recognized by a particular state but not the federal government, and a separately organized tribal entity under state law that conducts charitable and education activities, such as tribal history research, cultural activities, and community development projects.

Charitable contributions and gifts made to a tribal government or tribally-owned entity are tax-deductible if made for a public purpose. 26 U.S.C. § 7871 (a)(1)(A) (establishing that a tribal government be treated as a State for purposes of § 170 charitable contribution income tax deductions). In addition to tax-deductible donations to a tribal non-profit or governmental subdivision or organization, donors can choose to give in-kind contributions, a property or other type of asset donation. In-kind contributions can include tangible property such as vehicles or equipment, and intangible property such as intellectual property or an interest in real property. *See* IRS Publication 526 (Jan. 13, 2015). A donor is generally able to deduct the equivalent of the fair market value of the property at the time of the contribution. Percentage limitations apply based on the type of contribution. 26 U.S.C. § 170(b).

So long as a donor has not earmarked a contribution for a particular use, the contribution becomes the property of the tribal government or corporation and the donor retains limited or no authority over how the donation is subsequently used or expended, including if an asset is converted into cash through sales or other means. In the absence of an earmarked donation, the IRS and Treasury Department recognize only two specific situations in which a donor would otherwise retain control over the funds: by establishing either a community trust or a select form of a private foundation to manage the assets. Reg. 1.170A-9(e)(10)-(13); 26 U.S.C. § 170(b)(1)(A)(vii); 26 U.S.C. § 170(b)(1)(E)(iii). Consequently, once a charitable contribution or property donation has been made to a tribal government or corporation, a tribe can pass on those funds or assets to meet the needs of its community. A tribe does not receive any tax break or credit for charitable donations (since a tribe is not a taxable entity). By distributing outside donations out to smaller or perhaps otherwise unqualified organizations, however, a tribe can positively impact community development.

Many tribes make charitable donations through an application process that enables them to set parameters on eligible recipients. For instance, the Shakopee Mdewakanton Sioux

Community accepts charitable donation applications on a monthly cycle with preference given to requests from tribes in the Northern Plains and Minnesota regions. Tribal giving can also support the conservation of important cultural resources. For example, the Puyallup Tribe of Washington State donated over \$600,000 to the Point Defiance Zoo and Aquarium in Tacoma, Washington to strengthen red wolf conservation efforts, an animal and symbol of great importance in Northwest Coast art and culture. Tribal governments, political subdivisions, and corporations that receive charitable donations can thus pass the benefits on the greater community through a charitable giving program of financial assistance or asset donations.

c. Federal Tax Exclusions Applicable to Tribal Members

Under the tax code "gross income means all income from whatever source derived." 26 U.S.C. § 61. For more than 50 years, the IRS has relied on the Supreme Court ruling in *Squire v. Capoeman* for the principle that Indians are U.S. citizens subject to the requirement to pay income taxes. *Squire v. Capoeman*, 351 U.S. 1 (1956), 1956-1 C.B. 605. As a result, exemption of individual Indians from the payment of tax "must derive from treaties or agreements with the Indian tribes concerned or an act of Congress." IRS Notice 2015-67 (2015) (citing Rev. Rul. 67-284, 1967-2 C.B. 55). The Catawba Nation has agreements in place as well as acts of Congress that affect the taxation of tribal members. Moreover, several statutory provisions and administrative interpretations by the IRS applicable to Indian tribes and their members apply to exclude certain income from federal taxation.

**1. Benefits Paid to Tribal Members for the Promotion of the General Welfare**

Payments made to individuals under governmental programs are treated as gross income and subject to tax unless an exclusion applies. The IRS has concluded that, under the general welfare exclusion, certain payments made to individuals by governmental units under social benefit programs for the promotion of the general welfare are *not* included in the recipient's gross income. In 2014, IRS issued Revenue Procedure 2014-35 to establish terms under which benefits provided by tribal governments to their members would be treated as excluded from gross income (and federal income tax) pursuant to the general welfare exclusion. The guidance affirmed the applicability of the longstanding general welfare doctrine (noting that it applies "no less favorably" to tribal programs than to state and local government programs) and added new favorable provisions applicable only to tribal government benefits programs. The tribal-specific provisions included "safe harbors" whereby tribal benefits programs meeting certain governance and program criteria would be conclusively presumed to meet the requirements for application of the exclusion from income.

Later in 2014, Congress passed and President Obama signed the Tribal General Welfare Exclusion Act into law as Pub. Law No. 113-168 (codified as 26 U.S.C. § 139E). The intent of that Act was to codify and enhance Rev. Proc. 2014-35 in part by expanding the safe harbors to all tribal program areas. In 2015, the IRS issued Notice 2015-34, which explained that the Tribal General Welfare Exclusion Act (§ 139E) "codifies (but does not supplant) the general welfare exclusion for certain benefits provided under Indian tribal government programs." The Notice serves to clarify that both the administrative guidance and the statutory provisions represent valid

authority under which tribal general welfare program benefits payments may be excluded from the recipients' income.

To the extent that Catawba Indian Nation programs providing benefits payments to members for the promotion of the general welfare conform to the governance criteria set forth in § 139E or Rev. Proc. 2014-35, those benefits will not be treated as income to the tribal member and therefore not subject to tax. While there are terms in the Settlement Act that may appear to limit this right, these limitations are overcome by express terms of the Settlement Act itself. Specifically, 25 U.S.C. § 941m(c) states that federal law benefiting Indians enacted after October 27, 1993 will not apply unless made applicable to South Carolina. Although §139E is a law benefitting Indians that was enacted in 2014, the basis for its application to the Catawba Nation is twofold. First, another provision of the Settlement Act itself establishes that notwithstanding any other provision of the Settlement Act or the State Act, the terms of the federal tax code, *as amended*, applies to the Tribe. 25 U.S.C. § 941n. As it is part of the tax code, §139E applies. Second, the general welfare exclusion derives from a longstanding administrative doctrine whose application to tribal government programs has been recently clarified and codified by a Revenue Procedure and a tax code amendment. Even if § 139E were deemed not to apply to the Tribe, the IRS would still be bound to rely on its administrative guidance in determining whether benefits payments that a tribal member receives from the Tribe are excluded from gross income under the general welfare exclusion.

## **2. Distributions of Trust Income**

The Per Capita Act (25 U.S.C. §§ 117a-117c) authorizes Indian tribes to make per capita distributions to members of the tribe out of funds held in a tribal Trust Account. The Indian Tribal Judgment Funds Use or Distribution Act (25 U.S.C. §§ 1401-1408) further provides that funds distributed per capita or held in trust by the United States, including all interest and investment income accrued on the funds while held in trust, are *not* subject to federal income taxes. *See* IRS Notice 2015-67. As a result "per capita distributions made from funds the Secretary of the Interior holds in a tribal Trust Account are generally excluded from the gross income of the members of the tribe receiving the per capita distributions." IRS Notice 2015-67. Notice 2015-67 points out, for example, that proceeds from timber sales or an agricultural lease deposited into a tribe's tribal Trust Account from which the tribe subsequently makes a per capita distribution, the per capita distributions are excluded from the tribal members' gross income. *Id.*

The Catawba Settlement Act established several trust funds on behalf of the Tribe. They include the following funds:

- Land Acquisition Trust - 25 USC 941i(d)
- Economic Development Trust - 25 USC 941i (e)
- Education Trust - 25 USC 941i (f)
- Social Services and Elderly Assistance Trust - 25 USC 941i (g)
- Per Capita Payment Trust Fund - 25 USC 941i (h)

The Settlement Act also authorized certain income-generating activities associated with the Tribe's trust land, including the authorization to "sell, exchange, or lease lands within the

Reservation, and sell timber or other natural resources on the Reservation." 25 U.S.C. § 941j(j). Furthermore, the Settlement Act provides for the Tribe to administer "periodic distributions of current and accumulated income." 25 U.S.C. § 941i(a). The Tribe was given the option to maintain its trust accounts with the Department of the Interior or, subject to federal approval, place any of its trust funds in accounts managed by a private financial institution. 25 U.S.C. § 941i(b)(1).

Administering the exclusion from income of trust fund distributions to tribal members requires taking into account additional guidance from the IRS, which distinguishes the tax treatment of trust funds and interest held by the Department of Interior (at the Office of the Special Trustee) in a tribal trust account and tribal trust funds that have been transferred and held in a private financial institution. When held by the Department, the trust funds and all interest generated by the trust fund is excluded from tax when distributed to members. For funds transferred to a privately-managed account, however, only the portion of the distribution that represents the original trust fund amount is tax-excluded income. Distribution of privately-generated interest is taxable to the recipient. *See* IRS Notice 2012-60. Thus, when the Tribe receives an amount of income from a timber sale on trust lands and deposits that amount into a privately managed trust account, the Tribe may distribute that amount tax-free to its members. If that amount generates interest before the distribution, the distribution of interest is taxable as part of the recipient's gross income.

South Carolina state law adds another layer of tax treatment that must be considered. Under SC Code 1976 § 27-16-130(C)(2), the distribution of the one-time non-recurring per capita fund payment is not subject to state/local or local income tax, however, once a tribal member receives his or her distribution, any income subsequently earned on that distribution is subject to state and local income tax.

### **3. Distributions of Taxable Tribal Income Is Not Exempt from Federal Tax**

IRS Rev Ruling 94-16 explains that "tribal income not otherwise exempt from federal income tax is includible in the gross income of the Indian tribal member when distributed to, or constructively received by, the tribal member." IRS Rev Ruling 94-16 (Citing "Revenue Ruling 67-284, 1967-2 C.B. 55, 58, modified on another issue by Rev. Rul. 74-13, 1974-1 C.B. 14). Thus, for distributions to tribal members to be excluded from federal tax, a clear source of authority must provide terms defining that tax treatment.

### **4. The Tribal Fishing Rights Tax Exemption Does Not Apply to the Tribe or its Members**

Tribes and tribal members are not taxed on income derived from activities related to fishing rights. 26 U.S.C. § 7873(a). This tax exception applies only when carrying out activities associated with the exercise of a recognized fishing right, which requires such fishing right to be secured by a treaty, executive order, or statute. 26 U.S.C. § 7873(b)(2).

Tribes have heavily litigated establishment of their fishing rights. In the treaty rights context, courts examine whether the waters in question are the "usual and accustomed fishing

grounds" of the tribe. *See, e.g., Tulalip Tribes v. Suquamish Indian Tribe*, 794 F.3d 1129 (9th Cir. 2015); *United States v. Washington*, 384 F.Supp. 312 (W.D. Wash. 1974). These cases examine the breadth of treaty provisions in which tribes reserved their fishing rights. In some circumstances, tribes have also asserted fishing rights reserved through their settlement acts or through executive order. *See, e.g., Motion of Penobscot Nation for Summary Judgment, Penobscot Nation v. Mills*, 1:12-cv-00254-GZS (D. Me. 2015) (No. 121) (examining whether settlement act included river within reservation and thereby preserved sustenance fishing rights); *Parravano v. Babbitt*, 70 F.3d 539 (9th Cir. 1995).

The Tribe seeks to establish jurisdiction over coastal waters for fishing purposes. The Settlement Act, however, expressly extinguishes the Tribe's claims to fishing rights. It states:

This extinguishment of claims shall also extinguish title to any hunting, fishing, or water rights or rights to any other natural resource claimed by the Tribe or a Member based on aboriginal or treaty recognized title, and all trespass damages and other damages associated with use, occupancy or possession, or entry upon such lands.

25 U.S.C. § 941d(d)(2); *see also* 25 U.S.C. § 941a(2). Therefore, the Tribe's Settlement Act provisions are distinct from those of other tribes, such as the Penobscot Nation, that have successfully litigated to enforce and reaffirm their fishing rights based on their reserved treaty or settlement act terms. Due to the specific terms of the Settlement Act, the Tribe has ceded its claims to reserved fishing rights. Therefore, the tax exception for reserved treaty fishing rights is not applicable to the Tribe.

## **Section 2. State and Local Taxation (State: SC Code Ann 27-26-130)**

### **a. State and Local Income Tax**

#### **1. The Tribe.**

Under the State Act, the Tribe and any of its subdivisions that are exempt from federal income tax are also exempt from state and local income tax. SC Code § 27-16-130(C)(1) provides as follows:

"Income of the Tribe, subdivisions and governmental agencies of the Tribe, including entities owned by the Tribe or the federal government on behalf of the Tribe, the Tribal Trust funds, and tax revenues collected by the Tribe by levy or assessment which are nontaxable for federal income tax purposes because of the Tribe's status as a recognized or restored Indian tribe also are nontaxable for purposes of state income taxes or local income taxes."

As a result, income generated by the Tribe, its subdivisions and agencies are exempt from federal, state and local taxation. Moreover, as noted below, this State Act provision also clarifies the state and local tax immunity applies to those tribally-owned entities that are immune from federal tax, such as its Section 17 corporations.

## **2. Tribally-owned enterprises**

The terms of the State Act (SC Code § 27-16-130(C)(1)) extend the Tribe's immunity from state and local income tax to "entities owned by the Tribe... which are nontaxable for federal income tax purposes because of the Tribe's status as a recognized or restored Indian tribe." This immunity applies to the Tribe's Section 17 corporation(s). As noted in Section 1(a)(3) above, under certain circumstances, this immunity would also apply to certain entities formed under tribal law. Tribally-owned entities chartered under South Carolina's corporations code, which are not immune from federal income tax, would not be immune from state or local income tax.<sup>19</sup>

## **3. Tribal Members**

The general rule is that since federal adjusted gross income is generally the starting point for calculating state taxable income, the federal exclusions noted above in Section 1(c) are also excluded from federal adjusted gross income and thus not subject to state or local income tax. [Please note, we have not researched individual state income tax reporting requirements in South Carolina and rely upon the general rule here.] The State Act provides several additional exemptions and exclusions from state and local tax that benefit tribal members.

- The income earned by tribal members employed to perform governmental functions on the Reservation is exempt from state and local taxation. SC Code § 27-16-130(C)(2)).
- The income earned by tribal members from the sale of Catawba pottery and artifacts (whether the sale takes place on or off reservation) is exempt from state and local tax (provided the pottery and artifacts are made by Catawba members). SC Code § 27-16-130(C)(2).
- The Per Capita Payment Trust Fund distribution is not subject to state or local income tax at the time of distribution to state or local income taxes. SC Code § 27-16-130(C)(2).

Otherwise members are required to pay state and local income taxes to the same extent as any other person in the State,<sup>20</sup> including state and local tax on earnings a tribal member generates from investing his/her Per Capita Trust Fund distribution. *Id.*

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<sup>19</sup> It should be noted that even though the Tribe, its Section 17 Corporation or other tribally-owned entities incorporated under tribal law that is immune from federal taxation is immune from state and local tax even if the State requires these tribally-owned entities to register with the State in order to conduct business there. Registration of a tribally-owned and tribally-chartered or federally-chartered entity as a business operating within the State has no bearing on the income tax immunity of that entity. When a tribally-owned entity, however, forms under the laws of a state by filing a certificate of incorporation or articles of incorporation according to that jurisdiction's laws, that tribal entity loses its tax immunity and is subject to federal, state and local income tax just as any other entity incorporated under state law.

<sup>20</sup> Furthermore, "Members of the Tribe are liable for payment of all estate and inheritance taxes, except the undistributed share of a member in the Per Capita Payment Trust Fund established by the federal



The State Act also provides a state law exclusion associated with the fees that the Tribe pays to a local school district from tribal funds or from the federal Impact Aid program. *See* discussion below in Section 2(b) for further details regarding local school district fees. The provision clarifies that to the extent these contributions to local school districts are attributed to any individual student, the amounts contributed are not included as income of the student or the student's family and is therefore not subject to state tax. SC Code § 27-16-130(I)(2).

#### **4. Non-members**

The State Act clarifies that the state and local tax exemptions and exclusions that apply to the Tribe and its members, do not apply to any others who reside upon or conduct business on the reservation. SC Code § 27-16-130 (C)(3). As a result non-members employed to provide governmental services on the Reservation or engaged in the sale of Catawba pottery and artifacts are subject to all state and local income taxes. SC Code § 27-16-130 (C)(3).

#### **b. Real Property taxes**

##### **1. Trust land on the Reservation**

Trust lands on the Tribe's Reservation and permanent improvements are exempt from property taxes. SC Code § 27-16-130 (D)(1). The rule is generally consistent with the provisions of Section 5 of the Indian Reorganization Act, 25 U.S.C. § 465, which preempts state and local taxation of trust land and permanent improvements on trust land. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973); *Confederated Tribes of the Chehalis Reservation v. Thurston County*, 724 F.3d 1153 (9th Cir. 2013). The State Act establishes an exception to the Tribe's exemption from any property tax levied by state or local governments on trust lands. The State Act requires the Tribe to pay a "fee in lieu of school taxes" to the county school district(s) serving Catawba students. SC Code § 27-16-130(I). The Tribe is to pay this fee to county school districts based on the amount that is paid by students from outside the county. The federal funds generated by the Tribe for the school district (through the Impact Aid program or other federal programs that compensate school districts for the loss of revenues due to nontaxable tribal lands within their districts) are taken into account so that the Tribe's fee is reduced by the amount of those federal funds. SC Code § 27-16-130(I) (1) (citing 20 U.S.C. § 236 *et seq.*).

Another distinction from the general preemption rule created by the State Act involves tribal partnerships with non-tribal entities in owning a business or property on the Reservation. The State Act provides that "[i]f the Tribe owns a partial interest in property or a business, the property tax exemption provided in this section is applicable to the extent of the Tribe's interest." SC Code § 27-16-130 (D)(1). As a result, the State Act establishes that the portion of the interest owned by the non-tribal entity would be subject to property taxes. The Ninth Circuit recently considered whether a county could impose its real property tax on the non-Indian share of a jointly-owned hotel located on trust lands. It concluded that Section 5 of the IRA preempts state

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implementing legislation and the Settlement Agreement are exempt from state estate and inheritance taxes." SC Code § 27-16-130(K).

and local taxes on the trust lands and any permanent improvements located on that land "without regard to the ownership of the improvements." *Chehalis*, 724 F.3d at 1159 (rejecting the County's argument that because a non-tribal entity, Great Wolf Lodge, owned 49% of the improvements, the County could, at a minimum, impose its property tax on the portion of the improvements owned by Great Wolf Lodge, if not the portion owned by the Tribe). For the Catawba Indian Nation, however, the State Act provision asserts that when the Tribe partners with a non-tribal entity to jointly own improvements on trust lands located on the Reservation that the non-tribal entity's ownership interest would be subject to real property taxes.

## **2. Non-Trust land on the Reservation**

The State Act provides that land on the Reservation not held in trust is exempt from real property taxes, however, buildings, fixtures and improvements on that property is subject to all real property taxes. SC Code § 27-16-130 (D)(3).<sup>21</sup> To the extent that the buildings, fixtures and improvements on these lands are subject to real property taxes, local county rules for tax abatements or temporary exemptions would apply just as to other such properties located within the county. *Id.*

## **3. Off-Reservation land held in trust**

Although under the Settlement Act certain land claims were relinquished (25 U.S.C. § 941d(b)–(d)), this would not preclude an effort by the Tribe to place non-Reservation lands into trust under the IRA. For example, the State Act acknowledges non-Reservation trust lands by noting that "any non-Reservation real property held in trust by the Secretary is not taxable for property tax purposes, it is subject to the payment of a fee or fees by the Tribe...". SC Code § 27-16-130 (D)(6). Moreover, federal courts have established that tribes that have relinquished land claims through settlement acts may still petition for land under the IRA. *Akiachak Native Community v. Salazar*, 935 F.Supp.2d 195, 204–06 (D.D.C. 2013).

Because the payment in lieu of taxation set forth in the State Act would require the Tribe to pay to the local taxing jurisdiction the same amount that would otherwise be levied in property taxes, the tax advantages of the land-into-trust process would be offset by the required payment in lieu of taxation. *See* SC Code § 27-16-130 (D)(6).<sup>22</sup>

## **4. Off-Reservation, non-trust land**

The State Act treats real property and improvements owned by the Tribe or by tribal members just as any other real property within the State thereby making them fully subject to real property taxes. SC Code § 27-16-130(D)(5).

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<sup>21</sup> Further research may be needed here. Terms are not explicit but are clearly implied.

<sup>22</sup> This is another area for further analysis as key terms are not explicit but implied.

## **5. Tribal-member occupied on-Reservation residences exempt from state and local property taxes**

Residences owned by the Tribe or tribal member and occupied by a tribal member (or surviving spouse) are exempt from all state and local property tax levies. SC Code § 27-16-130(D)(2).<sup>23</sup> Furthermore, when the Tribe constructs rental property on the Reservation through an Indian Housing Authority financed by the Department of Housing and Urban Development (HUD), that property is exempt from all property taxes. SC Code § 27-16-130(D)(2)(a)(iv). The Tribe's Housing Authority may, but is not required to, "agree to make payments to the county or a political subdivision for improvements, services, and facilities furnished by the county or political subdivision for the benefit of the housing project." *Id.*

## **6. Business Partners of the Tribe**

As noted in the discussion above, even with regard to on-Reservation trust lands, the State Act suggests that the real property interests of non-tribal entities are subject to real property taxes imposed by state and local governments. SC Code § 27-16-130 (D)(1). This provision, however, does not expressly authorize such taxation. Rather, the taxation is implied by the terms stating that for jointly owned property, the tax exemption applies to the Tribe to the extent of its interest (and by implication the non-tribal interest would not be exempt). Further ambiguity is created, however, by State Act terms authorizing the Tribe to "levy taxes on buildings, fixtures, improvements, and personal property located on the Reservation, *even though the properties may be exempt from property taxation by the State or its subdivisions...*" SC Code § 27-16-130 (D)(4) (emphasis added). As to the exempt properties upon which the Tribe would levy its tax, this provision may be read as applicable to those residences of tribal members that are exempt from local government property taxes (see discussion above). SC Code § 27-16-130 (D)(2). With respect to non-tribal interests, it could be argued that this provision simply authorizes the Tribe to impose an additional tax on top of applicable real property taxes, as subparagraph (D)(3) makes any ownership not exempt under (D)(1) and (D)(2) subject to state/county real property taxes. This does not necessarily resolve the question of whether the Tribe's business partners under (D)(1) may be exempted.

Case law does not help resolve this question. For example, a recent federal court case held that the IRA preempts state and local taxes on the trust lands and any permanent improvements located on that land "without regard to the ownership of the improvements." *Chehalis*, 724 F.3d at 1159. But that case law involves the IRA, but here the Tribe's Reservation trust lands were acquired under the terms of the Settlement Act. To the extent the Tribe acquires off-Reservation lands in trust under the IRA instead of the Settlement Act, there may be additional ambiguity as to whether the IRA rules on the exemption of permanent improvements from real property taxes may apply. We expect that ambiguity would likely be resolved, however, by reference to the Settlement Act terms which provide that "[a]ll properties acquired by the Tribe shall be acquired subject to the terms and conditions set forth in the Settlement Agreement." 25 U.S.C. § 941j(f). The Settlement Agreement provides that "all non-reservation properties, and all activities conducted on such properties, shall be subject to the laws,

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<sup>23</sup> For multi-unit dwellings, tribal member occupied units are exempt, while nonmember occupied units are subject to tax.

ordinances, taxes and regulations of the State and its political subdivisions..." Settlement Agreement, § 15.2. Furthermore, given that the State Act requires the Tribe to make payments in lieu of taxation on those non-Reservation trust lands, we would expect a non-tribal business partner, even if not subject to property taxes, would be subject to payments in lieu of taxation, as the non-tribal entity would not have been intended to receive more favorable tax treatment than the Tribe itself.

## **7. Lessees**

The Tribe's leasing of trust lands is another area where the Settlement Act and State Act limit the tax benefits that would otherwise be available under federal Indian law. Under the BIA leasing regulations (25 C.F.R. Part 162) that implement 25 U.S.C. § 415, permanent improvements on leased land, leasehold or possessory interests, and activities under the lease are exempt from state and local tax and subject only to the applicable tribal tax. *See* 25 C.F.R. § 162.017; *see also Seminole Tribe of Florida v. Stranburg*, 799 F.3d 1324 (11th Cir. 2015) (discussing preemption of state rental tax imposed on lessees of the Tribe). The Tribe's Settlement Act specifically states that the Leasing Act (25 U.S.C. § 415) and the Leasing Regulations (25 C.F.R. Part 162) do not apply. 25 U.S.C. § 941j(l) and (m). The Settlement Act makes clear that the underlying land or leasehold in the land is not subject to real property taxes." SC Code § 27-16-130 (D)(3). The Settlement Act also provides that the Tribe has the flexibility to "sell, exchange, or lease lands" for up to 99 years with or without Secretarial approval (25 U.S.C. § 941j(j)). The Tribe, however, is unable to harness the tax benefits that federal Indian law bestows on the improvements and activities conducted under tribal leases. *See* 25 U.S.C. § 941k(b) (the "Tribe as land owner shall be subject to the same obligations and responsibilities as other persons and entities under State, Federal, and local law").

South Carolina imposes an ad valorem tax on property leased by a public authority to a private lessee when the lease is for a definitive term. *See* Memorandum from Burnet Maybank of Dec. 9, 2015, at 8 [attached as Appendix 2 of this Survey]. In discussing the South Carolina rules applicable to the Tribe's leases to private parties, Mr. Maybank identifies a precedent under which another public authority has conveyed the right to use and occupy the land through an instrument other than a lease. By making property use and occupancy rights available to the private party through a license rather than a lease, the State's ad valorem tax on the lease would not apply. *See id.* Under State law, when the Tribe leases property for a definite term, the lessee would be subject to property taxes on the lease. If the Tribe were to issue a license rather than a lease for the private party's use of that property, however, there would be no lease for the State to tax. *See id.*

### **c. Personal Property taxes**

#### **1. Tribally owned property**

Under the State Act, all personal property owned by the Tribe and used solely on the Reservation is exempt from personal property taxes levied by the State and its local taxing jurisdictions. SC Code § 27-16-130(E)(1). While personal property used off-Reservation would

be subject to property taxes, tribally-owned motor vehicles are exempted from any personal property taxes regardless of whether those vehicles are used off-Reservation. *Id.*<sup>24</sup>

## **2. Tribal Member owned property**

Personal property owned by tribal members, however, is subject to personal property taxes levied by "the State, a county, a school district, a special purpose district, and any other political subdivisions where the property is deemed to be located." SC Code § 27-16-130(E)(2). Tribal members' personal property is to be assessed and taxed on the same terms and amounts as other person property in that jurisdiction. *Id.* (E)(3).

### **d. The Property Tax Enforcement Regime**

The State Act sets forth specific relief available to state and local taxing authorities to recover unpaid taxes. SC Code § 27-16-130(F). In situations where a taxpayer required to pay real or personal property taxes failed to do so, the State Act authorizes the local tax authority "to levy against personal property subject to personal property taxes owned by the taxpayer within the county, on or off the Reservation, in order to satisfy the taxes due." *Id.* To the extent that there is a deficiency after that levy, the tax jurisdiction may certify the amount of the deficiency to the State. The State is then required to levy against other taxable property of the taxpayer in the State and remit the proceeds from that levy to the taxing authority that is owed the tax. SC Code § 27-16-130(F)(1).

In a situation where the taxing authority cannot satisfy its tax lien, the State Act provides that the affected taxing authority "may require the Tribe to cease allowing the taxpayer to do business on the Reservation." SC Code § 27-16-130(F)(2). This provision would appear designed to address a situation where a non-tribal entity is conducting business on the Reservation in order to obtain an unlawful tax haven. Yet, it would also appear to be applicable to tribal members who for any number of reasons may be able to meet their tax obligations and may not have any other taxable property in the state. Moreover, the provision is remarkable in providing an outside jurisdiction with discretion to require the Tribe to take an enforcement action on behalf of that outside taxing authority. It is not clear what mechanism would be available to this outside entity to enforce its demand that the Tribe revoke the taxpayer's authority to conduct business on the Reservation. What is clear, however, is that no state or local jurisdiction may seize real property located on the Reservation in order to satisfy a tax lien. SC Code § 27-16-130(F)(4).

### **e. State and Local Sales and Use Taxes**

Although the Tribe and its members are generally liable for state and local sale and use taxes, the State Act establishes the statutory exceptions identified below. SC Code § 27-16-130(H).

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<sup>24</sup> Although the Tribe's motor vehicles are exempt from personal property taxes, the Tribe and its members are subject to state and local government motor fuels taxes and are required to pay license, registration and inspection fees and meet license and inspection requirements. SC Code § 27-16-130(G).

**1. Purchases made by the Tribe for tribal governmental functions.**

Purchases made by the Tribe for tribal government functions are exempt from state and local sales and use taxes. SC Code § 27-16-130(H)(1).

**2. Catawba Pottery and Artifacts**

Catawba pottery and artifacts made by members of the Tribe and sold on or off the Reservation by the Tribe or members of the Tribe are exempt from state and local sales and use taxes. SC Code § 27-16-130(H)(2).

**3. On-Reservation sales**

On-Reservation sales of any other item (whether made on or off the Reservation) are exempt from state and local sales and use taxes. SC Code § 27-16-130(H)(3). The administration of this exemption, however, involves several additional requirements. First, the Tribe must levy a "special tribal sales tax" that is equivalent to the state and local sales tax that would otherwise apply. *Id.* The special tribal sales tax, however, is to be administered and collected by the South Carolina Tax Commission in accordance with State rules and is to be periodically remitted to the Tribe. SC Code § 27-16-130(H)(3)(a) & (b). Lesser value sales items of \$100 or less, however, are not subject to the special tribal sales tax. For transactions of \$100 or less, the state sales tax applies. SC Code § 27-16-130(H)(3)(c).

**4. Use Taxes**

The Tribe is authorized and responsible for imposing a tribal use tax "on the storage, use, or other consumption on the Reservation of tangible personal property purchased at retail outside the State *when the vendor does not collect the tax.*" SC Code § 27-16-130(H)(3)(d) (emphasis added). Use taxes collected by a vendor not located in the State are subject to state use taxes, and the use tax must be remitted to the State and not the Tribe.

**Section 3. Tribal Tax Authority**

As noted in Section 1, the tax revenues collected by the Tribe are not taxable for federal, state, or local income taxes. See SC Code § 27-16-130(C)(1). The Tribe's taxation authority includes specific provisions set forth in the Settlement Act and State Act as discussed below. Additionally, the Tribe retains its inherent authority to impose taxes on members and nonmembers (subject to certain limitations). See *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982); *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 417 U.S. 195 (1985). More recent Supreme Court cases, however, have significantly curtailed tribal authority to tax non-members. See, e.g., *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645 (2001). Several provisions in the State Act, however, reinforce and clarify the Tribe's tax authority over non-members.

a. Tribal property taxes on reservation

Under the State Act, the Tribe is authorized to levy taxes "on buildings, fixtures, improvements, and personal property located on the Reservation." SC Code § 27-16-130(D)(4). The State Act also requires York and Lancaster Counties and the South Carolina Tax Commission to assist the Tribe in assessing tribal real property taxes. *Id.* In federal Indian law, often while a tribe may be authorized to assess taxes on those doing business on the reservation, other state and local jurisdictions may tax the same transactions, thereby creating multiple layers of taxation that chill outside investment. The State Act suggests that certain properties on the Reservation are exempt from state and local tax, thereby providing opportunities for the Tribe to tax at a rate that may be economically viable for the Tribe and those conducting business on the Reservation.<sup>25</sup>

b. Tribal sales taxes for on-Reservation sales

State Act provisions governing the Tribe's authority to levy taxes on the sales of goods on the Reservation are set forth in direct, clear terms. As discussed above in Section 2(e)(3), a special tribal sales tax applies to sales whose gross proceeds are more than \$100. Rather than being administered by the Tribe under tribal law, however, the State Act requires the special tribal sales tax to be administered and collected by the South Carolina Tax Commission. SC Code § 27-16-130(H)(3). The terms would provide the Tribe with sales tax revenues for such commercial items as cell phones and computer-related goods and other retail items in which inventory items are generally priced at above \$100. The terms, however, require the tribal tax to be equivalent to the otherwise applicable state and local sales tax. As a result, the Tribe would not be able to reduce or waive that tax in order to attract vendors or buyers based solely on lower sales tax rates.<sup>26</sup>

c. Tribal use taxes

As noted above, the Tribe is authorized and responsible for imposing a tribal use tax "on the storage, use, or other consumption on the Reservation of tangible personal property purchased at retail outside the State *when the vendor does not collect the tax.*" SC Code § 27-16-130(H)(3)(d) (emphasis added). When the vendor is delivering tangible personal property to the Reservation from a location outside the state and the vendor does collect the tax, however, the State's use tax will apply. *Id.*

#### **Section 4. Financing and Commerce Advantages through Federal Economic Development Programs**

The Settlement Act also specifically makes certain federal statutes applicable to the Tribe, including: Title VII of the Housing and Community Development Act, 25 U.S.C.

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<sup>25</sup> Please see discussion in Section 2(b)(6) noting that the non-tribal property interests exempt from state and local taxation are unclear.

<sup>26</sup> Appendix 1 sets forth an illustrative scenario where sales tax benefits are combined with other tax and governance advantages to maximize the tax and revenue efficiencies of a tribally-owned school equipment and supplies business.

§ 941m(d), the Foreign Trade Zones Act, 25 U.S.C. § 941m(d), the Indian Child Welfare Act, 25 U.S.C. § 941h(3), and the Indian Self Determination and Education Assistance Act, 25 U.S.C. § 941h(6). Additionally, the Settlement Act affects jurisdiction of the Tribe and the State over the Tribe's land. *See* 25 U.S.C. §§ 941m(e), 941h(1).

a. Development Zones

**1. Enterprise Zone**

Title VII of the Housing and Community Development Act of 1987, 42 U.S.C. §§ 11501–11505, was the first Enterprise Zone legislation enacted. The Act did not create tax incentives, but rather it permitted the Department of Housing and Urban Development (HUD) to waive regulatory rules in areas it designated as Enterprise Zones to encourage development. 42 U.S.C. § 11504.

The Settlement Act states that the Tribe is eligible to become an Enterprise Zone under Title VII of the Housing and Community Development Act of 1987 or any other applicable federal laws or regulations. 25 U.S.C. § 941m(d). However, the designation timeframe was short under 42 U.S.C. § 11501(a)(4)(B), and HUD never designated any Enterprise Zones before it expired.<sup>27</sup> Therefore, the Act is now effectively defunct.

Under more recent legislation, such as the Empowerment Zones and Enterprise Communities Act of 1993 and Community Renewal Tax Relief Act of 2000, Empowerment Zones, Renewal Communities, and Enterprise Communities receive tax incentives, grants, bonding authority, and other benefits in order to bring new business to the designated areas.<sup>28</sup> These are new statutes rather than amendments to the Housing and Community Development Act. HUD manages the programs for Renewal Communities and urban areas and the Department of Agriculture (USDA) manages the programs for rural Empowerment Zones and Enterprise Communities. These programs have been carried out and communities, including some tribes, have received designations. However, designation under these programs no longer appears available.

The Tribe may be eligible for designation under other newer federal programs meant to draw business into economically disadvantaged areas using tax incentives. Upon request, we can research the availability of similar programs. If a new program is available, the Tribe can utilize it to both draw new businesses to its reservation land and to operate its own businesses using the benefits of the program.

**2. Foreign Trade Zone**

Under the Foreign Trade Zones Act of 1934, as amended, 19 U.S.C. §§ 81a–81u, foreign and domestic merchandise may be brought into a Foreign Trade Zone or Subzone to be stored, sold, manufactured, assembled, or otherwise manipulated without application of customs laws or

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<sup>27</sup> <http://www.referenceforbusiness.com/encyclopedia/Eco-Ent/Empowerment-Zones.html>.

<sup>28</sup> [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/comm\\_planning/economicdevelopment/programs/rc](http://portal.hud.gov/hudportal/HUD?src=/program_offices/comm_planning/economicdevelopment/programs/rc).



taxes—thereby permitting manufacturers to gather parts, assemble the product within the Foreign Trade Zone, and pay taxes on the manufactured product as a whole. 19 U.S.C. § 81c(a); 19 C.F.R. Part 146.<sup>29</sup> Those operating Foreign Trade Zones function as public utilities, making a profit by leasing storage or distribution space and providing access to various modes of transportation. 19 U.S.C. § 81n; 15 C.F.R. § 400.42(a).

To gain status as a Foreign Trade Zone, one must apply to the Foreign-Trade Zones Board (Board). 19 U.S.C. §§ 81b, 81f; *see also* 15 C.F.R. 400.11–400.38. The Board grants the application if it finds the proposed plans and location are suitable for accomplishment of the purpose of a Foreign Trade Zone. 19 U.S.C. § 81g; *see also* 15 C.F.R. § 400.26.

Foreign Trade Zones must be located in or adjacent to ports of entry. 19 U.S.C. § 81b(a); 15 C.F.R. § 400.11(b)(1). However, the implementing regulations found at 15 C.F.R. Part 400 state the adjacency requirement is met if the Foreign Trade Zone is "located within 60 statute miles or 90 minutes' driving time" from the outer limits of a port of entry, as determined or concurred upon by the U.S. Customs and Border Protection. 15 C.F.R. § 400.11(b)(2)(i). In an application to become a Foreign Trade Zone, an applicant must show "the land and water or land or water area or land area alone if the application is for its establishment in or adjacent to an interior port" as well as "the fitness of the area for a zone." 19 U.S.C. § 81f(a)(1). The application must include a statement regarding the distance and, if distance exceeds 60 miles, driving time. 15 C.F.R. § 400.21(d)(2)(iii). Subzones require only sufficient U.S. Customs and Border Protection supervision, including through electronic means. 15 C.F.R. § 400.11(b)(2)(ii).

Generally, each port is permitted one Foreign Trade Zone. 19 U.S.C. § 81b(b); 15 C.F.R. § 400.11(a)(1)(i). However, the Board may approve more than one Foreign Trade Zone per port in certain circumstances, including "if the Board finds that existing or authorized zones will not adequately serve the convenience of commerce." 19 U.S.C. § 81b(b); *see also* 15 C.F.R. § 400.11(a)(2). Additionally, the Board may designate Subzones, which are established for a specific rather than general use. 15 C.F.R. § 400.2(s).

The Settlement Act states that the Tribe is eligible to become a Foreign Trade Zone or Subzone under the Foreign Trade Zones Act of 1934, as amended, and the applicable regulations. 25 U.S.C. § 941m(d). Nowhere does the Foreign Trade Zones Act refer to tribes, but some tribes have received Foreign Trade Zone status, including the Lummi Indian Business Council and the Puyallup Tribal Foreign-Trade Zone Corporation.<sup>30</sup>

There are five ports of entry in South Carolina, and they are located in Charleston, Columbia, Georgetown, Greer, and Myrtle Beach.<sup>31</sup> There are currently three Foreign Trade Zones in the State, one of which serves the port in Greer.<sup>32</sup> The port in Greer is located approximately an hour and 45 minutes' or a 90 mile drive from the Tribe. The other ports of entry are located along the coast and farther from the Tribe's land.

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<sup>29</sup> <http://www.cbp.gov/border-security/ports-entry/cargo-security/cargo-control/foreign-trade-zones/about>.

<sup>30</sup> [http://www.gdi-solutions.com/directory/ftz\\_usa.htm](http://www.gdi-solutions.com/directory/ftz_usa.htm)

<sup>31</sup> <https://www.cbp.gov/contact/ports/SC>.

<sup>32</sup> <http://enforcement.trade.gov/ftzpage/letters/ftzlist-map.html>.

The Tribe could seek designation as a Foreign Trade Zone associated with the Greer port within its reservation land. This would involve submitting an application to the Board arguing the existing Foreign Trade Zone does not adequately serve the convenience of commerce and thus the Greer port should receive a second Foreign Trade Zone. Although the Greer port is farther than a 90 minutes' drive from the Tribe's land, the Tribe could attempt to establish that it is within 60 miles if measured as the crow flies and is thus sufficiently adjacent to the Greer port. In the alternative, the Tribe could attempt to establish its reservation land's status as a Subzone. Designating its land as a Foreign Trade Zone or Subzone would provide the Tribe with a business opportunity and would also bring other business to the Tribe's reservation.

In the alternative, the Tribe could purchase land closer to one of the State's ports, whether it is a port that already has a designated Foreign Trade Zone or one of the two ports that does not. If the Tribe acquired land near a port and gained status as a Foreign Trade Zone, the Tribe could operate a Foreign Trade Zone business venture at that location. Although this would not necessarily draw business to the Tribe's lands, it could serve as a separate tribal economic development opportunity.

### **3. HUBZone**

Under the Small Business Reauthorization Act of 1997, as amended, 15 U.S.C. § 657a(b)(2), certain businesses located in communities designated as historically underutilized business zones (HUBZones) receive government contracting preferences.<sup>33</sup> Although the program is managed by the Small Business Administration, it applies to all federal departments that contract. 13 C.F.R. § 126.101(a).

A business seeking to establish that it operates in a HUBZone must obtain certification from the Small Business Administration. *See* 13 C.F.R. §§ 126.200–126.207, 126.300–126.309. Any land meeting the definition of Indian country may qualify as a HUBZone, but land located in a state in which a tribe did not exercise jurisdiction as of December 21, 2000, and off-reservation and non-contiguous land acquired after that date cannot qualify. 13 C.F.R. § 126.103.

A tribally owned business may qualify for preferential contracting when 35% of its employees reside in a HUBZone, including a reservation. 13 C.F.R. § 126.103; 13 C.F.R. § 126.200(a); *see also* 15 U.S.C. § 637. Non-tribally owned small businesses may also qualify for preferential contracting when located in a HUBZone and when 35% of their employees reside in the HUBZone. 13 C.F.R. § 126.200(b).

Land located within the Tribe's reservation is eligible to qualify as a HUBZone, but trust land acquired outside and non-contiguously to the reservation after December 21, 2000, is not eligible. The Tribe may utilize its HUBZone reservation status to gain government contracts as a source of revenue. It may also work to make its eligibility as a HUBZone known in order to encourage other small businesses engaged in government contracting to locate on the Tribe's reservation. The Small Business Administration maintains an interactive map for public use in

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<sup>33</sup> <https://www.sba.gov/content/understanding-hubzone-program>.

determining whether an address or particular area is categorized as a HUBZone.<sup>34</sup> The Catawba Indian Nation Reservation is currently a Qualified Indian Reservation HUBZone.<sup>35</sup>

b. Funding

1. **DOI Loan Guaranty Program**

The Department of the Interior (DOI) under the Indian Financing Act of 1974, as amended, 25 U.S.C. §§ 1481–1499, operates the Loan Guaranty, Insurance, and Interest Subsidy Program, which encourages lending institutions to provide loans to Indian businesses.<sup>36</sup> The Office of Indian Energy and Economic Development (IEED) manages the program.<sup>37</sup>

Through the program, DOI can guaranty up to 90% of the principal amount of a loan. 25 U.S.C. § 1481(a)(1); 25 C.F.R. § 103.6(a). An economic enterprise may borrow \$250,000 or more with DOI's approval, 25 U.S.C. § 1484, and DOI has interpreted this authority to extend to sums over and above \$500,000, 25 C.F.R. § 103.5. Typically, the Indian business applies for a loan from the lending institution, and the institution requests a loan guarantee from the federal government. 25 C.F.R. § 103.9. The IEED has indicated that funding is available under the program and that many tribes that apply receive funding.

DOI guarantees loans for any lawful business organized for profit. 25 C.F.R. § 103.4. Thus, although the program is run by IEED, funding may be obtained for projects unrelated to energy. The businesses borrowing funds must be at least 51% Indian owned. 25 C.F.R. § 103.25.

Neither the statute nor its implementing regulations at 24 C.F.R. Part 103 dictate that a tribe cannot use its borrowed funds on fee land. The only reference to land status in the statute is a restriction on trust acquisition of lands located outside a reservation and purchased using loan funds. 25 U.S.C. § 1495. The implementing regulations contain more detailed restrictions, and they require the business borrowing funds to contribute to the economy of a reservation or service area. 25 C.F.R. § 103.4(a). If a business borrowing funds moves any significant portion of its business operations to a location not on or near a reservation or service area, the lender must obtain written DOI approval before modifying the loan guaranteed. 25 C.F.R. § 103.34(7). IEED's promotional material further requires a borrower's business to be located on or near a reservation or service area.<sup>38</sup> None of the guidance addresses whether the land on which the business is located must be held in trust or whether there are restrictions on where the funds are actually used.

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<sup>34</sup> Available at [maps.sba.gov/hubzone/maps](https://maps.sba.gov/hubzone/maps). Lancaster, Chester, Union, and Cherokee County are currently designated HUBZones; while Rock Hill and the City of York (but not York County) are listed as qualified census tracts.

<sup>35</sup> [https://www.sba.gov/sites/default/files/2014\\_QualifiedIndianLands.pdf](https://www.sba.gov/sites/default/files/2014_QualifiedIndianLands.pdf).

<sup>36</sup> <http://www.bia.gov/cs/groups/xieed/documents/document/idc-034739.pdf>.

<sup>37</sup> <http://bia.gov/WhoWeAre/AS-IA/IEED/LoanProgram/index.htm>.

<sup>38</sup> <http://bia.gov/cs/groups/public/documents/text/idc-001933.pdf>.

The Tribe seeks to use funding acquired through the loan guarantee program to construct a hotel on fee land within its service area. This project would contribute to the economy of its service area. Further, the Tribe as borrower is located on its reservation land, and it plans to expend the funds borrowed within its service area. Thus, it can likely acquire and use funds from the loan guarantee program to gain financing for the hotel.

## **2. DOE Loan Guarantee Program**

The Energy Policy Act of 1992 as amended in 2005, 25 U.S.C. § 3502, authorizes the Department of Energy (DOE) to operate the Tribal Loan Guarantee Program.<sup>39</sup> The Office of Indian Energy Policy and Programs runs the program, which closely resembles DOI's loan guarantee program. Thus, its application and benefits to the Tribe are discussed above.

## **3. Treasury CDFI Fund**

The Riegle Community Development and Regulatory Improvement Act of 1994, 12 U.S.C. §§ 4701–4719, authorizes Treasury to operate the Community Development Financial Institutions (CDFI) Fund.<sup>40</sup> Through the Native Initiatives Program, Treasury disburses grants or loans of up to \$75,000, which the grantee must match with non-federal funds, and grants of up to \$150,000 for technical assistance.<sup>41</sup> The program is meant to remove Native communities' barriers to accessing capital and financial services.

To receive financial assistance through the program, an organization must be certified as a CDFI by the CDFI Fund and at least 50% of its activities must serve Natives. Recipients for FY 2015 have already been announced, and the deadline for the next round of applications has not been posted. The Tribe could utilize this program to encourage financial institutions to work with the Tribe and its members or to create a financial institution to serve tribal members run by the Tribe.

## **4. USDA Housing Guaranteed Loan Program**

The Doug Bereuter Section 502 Single Family Housing Loan Guarantee Act of 1949, 42 U.S.C. §§ 1472(h), authorizes USDA to operate the Single Family Housing Guaranteed Loan Program. Funding is available to low income applicants to provide assistance with housing in eligible rural areas.<sup>42</sup>

Applicants contact lenders, and lenders work with USDA to secure loan guarantees. The program is available to those living on tribal land. *See* 7 C.F.R. § 3555.6. However, it appears that this particular program, unlike other USDA funding programs, *see* 42 U.S.C. § 1471(c), applies only to individuals seeking loans for their residences rather than to tribal entities as a whole.

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<sup>39</sup> <http://www.energy.gov/indianenergy/mission>.

<sup>40</sup> <https://www.cdfifund.gov/about/Pages/default.aspx>.

<sup>41</sup> [http://www.mycdfi.cdfifund.gov/what\\_we\\_do/programs\\_id.asp?programID=3](http://www.mycdfi.cdfifund.gov/what_we_do/programs_id.asp?programID=3).

<sup>42</sup> <http://www.rd.usda.gov/programs-services/single-family-housing-guaranteed-loan-program>.

The Tribe's land is located in an eligible rural area. Therefore, those seeking to purchase or improve their homes on the Tribe's land are eligible for loans under the program. Thus, the Tribe may be able to encourage businesses seeking to construct homes to build on its reservation land, as individuals seeking home ownership will have access to funding.

## **5. DOI Energy and Mineral Development Grant and Tribal Energy Development Capacity Grant**

The Energy Policy Act of 1992 as amended in 2005, 25 U.S.C. § 3502, authorizes DOI to establish and implement an Indian energy resource development plan, which includes provision of grant money. Under this authorization, DOI has created grant programs designed to aid tribes in evaluating and developing energy resources on their lands. DOI has created the Energy and Mineral Development Grant, designed to aid tribes with the technical side of resource development,<sup>43</sup> and the Tribal Energy Development Capacity Grant, designed to aid tribes with the commercial and legal side.<sup>44</sup>

Both grants are available annually and require grant submissions, and both are managed by IEED.<sup>45</sup> IEED makes technical assistance available while applicants prepare their submissions. However, the deadline for both grants passed in June. It appears Congress has provided funding for both grants for FY 2016, and therefore the grants should be accessible again this coming summer. The Tribe may use these grants to develop natural resources on its reservation.

### **c. Technical Assistance**

#### **1. White House Promise Zone**

President Obama in his 2013 State of the Union Address announced his Promise Zone Initiative, which provides for a partnership in selected communities between local leaders and federal government officials in order to address community revitalization.<sup>46</sup> The program aims to increase economic activity, improve educational opportunities, leverage private investment, reduce violent crime, enhance public health, and address other priorities identified by the community. Chosen communities receive five designated AmeriCorps VISTA members, a federal liaison, preferences for certain grant programs and technical assistance, and tax incentives if enacted by Congress at a later date.<sup>47</sup>

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<sup>43</sup> <http://www.bia.gov/WhoWeAre/AS-IA/IEED/DEMD/TT/TF/index.htm>.

<sup>44</sup> <http://www.bia.gov/WhoWeAre/AS-IA/IEED/DEMD/TEDCP/index.htm>

<sup>45</sup> <http://www.bia.gov/cs/groups/xbia/documents/document/idc1-029754.pdf> (2015 solicitation of proposals for Energy and Mineral Development Grant); <http://www.bia.gov/cs/groups/xbia/documents/document/idc1-030803.pdf> (2015 solicitation of proposals for Tribal Energy Development Capacity Grant).

<sup>46</sup> <http://www.usda.gov/wps/portal/usda/usdahome?contentid=2015/04/0116.xml>;  
[http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/comm\\_planning/economicdevelopment/programs/pz/overview](http://portal.hud.gov/hudportal/HUD?src=/program_offices/comm_planning/economicdevelopment/programs/pz/overview).

<sup>47</sup> [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/comm\\_planning/economicdevelopment/programs/pz/overview](http://portal.hud.gov/hudportal/HUD?src=/program_offices/comm_planning/economicdevelopment/programs/pz/overview).

USDA manages the program, and communities are selected through competitions.<sup>48</sup> USDA has designated 13 Promise Zones thus far, with the Choctaw Nation selected in 2014 and the Oglala Sioux Tribe selected in 2015. In the Choctaw Nation, the program has enabled 19 Head Start classrooms to receive support from the Department of Health and Human Services to provide early education, nutrition, and health services to 310 children and their families.

The third round of competition should begin shortly with one new tribal community eligible for designation as a Promise Zone by USDA.<sup>49</sup> However, HUD and USDA have not yet opened the application process. Instead, they took comments this summer on how better to structure the competition process, with plans to issue new guidance on what submissions should contain. The second round required an application that set out goals and activities accompanied by maps and a narrative.<sup>50</sup> Once USDA begins accepting submissions, the Tribe could apply for designation as a Promise Zone in order to gain access to grants and technical assistance from the federal government for a wide array of revitalization projects.

## **2. Commerce Native American Export and Trade Promotion Program**

The Native American Business Development, Trade, Promotion, and Tourism Act of 2000, 25 U.S.C. § 4304, creates the Native American Export and Trade Promotion Program aimed at facilitating government coordination and technical assistance to tribes on marketing Indian goods and services. It does not provide funding or other business development incentives, but legislation has been introduced that would strengthen the program. The program is managed by the Office of Native American Business Development within the Department of Commerce (Commerce).<sup>51</sup>

The Office of Native American Business Development seems to focus its efforts on acting as a tribal liaison and creator of the Department's tribal consultation policy rather than providing technical assistance under the program. However, the Tribe could still contact the Office to request technical assistance on exporting or importing its goods and services.

### **d. Other Considerations**

As shown above, the Tribe has access to multiple programs it can use to encourage economic development and revenue generation, both through its own economic enterprises and through drawing other Indian and non-Indian businesses to its reservation lands. However, these programs are highly technical, and each has its own advantages and shortcomings. If the Tribe is interested in pursuing any of the above programs, we can work with the Tribe to generate application material and to coordinate with the relevant federal agencies.

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<sup>48</sup> <http://www.usda.gov/wps/portal/usda/usdahome?contentid=2015/04/0116.xml>.

<sup>49</sup> [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/comm\\_planning/economicdevelopment/programs/pz](http://portal.hud.gov/hudportal/HUD?src=/program_offices/comm_planning/economicdevelopment/programs/pz).

<sup>50</sup> [http://portal.hud.gov/hudportal/documents/huddoc?id=PZ\\_R2\\_App\\_Guide\\_Urban.pdf](http://portal.hud.gov/hudportal/documents/huddoc?id=PZ_R2_App_Guide_Urban.pdf).

<sup>51</sup> <http://www.mbd.gov/main/programs/office-native-american-business-development-onabd>.

Additionally, IEED is a resource the Tribe can utilize, as its employees have developed expertise in helping tribes navigate applying for federal funding for economic development.<sup>52</sup> Securing a meeting with IEED to discuss possible funding sources may be a good first step.

## **Section 5. Federal Tax Credits Available to Tribal Partners**

The Federal Government currently runs a variety of tax incentive programs known as "tax extenders" that may be interest to the Catawba Nation, its non-Indian partners, and to individual tribal member enterprises. It is important to note that tax extenders are authorized on a temporary basis, meaning they are *not* guaranteed tax credits but instead rely on Congress for annual support. It is therefore necessary to periodically verify that the tax extender programs described below are still active before including them in business transactions.

### **a. New Markets Tax Credit**

The New Markets Tax Credit Program (NMTC) is designed to increase the flow of capital to low-income communities – including an identifiable group of individuals such as an Indian Tribe – by providing private investors tax rewards for investing in qualified Community Development Entities (CDEs). 26 U.S.C. § 45D (2000). Such entities must have a primary mission of serving low-income communities, maintain public accountability through community representation on a governing board, and be certified by the Treasury Department as a qualified community development agency. The tax credit itself is based on the amount of a Qualified Equity Investment (QEI) an investor makes in such an entity. Investors receive a tax credit of 5% of the QEI in the first three years and 6% per year in the final four years, for a 39% tax credit over a seven-year period. *Id.* at § 45D(a)(2).

For purposes of the NMTC, "low-income community" (LIC) means any population census tract that has a poverty rate of at least 20% or where the median family income does not exceed 80% of the statewide median family income or the metropolitan area median family income. 26 U.S.C. § 45D(e). Additionally, the NMTC treats "targeted populations" as low-income communities. A "targeted population" refers to "individuals, or an identifiable group of individuals, including an Indian tribe, who are low-income persons; or otherwise lack adequate access to loans or equity investments." 26 U.S.C. § 45(e)(2) (as defined in 12 U.S.C. § 4702(20) and 12 C.F.R. § 1805.201). A LIC designation thus includes Indian reservations and communities and HUBZones.

Designation as a NMTC low-income community does not require an active certification by the Tribe. Further, because LIC status includes targeted populations within its definition, an entire tribe may be eligible for this classification as one entity, rather than obtaining the classification on an area-by-area basis. The CDFI Fund maintains a census population tract database that automatically designates an area for NMTC qualification, referenced above, as well

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<sup>52</sup> IEED has even compiled information on other agencies' grant programs for tribal energy development. <http://energy.gov/indianenergy/federal-grant-loan-and-technical-assistance-programs-tribal-energy-development-0>.

as other eligibility mapping tools.<sup>53</sup> For the purposes of this tax credit, the Catawba Indian Nation's has an established LIC status because it is both targeted population group and a Qualified Indian Reservation HUBZone, which itself is located within the greater Lancaster County HUBZone and the qualified census tract of Rock Hill.

This program has the potential to provide the Catawba Nation with two-fold benefits for both investors and the Tribe. First, flexible financing will make business partnerships on tribal lands more appealing. CDEs are required to offer flexible financing terms that allow for greater cash flow management with the benefit of below market interest rates or underwriting terms. Second, increased capital flows will improve access to services and employment for the tribal community. Revitalization projects provide communities with new construction and permanent employment, and encourage future development by building on the improved access to goods and services following each QEI investment. As a result, the New Markets Tax Credit Program will appeal to private investors and tribal member enterprises alike by providing greater access to loans or equity investments under flexible financing terms.

On October 23, 2015, the Treasury's Community Development Financial Institutions (CDFI) Fund released a Notice of Allocation Availability of up to \$5 billion of NMTC investment for the CY 2015. 80 Fed. Reg. 64495 (Oct. 23, 2015). New to this year's application is the inclusion of Native Areas – i.e., federal Indian reservations, off-reservation trust lands, Hawaiian home lands, and Alaska Native village statistical areas – in the list of "innovative uses" of an NMTC allocation.<sup>54</sup> Applicants are directed to use the CIMS3 to geocode addresses and determine whether potential qualified low-income community businesses are located within Native Areas by visiting [https://www.cims.cdfifund.gov/preparation/?config=config\\_nmhc.xml](https://www.cims.cdfifund.gov/preparation/?config=config_nmhc.xml). The electronic application submission deadline for the CY 2015 period was December 16, 2015. The application deadline for the CY 2016 cycle will likely be scheduled for a date in December of 2016.

b. Accelerated Depreciation

Depreciation is a general income tax deduction that allows a taxpayer to recover the cost of wear and tear or deterioration of certain property. In order to qualify for a depreciation tax credit, a taxpayer must own the property for use in an income-producing activity, and the property must have a useful life of more than one year, i.e., it cannot be first used and fully depreciated within the same year. Depreciation begins when property is first introduced to an income-producing activity, and ends when either the cost has been fully recovered or the property is removed from service. Accelerated depreciation under the Accelerated Cost Recovery System (ACRS) allows for the deduction of wear and tear faster than the property's value actually declines. 26 U.S.C. § 168. Accelerated depreciation allows companies to claim

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<sup>53</sup> "Maps and Data Tables," New Markets Tax Credit Resource Center (Updated for 113<sup>th</sup> (2013-2014) Cong. Districts), available at [http://www.novoco.com/new\\_markets/resources/maps\\_data.php#target](http://www.novoco.com/new_markets/resources/maps_data.php#target).

<sup>54</sup> "Innovative use" refers to investments in unrelated Community Development Entities that do not have NMTC allocations; target states identified by the CDFI Fund; inventory or equipment purchase, qualified low-income community investments of \$2 million or less, etc. "NMTC 2015 Allocation Application," Question 18, available at <https://www.cdfifund.gov/Documents/2015%20NMTC%20Application%20FINAL.pdf>.



higher expenses and thus lower their short-term taxable income with higher interest savings on investment returns.

Diverse categories of property are eligible for accelerated depreciation tax credits. Most forms of real property such as buildings, machinery, or vehicles are depreciable; however, land is not. Some forms of intangible property, like patents or computer software are also depreciable. For a full list of property categories and recovery periods, see Appendix B of the Internal Revenue Service's Publication 946 on *How to Depreciate Property*.<sup>55</sup>

The wide range of eligible property types coupled with the low tax rate on capital investments serve as a strong incentive to engage in business projects in Indian Country. For example, a non-Indian partner or tribal member enterprise could provide a loan to a qualified CDE under the New Markets Tax Credit program to finance and retrofit the expansion of a community or business facility. Wear and tear on the building, machinery used in construction, vehicles purchased for the project, and other items would then be eligible for property depreciation deductions. Consequently, the investor would benefit from the NMTC *and* the accelerated depreciation income tax reduction for any property the investor owned that was involved in the project. The broad applicability of the accelerated depreciation system and its easy coupling with other tax incentives makes this a profitable addition to any business partnership.

c. Clean Renewable Energy Bonds

Clean renewable energy bonds (CREBs) may be used to finance renewable energy projects. CREBs differ from traditional tax-exempt bonds because CREBs tax credits are treated as taxable income for the bondholder. The bonds work by substituting federal tax credits for a portion of the traditional bond interest, which results in an ability to borrow at a 0% interest rate. For new CREBs, issued after March 2010, a bondholder can choose to receive a direct refundable tax credit equal to and in place of the non-refundable tax credit which would otherwise be applied. 26 U.S.C. §§ 54(A), 54(C); IRS Notice 2010-35. While Congress limits the volume of bonds available, CREBs may be issued to qualified public entities by tribal governments, government entities, and certain lenders. Essentially, CREBs allow non-taxpaying entities such as Tribes to borrow capital for making loans without paying interest. Issuers must apply to the Internal Revenue Service for a CREBs allocation, and then issue the bonds within three years.

In order to qualify for CREBs financing, a project must involve public sector renewable energy production in a facility owned by a qualified borrower – a governmental entity, including States and Tribal governments, or a mutual or cooperative electric company. Types of eligible facilities include: wind, biomass, geothermal or solar energy, landfill gas, small irrigation power, qualified hydropower, marine renewables, or municipal solid facilities. 26 U.S.C. §§ 54C(d)(1); 45(d).

It is important to note that a CREBs tax credit is not movable, meaning it must be used within the year in which arises and cannot be carried forward to future tax years. The amount of

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<sup>55</sup> Available at [https://www.irs.gov/publications/p946/ar02.html#en\\_US\\_2013\\_publink1000107772](https://www.irs.gov/publications/p946/ar02.html#en_US_2013_publink1000107772).

the tax credit cannot exceed the taxpayer's regular tax liability. The benefit, then, of holding a CREBs tax credit is that it can be used to offset a holder's current-year tax liability on a dollar-for-dollar basis, in contrast to excluding interest from gross income.<sup>56</sup> CREBs therefore has the potential to reduce the financing challenges associated with renewable energy projects and attract investors to undertaking such projects in diverse landscapes, including Indian Country.

d. Indian Employment Tax Credit

The Indian Employment Credit is intended to provide businesses with an incentive to hire certain individuals living on or near a reservation. To qualify, an employee must be an enrolled tribal member (or an enrolled member's spouse), who lives on or near the reservation, and performs substantially all (greater than 50%) of his or her employment services within an Indian reservation. 26 U.S.C. § 45A(c)(1). Certain restrictions exist that render an otherwise qualified employee ineligible for tax credits. These include employees who earn an annual wage of more than \$30,000 (adjustable to reflect inflation), any 5% owner, services involving particular gaming activities, and services performed in a building housing certain gaming activities. 26 U.S.C. § 45A(c)(2)-(5). Employers receive a credit equal to 20% of the total qualified wages and qualified employee health insurance costs paid in the current tax year minus the total qualified wages paid in the calendar year 1993. The aggregate amount of qualified payments taken into account cannot exceed \$20,000 per employee, which means that an employer could receive a maximum credit of \$4,000 per employee under this program.

The businesses themselves do not have to be located on a reservation to qualify for the credit. Such flexibility in a business's physical location opens the tax credit to a relatively broad application. So long as the majority of the employee's services are performed on an Indian reservation, the employer can benefit from significant payroll savings. Outsourcing accordingly becomes an attractive option for both specialized industries and general services. Moreover, the credit can be claimed retroactively to 1994 and is renewable every year an eligible individual is employed (pending congressional reauthorization of the tax extender overall). The Indian Employment Credit represents an opportunity that should be marketed for its flexibility and layering ability. The credit can easily be layered upon other incentives, such as the South Carolina Wage Rebate or the federal New Markets Tax Credit, in order to increase a business's profitability while simultaneously enhancing the economic growth of the Catawba Indian Nation.

## **Section 6. State and Local Tax Benefits/Credits**

Tax credits and community development incentive programs have the potential to both reduce an individual's tax liability and make business partnerships more profitable endeavors. In the state of South Carolina, numerous tax incentive programs exist that may be of interest to the Catawba Nation, its non-Indian partners, and to individual tribal members' enterprises.

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<sup>56</sup> Edwin Oswald and Michael Larsen, "An Explanation of Clean Renewable Energy Bonds," 1 (2006), available at <http://www.orrick.com/fileupload/636.pdf>.

a. South Carolina Motion Picture Cash Rebate Incentive

The South Carolina Motion Picture Incentive Act creates incentives for a motion picture production company – i.e., "a company engaged in the business of producing motion pictures intended for a national theatrical release or for television viewing"<sup>57</sup> – to film all or part of its project in-state, primarily through the use of cash rebates.<sup>58</sup> S.C. Code Ann. §§ 12-62-10, 12-62-20(4) (2004). There are no rebates available for unscripted productions or reality shows. The South Carolina Film Commission will set up a meeting with members of the production team to go over the available incentives in detail. Once the production company has completed all production-related work in South Carolina (SC), a rebate check is distributed within thirty days of the final audit and compliance check.

There are three main financial incentives for film production in South Carolina. First, a 30% Supplier Rebate is available based on total in-state expenditures obtained from SC vendors. As a general rule, if the service is taxable in South Carolina, it qualifies. A pass-thru company specifically set up to order out-of-state items does not qualify, and an order cannot come from a SC vendor that has no relation to the company's customary stock. For example, a production entity cannot obtain a lighting platform from a wardrobe supply shop and have it count as a rebate expenditure. Internet orders do not qualify for supplier rebates. Second, a Wage Rebate of 25% for all resident wages and 20% for non-residents—including all actors and stunt performers—is available. The Wage Rebate is capped at the first \$1,000,000 of earnings taxed in SC per individual. And third, all productions that spend an in-state minimum of \$250,000 within a 12-month period are exempt from state and local sales and use tax on supplies at the point of purchase, including services and rentals of personal and real property. Eligibility for the Supplier and Wage Rebates requires an in-state expenditure of at least \$1 million in a single taxable year, while the tax exemption requires in-state spending of at least \$250,000.

In order to qualify for any of the incentives, the production company must complete a Qualifying Motion Picture Application, which must be approved before in-state principal photography begins. The application requires information concerning the "production company, the production and its associated timelines, total anticipated expenditures, anticipated South Carolina expenditures, and other pertinent information."<sup>59</sup> If the application is approved for the sales and use tax exemption and Wage and Supplier Rebates, the production company must then:

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<sup>57</sup> Limited traditional tax credits are available for certain categories of investors: (a) production companies that produce qualifying commercials; for (b) investors that construct production or post-production facilities; and (c) individual taxpayers who invest cash in the development of a single South Carolina motion picture. See "Policies and Procedures," South Carolina Film Commission (1 June 2015), available at <http://www.filmsc.com/incentives/policies/default.aspx>.

<sup>58</sup> To qualify for the maximum amount of rebates, a production company must anticipate expenditures of at least \$1 million in South Carolina and be intended for national viewing. In the case of a TV series, the production must be intended for national distribution and project a minimum spend of at least \$1 million per episode and \$10 million in overall expenditures. See *Incentives for Economic Development*, SC Department of Revenue 88-93 (2014), available at <https://dor.sc.gov/resources-site/publications/Publications/SC%20Tax%20Incentive%202014%20Edition-Web.pdf>.

<sup>59</sup> "Policies and Procedures," South Carolina Film Commission, at subsection "An Overview of the Act and Incentives Available."

- (1) Establish a staffed and functioning production office in South Carolina within sixty days of signing the Incentive Agreement Letter, and;
- (2) Maintain a functioning South Carolina production office until the production's final Supplier Rebate request has been audited by the South Carolina Film Commission.<sup>60</sup>

South Carolina's motion picture incentives enjoy a broad applicability. Because the incentives operate as cash rebates and not as traditional tax credits, non-Indian partners, tribal member enterprises, and even the Tribe itself will benefit from this program, provided the latter is a tribally owned production studio. The only requirement is that the entity applying for the incentive(s) be engaged in the business of producing motion pictures, defined as "feature-length film, video, television series, or commercial[s]," and does not include the production of television coverage of news or athletic events. S.C. Code Ann. § 12-62-20(3). The straightforward incentive requirements and relatively simple application of qualification make this program an appealing avenue of economic development. As just one example, a non-Indian partner would potentially be able to benefit from both the Federal Indian Employment Tax Credit *and* the Wage Rebate incentive if the company for each Tribal Member employed as part of the production crew or cast. In light of these considerations, the South Carolina Motion Picture Incentive Act has the potential to start the film rolling on promising new partnerships with the Catawba Indian Nation.

As an illustration, consider the benefits to area businesses that recent filming of the Cinemax television series "Outcast" has brought to York and Chester counties. According to the Rock Hill Herald, since production began in June 2015, the local economy has been energized by over \$2 million in expenditures, the use of 626 local South Carolina vendors (so far), local purchases of approximately 35-50% of a production crew's expenses, and an average employment of 150-175 crew members weekly.<sup>61</sup> The show is set in Rome, West Virginia, however, downtown Chester has doubled as Rome for most of the filming, with Rock Hill and the surrounding areas serving as additional locations. Barbara D'Alessandro, a unit production manager, noted that a deciding factor in choosing to film in South Carolina was the state's film incentive program, offering Supplier and Wage Rebates and tax exemptions that made filming here a lucrative enterprise – for both the production company and the local economy.

b. South Carolina Hospitality Fee

In York County, a 2% Hospitality Tax applies to the gross proceeds of sales of prepared food and beverages sold in eating/drinking establishments – such as restaurants or hotel cafés – located within the county's unincorporated areas. However, such businesses located within the city limits of Rock Hill, Fort Mill, Tega Cay, Clover, and York are not required to submit the county hospitality tax because their municipality is, at present, remitting the tax requirement. It is important to emphasize that a hospitality tax is paid by the consumer of services and the proceeds are used to develop tourism-related facilities and advertisements, as well as

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<sup>60</sup> *Id.*

<sup>61</sup> See Don Worthington, "Filming of TV show 'Outcast' boosts Rock Hill businesses," The Herald, October 30, 2015.

infrastructure providing access to tourist destinations – such as highways, bridges, streets, sewer lines, or beach renourishment. S.C. Code Ann. §§ 6-1-700, 6-1-730 (1997).

Establishments and communities in unincorporated areas of York County can apply for capital projects intended to expand tourism within the county. Priority in allocating funds from the hospitality tax is given to projects that promote, among others, "[p]romote and highlight York County's historic and cultural venues, recreational facilities, and events."<sup>62</sup> York County's Hospitality Tax Advisory Committee considers grant requests in the spring and reviews capital expenditures in the fall.

The unique hospitality tax program set up in York County has the potential to benefit the Catawba Nation and its partners. Applications for capital projects are open to any applicant that has been in operation for at least one year before applying for capital funds to support tourism development. This would include dining establishments, cultural facilities, or even Tribal road construction projects, so long as the project is demonstrably related to expanding tourism. Capital grants from the Hospitality Advisory Committee could offset the costs of infrastructure development or facilities management and make doing business in Indian Country more profitable. Thus, while the hospitality tax is not a tax credit per se, it has the ability to benefit the Tribe and its business partners.

c. Additional Tax Credits and Incentives

In addition to the opportunities described above, South Carolina hosts numerous other tax incentive programs that may be of interest to the Tribe. Of particular note are the Rehabilitation of Certified Historic Structures tax credit, the South Carolina Abandoned Buildings Revitalization Act, and the Community Development tax credit program, each of which is described in brief below. As tax credits, however, the beneficiaries of these programs will be non-Indian partners and tribal member enterprises and not the Tribe, as the Tribe is a non-taxable entity that cannot benefit from a tax credit.

**1. Rehabilitation of Certified Historic Structures**

The income tax credit for making qualified rehabilitation expenditures on a certified historic structure is intended to benefit property owners and preserve historic buildings in local communities. To qualify, a taxpayer must satisfy the requirements of Section 47 of the Internal Revenue Code (IRC), i.e., it must be a qualified rehabilitated building that was first placed in service before 1936. 26 U.S.C. § 47(a)-(c). A certified historic structure is "any building (and its structural components) which is listed in the National Register, or is located in a registered historic district and is certified by the Secretary of the Interior...as being of historic significance to the district." 26 U.S.C. § 47(c)(3)(A)-(B). The rehabilitation tax credit available for capital expenditures is 10% for any qualified rehabilitated building other than a certified historic

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<sup>62</sup> "York County Hospitality Tax Grant Application – Capital Projects," York County Hospitality Tax Program, YORK COUNTY GOVERNMENT (Jan. 16, 2015), *available at* <https://www.yorkcountygov.com/fileUploads/files/York%20County%20Capital%20Projects%20Grant%20Application%202015.pdf>.

structure; and 20% of the qualified rehabilitation expenditures for any certified historic structure. 26 U.S.C. § 47(a)(1)-(2).

A South Carolina taxpayer who qualifies under the federal requirements is allowed to claim a state credit against a combination of income taxes and license fees imposed by this title. Subsequently, a taxpayer may choose a 25% tax credit instead of the 10% tax credit derived from qualified rehabilitation expenditures, however, the value of the tax credit cannot exceed \$1 million for each certified historic structure. S.C. Code Ann. § 12-6-3535 (9 June 2015). A taxpayer who does not qualify for the federal income tax credit under Section 47 of the IRC is nonetheless allowed to claim a credit of 25% of the rehabilitation expenses by submitting documentation that a historic structure has been rehabilitated. *Id.* at § 12-6-3535(A)-(B).

## **2. Abandoned Buildings Revitalization Act**

South Carolina also provides tax credits for the rehabilitation of an abandoned building in order to encourage the restoration of such facilities into "productive assets" for local communities. An "abandoned building" is a structure "at least 66% of the space in which has been closed continuously to business or otherwise nonoperational for income producing purposes for a period of at least five years immediately" before a "Notice of Intent to Rehabilitate" is filed. S.C. Code Ann. § 12-67-120(1)(2013).

To qualify for this tax credit, a taxpayer must spend rehabilitation expenses of more than: (a) \$250,000 if the building is located in the unincorporated areas of a county with more than 25,000 people; (b) \$150,000 for a building located in the unincorporated areas of a county with at least 1,000 people; **or** (c) \$75,000 for a building located in a municipality with a population of less than 1,000 people. *Id.* at § 12-67-130(A)(1)-(3). A taxpayer can choose either a credit against income taxes, corporate license fees, or taxes on associations (or a combination thereof), or a credit against real property taxes imposed by local taxing entities. The amount of the tax credit is scaled depending on the actual rehabilitation expenses incurred. The Abandoned Buildings tax credit applies only to abandoned buildings that will be used for income producing purposes, and not for construction of facilities such as educational institutions or family residences.

## **3. Community Development Tax Credits**

The South Carolina also supports the development of low-income communities through partnerships under its Community Development Tax Credit program. The program allows a taxpayer to claim a 33% credit against state income tax or bank tax for all amounts invested in a community development entity. If the tax credit exceeds the taxpayer's liability to the state, the difference can be carried forward for up to nine year from the date of the investment contribution. To qualify for the tax credit, the community development entities must be certified by the South Carolina Department of Commerce, and be either a: (a) Community Development Corporation, a non-profit organizations focused on economic opportunity creation; **or** (b) Community Development Financial Institutions, a non-profit, community-based financial

institutions.<sup>63</sup> S.C. Code Ann. § 12-6-3530(2000). It is important to note that a fixed amount of revenue of \$5 million was dedicated to the tax credit, however, at present, that funding has not yet been exhausted and is still available for credit distribution.

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<sup>63</sup> There are currently twenty-three certified community development entities in South Carolina, *see* [http://communitydevelopmentsc.org/uploads/Certified\\_Organizations\\_Addresses\\_with\\_Phone\\_Numbers\\_10.3.pdf](http://communitydevelopmentsc.org/uploads/Certified_Organizations_Addresses_with_Phone_Numbers_10.3.pdf).



## Appendix 1

### Catawba Economic Development and Taxation Considerations

#### Illustrative Scenario

##### *On Reservation school equipment and supplies sales: possible mechanisms to address School District fees and generate revenue*

Issue: The Tribe is required to pay the local school district a fee in lieu of school taxes at the same amount that out of district students pay. SC Code § 27-16-130(I). The Tribe has not been able to meet these payment requirements and the school district has recorded a substantial balance due from the Tribe.

Opportunity: The school district must pay sales taxes on equipment and supplies and is looking for mechanisms to cut costs, such as possible on-reservation purchases of supplies.

##### Considerations:

- To establish a mutual benefit from this opportunity, the Tribe would need to create a business or invite an existing business onto the Reservation under terms that would allow for overall pricing of school equipment and supplies to be lower than that available off-reservation.
- The Tribe may not waive or otherwise reduce the applicable sales taxes for on-reservation purchases because the special tribal sales tax must be set at the rate that is equivalent to the off-reservation sales tax. SC Code § 27-16-130(H)(3).
- Other mechanisms, however, may be available to the Tribe to offer lower operating and sales costs by maximizing the other tax advantages available to the Tribe so that a school equipment and supply vendor (most effectively operated by the Tribe or a tribal corporation) could offer the school district savings while generating revenue for the Tribe.
- The savings and/or revenue generated could be designated by tribal resolution and by compact or other agreement with the school district as a mechanism to pay, reduce, or otherwise off-set the Tribe's financial obligations to the school district.

##### Potential Approaches and Applicable Tax Provisions:

- (1) The Tribe or its Section 17 Corporation would take on the role as the vendor of school equipment and supplies (so the income of the vendor is not subject to federal or state income taxes). IRS Rev. Rul. 94-16, 1994-1 C.B. 19; SC Code § 27-16-130(C)(1).



- (2) The operations of the school equipment and supplies business would be housed in a building owned by the Tribe and located on trust lands (so it is not subject to any real property taxes). SC Code § 27-16-130(D)(1).
- (3) Alternatively, the Tribe could operate without a separate brick and mortar site; provided that the sale of the equipment and supplies is made by the tribal enterprise to the school district on Reservation lands (triggering the special tribal sales tax to the exclusion of the state sales tax).
- (4) The tribal enterprise, operating pursuant to a sales purchase agreement with the school district, would accept orders from the school district for goods at a set purchase price (total price plus special tribal sales tax). The tribal enterprise would order the equipment and supplies from the vendor and arrange for the product to be delivered to enterprise on the Reservation. The school district would complete the purchase through payment to the tribal enterprise and by picking up the goods or arranging for their delivery to the school district. Under this scenario, the tribal enterprise would not be subject to federal or state income taxes or any real property taxes. SC Code §§ 27-16-130(C)(1) and (D)(1).
- (5) The Tribe or tribal business entity would own all personal property associated with the school equipment and supplies business such as vehicles, computers, cash registers, shelving, etc. (so that no personal property taxes would apply). SC Code § 27-16-130(E)(1).
- (6) The purchase of all items sold on the Reservation by the tribal school equipment and supplies business would be subject to the special tribal sales tax, which the Tribe will periodically receive from the State. SC Code §§ 27-16-130(H)(3) and (H)(3)(b). No state sales taxes would apply.
- (7) In estimating the revenue and/or profit the business would generate for the Tribe, the Tribe has the advantage that both profit from the sale and revenue from the special tribal sales tax would directly benefit the Tribe. Allocation of the receipts of the special tribal sales tax would be designated under tribal law. The Tribe could determine whether to remit a portion of those receipts to the business enterprise, a portion to the school district fee and/or to other tribal government purposes.
- (8) A business plan incorporating these elements would be developed and analyzed to establish the extent to which the Tribe or its corporation would be able to offer the sales of school equipment and supplies to the school district at a lower overall cost than would be available off-reservation. The plan would enable the Tribe to determine whether the activity would generate sufficient revenues for the Tribe to justify designating some portion to the payment of the school district fee.
- (9) With regard to the purchase agreement between the Tribe and the school district, the terms would include assurances that if the Tribe advances this approach that the school district will purchase from the Tribe. The school district would likely insist upon some terms in the agreement that would obligate the Tribe to dedicate some portion of the revenue stream generated by the sales of school equipment and supplies toward the payment of the school district fees. The Tribe could also request terms in that agreement under which savings to the school district attributed to on-reservation purchases would be credited to the Tribe's payment of school district fees.

Additional considerations:

The most effective approach for this scenario would appear to be for the Tribe to structure the activity so that the Tribe is operating both as the governmental entity that receives the sales tax for the sale of school equipment and supplies while also being the vendor selling those goods at a profit (as the Tribe or under a tribal corporation). This arrangement could provide the Tribe with the ability to market school equipment and supplies at a lower rate than other vendors who would have to price goods to meet all costs and allow for a profit, since those vendors would not have the benefit that the Tribe would of receiving any share of the sales tax proceeds.

On this last point, however, an alternative approach would be feasible where the Tribe could entice an existing school equipment and supply company to locate a store/warehouse on the Reservation (e.g., Staples or Office Depot). The Tribe would still receive the tribal sales tax (a portion of which the Tribe could dedicate to paying school fees). It could also help the vendor make pricing attractive to the school district purchasers by offering the vendor favorable terms to occupy a tribal building through some form of license that would not be subject to state tax. The Tribe could also consider remitting a portion of the special tribal sales tax back to the vendor as some type of grant encouraging its location on the Reservation. Additionally, if the discount on the products is not in itself motivation for the school district to purchase there, the Tribe could agree to dedicate a higher percentage of the tribal sales tax to paying the school fees in the purchase agreement with the school district.

# NEXSEN PRUET

## MEMORANDUM

**TO:** Gregory A. Smith ([GSmith@hobbsstrauss.com](mailto:GSmith@hobbsstrauss.com))  
F. Michael Willis ([mwillis@hobbsstrauss.com](mailto:mwillis@hobbsstrauss.com))  
Bill Harris ([bill.harris@catawbaindian.net](mailto:bill.harris@catawbaindian.net))

**FROM:** Burnet R. Maybank, III

**DATE:** December 9, 2015

**RE:**

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Below is my memo on various Catawba state and local tax issues. Although my engagement is limited to sales taxes, I will discuss several other taxes as well.

### **I. Sales Taxes**

#### **A. General**

The State Tax Code Section relating to sales taxes is found in section 12-16-130. It states:

**SECTION 27-16-130.** Taxation of Tribe and tribal persons, entities, and property; taxation of persons or enterprises operating or doing business on Reservation.

(A) The Tribe, its members, the Tribal Trust Funds, and other persons or entities affiliated with or owned by the Tribe, members of the Tribe, or the Tribal Trust Funds, whether a resident, located, or doing business on or off the Reservation, are subject to all state and local taxes, sales taxes, real and personal property taxes, excise taxes, estate taxes, and all other taxes, licenses, levies, and fees, except as expressly provided in this section or the federal implementing legislation.

Any other person or business entity which locates, operates, or does business on the Reservation is subject without exception to all state and local taxes, licenses, and fees, unless otherwise expressly provided in this chapter. To the extent the Tribe may be subject to taxes under this section, the Tribe must be taxed as if it were a business corporation incorporated under the laws of South Carolina unless otherwise expressly provided.

(H) The Tribe, its members, and the Tribal Trust Funds are liable for the payment of all state and local sales and use taxes to the same extent as any other person or entity in the State, except as specifically provided as follows:

(1) Purchases made by the Tribe for tribal government functions during ninety-nine years from the effective date of this chapter are exempt from state and local sales and use taxes.

(2) Catawba pottery and artifacts made by members of the Tribe and sold on or off the Reservation by the Tribe or members of the Tribe are exempt from state and local sales and use tax.

(3) During ninety-nine years from the effective date of this chapter, the sale on the Reservation of all other items, made on or off the Reservation, are exempt from state and local sales and use taxes but are subject to a special tribal sales tax levied by the Tribe equal to the state and local sales tax that would be levied in the jurisdiction encompassing the Reservation but for this exemption.

(a) The South Carolina sales and use tax laws, regulations, and rulings apply to the special tribal sales tax, and the special tribal sales tax must be administered and collected by the South Carolina Tax Commission.

(b) The South Carolina Tax Commission separately shall account for the special tribal sales tax, and the State Treasurer shall remit the special tribal sales tax revenues periodically to the Tribe at no cost to the Tribe.

(c) The tribal sales tax does not apply to retail sales occurring on the Reservation as a result of delivery from outside the Reservation when the gross proceeds of sale are one hundred dollars or less. If it does not apply, the state sales tax applies.

(d) The Tribe shall impose a tribal use tax on the storage, use, or other consumption on the Reservation of tangible personal property purchased at retail outside the State when the vendor does not collect the tax. However, use taxes collected by a vendor which is not located in the State are subject to state use taxes, and the use tax must be remitted to the State and not the Tribe. Use taxes not collected by the vendor and remitted to the State are subject to the tribal use tax and must be collected directly by the Tribe.

## **B. Application to the Tribe**

Unfortunately, the section is very tightly written.

First, Section 27-16-130(A) states:

(A) *The Tribe, its members, the Tribal Trust Funds, and other persons or entities affiliated with or owned by the Tribe, members of the Tribe, or the Tribal Trust Funds, whether a resident, located, or doing business on or off the Reservation, are subject to all state and local taxes, sales taxes, real and personal property taxes, excise taxes, estate taxes, and all other taxes, licenses, levies, and fees, except as expressly provided in this section or the federal implementing legislation.* (Emp. added.)

Section (H) is the main substantive section. It states in part: “During ninety-nine years from the effective date of this chapter, the sale on the Reservation of all other items, made on or off the Reservation, are exempt from state and local sales and use taxes but are subject to a special tribal sales tax levied by the Tribe *equal to the state and local sales tax that would be levied* in the jurisdiction encompassing the Reservation *but for this exemption.*” (Emp. added.) This eliminated pricing differentials.

#### **C. Application to Other Persons**

Subsection (A) states: “Any other person or business entity [other than the Tribe or its members] which locates, operates, or does business on the Reservation is subject without exception to all state and local taxes, licenses, and fees, unless otherwise expressly provided in this chapter.”

#### **D. Sales of \$100 or more.**

The tribal sales tax does not apply to retail sales occurring on the reservation of products purchased from outside the reservation where the gross proceeds are one hundred dollars or less. Instead the state sales tax applies. (I speculate this was meant to cover malls.)

The tribal sales tax applies to products purchased off the reservation where the gross proceeds exceed \$100. Note that the Tribal Sales Taxes must be equal to the combined state and local sales taxes, thus eliminating pricing differentials.

### **E. Use Taxes**

Use taxes are typically imposed on the purchaser where the vendor does not have nexus with South Carolina (*e.g.*, internet or mail order.) The state then imposes the comparable use tax on the purchaser. Occasionally a seller with nexus will not collect and remit the sales tax and the DOR also imposes the use tax on the purchaser in this circumstance.

In our case, where the seller is located off the reservation, has nexus but does not collect and remit sales taxes, then the DOR will impose the state 6% use tax on the purchaser.

Where the seller is located off the reservation but is not registered with the DOR then the tribal use tax is applied. It is equal to the combined state and local tax.

### **F. DOR Sales Tax Manual**

The DOR Sales Tax Manual (2015) does a good job of explaining the Catawba sales tax provisions. It is attached.

## **II. Property Taxes**

### **A. General**

Section 27-16-130(D)(1) provides “All lands held in trust by the United States for the Tribe as part of the Reservation, all nonresidential buildings, fixtures, and real property improvements owned by the Tribe or held in trust by the United States for the Tribe on the Reservation are exempt from all property taxes levied by the State, a county, a school district, and a special purpose district. If the Tribe owns a partial interest in property or a business, the property tax exemption provided in this section is applicable to the extent of the Tribe's interest.”

Residential property is exempt under (D)(2).

Other property (*e.g.*, property owned by third parties) is taxed under (D)(3) as follows: “All buildings, fixtures, and real property improvements located on the Reservation which are

not exempt from real property taxes under items (1) or (2) are subject to all property taxes levied by the State, a county, a school district, a special purpose district, and any other political subdivision to the same extent that similar buildings, fixtures, or improvements are assessed and taxed elsewhere in the same jurisdiction. However, the underlying land or leasehold in the land is not subject to real property taxes. All buildings, fixtures, and improvements subject to real property taxes are eligible for a tax abatement or temporary exemption allowed new business investments to the same extent as similar properties qualify for exemption or abatement in the same county.”

#### **B. Taxation of Property Owned by Tribe and Leased to Third Parties**

Property owned by the Tribe is exempt from property taxes. Suppose the Tribe did a build to suit for a large manufacturing facility or resort and leased the property to the manufacturer or resort. Is the manufacturer’s lease interest subject to property taxes?

##### **1. General**

All property of the State, counties, municipalities, school districts, water and sewer authorities and other political subdivisions is exempt from property taxes, if the property is used exclusively for public purposes. ( Public purpose requirement discussed below.) It is the duty of the Department of Revenue and the county assessor to determine whether such property is used exclusively for public purposes. SC Code §12-37-220(A)(1), S.C. Const. art. X, §3. No application for exemption is necessary. SC Code §12-4-720(A)(3).

The statute granting exemption of the property of the State and political subdivisions from taxation is subject to liberal construction. The rule of strict construction governs exemptions applicable to private, not public property, *Charleston County Aviation Authority v. Wasson*, 277 S.C. 480 S.E.2d 416 (1982).

## 2. Public Purpose

Article X, Section 3 of the South Carolina Constitution and SC Code §12-37-220(A)(1) provide that all property of a political subdivision is exempt if the property is used exclusively for public purposes. In *Charleston County Aviation Authority v. Wasson*, 277 S.C. 480, 289 S.E.2d 416 (1982), a challenge was raised to the exemption of property owned by the Aviation Authority (a political subdivision) that was leased to a private business. The court held:

- A. The fact that property is used by a private business entity does not alone preclude its being used exclusively for public purposes;
- B. The use of the airport authority's property by certain private tenants, including airlines, car rental companies, a parking lot operator, a limousine and taxi service, an air cargo company and to the operator of a restaurant, snack bar, lounge and gift shop providing various services to meet the needs of passengers, was incidental to the public use. Therefore, such property was exempt under Article X, Section 3 of the South Carolina Constitution and SC Code §12-37-220(A)(1). By contrast, the use of the airport authority's property by two private aviation companies was primarily private: the public use was incidental to the private use. Consequently, the property leased to the private aviation companies was not exempt.

The decision is a typical early 1980s Supreme Court decision. It is very concise and there was very little discussion of why the private aviation companies use was primarily private and how it differed from the other private tenants.

### **C. Taxation of Property leased by Catawba to Private Sector**

Suppose the Tribe built a large manufacturing facility which it leased to a manufacturer. The next question is whether the manufacturer would then become subject to property taxation. The question may turn on whether it is a true lease or a financing lease.

The South Carolina Constitution and Title 12 of the SC Code provide numerous property tax exemptions, chiefly to government and certain non-profit organizations. These entities own billions of dollars in real estate in this State some of which is leased to non-exempt (chiefly for-



profit) entities. Historically, the for-profit entities escaped property taxation notwithstanding S.C. Code Section 12-37-950, which has been on the books since 1957. This statute states:

When any leasehold estate is conveyed for a definite term by any grantor whose property is exempt from taxation to a grantee whose property is not exempt, the leasehold estates shall be valued for property tax purposes as real estate.

When I was at the DOR we started regularly getting questions and concerns from the Assessors regarding what this statute meant and why it wasn't being enforced. I hired USC law school Professor Bill Quirk for his opinion. I also asked Professor Quirk to testify on it before the Taxation Realignment Commission (TRAC) which I chaired. His report/testimony noted that this statute was passed in a number of states after the federal government began purchasing large tracts of land in the 1940s and 50s. I suppose the states were concerned over the erosion of their property tax base.

As noted in 2011 - - before the Court case below - - the DOR's publication, *South Carolina Property Tax* (2011) discussed the statute, saying:

Practitioners in the area of ad valorem taxes are split on whether SC Code §12-37-950 should be construed as a tax imposition statute as well as a tax valuation statute. Some practitioners believe that SC Code §12-37-950 is merely a valuation statute that is obsolete because it values the leasehold interest, which they view as intangible personal property.

Incredibly (given that the statute has been on the books since 1957) the issue was not litigated in the courts until 2009 when the Clarendon County Assessor sought to tax a leasehold interest entered into between a for-profit campground and the South Carolina Public Service Authority (Santee Cooper), a political subdivision of the State. In upholding the assessment, the Court of Appeals in *Clarendon County Assessor v. Tykat, Inc.*, 394 SC 21, 714 S.E.2d 305 (2011) found that:

[t]he precedents relied upon by Tykat address whether a tax-exempt owner in fee simple retains its tax exemption when it leases real property to a private entity. These cases make no mention of a tax exemption for a lessee. . . . By contrast, Section 12-37-950 is directly on point. Section 12-37-950 unambiguously requires that Tykat's leasehold estate 'be valued for property tax purposes as real estate', and it makes no mention of an exemption if the leasehold estate is used for a public purpose.

The 2015 version of the DOR Property Tax Manual now simply states:

"Note further that, when real property that is subject to a property tax exemption is leased for a definite term and the lessee does not qualify for an exemption, the leasehold interest will be subject to ad valorem tax. SC Code §12-37-950; *see Clarendon County ex rel. Clarendon County Assessor v. TYKAT, Inc.*, 394 S.C. 21, 714 S.E.2d 305 (2011).

Incredibly....I read all the briefs.....Charleston County did not assert section 12-37-950 in *Charleston County Aviation Authority v. Wasson*, so there is no discussion of it in the case. (Or maybe there were not leases for a definite term.)

Note that for section 12-37-950 to apply, there has to be (1) a lease, (2) for a definite term.

The Family Circle Cup moved their tournament to Charleston. Their land is owned by the City of Charleston. The legal document giving Family Circle the right to use and occupy the land was drafted by the City's legal staff who obviously was aware of this statute. Although it looks exactly like a lease, it was captioned (if my memory serves me correctly) as a "License."

In summary, if the Tribe built a large manufacturing facility and (1) leased it (2) for a definite term the manufacturer would be subject to property taxes on the lease. There are ways to draft around this.

### **III. Alcohol**

I know many Tribes enjoy significant pricing advantages regarding the sales of cigarettes and liquor. The Settlement Act complicates this as follows.

Section 27-16-40 provides that the Tribe and its members are subject to the regulatory jurisdiction of the state to the same extent as any other person except as expressly provided in this Chapter.

Section 27-160-120(G) provides:

Alcohol is prohibited on the Reservation unless the Tribe adopts laws or ordinances permitting the sale, possession, or consumption of alcohol on the Reservation. If the Tribe adopts the laws or ordinances, they must incorporate all state standards and regulations regarding hours, sales to minors, employment, consumption, possession, and standards for licensing. However, the Tribe may impose stricter standards and regulations than those prescribed by state law. *If beer, wine, and alcoholic liquor are sold on the Reservation, licenses must be issued by the State in accordance with South Carolina law, and all beer, wine, and alcoholic liquor taxes must be paid to the State in accordance with South Carolina law.* (Emp. added.)

#### **IV. Economic Development Incentives**

It is possible for the Tribe to construct and own a large manufacturing/convention facility and not pay property taxes on it. It is also possible with proper drafting that the tenant would not owe property taxes. A convention center or large mall would have to collect sales taxes but it is possible for the Tribe to remit the Catawba sales taxes back to the retailer. Sales of under \$100 would be subject to state sales taxes but sales of \$100 or more would be subject to Catawba sales taxes. The Tribe could enter into a grant program with the convention center/mall whereby it would remit a portion of the Catawba sales tax collected to the convention center/mall. The convention center/mall would pay no property taxes and receive back a portion of the Catawba sales taxes. Obviously there are issues involved with this so let's discuss.

BRM/maj

*Catawba Indian  
Reservation –  
State and Tribal  
Sales and Use Taxes*

## **Chapter 18**

### **Catawba Indian Reservation - State and Tribal Sales and Use Taxes**

#### **A. The Catawba Indian Claims Settlement Act**

Chapter 16, Title 27 of the South Carolina Code of Laws is known as “The Catawba Indian Claims Settlement Act” (“The Act”). The Act is based on the agreement in principle reached between the State of South Carolina and the Catawba Indian Tribe to settle differences between the two parties.

This act took effect on November 29, 1993 when the Governor certified that the Counties of York and Lancaster had taken all actions required of them by the Settlement Agreement and that the federal implementing legislation enacted by Congress and signed in law by the President was consistent with the Settlement Agreement.

South Carolina Code §27-16-130 of the Catawba Indian Claims Settlement Act reads, in part:

(H) The Tribe, its members, and the Tribal Trust Funds are liable for the payment of all state and local sales and use taxes to the same extent as any other person or entity in the State, except as specifically provided as follows:

- (1) Purchases made by the Tribe for tribal government functions during ninety-nine years from the effective date of this chapter are exempt from state and local sales and use taxes.
- (2) Catawba pottery and artifacts made by members of the Tribe and sold on or off the Reservation by the Tribe or members of the Tribe are exempt from state and local sales and use taxes.
- (3) During ninety-nine years from the effective date of this chapter, the sale on the Reservation of all other items, made on or off the Reservation, are exempt from state and local sales and use taxes but are subject to a special tribal sales tax levied by the Tribe equal to the state and local sales tax that would be levied in the jurisdiction encompassing the Reservation but for this exemption.
  - (a) The South Carolina sales and use tax laws, regulations, and rulings apply to the special tribal sales tax, and the special tribal sales tax must be administered and collected by the South Carolina Tax Commission.<sup>1</sup>

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<sup>1</sup> The South Carolina Tax Commission is now the South Carolina Department of Revenue.

- (b) The South Carolina Tax Commission separately shall account for the special tribal sales tax, and the State Treasurer shall remit the special tribal sales tax revenues periodically to the Tribe at no cost to the Tribe.
- (c) The tribal sales tax does not apply to retail sales occurring on the Reservation as a result of delivery from outside the Reservation when the gross proceeds of sale are one hundred dollars or less. If it does not apply, the state sales tax applies.
- (d) The Tribe shall impose a tribal use tax on the storage, use, or other consumption on the Reservation of tangible personal property purchased at retail outside the State when the vendor does not collect the tax. However, use taxes collected by a vendor which is not located in the State are subject to state use taxes, and the use tax must be remitted to the State and not the Tribe. Use taxes not collected by the vendor and remitted to the State are subject to the tribal use tax and must be collected directly by the Tribe.

## **B. Application of State and Tribal Sales and Use Taxes to Sales of Tangible Personal Property Delivered on the Reservation**

Based on the Catawba Indian Claims Settlement Act, the following chart outlines the application of sales and use taxes to sales to individual members of the Catawba Indian Tribe:

<u>Delivery on the Reservation From:</u>	<u>Type Tax Applicable</u>	<u>Administered and Collected By:</u>
Location On the Reservation	Tribal Sales Tax (Equal to Combined State and Local Rate)	DOR
Location Off the Reservation But in SC – Sales \$100 or less	State Sales Tax (6%) *	DOR
Location Off the Reservation But in SC – Sales Over \$100	Tribal Sales Tax (Equal to Combined State and Local Rate)	DOR
Location Off the Reservation and Outside the State – Seller Registered with DOR	State Use Tax (6%) *	DOR
Location Off the Reservation and Outside the State – Seller Not Registered with DOR	Tribal Use Tax (Equal to Combined State and Local Rate)	Catawba Indian Tribe

\*Local taxes would not be applicable in these circumstances.

**Effective January 1, 2012**, Lancaster County imposes a 1% local option sales and use tax and a 1% Capital Projects Tax. York County imposes a 1% Capital Projects sales and use tax. These local taxes are in addition to the State sales and use tax. Therefore, **effective January 1, 2012**, the tribal sales tax and the tribal use tax are imposed at the following rates:

For sales (deliveries) made on the Reservation within Lancaster County:

- 8% for general sales of tangible personal property
- 9% for sales of accommodations
- 2% for sales of unprepared foods

For sales (deliveries) made on the Reservation within York County:

- 7% for general sales of tangible personal property
- 8% for sales of accommodations
- 0% for sales of unprepared foods<sup>2</sup>

Please note that the rate for the tribal sales tax and the tribal use tax may increase or decrease dependent upon whether the total state and local sales and use tax rates change in Lancaster County or York County in the future.

### **C. Purchases by the Tribe for Tribal Government Functions<sup>3</sup>**

Sales to, or purchases by, the Catawba tribal government for tribal government functions are exempt from state and local sales and use taxes until November 28, 2092 (99 years after the Act took effect on November 29, 1993). Sales to, or purchases by, the Catawba tribal government for tribal government functions will be subject to state and local sales and use taxes beginning November 29, 2092.

### **D. Artifacts Made by Members of the Tribe<sup>4</sup>**

Catawba pottery and artifacts made by members of the Tribe and sold on or off the Reservation by the Tribe or members of the Tribe are exempt from state and local sales and use taxes. Unlike the other exemptions enacted in South Carolina Code §27-16-130(H), this exemption does not automatically expire on November 28, 2092 (99 years after the Act took effect on November 29, 1993).

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<sup>2</sup> York County “re-imposed” its 1% Capital Projects Tax effective January 1, 2012. The prior 1% Capital Projects Tax imposed in York county expired on December 31, 2011 and the new Capital Projects Tax became effective the next day on January 1, 2012. In addition, the new 1% Capital Projects Tax in York County exempts sales of unprepared food effective January 1, 2012.

<sup>3</sup> South Carolina Code §27-16-130(H)(1).

<sup>4</sup> South Carolina Code §27-16-130(H)(2).

For purposes of this exemption, the phrase “artifacts made by members of the Tribe” means objects, including tools, weapons and ornaments, produced or shaped by the workmanship of one or more members of the Catawba Indian Tribe that are associated with the culture or history of the Tribe.

## **E. Sales on the Reservation<sup>5</sup>**

Sales on the Reservation (whether the tangible personal property is made on or off the Reservation) are exempt from state and local sales and use taxes until November 28, 2092 (99 years after the Act took effect on November 29, 1993), except for retail sales occurring on the Reservation as a result of delivery from outside the Reservation when the gross proceeds of sale are one hundred dollars or less. Sales occurring on the Reservation as a result of delivery from outside the Reservation are subject to state and local sales and use taxes when the gross proceeds of the sale are one hundred dollars or less. Sales on the Reservation will be subject to state and local sales and use taxes beginning November 29, 2092.

Sales on the Reservation (whether the tangible personal property is made on or off the Reservation) are subject to the Catawba tribal sales and use tax until November 28, 2092 (99 years after the Act took effect on November 29, 1993), except for retail sales occurring on the Reservation as a result of delivery from outside the Reservation when the gross proceeds of sale are one hundred dollars or less. Sales occurring on the Reservation as a result of delivery from outside the Reservation are subject to state and local sales and use taxes when the gross proceeds of sale are one hundred dollars or less. Sales on the Reservation will no longer be subject to the Catawba tribal sales and use tax beginning November 29, 2092.

## **F. Tangible Personal Property Made by Members of the Tribe (Other than Artifacts)**

### Delivered Off the Reservation within South Carolina

When tangible personal property, other than pottery and artifacts made by members of the Tribe, is sold and delivered by a retailer to a location in South Carolina but outside the reservation, sales of these items off the Reservation are subject to state and local sales taxes and are not subject to the tribal sales tax.

### Delivered Off the Reservation Outside of South Carolina

When tangible personal property is sold and delivered by a retailer to a location outside of South Carolina, sales of these items off the Reservation and outside of South Carolina are exempt from the tribal tax and the state tax.<sup>6</sup>

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<sup>5</sup> South Carolina Code §27-16-130(H)(3).

<sup>6</sup> South Carolina Code §12-36-2120(36).



When tangible personal property is sold and delivered by a retailer to the mails or to a common carrier for delivery outside of South Carolina, sales of these items off the Reservation and outside of South Carolina are exempt from the tribal tax and the state tax.<sup>7</sup>

## **G. Accommodations**

Accommodations furnished on the Reservation are subject to the tribal sales tax at a rate of 9% for accommodations furnished in Lancaster County and at a rate of 8% for accommodations furnished in York County. Additional guest charges imposed on the Reservation are subject to the tribal sales tax at a rate of 8% in Lancaster County and at a rate of 7% in York County.

## **H. Maximum Tax Items**

For sales (deliveries) made on the Reservation of tangible personal property subject to the maximum tax provisions, the tribal sales and use tax rate is 5%<sup>8</sup> in each county (since the state sales and use tax on maximum tax items is 5% and maximum tax items are exempt from all local sales and use taxes), but the tax may not exceed the maximum tax set forth in South Carolina Code §12-36-2110.<sup>9</sup>

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<sup>7</sup> South Carolina Code §12-36-2120(36).

<sup>8</sup> Since the state sales and use tax rate for maximum tax items is 5%, the tribal tax rate for items subject to the maximum tax must equal the combined state and local rate for the counties in which the reservation is located. At this time, the rate of maximum tax items would be 5% (equal to the 5% state rate and the 0% local rate since maximum tax items are not subject to local taxes).

<sup>9</sup> See Chapter 10 of this publication for information on the maximum tax provisions of South Carolina Code §12-36-2110.