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Tribal Businesses and Taxation

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Types of Tribal Businesses

Part I:

- Distinguishing between forms of business entities

Part II:

- Choosing a Tribal Entity Structure

Distinguishing between forms of business entities

- Tribes are sovereign entities that exercise powers of self-governance over their tribal lands, tribal members, and in some situations non-Indians (*e.g.*, consensual business arrangement). As sovereign governments, tribes enjoy the power to raise revenue through taxation and the power to enter into commercial activity.
- As tribal economies have become more complex, tribes may benefit from utilizing different business entities depending on the nature of the transaction.

- Political Subdivisions, Enterprises, Instrumentalities, Agencies, and Authorities.
- Tribally-chartered Corporations.
- Section 17 Corporations (25 U.S.C. § 477)
- Limited Liability Companies.
- Joint Ventures, Partnerships and Limited Partnerships.

- Sole Proprietorship: Personally liable for obligations of business. Doing business as yourself.
- Partnerships: Association of two or more people with few formalities. All partners are jointly liable as both principal and agent; pass-through tax treatment.
- Limited Partnerships: Consist of one or more general partner and limited partners. Limited partners do not have personal liability, and are not actively involved in the management of the limited partnership.

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- State –Chartered Corporation: Created under state law and have separate legal existence. Shareholders have limited liability (only their investment is subject to loss), and enjoy free transferability of ownership interest. Corporations have centralized management and indefinite existence.

- Limited Liability Company: Owners have limited liability and may participate in management decisions. LLC have favorable pass through tax treatment; the entity is disregarded for federal income tax purposes, and possibly state income taxes depending on the laws of a particular state.
- A limited liability company can have a single member. Favorable tax treatment facilitates joint venture formation, and complex business activity.

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Tribally-chartered corporation: Created under tribal laws or statutes that authorize the formation of a tribally-chartered corporation. Tribal law can address the degree to which sovereign immunity applies to the business activities of a tribally-owned tribal corporation.

Greater uncertainty on whether courts will treat these corporations as enjoying the tribe's sovereign immunity.

- ‘Integral Part Test” The IRS looks at several factors to determine if a tribally-chartered corporation will be treated as a tribe for federal tax purposes that include:
  - Whether the tribal government controls the corporation (elect and remove board members, terminate existence).
  - Exercises significant financial commitment (contribute assets, right to earn profits, liable for acts of the corporation).
  - Operating as a unit, authority or agency of the tribe.

- Economic Development Arm of the Tribe
  - Unincorporated enterprises, instrumentalities, and authorities.
  - Unincorporated tribal businesses are not subject to federal income tax. Established under tribal law.

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Section 17 Corporation:

• Indian tribes are permitted to form federally chartered corporations under Section 17 of the Indian Reorganization Act. Section 17 corporations are “not recognized as separate entities for federal tax purposes.” Treas. Reg. § 301.7701-1(a)(3).

• It shares the same tax status as an Indian tribe.

• Enjoys the same privileges and immunities of the tribe; an alter ego of the tribe.

• Oklahoma tribes can incorporate under section 3 of the Oklahoma Indian Welfare Act, 25 U.S.C. § 503.

- Section 17 of the IRA: The Secretary of the Interior may, upon petition by any tribe, issue a **charter of incorporation** to such tribe: Provided, that such charter shall not become operative until ratified by the governing body of such tribe. Such charter may convey to the incorporated tribe the power to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange therefor interests in corporate property, **and such further powers as may be incidental to the conduct of corporate business, not inconsistent with law**; but no authority shall be granted to sell, mortgage, or lease for a period exceeding twenty-five years any trust or restricted lands included in the limits of the reservation. Any charter so issued shall not be revoked or surrendered except by Act of Congress. (25 U.S.C. § 477).

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- Corporate Charter/bylaws: Identify the powers of the corporation. Buy/sell; enter into agreements, borrow; waiver sovereign immunity; agree to sue and be sued.
- Benefits:

  Commercial purpose recognized under federal law.

  Certainty of existence and organizational structure.

  Facilitates tribal economic diversification through the establishment of corporate subdivisions.

  Preserves continuity of tribal business norms and practices.

  Enter into (i) leases for a term of 25 years without approval of the Secretary of the Interior, and (ii) contracts without Section 81 (encumbrances on land) approval by the Secretary.

Choosing a Tribal Entity Structure

- BUSINESS CONSIDERATIONS WHEN CHOOSING A TRIBAL ENTITY STRUCTURE
- Federal tax treatment
- Tribal sovereign immunity vs. limited liability
- Nature of commercial activity: governmental vs. commercial
- On-reservation vs. off-reservation activity
- Segregation of tribal assets; management of resources

- BUSINESS CONSIDERATIONS WHEN CHOOSING A TRIBAL ENTITY STRUCTURE
- Efficient and simplified decision-making practices
- Financing and licensing considerations
- Partnering with non-tribally owned businesses
- Tribal career development/training programs
- Government contracting opportunities (Section 8(a) of the Small Business Administration)
- Management of operating costs

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