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**STATE OF ARIZONA  
EXECUTIVE HEARING OFFICE  
DEPARTMENT OF TRANSPORTATION**

**IN THE MATTER OF THE MATTER OF  
AN AIRCRAFT TAX AND  
REGISTRATION, A.R.S. §§ 28-5924, 28-  
8244, 28-8328, 28-8336, 28-8329, 28-8330, *et*  
*seq.***

[REDACTED]

**Petitioner.**

**FAA Aircraft Registration Numbers**

[REDACTED]

**AERO-2430**

**FINDINGS OF FACT  
CONCLUSIONS OF LAW  
DECISION and ORDER**

[REDACTED]

**Administrative Law Judge**

Appearances

[REDACTED]

[REDACTED], Counsel for the Petitioner

[REDACTED], Counsel for the Petitioner

[REDACTED], Assistant Attorney General

Exhibit(s)

1. [REDACTED]

2. [REDACTED]

2.A. [REDACTED]

3. [REDACTED]

Pursuant to the authority of Arizona Revised Statutes §§ 28-5924, 28-8244, a telephonic hearing was convened in the above captioned matter on [REDACTED], 2018, at the Executive Hearing

Office of the Arizona Department of Transportation in Phoenix, Arizona. The purpose of the hearing was to allow Petitioner to show cause why the Departments assessment on [REDACTED], 2017 was in error.

Petitioner requested the hearing pursuant to the authority of A.R.S. § 28-5924, which states: A written request for hearing shall include the reasons why the assessment decision or order of the director is in error. *Only the reasons set forth in the request for hearing may be raised at the hearing. (Added for emphasis)* Petitioner's hearing request stated: The taxpayer's basis for disagreeing with the assessment is due to the fact that it does not operate within [Arizona]. (Exhibit 1). Taxpayer solely operated within the Borders of the State of Arizona on land owned by the [REDACTED] Indian Tribe of the [REDACTED] Indian Reservation, a federally recognized sovereign Indian tribe. (*Id.*). Thus, the single issue before this tribunal is; whether a Nevada based, nontribal, commercial airline is exempt from Arizona's Aircraft License Tax, specifically Arizona Revised Statutes Title 28, Chapter 25, if it lands almost exclusively on tribal runways within the [REDACTED] Indian Reservation.

### **FINDINGS OF FACT**

On or about [REDACTED], 2017, the Arizona Department of Transportation ("ADOT") Office of Audit and Analysis conducted an audit of the tax periods 2015, 2016 and 2017 and assessed [REDACTED]. ("[REDACTED]"), a total of \$[REDACTED] which included the Aircraft License Taxes ("ALT"), annual registration fees, penalties and lien fees pursuant to A.R.S. Title 28, Chapter 25, Article 4. (Exhibit [REDACTED]) Pursuant to A.R.S. § 28-8336, ADOT found that [REDACTED] subject to the nonresident license tax requirement. ADOT found [REDACTED] to be a nonresident whose Helicopters were based in Arizona more than 90 days but less than 210 days and not engaged in any intrastate commercial activity. Said assessment was the basis of [REDACTED]'s request for hearing pursuant to A.R.S. § 28-5924. (Exhibit 1).





assumed by the United States pursuant to a lawful grant from Arizona, pursuant to A.R.S. §28-8206. Additionally, ADOT argues that the State Aviation Fund which consists of the collected registration fees and ALTs, requires ADOT to distribute those monies for planning, design, development, acquisition, construction and improvement of publicly owned and operated airport facilities in counties, incorporated cities and towns and *Indian reservations*. (*emphasis added*, A.R.S. §28-8202). Specifically, noted by ADOT is A.R.S. §28-8202(D), “publicly owned and operated airport facility, means city, town, or county of this state or an Indian tribe or tribal government hold an interest in the land on which the airport is located.” ADOT did not provide any information on whether or not the Tribe or Reservation have received money from the fund during the tax periods involved in ██████████ case.

ADOT also notes a line of U.S. Supreme Court cases that have upheld State taxes on non-Indian and Indian businesses serving non-Indian customers on reservation land. The state may impose a tax on non-Indians for cigarettes sold to them by Indian smoke shops. *Moe v. Confederate Salish & Kootenai Tribes*; 425 U.S. 463 (1976). Impositions of on-reservation state luxury tax, tobacco sales tax, did not infringe on the sovereignty of the tribe when non-enrolled member of the tribe sold cigarettes to non-Indian customers. *State ex rel, Arizona Department of Revenue v. Dillon*; 70 Ariz. 560 (1991). ADOT argues that if a nontribal, non-Indian, commercially owned and operated aircraft, ferrying non-Indian, nontribal tourists back and forth between Arizona and Nevada may land on tribal runways in order to avoid State taxation, then an unintended loophole that was not intended by the Congress of the United States nor the Legislature of Arizona is created.

██████████ argues that Arizona lacks the jurisdiction to impose an ALT on the Helicopters it uses to bring its customers into the State of Arizona. These customers pay ██████████ money to sight see at the Grand Canyon. ██████████ only lands within the sovereign lands of the Tribe at

████ Airport and other areas solely within the Reservation. █████ argues that under a *Bracker* analysis the ATL cannot be imposed.

Under Justice Marshall's test in *Bracker*, a State tax on Indian reservation land or activities is considered valid unless (1) congressional legislation explicitly preempts the tax, or (2) the tax would interfere with the tribe's ability to govern itself. *Bracker*; at 145. In *Bracker*, the Court struck down two Arizona taxes, use fuel tax and motor carrier tax, on a contracted non-Indian logging company working for the tribe on that tribe's reservation felling timber, building and maintaining roads, and milling the felled timber at the tribe's own sawmill. The non-Indian companies conducted all of their operations within the reservation and for the benefit of that reservation's tribe. The non-Indian company was paid by the tribe and the profits from the company's timber production returned to the tribe. In *Bracker*, Justice Marshall noted that the "Federal Government's regulations of the harvesting, sale, and management of tribal timber, and of the Bureau of Indian Affairs ("BIA") and tribal timber operations were so pervasive as to preclude the additional burdens sought to be imposed..." *Bracker* at 145-6.

In the case at hand, while finding no congressional legislation that explicitly preempts the tax, the BIA regulates much of the activity on the Reservation and the Federal Aviation Administration ("FAA") regulations are the most pervasive as to the operation of █████ Airport. However, one FAA regulation allows for a state or political subdivision of the state to levy or collect a tax on a flight of a commercial aircraft only if the aircraft takes off or lands in the state as part of the flight. 49 U.S. Code § 40116(c). Thereby, the first prong of the *Bracker* test appears to allow for Arizona to impose the ALT and associated fees on █████

As to the second prong envisioned by the Court in *Bracker*, there was no testimony that █████ had the same arrangement with the Tribe as the timber company had with the White Mountain Apache. █████ only testified that they pay taxes and/or assessments to the Tribe as

part of their agreement. ██████ transports non-Tribe members from Nevada into Arizona using the public airport on the Reservation. Moreover, as part of their Declaration ██████ notes that the Grand Canyon tour is only one of the tours offered by the helicopter tour company, making their business relation with the Tribe not as exclusive, as in the relation between the White Mountain Apache and the timber company in *Bracker*. One may presume that the Tribe does receive an ancillary benefit of additional tourists on Tribal lands and the fee payments from ██████ operations. However, ██████ does not hold the same position, vis-à-vis the tribe and the timber company did in *Bracker*. In *Bracker*, the Court concerned that the taxes Arizona sought to be imposed would affect the timber operation's profitability and by extension the White Mountain Apache Tribe's sovereignty. In this case, there is no evidence, direct, circumstantial or even hypothetical that the ALT would affect the sovereignty of the Tribe. Under a *Bracker* analysis, Arizona's assessment of the ALT and associated fee's appears to be allowed.

The U.S. Supreme Court has a long history of cases in reference to state taxes application to non-Indian commercial enterprises operating in/on tribal reservation land. In most of the cases, when non-Indians are doing business with other non-Indians, state taxes have been upheld as applicable. "There is no direct conflict between the state and tribal schemes, since each government is free to impose its taxes without ousting the other." *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 158 (1980). As recently as 1989, the Court permitted concurrent jurisdiction, tribal and state, to tax when the exercise of both authorities does "not do violence to the rights of either sovereign." *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*; 492 U.S.408, 466 (1989). *Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989) (finding that the state may impose its own severance tax on minerals despite the tribe's severance tax). Territorial legislatures may impose a tax on cattle,

belonging to others than Indians, which are grazing on Indian reservations within the territory. *Thomas v. Gay*; 169 U.S. 264, 274 (1889). “Such tax is too remote and indirect to be deemed a tax on the lands or privileges of the Indians, and is not an interference with the power of congress to deal with the Indians and their property and commercial transactions.” *Id.* For example, the usual Indian reservation set apart within a state as a place where the United States may care for its Indian . . . . *Surplus Trading Co. v. Cook*; 281 U.S. 647 (1930). “Such reservations are part of the state within which they lie, and her laws, civil and criminal, have the same force therein as elsewhere within her limits, save that they can have only restricted application to the Indian . . . .” *Id.* The state may impose a tax on non-Indians for cigarettes sold to them by Indian smoke shops. *Moe, supra at 483.* Impositions of on-reservation state luxury tax, tobacco sales tax, did not infringe on the sovereignty of the tribe when non enrolled member of the tribe sold cigarettes to non-Indian customers. *Dillon, supra at 569-70.*

In the case at hand, ██████████ a non-Indian business transporting non-Indian tourists from Las Vegas, Nevada to the Grand Canyon, Arizona for the purposes of sightseeing. ██████████ is landing their non-tribal owned Helicopters on the public airport, located within the Reservation and operated by the Tribe. The only relation between the Tribe and ██████████ is an agreement as to the use of ██████████-Airport and other landing sites within the Reservation. Federal law does not appear to preempt the levy of Arizona’s ALT on ██████████. Additionally, Arizona through A.R.S. §28-8202(D) does not distinguish between a municipalities’ interest in, and Indian Tribes’ interest in, a publicly owned and operated airport facility, for the purposes of State aviation fund disbursements.

Therefore, this tribunal finds that Arizona’s Department of Transportation may impose an Aircraft License Tax and associated fees pursuant to A.R.S. Title 28, Chapter 25 on a non-Indian commercial aircraft transporting interstate non-Indian tourists even if that aircraft only lands and



takes off from public airports located within and operated solely by the Tribal Reservation government within the boundaries of the State of Arizona.

**ORDER**

It is ORDERED that [REDACTED] is subject to the jurisdiction of Arizona and subject to Arizona Revised Statutes, Title 28, Chapter 25 even though it solely operated on land owned by the [REDACTED] Indian Tribe of the [REDACTED] Indian Reservation. As such, [REDACTED] is ORDERED to pay the following amounts: [REDACTED] [REDACTED] [REDACTED] [REDACTED] for a total of \$ [REDACTED].

It is so ORDERED this [REDACTED] [REDACTED] June, 2018.

[REDACTED]  
[REDACTED], Administrative Law Judge  
The Executive Hearing Office

NOTE: The assessment or civil penalty ordered herein must be paid not later than thirty (30) days from the date of this Order. The check or money order is to be made payable to the Arizona Department of Transportation, Motor Vehicle Division and mailed to:

Arizona Department of Transportation  
Motor Vehicle Division  
Collections Unit  
PO Box 2100  
Mail Drop 529M  
Phoenix, AZ 85001-2100  
(602) 712-8745

Copy mailed this [REDACTED], 2018, to:

[REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED]  
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/s/ [REDACTED]  
\_\_\_\_\_  
[REDACTED], Case Management Specialist