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## Note

### THE POWER OF INDIAN TRIBES TO TAX THE INCOME OF PROFESSIONAL ATHLETES AND ENTERTAINERS WHO PERFORM IN INDIAN COUNTRY

DREW K. BARBER

*Athletes and entertainers represent some of the highest paid individuals in the United States today. Historically, these individuals perform in various states throughout the country and pay state income taxes to each state they earn income in. With the recent rise of athletic and entertainment venues in Indian Country, more athletes and entertainers are earning income in Indian Country. For example, the Mohegan Tribe owns and operates the Mohegan Sun Arena on its reservation in Connecticut and the Arena annually hosts hundreds of professional athletic and entertainment events.*

*Because the Mohegan Sun Arena is located in Connecticut, athletes and entertainers who perform at the Arena and receive compensation are currently subject to Connecticut's state income tax. However, as a federally-recognized Tribe, the Mohegan Tribe possesses the power to tax, including the power to tax non-member Indians doing business on the Mohegan Reservation. Although the Mohegan Tribe does not currently levy an income tax on the athletes and entertainers who perform at the Mohegan Sun Arena, the prospect of double taxation raises the question of which sovereign is really the proper taxing entity—the State or the Tribe? This Note proposes an equitable tax framework that resolves this double taxation quandary.*

## NOTE CONTENTS

I. INTRODUCTION.....	1787
II. LEGAL HISTORY OF INDIAN SOVEREIGNTY AND TAXATION .....	1789
A. THE POWER OF A STATE TO TAX NON-INDIANS .....	1790
B. THE POWER OF INDIAN TRIBES TO LEVY TAXES.....	1793
C. CONCURRENT STATE AND TRIBAL TAXATION .....	1795
III. WHAT IS AT STAKE? NONRESIDENT INCOME TAXATION AND THE MOHEGAN SUN ARENA .....	1798
A. MULTISTATE TAXATION OF ATHLETES AND ENTERTAINERS.....	1798
IV. A FRAMEWORK FOR TRIBAL TAXATION OF INCOME EARNED AT THE MOHEGAN SUN ARENA.....	1800
A. THE MOHEGAN TRIBE AS A TAXING ENTITY .....	1802
B. INTEREST IN AND CONTROL OF TAXED ACTIVITY.....	1803
C. STATE TAX CREDIT .....	1804
D. THE ECONOMIC JUSTIFICATION FOR THE PROPOSED TAX FRAMEWORK .....	1807
E. TAX SHARING AGREEMENT .....	1811
V. CONCLUSION .....	1813



THE POWER OF INDIAN TRIBES TO TAX THE INCOME OF  
PROFESSIONAL ATHLETES AND ENTERTAINERS WHO PERFORM IN  
INDIAN COUNTRY

DREW K. BARBER\*

I. INTRODUCTION

The power to tax is one of the fundamental powers an Indian tribe possesses as a sovereign government.<sup>1</sup> Concurrently, state governments also have the power to levy an income tax on the residents of its state and the nonresidents who earn income in the state. Now, enter millions of dollars of income earned by professional athletes and entertainers on an Indian reservation<sup>2</sup> into the equation. Two sovereign jurisdictions, two governments with the power to tax the same income, and a public policy which shuns double taxation—something has to give.

The Mohegan Tribe, located in Uncasville, Connecticut, owns and operates the Mohegan Sun Arena which is home to the WNBA's Connecticut Sun and has hosted concerts for world-class entertainers including Billy Joel, Britney Spears, and Kenny Chesney.<sup>3</sup> These events bring in substantial amounts of revenue; for example, Billy Joel sold \$9.25 million in tickets for his ten concert series at the Mohegan Sun Arena in the summer of 2008.<sup>4</sup> Given the high level of poverty amongst members of Indian tribes,<sup>5</sup> and more specifically, the recent economic struggles of the Mohegan Tribe,<sup>6</sup> a tribal income tax on the income of the athletes and

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\* Trinity College, B.S. 2007; University of Connecticut School of Law, J.D. Candidate 2010. I would like to thank Professor Richard Pomp for his guidance and suggestions on this Note. I would also like to thank my fiancée Jeanne Hayes for her comments and support throughout the writing process. Finally, I dedicate this Note to my parents for their unconditional love and encouragement. All errors contained herein are mine and mine alone.

<sup>1</sup> *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982).

<sup>2</sup> I use the terms "Indian reservation" and "Indian Country" interchangeably throughout this Note. "Indian reservation" is the common term used to describe the land occupied by and granted to Indians while "Indian Country" is technically the appropriate legal term. AMERICAN INDIAN RESOURCES INSTITUTE, INDIAN TRIBES AS SOVEREIGN GOVERNMENTS 34 (1988) [hereinafter AIRI].

<sup>3</sup> Mohegan Sun Arena, <http://www.mohegansun.com/entertainment/arena.html> (last visited Nov. 4, 2008).

<sup>4</sup> Diane Weaver Dunne, *Concert Business Goes South*, HARTFORD BUS. J., Aug. 4, 2008, available at <http://www.hartfordbusiness.com/news6210.html>.

<sup>5</sup> Census 2000 findings report that the 1999 poverty rate for Native Americans (25.7%) was more than double that of the total American population (12.4%). U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, WE THE PEOPLE: AMERICAN INDIANS AND ALASKA NATIVES IN THE UNITED STATES 12 (2006), <http://www.census.gov/prod/2006pubs/censr-28.pdf>.

<sup>6</sup> See Adam Bowles, *Casinos: Foxwoods, MGM Grand Laying off 700*, NORWICH BULLETIN, Oct. 1, 2008, available at <http://www.norwichbulletin.com/news/business/x506586752/Casinos-Foxwoods-MGM-Grand-laying-off-700> (describing the impact of the struggling economy on both the Mashantucket Pequots and the Mohegans: the Mohegans laid off 600 employees and halted

entertainers who perform at the Mohegan Sun Arena could provide much-needed revenue to the Tribe. Even if additional revenue was not needed to help pay for tribal government functions, the mere fact that the Mohegan Tribe has the authority to levy such an income tax raises the compelling question of which entity—the State or the Tribe—most deserves the revenue?

Currently, the State of Connecticut levies an income tax on the portion of an athlete's and entertainer's income earned while performing at the Mohegan Sun Arena. But as a sovereign nation,<sup>7</sup> the Mohegan Tribe retains the inherent power to tax.<sup>8</sup> Although tribal taxes are the exception rather than the norm, some tribes have taxed non-Indian businesses which conduct business in Indian Country.<sup>9</sup> However, if the Mohegan Tribe exercised its power to levy its own income tax on these athletes and entertainers, double taxation would exist—both Connecticut and the Mohegan Tribe would be taxing the same income.

Double taxation is a concern for legislatures, courts, and of course, the taxpayer.<sup>10</sup> The reality of paying tax on your income once is horrifying enough for most people, let alone twice on the same income. If Connecticut and the Mohegan Tribe permitted double taxation to occur, it would serve as a disincentive for future athletes and entertainers to perform at the Mohegan Sun Arena. An economically rational athlete or entertainer with the option of performing and earning income on an Indian reservation, which would result in double taxation, or performing off of an Indian reservation and only paying state income tax—all other things being equal—will always choose the latter. As discussed below, decreased business at the Mohegan Sun Arena results in decreased revenue for both Connecticut and the Mohegan Tribe, a result neither sovereign would welcome.

At the most basic level, the problem of double taxation can be resolved by asking “what is fair?” Yet, what is fair and what the law is do not always coincide. Given that the Mohegan Tribe owns and operates the Mohegan Sun Arena and is responsible for attracting the athletes, entertainers, and spectators to the Arena, it is fairest to grant the Tribe the

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construction of a \$734 million expansion to the Mohegan Sun Casino which would have created an additional 1200 jobs).

<sup>7</sup> 25 U.S.C. § 1775 (2006) (recognizing the Mohegan Tribe as a sovereign Indian nation).

<sup>8</sup> See *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982) (“The power to tax is an essential attribute of Indian sovereignty . . .”).

<sup>9</sup> See, e.g., *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195, 196–97 (1985) (noting that the Navajo Tribe enacted a Business Activity Tax to be “assessed on receipts from the sale of property produced or extracted . . . from the sale of services within the [Indian reservation]”).

<sup>10</sup> See Mark J. Cowan, *Double Taxation in Indian Country: Unpacking the Problem and Analyzing the Role of the Federal Government in Protecting Tribal Governmental Revenues*, 2 PITT. TAX REV. 93, 94 (2005) (“[M]uch of the law in the multistate and international tax fields is concerned with ensuring that income is taxed no more and no less than once.”).

exclusive right to the income tax revenue generated from the Arena. However, Connecticut has the legal right to tax both the income of residents earning income in Connecticut and the income of non-residents who earn income through business conducted in Connecticut.<sup>11</sup>

Part II of this Note outlines the legal history of Indian sovereignty and taxation in the United States. There are many historical Supreme Court cases that established Indian sovereignty; these cases serve as the building blocks for the principles of Indian taxation. This Part also identifies specific cases that have upheld particular state and tribal taxes on non-Indians. Although the issue of whether Connecticut or the Mohegan Tribe has the power to levy such an income tax is not really in question, understanding how and why the courts have come to this conclusion is helpful in later resolving the double taxation predicament. Part III details the practice of nonresident state taxation and explains what tax revenue is at stake. While both the Mohegan Tribe and State of Connecticut have compelling arguments as to why they should be the primary taxing entity, Part IV of this Note proposes a framework for implementing a tribal income tax on professional athletes and entertainers who perform at the Mohegan Sun Arena.<sup>12</sup>

## II. LEGAL HISTORY OF INDIAN SOVEREIGNTY AND TAXATION

Despite the well-established principle of tribal sovereignty,<sup>13</sup> many

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<sup>11</sup> CONN. GEN. STAT. § 12-700(b) (2009); see State of Conn. Dep't of Revenue Servs., Nonresidents with Connecticut Source Income, available at <http://www.ct.gov/drs/cwp/view.asp?a=1462&q=271508> (last visited Mar. 13, 2009) (listing the circumstances under which a non-Connecticut resident must file and/or pay Connecticut's individual income tax).

<sup>12</sup> The tribal income tax proposed in this Note would also apply to the Mashantucket Pequot Tribe which owns and operates the MGM Grand Theater at Foxwoods Resort Casino, located in southeastern Connecticut. Foxwoods Resort Casino: About Foxwoods, <http://www.foxwoods.com/AboutFoxwoods/> (last visited Mar. 11, 2009); MGM Grand at Foxwoods: Entertainment, <http://www.mgmatfoxwoods.com/Entertainment.aspx> (last visited Mar. 11, 2009). However, for purposes of this Note, I will focus solely on the Mohegan Tribe and the Mohegan Sun Arena.

<sup>13</sup> In 1832, the United States Supreme Court recognized that an Indian nation was "a distinct community occupying its own territory, with boundaries accurately described, in which the laws of [the state] can have no force . . ." *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832). Chief Justice Marshall's opinion in *Worcester* served as the benchmark for the adoption of the Indian sovereignty doctrine which provided that a state has no jurisdiction in Indian Country unless a treaty, Indian tribe, or Congress specifically authorizes it. *Id.*; see also JAY VINCENT WHITE, *TAKING THOSE THEY FOUND HERE: AN EXAMINATION OF THE TAX EXEMPT STATUS OF THE AMERICAN INDIAN 18-22* (1972) (discussing the general principle of tribal sovereignty and taxation). Since *Worcester*, the near-absolute tribal sovereignty provided for in the Indian sovereignty doctrine has been reduced in scope. See *Williams v. Lee*, 358 U.S. 217, 219 (1959) ("Over the years this Court has modified [Indian sovereignty] principles in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized . . ."). However Indian tribes still possess the "inherent right of self-determination and self-government." STEPHEN L. PEVAR, *THE RIGHTS OF INDIANS AND TRIBES* 86 (3d ed. 2002) (emphasis in original). The Court more recently labeled Indian tribes as "unique aggregations possessing attributes of sovereignty over both their members and their territory . . ." *United States v. Wheeler*, 435 U.S. 313, 323 (1978) (quoting *United States v. Mazurie*, 419 U.S. 544, 557 (1975)). While not the controlling factor in today's Supreme Court jurisprudence of Indian

Indian taxation laws remain in flux. In *McClanahan v. Arizona State Tax Commission*, the United States Supreme Court held that states lack the power to tax the income of Indians who reside and earn their income in Indian Country.<sup>14</sup> *McClanahan* is regarded as a “landmark” decision in Indian taxation law;<sup>15</sup> the Court’s holding represents the most basic premise of Indian taxation—Indians residing in and earning all of their income exclusively on their tribe’s reservation are not subject to state taxes, including state income taxes. The gray areas of Indian taxation law arise when Indians work and/or live off of the reservation, non-Indians conduct business in Indian Country, and nonmember Indians seek the same tax protection as member Indians. If the *McClanahan* principle of “no taxation” extended to non-Indians working and/or living on an Indian reservation, Indian Country would quickly become a safe-haven from state taxation. While such a situation would be problematic, the concurrent authority of states and tribes to tax the same income of non-Indians is also troublesome.

#### A. *The Power of a State to Tax Non-Indians*

A state has the power to tax the incomes of the people who reside within its boundaries.<sup>16</sup> A state also has the power to tax the income generated from activities occurring within its boundaries, even if the individual earning the income is not a resident of the state.<sup>17</sup> States routinely collect tax revenue from both types of taxes.

Despite the principle of Indian sovereignty, as far back as 1898 the United States Supreme Court held that states have the power and jurisdiction to levy a tax on the property of non-Indians located within

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taxation, Indian sovereignty remains a guiding “backdrop” for the Court. *McClanahan v. Ariz. State Tax Comm’n*, 411 U.S. 164, 172 (1973). For a more detailed background of federal Indian policy, see Anna-Marie Tabor, *Sovereignty in the Balance: Taxation by Tribal Governments*, 15 U. FLA. J. L. & PUB. POL’Y 349, 353–60 (2004).

<sup>14</sup> *McClanahan*, 411 U.S. at 165.

<sup>15</sup> See Sandra Hansen, *Survey of Civil Jurisdiction in Indian Country 1990*, 16 AM. INDIAN L. REV. 319, 358 (1991) (referencing *McClanahan* as a “landmark decision”).

<sup>16</sup> *Okla. Tax Comm’n v. Chickasaw Nation*, 515 U.S. 450, 462–63 (1995).

That the receipt of income by a resident of the territory of a taxing sovereignty is a taxable event is universally recognized. Domicil [sic] itself affords a basis for such taxation. Enjoyment of the privileges of residence in the state and the attendant right to invoke the protection of its laws are inseparable from responsibility for sharing the costs of government . . . . These are rights and privileges which attach to domicil [sic] within the state. . . . Neither the privilege nor the burden is affected by the character of the source from which the income is derived.

*Id.* at 463 (quoting *New York ex rel. Cohn v. Graves*, 300 U.S. 308, 312–13 (1937)).

<sup>17</sup> See *Shaffer v. Carter*, 252 U.S. 37, 57 (1920) (“As to nonresidents, the [state’s] jurisdiction extends only to [the nonresidents] property owned within the state and their business, trade, or profession carried on therein, and the tax is only on such income as is derived from those sources.”).

Indian Country.<sup>18</sup> The modern trend of courts in analyzing the validity of a state tax on non-Indians is to use a preemption analysis to determine where the legal incidence of the tax falls—on the Indian tribe or the non-Indian.<sup>19</sup> If the legal incidence falls on the Indian tribe, the state tax is categorically barred “absent clear congressional authorization.”<sup>20</sup> But if the incidence falls on the non-Indian, further examination into the federal, state, and tribal interests in the tax is necessary to determine whether the tax is preempted.<sup>21</sup> If, based on these factors, the tax is not preempted by federal legislation, the state may continue to impose the tax.<sup>22</sup> Preserving tribal sovereignty is still an interest that courts consider, but the federal preemption of state jurisdiction is the principal analysis.<sup>23</sup>

### 1. Preemption Analysis

In *White Mountain Apache Tribe v. Bracker*, the United States Supreme Court invalidated Arizona’s motor carrier license tax and use fuel tax which the State levied on an Arizona logging company that performed timber operations on an Indian reservation in Arizona.<sup>24</sup> The logging company filed suit against the State in protest of the two state taxes levied on its operations, which were conducted exclusively on tribal land.<sup>25</sup>

In holding that the Arizona taxes cannot be sustained, the Supreme Court departed from the Court’s previous unqualified grant of tribal sovereignty<sup>26</sup> and applied a “two barrier” test.<sup>27</sup> The first barrier requires that the state tax must not be preempted by federal law.<sup>28</sup>

This inquiry is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but has called for a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law.<sup>29</sup>

Applying this test, the Court observed that the White Mountain Apache

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<sup>18</sup> See *Thomas v. Gay*, 169 U.S. 264, 277 (1898) (noting a state’s power to tax the property of nonresidents that is located within the state’s borders).

<sup>19</sup> *Okla. Tax Comm’n*, 515 U.S. at 458–59.

<sup>20</sup> *Id.* at 459.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> Cowan, *supra* note 10, at 110.

<sup>24</sup> *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 137–38 (1980).

<sup>25</sup> *Id.* at 140.

<sup>26</sup> See *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832) (Chief Justice Marshall stated that “the law[] of [a State] can have no force” in Indian Country).

<sup>27</sup> See *White Mountain Apache Tribe*, 448 U.S. at 142 (“This congressional authority . . . ha[s] given rise to two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members.”).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 145.

Tribe's interest—particularly their financial interest—in the logging operations was great.<sup>30</sup> The Court also found that the federal government had a particularly strong interest in regulating timber operations; the nation's timber industry was regulated through acts of Congress, detailed federal regulations, and close oversight by the Bureau of Indian Affairs.<sup>31</sup> In contrast, Arizona did not build, maintain, or police any of the roads the logging company used in its operations on the Indian reservation and thus had no sufficient justification for imposing the taxes.<sup>32</sup> The Court held that such a generalized interest in raising revenue, without some corresponding showing of services provided, was not grounds for levying such a tax.<sup>33</sup> Accordingly, the Court found that the tribal and federal interests in the logging operations outweighed the state's interests and ruled that Arizona's taxes on the logging company were preempted by federal law.<sup>34</sup>

Since the state tax was preempted under the first barrier, the Court did not address the second half of the “two barrier” test—whether the tax unlawfully infringes on tribal sovereignty.<sup>35</sup> The Court did, however, note that both barriers carry equal weight and that a violation of either barrier, by itself, is grounds for invalidation of a state tax.<sup>36</sup>

## 2. *State Income Taxation of Non-Indians: Loveness v. State ex rel. Department of Revenue*

In an Arizona case decided after the resolution of *McClanahan*, the Court of Appeals of Arizona held that Arizona had the authority to levy its state income tax on non-Indian loggers who lived in Arizona (not on an Indian reservation) but earned their income on an Indian reservation.<sup>37</sup> The Loveness's worked and earned income on the Fort Apache Reservation in Arizona.<sup>38</sup> The State of Arizona audited the Loveness' 1987 and 1988 tax

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<sup>30</sup> See *id.* at 138 (“Of [the Tribe's] enterprises, timber operations have proved by far the most important, accounting for over 90% of the Tribe's total annual profits.”).

<sup>31</sup> *Id.* at 145.

<sup>32</sup> See *id.* at 148–50 (explaining why the State's interest in the logging operations was secondary to that of the federal government's).

<sup>33</sup> *Id.* at 150.

<sup>34</sup> See *id.* at 148 (“[T]he assessment of state taxes [on the logging company] would obstruct federal policies.”).

<sup>35</sup> *Id.* at 142.

<sup>36</sup> See *id.* at 143.

The two barriers are independent because either, standing alone, can be a sufficient basis for holding state law inapplicable to activity undertaken on the reservation or by tribal members. They are related, however, in two important ways. The right of tribal self-government is ultimately dependent on and subject to the broad power of Congress. Even so, traditional notions of Indian self-government are so deeply engrained in our jurisprudence that they have provided an important ‘backdrop,’ against which vague or ambiguous federal enactments must always be measured.

*Id.* (internal citations omitted).

<sup>37</sup> *Loveness v. State ex rel. Dep't of Revenue*, 963 P.2d 303, 304–05 (Ariz. Ct. App. 1998).

<sup>38</sup> *Id.* at 305 (noting that Gary and Elizabeth Loveness were the sole shareholders of the Pinetop Logging Company, which conducted logging operations on the Fort Apache Indian Reservation).

returns and subsequently challenged the deduction of the income they earned on the Indian reservation from their taxable income.<sup>39</sup>

The court found that the facts in this case were identical to those in *White Mountain Apache*, except that the disputed tax in this case was an income tax.<sup>40</sup> That difference, however, coupled with no federal statute preempting the state tax, was substantial enough to alter the balance of interests described in *White Mountain Apache*.<sup>41</sup> The court found that unlike in *White Mountain Apache*, Arizona's income tax did not have a direct effect on the comprehensive federal regulation of the timber industry and the Court thus concluded that the tax was not preempted.<sup>42</sup>

In finding that Arizona had the authority to tax the income of non-Indian residents earning income on an Indian reservation, the court relied on the principle that a state has the power to tax all the income earned by its residents.<sup>43</sup> The court rejected the notion that tribal sovereignty shields all income earned on Indian reservations from state taxation; "the infringement doctrine as now conceived by the United States Supreme Court does not apply in cases testing the legality of state taxation of *non-Indians* arising out of on-reservation transactions, regardless of whether the economic burden of the tax is passed along to reservation Indians."<sup>44</sup> Had Congress intended for all income earned through activities occurring on an Indian reservation to be exempt from state income taxation, it could have done so already.<sup>45</sup> Consequently, the Court affirmed the validity of Arizona's income tax.<sup>46</sup>

#### B. *The Power of Indian Tribes to Levy Taxes*

As sovereign governments, Indian tribes retain the power to tax.<sup>47</sup> While the power of a tribe to tax its own members has historically not been challenged,<sup>48</sup> tribal taxation of non-Indians has produced much litigation.<sup>49</sup>

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<sup>39</sup> *Id.* at 306.

<sup>40</sup> *Id.*

<sup>41</sup> *See id.* at 306–07 (noting that Arizona's income tax is not levied to recoup expenses for certain services provided by the State; rather the income tax is an "equitable way of distributing the burdens of government and is directly related to the ability of the taxpayer to pay it").

<sup>42</sup> *Id.* at 308.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 309 (emphasis added).

<sup>45</sup> *See id.* at 308–09 ("Congress has had the authority to change the taxability of this income if desired. It has not done so. As a result, there is no exception from the general principle permitting taxation of those who reside within a State's jurisdiction.") (internal citations omitted). In the alternative, Congress could have also explicitly stated that the State is permitted to tax such income.

<sup>46</sup> *Id.* at 310.

<sup>47</sup> *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982).

<sup>48</sup> *See* PEVAR, *supra* note 13, at 101 ("The right of a tribe to tax its own members has never been seriously questioned.")

<sup>49</sup> *See id.* (discussing the history of Supreme Court cases addressing the issue of tribal taxation of non-Indians). Much of the litigation in this area of law, however, involves an important distinction over the character of the land being taxed—Indian leasehold land versus non-Indian fee land. Because

Nonetheless, there is consensus that Indian tribes have the authority to tax non-Indians doing business on an Indian reservation.<sup>50</sup> In fact, tribal taxation is perhaps the best means for a tribe to raise the revenue needed to provide essential government services and programs for its members.<sup>51</sup>

### 1. *Merrion v. Jicarilla Apache Tribe*

In *Merrion*, the United States Supreme Court held that the Jicarilla Apache Tribe's imposition of a severance tax on oil and gas production on the tribal reservation was a lawful exercise of its inherent power of self-government.<sup>52</sup> Twenty-one non-Indian lessees, who extracted and produced oil and gas on the Tribe's reservation, challenged the Tribe's power to levy a severance tax.<sup>53</sup> The lessees argued that a Tribe's power to tax nonmembers is rooted exclusively in their power to exclude nonmembers from their lands and—since the Jicarilla Tribe did not condition the severance tax on their power to exclude—the tax was unlawful.<sup>54</sup> The Court rejected the lessees' argument, finding instead that the tribal power to tax originates from a tribe's authority to raise revenues and help pay for the expenses of government.<sup>55</sup>

*The power to tax is an essential attribute of Indian sovereignty* because it is a necessary instrument of self-government and territorial management. This power enables a tribal government to raise revenues for its essential services. The power does not derive solely from the Indian tribe's power to exclude non-Indians from tribal lands. Instead, it derives from the tribe's general authority, as sovereign, to control economic activity within its jurisdiction, and to defray the cost of providing governmental services by requiring contributions from persons or enterprises engaged in economic activities within that jurisdiction.<sup>56</sup>

The Court reasoned that the tribal severance tax served as the lessees'

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the Mohegan Sun Arena is located on tribal trust land and not on non-Indian fee land, this Note will not discuss the intricacies of this litigation. For a general overview of this on-going legal dispute, see *id.*

<sup>50</sup> AIRI, *supra* note 2, at 44. It should be noted that a tribe's power to tax non-Indians is subject to two conditions: "when the non-Indian has entered into a consensual relationship with the tribe, such as a business venture, or when the conduct of the non-Indian imperils a significant tribal interest." PEVAR, *supra* note 13, at 101. Because, as discussed below, entertainers and athletes who perform at the Mohegan Sun Arena enter into a commercial relationship with the Mohegan Tribe and thus satisfy the taxing nexus, this Note does not cover the detailed analysis laid out in *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 651–59 (2001).

<sup>51</sup> See PEVAR, *supra* note 13, at 100 ("[Indian] taxation provides the best and most reliable means of raising the revenue needed to manage their affairs and provide services to their citizens.").

<sup>52</sup> *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 133, 159 (1982).

<sup>53</sup> *Id.* at 133.

<sup>54</sup> *Id.* at 136–37.

<sup>55</sup> *Id.* at 144.

<sup>56</sup> *Id.* at 137 (emphasis added).

contribution to the Jicarilla Tribe's cost of providing governmental services such as police protection. In addition, the Court relied on other cases such as *Morris v. Hitchcock*, which similarly held that tribal taxation is an appropriate manner of raising revenue.<sup>57</sup> The Court's holding was instrumental in establishing that a tribe's power to tax is not just a product of land ownership, but rather a sovereign right.<sup>58</sup>

The inherent power of tribal taxation is not exclusively a judicial creation. Rather, all three branches of the federal government, including Congress, share a similar perspective.<sup>59</sup> The Court noted, however, that the power of tribal taxation is not necessarily absolute. Congress can pass federal legislation which effectively limits tribal sovereignty, including the power to tax.<sup>60</sup> Despite two federal Acts governing Indians and energy legislation, the Court found that Congress had not limited the Jicarilla Tribe's inherent power to levy the severance tax on oil and gas production.<sup>61</sup>

### C. Concurrent State and Tribal Taxation

Because both Indian tribes and states have concurrent taxing authority over non-Indians who conduct business in Indian Country, the prospect of double taxation is a serious concern. However, current jurisprudence does not categorically bar multiple taxation. Just because a tribe levies a tax on a given person or activity does not automatically preempt a state from concurrently levying a similar state tax.<sup>62</sup> The United States Supreme Court established a test in *Williams v. Lee* for balancing the concurrent jurisdiction and interests of a tribe and a state.<sup>63</sup> Although not decided on tax grounds, "[t]he Williams test was designed to resolve [the conflict of concurrent state and tribal jurisdiction] by providing that the State could protect its interest up to the point where tribal self government would be affected."<sup>64</sup>

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<sup>57</sup> *Id.* at 142 (referencing *Morris v. Hitchcock*, 194 U.S. 384 (1904)).

<sup>58</sup> See Susan Williams & Kevin Grover, *State and Indian Tribal Taxation on Indian Reservations: Is It Too Taxing?*, in 1989 HARVARD INDIAN LAW SYMPOSIUM 165, 168 (1990) (analyzing the impact of the *Merrion* decision on the tribal power of taxation).

<sup>59</sup> See *Merrion*, 455 U.S. at 139 ("Viewing the taxing power of Indian tribes as an essential instrument of self-government and territorial management has been a shared assumption of all three branches of the Federal Government.").

<sup>60</sup> See *id.* at 149 (stating that "Congress may limit tribal sovereignty").

<sup>61</sup> See *id.* at 149-52 (discussing the lessee's unsuccessful argument that the tribal severance tax was preempted).

<sup>62</sup> *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 158 (1980).

<sup>63</sup> See *Williams v. Lee*, 358 U.S. 217, 220 (1959) ("[T]he question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.").

<sup>64</sup> *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164, 179 (1973).

1. Washington v. Confederated Tribes of the Colville Indian Reservation

In *Washington v. Confederated Tribes of the Colville Indian Reservation*, the United States Supreme Court held that concurrent taxation by three Indian Tribes and the State, as applied to cigarette sales, was permitted.<sup>65</sup> In *Colville*, the State of Washington levied a cigarette excise tax on the sale and use of cigarettes within the state.<sup>66</sup> Washington also imposed a five percent sales tax on the sale of personal property in the state, including the sale of cigarettes.<sup>67</sup> Washington sought to require Indian tribes located within state boundaries to collect these taxes on sales made to non-Indians on an Indian reservation.<sup>68</sup> Three Indian tribes, located in Washington, imposed similar tribal taxes of their own on on-reservation cigarette sales made to non-Indians.<sup>69</sup> Because the Tribes did not collect the Washington excise or sales tax on their cigarette sales to non-Indians, non-Indians who lived near Indian Country would often travel onto a reservation to buy cigarettes.<sup>70</sup> Consequently, the profitability of Indian smokeshops largely depended upon the Tribes' claimed exemption from Washington state taxes—without such a tax exemption, the volume of the Tribes' cigarette retail business would be dramatically reduced.<sup>71</sup> Both Washington and the Tribes asserted that the other's tax was without proper authority.

The Court relied on *Moe v. Salish & Kootenai Tribes* for the fundamental principle that a state may levy a tax on non-Indians doing business on an Indian reservation.<sup>72</sup> Even if the state tax “seriously disadvantages or eliminates” the tribe's business with non-Indians, the tax may still be valid.<sup>73</sup> Concurrent with the state's authority to tax non-Indians, the Court also reaffirmed that tribal taxation is one of the primary powers Indian tribes enjoy as sovereign entities.<sup>74</sup> A tribe's power to tax is subject to federal law, and no existing federal law deprived Indian tribes of

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<sup>65</sup> *Colville*, 447 U.S. at 159 (1980).

<sup>66</sup> *Id.* at 141.

<sup>67</sup> *Id.* at 142.

<sup>68</sup> *Id.* at 141.

<sup>69</sup> *Id.* at 143–44.

<sup>70</sup> *Id.* at 145. Although not explicitly stated in the opinion, the rate of the tribal taxes on cigarette sales was presumably less than that of Washington's. Washington's excise tax was levied at \$1.60/carton of cigarettes plus the five percent sales tax. The Court stated that a non-Indian saved more than one dollar by purchasing the cigarettes on one of the Indian reservations. *Id.*

<sup>71</sup> *See id.* (“In short, the Indian retailer's business is to a substantial degree dependent upon his tax-exempt status, and if he loses that status his sales will fall off sharply.”).

<sup>72</sup> *Id.* at 151 (referencing *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463 (1976)).

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 152.

such power.<sup>75</sup>

While there were several issues at stake in *Colville*,<sup>76</sup> the principal question in the case was whether the Tribes' own taxes on cigarette sales ousted Washington's authority to tax on-reservation cigarette sales to non-Indians.<sup>77</sup> The Tribes argued that maintaining their tax-advantage on cigarette sales was pivotal to help generate much-needed revenue for tribal government services on their reservations.<sup>78</sup> However, the Court was quick to reject the notion that the existence of a tribal tax per se invalidated a corresponding state tax. The Court stated that "[i]f this assertion were accepted, the Tribes could impose a nominal tax and open chains of discount stores . . . selling goods of all descriptions at deep discounts . . . ."<sup>79</sup> Despite federal encouragement for tribes to develop stronger economies and governments, no existing law provided for such a "competitive advantage."<sup>80</sup>

The Court found that Indian tribes have an interest in raising revenues for their own government services and that a tribal tax is a justifiable means for doing so.<sup>81</sup> Washington as a state, however, also has an interest in raising revenues for its government programs.<sup>82</sup> Thus, the Court rejected the Tribes' proposition that the Indian Commerce Clause "automatically bars all state taxation of matters significantly touching the . . . economic interests of the Tribes."<sup>83</sup> Instead, the Indian Commerce Clause only applies to discriminatory and/or burdensome taxes on Indian commerce.<sup>84</sup>

Finally, the Court addressed the issue of whether Washington was

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<sup>75</sup> See *id.* at 153 ("Except where Congress has provided otherwise, [the power of tribal taxation] may be exercised over members of the tribe and over non-members . . . ." (quoting *Powers of Indian Tribes*, 55 INTERIOR DEC. 14, 46 (1934))).

<sup>76</sup> In addition to the dispute over the cigarette taxes, the Court resolved questions of jurisdiction to hear the case, the authority of Washington to require the Tribes to collect the state taxes, and the validity of Washington levying its motor vehicle excise tax and mobile home, camper, and trailer taxes on vehicles owned by the Tribes or their members and used both on and off the reservation. See *id.* at 145, 159, 162.

<sup>77</sup> *Id.* at 138.

<sup>78</sup> *Id.* at 154. The Court noted the potential rippling effect double taxation of cigarette sales would allegedly have on the Tribes:

If the State is permitted to impose its taxes, the Tribes will no longer enjoy any competitive advantage vis-à-vis businesses in surrounding areas. Indeed, because the Tribes themselves impose a tax on the transaction, if the state tax is also collected the price charged will necessarily be higher and the Tribes will be placed at a competitive *disadvantage* . . . . Tribal smokeshops will lose a large percentage of their cigarette sales and the Tribes will forfeit substantial revenues.

*Id.*

<sup>79</sup> *Id.* at 155.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 156.

<sup>82</sup> *Id.* at 157.

<sup>83</sup> *Id.*

<sup>84</sup> See *id.* (suggesting the Indian Commerce Clause's role is restricted to barring discrimination against and burdens upon Indian commerce).

required to give a state tax credit to taxpayers who purchased cigarettes in Indian Country and paid tribal taxes on the transaction.<sup>85</sup> Theoretically, the purpose for such a tax credit is to mitigate the anticipated decrease in business at the tribal smokeshops if both the state and tribal taxes are levied on the same transaction.<sup>86</sup> The Court found, however, that the Tribes did not produce sufficient evidence to prove that with a state tax credit, on-reservation cigarette sales would still not decrease.<sup>87</sup> Thus, the Court ruled that despite the prospect of double taxation, the law permitted both the Tribes and Washington to impose their cigarette taxes concurrently.<sup>88</sup>

### III. WHAT IS AT STAKE? NONRESIDENT INCOME TAXATION AND THE MOHEGAN SUN ARENA

#### A. *Multistate Taxation of Athletes and Entertainers*

Athletes and entertainers, like the rest of society, are liable for income taxes on income earned both in the state in which they are residents and in the states of which they are not residents, but in which they perform income-earning activity. In the case of athletes, many are residents of the state in which their team is located. However, this is not universally true. In either case, an athlete is liable to pay income tax in his/her state of residence, the state in which his/her team plays their home games (if different from his/her state of residence), and in each state his/her team plays road games. Entertainers, on the other hand, do not have a “home” venue so to speak; they may perform and earn all of their income in one state or their income may be the aggregate of earnings collected from performances in all fifty states. Athletes and entertainers typically receive a tax credit in their state of residence for all income taxes paid to other states. This credit prevents the double taxation of their income.

State income taxation of nonresidents is not a novel concept; however, enforcement of such taxation as specifically applied to nonresident athletes is a more recent trend.<sup>89</sup> If every state in which an athlete is a non-resident

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<sup>85</sup> *Id.*

<sup>86</sup> See *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 157 (1980) (noting the Tribes’ argument that without a credit, tribal smokeshops would be at a “competitive disadvantage”).

<sup>87</sup> See *id.* at 158 (“It is evident that even if credit were given, the bulk of the smokeshops’ present business would still be eliminated, since nonresidents of the reservation could purchase cigarettes at the same price and with greater convenience nearer their homes and would have no incentive to travel to the smokeshops for bargain purchases as they do now.”).

<sup>88</sup> See *id.* at 158–59 (concluding no conflict existed between the state and tribal laws regarding taxation).

<sup>89</sup> John DiMascio, *The “Jock Tax”: Fair Play or Unsportsmanlike Conduct*, 68 U. PITT. L. REV. 953, 956 (2007). Because the focus of this Note is on Indian taxation, not the policy of state income taxation, only limited attention will be paid to the origins of the nonresident athlete/entertainer tax. For

but earns income in does not levy an income tax on the athlete, the athlete would pay all of his income tax to his state of residence. However, because professional athletes and entertainers are some of the highest paid individuals in the twenty-first century, states are enticed to tax the portion of these individuals' incomes that is attributable to their state. If a state does tax the income of a non-resident athlete, it is common for the athlete's state of residence to credit the athlete for the amount of income taxes paid to other states.<sup>90</sup> Such a credit prevents the athlete from being taxed twice on the same income. For instance, the Boston Red Sox are scheduled to play 9 of their 162 games in California during the 2009 Major League Baseball season. If a player on the Red Sox is a resident of Massachusetts and earns an annual salary of \$10 million, \$555,555 of that income is proportionately attributable to California. Assuming, albeit unrealistically, that all \$555,555 of that income constitutes taxable income in California, California would collect just under \$50,000 in tax from this one athlete.<sup>91</sup> It follows that Massachusetts would subsequently issue the athlete a tax credit for the amount of income tax paid to California, thereby preventing double taxation. While \$50,000 may not make much of an impact on a state like California, which collects billions of dollars a year in income taxes, collecting income tax revenue from each nonresident athlete playing in California against one of California's fifteen major professional athletic teams<sup>92</sup> during the taxable year results in a sizeable sum of revenue.

Calculating the taxable income of a nonresident entertainer who performs in a given state is slightly easier as most entertainers sign a contract guaranteeing them a fixed amount of income or gross receipts for performing at a specified venue within the respective state. Based on the terms of the contract, the state in which the specified venue is located is permitted to tax the amount paid to the entertainer for his/her performance in the state.

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a more detailed background of the rise in state taxation of nonresident athletes and entertainers, see generally Elizabeth C. Ekmekjian, *The Jock Tax: State and Local Income Taxation of Professional Athletes*, 4 SETON HALL J. SPORT L. 229 (1994).

<sup>90</sup> See, e.g., *infra* note 121 and accompanying text (discussing Connecticut's income tax credit for income taxes paid to other states).

<sup>91</sup> The calculation is based on California's 2008 tax schedule. See CAL. REV. & TAX CODE § 17041 (West 2008) (providing the statutory authority for the State of California to levy an income tax on non-residents with source-based income in California); BANKRATE.COM, STATE TAX ROUNDUP: CALIFORNIA, Feb. 2, 2009, [http://www.bankrate.com/brm/itax/edit/state/profiles/state\\_tax\\_Cal.asp](http://www.bankrate.com/brm/itax/edit/state/profiles/state_tax_Cal.asp).

<sup>92</sup> California had fifteen professional teams in the four major sports as of 2008. MLB: Los Angeles Angels of Anaheim, Los Angeles Dodgers, Oakland Athletics, San Diego Padres, and San Francisco Giants. NBA: Golden State Warriors, Los Angeles Clippers, Los Angeles Lakers, Sacramento Kings. NFL: Oakland Raiders, San Diego Chargers, San Francisco 49ers. NHL: Anaheim Ducks, Los Angeles Kings, San Jose Sharks. Wikipedia, *List of Professional Sports Teams in California*, [http://en.wikipedia.org/wiki/List\\_of\\_professional\\_sports\\_teams\\_in\\_California](http://en.wikipedia.org/wiki/List_of_professional_sports_teams_in_California) (as of Feb. 24, 2009, 05:19 GMT).

### 1. *Connecticut's Nonresident Athlete and Entertainer Income Tax*

Connecticut imposes an income tax on all nonresidents with Connecticut source income.<sup>93</sup> Because the Mohegan Sun Arena is located in Connecticut, this broad classification necessarily includes the income nonresident entertainers and professional athletes earn from performing at the Arena. A state-issued policy statement requires a Connecticut employer or entity to withhold five percent from any wages or salary paid to any resident or nonresident performer.<sup>94</sup> The statement also includes a non-exhaustive list of what constitutes an athlete and entertainer for purposes of this withholding requirement:

***Performer*** means an athlete, including but not limited to a wrestler, boxer, golfer, tennis player, or other athlete, as well as a referee or trainer, or an entertainer. An entertainer includes but is not limited to an actor, singer, musician, dancer, circus performer, comedian, public speaker, as well as a writer, director, set designer, or member of a sound or light crew.<sup>95</sup>

This expansive definition of a “performer” increases the significance of the income revenue at stake. All professional athletic teams travel with fairly large amounts of staff including trainers, coaches, and management. Likewise, entertainers employ large set-up crews who travel with them to every concert. Consequently, while athletes and entertainers make a significant amount of money and therefore pay large amounts in income taxes, the income tax revenue generated by the hundreds or even thousands of other personnel who fall within the “performer” classification is also a significant source of revenue for Connecticut.

## IV. A FRAMEWORK FOR TRIBAL TAXATION OF INCOME EARNED AT THE MOHEGAN SUN ARENA

Based on the law outlined in Section II above, this Note accepts the likely conclusion that both Connecticut and the Mohegan Tribe are legally permitted to levy an income tax on professional athletes and entertainers who perform at the Mohegan Sun Arena. While the Mohegan Tribe is free to levy an income tax on these athletes and entertainers, a tribal income tax without a corresponding reduction in state income taxation would result in

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<sup>93</sup> CONN. GEN. STAT. § 12-700(b) (2009).

<sup>94</sup> STATE OF CONN. DEP'T OF REVENUE SERVS., INCOME TAX WITHHOLDING FOR ATHLETES AND ENTERTAINERS 3 (2008), <http://www.ct.gov/drs/lib/drs/publications/pubsp/2008/ps08-1.pdf> [hereinafter INCOME TAX WITHHOLDING FOR ATHLETES AND ENTERTAINERS]. For the statutory authority for this withholding requirement, see CONN. GEN. STAT. § 12-707 (2009).

<sup>95</sup> INCOME TAX WITHHOLDING FOR ATHLETES AND ENTERTAINERS, *supra* note 94, at 1 (emphasis in original).

double taxation and could have many perverse effects. Forcing a tribe to choose between levying a tax (and thus creating double taxation which might put the tribe at a competitive disadvantage) or not levying a tax and losing out on potential revenue is unsatisfactory and interferes with tribal sovereignty.<sup>96</sup>

Assume for instance that both Connecticut and the Mohegan Tribe levy an income tax pursuant to Connecticut's current income tax schedule.<sup>97</sup> If this were the case, an entertainer who made \$200,000 for performing at the Mohegan Sun Arena would pay \$9800 in Connecticut income taxes and \$9800 in tribal taxes. In total, the entertainer would pay \$19,600 in income taxes or 9.8% of his income. While double taxation is not illegal per se, such a high tax-burden is undesirable and would likely lead entertainers to look elsewhere to perform. As discussed below, the positive economic impact produced by the Mohegan Sun Arena makes it essential that Connecticut and the Mohegan Tribe work towards a mutually acceptable tax sharing arrangement as opposed to permitting double taxation to ensue and losing a valuable stream of revenue.

This Note recommends a simple and fair tax proposal for resolving this double tax dilemma. Because the Mohegan Tribe exerts greater control over and has a more direct interest in the Mohegan Sun Arena than Connecticut, it should be the primary taxing entity. For ease of administration and for purposes of maintaining strong tribal-state relations, the Mohegan Tribe should levy a 3% flat income tax on any wages, salaries, and income paid to professional athletes and entertainers for performing at the Mohegan Sun Arena. The income tax should be levied on the same group of people who fall within the "performer" classification in Connecticut's policy statement regarding athlete and entertainer taxation. The 3% tax rate is consistent with the Tribe's policy of setting its tax rates equal to or lower than those of neighboring states; importantly, the 3% rate is equal to the floor of Connecticut's state income tax schedule.<sup>98</sup> Because Connecticut should not be stripped of all the income tax revenue it currently receives in connection with the Arena, the State may continue to levy its state income tax but must credit the athletes and entertainers for any amounts paid in income tax to the Mohegan Tribe. This proposal satisfies the *Williams v. Lee* test described *supra*; Connecticut is protecting itself and its revenue stream while not interfering

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<sup>96</sup> See *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 170–71 (1980) (Brennan, J., concurring in part and dissenting in part) (noting the ill effects of the majority's opinion on tribal welfare).

<sup>97</sup> For single filers, Connecticut currently levies a 3% income tax on income up to and including \$10,000 and then 5% on all income greater than \$10,000. BANKRATE.COM, STATE TAX ROUNDUP: CONNECTICUT, Feb. 2, 2009, [http://www.bankrate.com/brm/itax/edit/state/profiles/state\\_tax\\_Conn.asp?caret=14a](http://www.bankrate.com/brm/itax/edit/state/profiles/state_tax_Conn.asp?caret=14a).

<sup>98</sup> For Connecticut's income tax schedule, see *id.*

with the Mohegan's right to self-government and tribal sovereignty.

To illustrate, if an entertainer made \$200,000 in taxable income from performing at the Mohegan Sun Arena, the Mohegan Tribe would collect \$6000 in income tax. Connecticut would ordinarily collect \$9800 from its state income tax. Connecticut, however, must credit the entertainer in the amount of \$6000, thereby collecting only \$3800 in tax revenue. In sum, the entertainer would only pay \$9800 in income taxes or 4.9% of his income in contrast to the 9.8% paid under the double taxation scheme described above. In fact, under this proposal the taxpayer's final tax obligation is equal to what it would have been if he had just paid Connecticut's state income tax. Such equality is important because it leaves the taxpayer indifferent about his tax obligation—the taxpayer should not care who he is paying tax to as long as his tax burden is not increased—and as a result the current level of business at the Mohegan Sun Arena should not decrease.

#### A. *The Mohegan Tribe as a Taxing Entity*

Despite a Tribe's power to levy an income tax, few, if any, actually do so. Instead, many tribes resort to other means or taxes for raising revenue. The Mohegan Tribe is no exception to this general rule. Like any sovereign government, the Mohegan Tribe must raise revenue to help pay for, among other things, the costs of government, education, and public services.<sup>99</sup> The Mohegan Taxation Code, located in Article V of the Mohegan Tribe Constitution, establishes three tribal taxes: a 6% Meals Tax, 12% Hotel Tax, and 6% Sales Tax.<sup>100</sup> The rates of the three tribal taxes were specifically set to not exceed the tax rates levied on similar transactions by the neighboring New England states and New York.<sup>101</sup> Although the Mohegan Tribe exercises its sovereign authority to levy these three taxes, the Mohegan Tribe does not currently levy an income tax in any form.

There is a commonly-held belief that Indian tribes escape federal and state taxation while earning a windfall through gambling profits. Because of this animosity, to the public opinion may weight against taking income tax revenue away from Connecticut and redistributing it to the Mohegan Tribe. However, this public perception is somewhat incorrect. For instance, the 2000 U.S. Census Bureau found that the median income of an

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<sup>99</sup> See MOHEGAN TRIBE OF INDIANS OF CONN. CODE OF ORDINANCES, ch. 7, art. V, § 7-224, Res. No. 2009-06 (Municode.com through Oct. 15, 2008), available at <http://www.municode.com/resources/gateway.asp?pid=13768&sid=7> (describing the purposes of the Mohegan Tribe's taxation code).

<sup>100</sup> *Id.* at § 7-226.

<sup>101</sup> See *id.* at § 7-224 (“[T]he taxes herein will be of the same types which are imposed by and at rates which are not in excess of those imposed by State and local governments of the New England states or New York upon similar enterprises, property or transactions located in those jurisdictions.”).

American Indian family in 1999 was \$30,599, compared to the national average of \$41,994.<sup>102</sup> In fact, American Indian households had the second-lowest median income of all the races examined in the report.<sup>103</sup> As for the Mohegan Tribe, the public's perception may be slightly more accurate. The Mohegan Tribal Gaming Authority reported a 2008 third quarter net income of \$5 million and in the third quarter of 2007, a net income of \$45.7 million.<sup>104</sup> While these profit figures are admittedly large, the profits from the Tribe's Gaming Authority are the primary source of revenue that the Mohegan Tribal Government uses to pay for government-related expenditures. Furthermore, the Mohegan Tribal Gaming Authority realized over a \$40 million decrease in net income from the third fiscal quarter in 2007 as compared to the third fiscal quarter of 2008.<sup>105</sup> Similar to how the United States is forced to find new sources of revenue to help revive a struggling economy, Indian tribes need to find alternative revenue streams to help make-up for such dramatic drops in income. The proposed tribal income tax could provide the additional funds needed to help sustain tribal welfare.

#### B. *Interest in and Control of Taxed Activity*

In determining which entity should be the primary taxing sovereign, it is appropriate to examine the interests of the affected entities and the degree of control each entity exerts. Under the proposal set forth in this Note, the Mohegan Tribe is treated as the primary taxing entity because its interest in and control of the Mohegan Sun Arena exceeds that of Connecticut's—in fact, it is immense.

The Mohegan Tribal Gaming Authority—an entity of the Mohegan Tribal Government—is responsible for operating all facets of the Mohegan Sun Arena.<sup>106</sup> In conjunction with the Mohegan Sun Casino, the Mohegan Tribal Gaming Authority works to attract entertainers and other performers to the Mohegan Sun Arena. The Gaming Authority also manages the day-to-day operations of the Arena. Beyond the Arena itself, the Mohegan

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<sup>102</sup> U.S. CENSUS BUREAU, *American Indian, Alaska Native Tables*, in STATISTICAL ABSTRACT OF THE UNITED STATES 2004–2005, at 441 (12th ed. 2004), available at <http://www.census.gov/statab/www/sa04aian.pdf>.

<sup>103</sup> *Id.*

<sup>104</sup> *Mohegan Tribal Gaming Authority Announces Third Quarter Fiscal 2008 Operating Results*, REUTERS, July 31, 2008, available at <http://www.reuters.com/article/pressRelease/idUS147116+31-Jul-2008+PNW20080731>.

<sup>105</sup> *Id.*

<sup>106</sup> See Mohegan Tribal Gaming Authority, <http://mtga.com/mtga/about> (last visited Mar. 23, 2009) (indicating that the Authority “has been granted the exclusive power to conduct and regulate gaming activities on the existing reservation of the Tribe, including the operation of Mohegan Sun” and that “Mohegan Sun currently operates in an approximately 3 million square foot facility, which includes the Casino of the Earth, Casino of the Sky, the Shops at Mohegan Sun, a 10,000-seat Arena, a 350-seat Cabaret, meeting and convention space and a 1,200-room luxury hotel tower”).

Tribe actually *owns* the Connecticut Sun basketball organization.<sup>107</sup> Unlike the Mohegan Tribe, the state of Connecticut does not own or operate any portion of the Mohegan Sun Arena or the Connecticut Sun. Even though the Arena is located in Connecticut, it is on federally-granted Indian land, not state property.<sup>108</sup> Connecticut does, however, provide extensive infrastructure by means of state-owned and maintained roads. These roads serve as the exclusive manner of transportation to and from the Mohegan Sun Arena and thus are a key component to the Arena's success.

The Mohegan Tribe's interest in the success of the Mohegan Sun Arena is also maximized. The Tribe relies on the Arena for a large source of its income and also uses the Arena to attract larger crowds to the Mohegan Sun Casino.<sup>109</sup> Although the Tribe has not exercised its power to levy an income tax in the past, it is likely that the Mohegan's interest in the potential revenue from an income tax on non-Indian athletes and entertainers is significant. As expenses continue to rise and the Tribe is forced to lay off workers in order to curtail spending,<sup>110</sup> the Mohegan Tribe's desire to increase its revenue likely increases. While there may be some non-economic factors weighing against levying a tribal income tax, such as peaceful tribal-state relations between the Mohegan Tribe and Connecticut, the Tribe's financial incentive in levying an income tax is undeniable. Connecticut is also certain to have a strong financial interest in maintaining its current status as the exclusive taxing entity of nonresident athletes' and entertainers' incomes. Connecticut's interest in such revenues is likely only heightened by the economic recession the United States is currently experiencing.<sup>111</sup> Proportionately speaking, however, the income tax revenue would likely have a greater impact on the Mohegan Tribe than Connecticut due to the overall size of their respective budgets.

### C. State Tax Credit

In *Complete Auto*, the United States Supreme Court implicitly created

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<sup>107</sup> See *WNBA Comes to Connecticut*, Jan. 28, 2003, [http://www.wnba.com/sun/news/wnba\\_comes\\_connecticut.html](http://www.wnba.com/sun/news/wnba_comes_connecticut.html) (quoting the chairman of the Mohegan Tribe, concerning the introduction of the Connecticut Sun franchise, as saying "[t]he Mohegan Tribe is proud to bring professional women's basketball to Connecticut").

<sup>108</sup> See *Mohegan Tribal Gaming Authority Announces Cost Reductions That Do Not Include Layoffs*, REUTERS, Jan. 11, 2009, available at <http://www.reuters.com/article/pressRelease/idUS90019+11-Jan-2009+BW20090111>.

<sup>109</sup> See *infra* notes 120–29 and accompanying text (discussing the substantial amount of profits earned from the Arena).

<sup>110</sup> See Bowles, *supra* note 6 (stating that the Mohegan Tribe laid off approximately 600 employees in May 2008).

<sup>111</sup> See *A Crisis So Big, Even Greenwich Connecticut is Humbled*, <http://theboard.blogs.nytimes.com/tag/connecticut/> (Sept. 26, 2008, 11:44 EST) (noting Connecticut's recent deficit in income tax revenue caused by the State's dependence on the incomes of hedge fund managers and bankers in Greenwich and the collapse of the United States financial markets).

what has become a four-prong analysis for testing the constitutionality of state taxes under the interstate commerce clause.<sup>112</sup> The apportionment requirement, which is the second-prong of the *Complete Auto* test, requires that “each State taxes only its fair share of an interstate transaction.”<sup>113</sup> A fairly apportioned tax must be internally and externally consistent.<sup>114</sup> Despite the Supreme Court finding that it is inappropriate to apply the interstate commerce clause to “multiple taxation” issues between states and Indian tribes,<sup>115</sup> the fair apportionment prong of the test is still a useful tool in analyzing the effectiveness of the state tax credit proposed in this Note.

### 1. *Internal Consistency*

Internal consistency serves as an inherent block to double taxation. For a tax to be internally consistent, one must imagine a world in which every state levied an identical tax. If no multiple taxation would result from the fifty identical taxes, the tax is internally consistent.<sup>116</sup>

Under *Colville*, a tribal tax does not automatically oust the corresponding state tax.<sup>117</sup> Consequently, double taxation is likely to occur if both the Mohegan Tribe and Connecticut levy an income tax on athletes and entertainers who perform at the Mohegan Sun Arena. To avoid this pitfall, this Note proposes that Connecticut should issue a tax credit to all nonresident athletes and entertainers for the amount of income tax paid to the Mohegan Tribe. This assertion contradicts the holding in *Colville* but is a much better resolution to the double tax predicament. A tax credit would preserve the ideal policy that an individual taxpayer should only pay tax on his income once and thus would satisfy the internal consistency requirement. Although the majority in *Colville* refrained from requiring Washington to issue a tax credit, Justice Stewart found otherwise in his minority opinion—he argued that a state tax credit in the amount of the tribe’s tax should be mandatory to permit the Tribe to share in tax revenues from the given activity without putting the tribe at a “competitive disadvantage.”<sup>118</sup>

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<sup>112</sup> See *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 274, 287 (1977) (providing basis for the eventual four-prong test: (1) taxing activity sufficiently connected to the taxing state; (2) tax is fairly related to benefits provided by the State; (3) tax does not discriminate against interstate commerce; and (4) tax is fairly apportioned).

<sup>113</sup> *Goldberg v. Sweet*, 488 U.S. 252, 260–61 (1989).

<sup>114</sup> *Id.* at 261.

<sup>115</sup> See *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989) (“[T]he fact that States and tribes have concurrent jurisdiction over the same territory makes it inappropriate to apply Commerce Clause doctrine developed in the context of commerce ‘among’ States with mutually exclusive territorial jurisdiction to trade ‘with’ Indian tribes.”).

<sup>116</sup> See *Goldberg*, 488 U.S. at 261 (“To be internally consistent, a tax must be structured so that if every State were to impose an identical tax, no multiple taxation would result.”).

<sup>117</sup> *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 158 (1980).

<sup>118</sup> *Id.* at 175 (Stewart, J., concurring in part and dissenting in part).

In contrast to *Colville*, the proposed tribal income tax on athletes and entertainers has a substantial connection to reservation lands.<sup>119</sup> The Mohegan Sun Arena was built by the Mohegan Tribe on the Mohegan Reservation and is owned and operated by the Tribe. The Mohegan's level of control and interest in the income produced from the Arena far exceeds the Colville Tribe's interest in cigarettes. While this heightened interest may not be enough to warrant a departure from the holding in *Colville*, the likely conclusion that business at the Mohegan Sun Arena would be significantly reduced without a state tax credit provides additional support for the proposed tax scheme. The majority in *Colville* looked for specific evidence of how the absence of a state tax credit would hurt the tribe's cigarette business but found none and thus denied the Colville tribe's wish for a court-mandated tax credit.<sup>120</sup> In contrast to the tribe in *Colville*, there is a great likelihood that the Mohegan Tribe's bottom line would be hurt if Connecticut did not issue a state income tax credit. Without such a credit—assuming the Mohegan Tribe does levy the proposed income tax—an entertainer who otherwise would perform at the Mohegan Sun Arena is likely to look elsewhere to avoid paying tax on his income twice. A decrease in the number of entertainers who perform at the Mohegan Sun Arena directly translates into lost revenue for the Mohegan Tribe. This likely outcome may provide the additional evidence that was lacking in *Colville* to constitutionally require Connecticut to issue a tax credit.

The issuance of a state tax credit by Connecticut would not be a new phenomenon; Connecticut currently credits Connecticut resident taxpayers for the amount of income tax they pay to other states.<sup>121</sup> If, as proposed by this Note, Connecticut does issue a tax credit to non-Indian athletes and entertainers for the amount of income tax paid to the Mohegan Tribe and the State is then permitted to collect the remaining difference between the tribal income tax and state income tax, the athletes and entertainers would end up in the same after-tax position as if there was only a state income tax. If this were the case, no double taxation would occur, the Mohegan Tribe would not be placed at a competitive disadvantage, and business at the Mohegan Sun Arena would likely not decrease, all of which is beneficial to both the Mohegan Tribe and Connecticut.<sup>122</sup>

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<sup>119</sup> See *id.* at 156 (“[T]he present taxes are assessed against nonmembers of the Tribes and concern transactions in personalty with no substantial connection to reservation lands.”).

<sup>120</sup> See *id.* at 157 (“[W]e find that the Tribes have failed to demonstrate that business at the smokeshops would be significantly reduced by a state tax without a credit as compared to a state tax with a credit.”).

<sup>121</sup> CONN. GEN. STAT. § 12-704 (2009).

<sup>122</sup> See *infra* notes 125–39 and accompanying text (discussing the economic impact of the Mohegan Sun Arena on Connecticut).

## 2. *External Consistency*

Unlike the objective internal consistency analysis, external consistency is a more subjective requirement. External consistency considers “the economic justification for the State’s claim upon the value taxed, to discover whether a State’s tax reaches beyond that portion of value that is fairly attributable to economic activity within the taxing State.”<sup>123</sup> Because the Mohegan Sun Arena is located within Connecticut but is not a state enterprise, Connecticut cannot economically justify that the full value of the income tax revenue generated from the Arena is attributable to the State. Connecticut should not be permitted to levy its income tax for the general purpose of raising revenue without a corresponding showing of services.<sup>124</sup> In fact, the Mohegan Tribe’s ownership and control of the Mohegan Sun Arena is compelling evidence that the majority of the income tax revenue produced at the Mohegan Sun Arena is attributable to the Tribe, not Connecticut. However, the Mohegan Tribe’s economic justification for this tax revenue is not absolute; the State of Connecticut provides significant public funding and maintenance for infrastructure—namely state roads—which is an essential component to the accessibility and ultimately, the success of the Mohegan Sun Arena. The proposed tribal income tax accounts for each entity’s economic justification for the tax revenue. The Mohegan Tribe receives a small majority of the income tax revenue while Connecticut is still compensated for its role in the success of the Mohegan Sun Arena. This is accomplished through the state tax credit. Ideally, the amount of the credit would represent the value of the income produced at the Mohegan Sun Arena which is attributable to the Mohegan Tribe.

### D. *The Economic Justification for the Proposed Tax Framework*

Under the proposed tribal income tax, the Mohegan Tribe would essentially act as both a promoter for the Mohegan Sun Arena and a taxing sovereign. If the Tribe chooses to levy an income tax, its incentive would clearly be to increase its revenue. Critics of this proposal could argue that given the Mohegan Tribe’s position as a promoter, the Tribe could simply raise ticket prices or keep a higher percentage of the gate receipts, rather than levy an income tax. In other words, the Mohegan Tribe could increase their revenue from the Mohegan Sun Arena by raising *additional* sources of funding, while simultaneously preserving Connecticut’s current income tax revenue. While creating “new” revenue is an alternative for the

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<sup>123</sup> Okla. Tax Comm’n v. Jefferson Lines Inc., 514 U.S. 175, 185 (1995).

<sup>124</sup> See *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 150 (1980) (finding that the State’s general interest in raising revenue, without a corresponding showing of services provided, is not sufficient grounds for levying a tax).

Tribe, the available options for doing so have serious flaws. Raising ticket prices is typically not well-received by the general public and can diminish an entity's goodwill. Likewise, gate receipts are the major source of income for the entertainers and athletic teams who perform at the Arena. If the Mohegan Tribe demands a higher share of the gate receipts instead of levying the proposed income tax, the Mohegan Sun Arena risks becoming a less financially attractive venue for entertainers and the Connecticut Sun; future business at the Arena may decrease. Furthermore, most states give their residents credits for income taxes paid to other jurisdictions. Thus, entertainers who do not live in Connecticut would likely be able to receive a tax credit in their home state for income taxes paid to the Mohegan Tribe, whereas there is no tax benefit for the entertainers if they receive a decreased share of the gate receipts. Consequently, this Note maintains that an equitable split of the existing income tax revenue pool—a tribal income tax with a state tax credit—is the most efficient means to the proposed end for the Mohegan Tribe.

Despite the argument that Connecticut should be constitutionally required to issue a state tax credit, to date, no such constitutional precedent exists. In the event that Connecticut is not constitutionally mandated to issue the credit, what, if any, reason does Connecticut have for giving such a credit? As explained above, double taxation is likely to dissuade future entertainers from performing at the Mohegan Sun Arena. While a decrease in events at the Mohegan Sun Arena may appear to only hurt the Mohegan Tribe, in fact, decreased business at the Arena translates into decreased revenue for the State of Connecticut. The economic impact of the Mohegan Sun Arena on Connecticut is widespread.

The Mohegan Sun Arena is a 10,000 seat arena, located within the Mohegan Sun Casino on the Mohegan Reservation.<sup>125</sup> The Arena has consistently attracted a wide variety of athletic events and entertainers to the Mohegan Reservation. The Mohegan Tribe owns the Connecticut Sun—a professional women's basketball team which participates in the Women's National Basketball Association (WNBA).<sup>126</sup> Individual salaries for the WNBA's Connecticut Sun players are not published; however, the league minimum and maximum salaries for the upcoming 2009 WNBA season are \$35,190 and \$99,500, respectively.<sup>127</sup> The WNBA's salary cap range for the 2009 season is between \$772,000 (minimum) and \$803,000

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<sup>125</sup> Mohegan Sun Arena, <http://www.mohegansun.com/entertainment/arena.html> (last visited Feb. 22, 2009).

<sup>126</sup> Paul Doyle, *One Arena's Feast, Another's Famine: Civic Center Mall Dealt Another Blow*, HARTFORD COURANT, Jan. 29, 2003, at C4, available at LEXIS, News Library, HTCOUR File.

<sup>127</sup> Women's Basketball Online, WNBA Salary Scale, <http://womensbasketballonline.com/wnba/rosters/salary.html> (last visited Feb. 22, 2009). The minimum and maximum salaries listed above vary slightly based on the number of years of service an individual player has in the WNBA.

(maximum).<sup>128</sup> For purposes of this Note, assume that the Connecticut Sun's total team salary for 2009 falls exactly in the middle of the league-mandated minimum and maximum: \$787,500. Half of that total, \$393,750, will be attributable to Connecticut because the Connecticut Sun plays half of its total games at home at the Mohegan Sun Arena and the other half of its games in other states. Given Connecticut's progressive tax schedule, it is hard to predict without individual salaries exactly how much tax revenue the \$393,750 paid-in-salaries would generate. Regardless, between the salaries paid to players, coaches and trainers of the Connecticut Sun, and the portion of the salaries of each visiting team attributable to Connecticut, it is evident that the State of Connecticut currently collects a substantial amount of income tax revenue as a result of the Connecticut Sun's operations at the Mohegan Sun Arena.

In addition to professional athletics, the Mohegan Sun Arena is one of the premiere concert venues in the world; according to Mohegan Sun officials, the Mohegan Sun Arena is the tenth-ranked concert venue in the world and the sixth-ranked venue in the United States.<sup>129</sup> The total amount of income paid to entertainers who perform at the Mohegan Sun Arena over the course of a year is unknown. While the ticket prices to attend many of these concerts are high, the amount paid to the entertainers is typically not available to the public. Despite this lack of information, the total sum paid to the hundreds of entertainers who perform at the Mohegan Sun Arena over the course of a given year is likely several millions of dollars. In a small state like Connecticut, the revenue generated from an income tax on multi-millions of dollars is a significant revenue stream.

The economic benefits of having a tribally-owned and operated professional athletic venue located on an Indian reservation go far beyond income taxes. For instance, the Oneida Indian Nation owns and operates the Turning Stone Resort & Casino located on the Tribe's reservation in Verona, New York. In conjunction with the casino, the Tribe also owns and operates a world-class golf course which plays host to an annual PGA golf tournament.<sup>130</sup> According to PGA Tour officials, the annual golf tournament can inject upwards of twenty-five to fifty million dollars into the surrounding economy.<sup>131</sup> Such a figure is substantial proof of the economic impact professional athletic events on Indian reservations can have on the state in which the reservation is located.

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<sup>128</sup> *Id.* A salary cap is the limit on the total amount of money a team may spend on the salaries of its players. Wikipedia, *Salary Cap*, [http://en.wikipedia.org/wiki/Salary\\_cap](http://en.wikipedia.org/wiki/Salary_cap) (last visited Feb. 22, 2009).

<sup>129</sup> Dunne, *supra* note 4.

<sup>130</sup> Turning Stone Resort Championship, <http://www.turningstonechampionship.com> (last visited Feb. 22, 2009).

<sup>131</sup> Oneida Indian Nation, Region Benefits from Oneida Nation Enterprises, <http://www.oneidaindiannation.com/about/economicimpact> (last visited Feb. 22, 2008).

While a professional golf tournament lasts only one week, the Mohegan Sun Arena hosts events much more frequently throughout the year. Whether it is the WNBA or a famous pop star, the hundreds of events held each year at the Mohegan Sun Arena attract millions of fans and in turn, generate millions of dollars in revenue. Fans pay substantial amounts of money to attend concerts in the twenty-first century; in 2008, the average ticket price for a Billy Joel concert, according to StubHub, was \$224.<sup>132</sup> Most people who attend events at the Mohegan Sun Arena travel to the Arena either from somewhere in Connecticut off of the Mohegan Reservation or from out-of-state. The trickle-down effect of this travel is potentially large. To begin with, fans need transportation to the Arena. Consequently, it is likely that many of the fans will purchase gas in Connecticut on their way to or from the Arena. Such gas purchases result in immediate revenue for Connecticut through its seven percent state tax on the wholesale price of gasoline and twenty-five-cent per gallon excise tax.<sup>133</sup> Others who may not have the luxury of driving or who attend an event at the Mohegan Sun Arena in a group may purchase a bus ticket in Connecticut. Connecticut's six percent sales tax is levied on the purchase of a bus ticket resulting in additional tax revenue for the State. In addition to transportation-related revenue, Connecticut is the likely beneficiary of spectators staying in Connecticut hotels after a concert or basketball game. While there are hotel rooms at the Mohegan Sun Casino, they are highly-priced and often sold-out. Thus, those who live out-of-state and travel to the Reservation for a concert or basketball game may choose to stay in a hotel in Connecticut located near, but not on, the Reservation. The purchase of a hotel room in Connecticut translates into revenue for the State through its twelve percent room occupancy tax.<sup>134</sup> Other positive impacts the Mohegan Sun Arena has on Connecticut include increased employment both on and off the reservation and incidental purchases such as food or personal items which generate sales tax revenue for the State.

Although the relative impact of the revenue generated from gas and lodging purchases made by spectators traveling to the Mohegan Sun Arena is likely minor on Connecticut's budget, the revenue Connecticut receives from the gaming operations at the Mohegan Sun Casino is much more significant. As part of its Tribal Compact with Connecticut, the Mohegan

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<sup>132</sup> StubHub, *2008 StubHub Concert Ticket Annual Report*, MARKETWIRE, Dec. 12, 2008, available at <http://www.marketwire.com/press-release/Stubhub-NASDAQ-EBAY-929720.html>. Other entertainers who have performed or are scheduled to perform at the Mohegan Sun Arena and made StubHub's top-ten list for highest average ticket prices include the Eagles (\$234), Hannah Montana (\$209), Celine Dion (\$198), Neil Diamond (\$193), and Michael Buble (\$189). *Id.*

<sup>133</sup> Derrick Henry, *Good News for Drivers is Bad News for State Budget*, N.Y. TIMES, Dec. 14, 2008, at CT6, available at LEXIS, News Library, NYT File.

<sup>134</sup> STATE OF CONN. DEP'T OF REVENUE SERVS., APPLICATION OF SALES AND USE TAXES AND THE ROOM OCCUPANCY TAX TO THE HOTEL AND MOTEL INDUSTRY 1, (2003), <http://www.ct.gov/drs/lib/drs/publications/pubsp/ps03-1.pdf>.

Tribe gives the State twenty-five percent of all the slot revenues generated from the Mohegan Sun Casino.<sup>135</sup> This revenue represents the second largest single source of revenue for Connecticut, second only to federal government grants.<sup>136</sup> For instance, Connecticut's net revenue from Indian Gaming Payments in 2007–08, including both the Mohegan and Pequot Tribes, was \$411 million.<sup>137</sup> As a comparison, Connecticut's cigarette tax generated \$335 million in revenue and the Oil Companies Tax generated only \$206 million in revenue.<sup>138</sup> It is reasonable to assume that many, if not most fans traveling to the Mohegan Sun Casino to watch a concert or athletic event will partake in at least some form of gambling at the casino. Granted, not every person will gamble and not every person that gambles will play slot machines, but over the course of an entire year, it is a fair assumption that Connecticut's gambling revenue is significantly increased by Mohegan Sun Arena spectators. Without the hundreds of events held each year at the Mohegan Sun Arena, the daily influx of fans into the Mohegan Sun Casino would reduce dramatically. Consequently, the Tribe's slot revenues would decrease and therefore so would the State's twenty-five percent cut of those revenues. Thus, the Mohegan Sun Casino and Mohegan Sun Arena serve as important economic enterprises and revenue streams not only for the Mohegan Tribe, but also for the State of Connecticut.<sup>139</sup>

#### E. Tax Sharing Agreement

If the Mohegan Tribe chooses to levy the proposed income tax, Connecticut could continue to collect its state income tax in full or it may work with the Mohegan Tribe to reach a mutually beneficial taxing arrangement. Given the financial importance of the Mohegan Sun Arena to the State of Connecticut, this Note supports the latter. However, critics

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<sup>135</sup> The Mohegan Tribe, Government: Tribal Enterprises, <http://www.mohegan.nsn.us/government/enterprisesDetails.aspx?e=Mohegan%20Sun> (last visited Feb. 22, 2009).

<sup>136</sup> *Id.*

<sup>137</sup> STATE OF CONNECTICUT: OFFICE OF POLICY AND MGMT, FY 2010–11 GOVERNOR'S BUDGET SUMMARY: FINANCIAL SUMMARY 8 (2009), <http://www.ct.gov/opm/cwp/view.asp?a=2958&q=433196> (follow hyperlink "Section A: Financial Summary").

<sup>138</sup> *Id.* Connecticut's largest source of revenue for 2007–2008 was the personal income tax (approximately \$7.5 billion in revenue) followed by the sales/use tax (approximately \$3.6 billion in revenue). *Id.* However, these revenue streams are not generated from a "single source" like the slot revenues.

<sup>139</sup> The Connecticut Center for Economic Analysis at the University of Connecticut conducted an extensive study of the economic impact that the Mashantucket Pequot Tribal Nation operations had on Connecticut. CONNECTICUT CENTER FOR ECONOMIC ANALYSIS, THE ECONOMIC IMPACT OF THE MASHANTUCKET PEQUOT TRIBAL NATION OPERATIONS ON CONNECTICUT (2000), <http://ccea.uconn.edu/studies/Mashantucket%20Final%20Report.PDF>. The Center's findings—which included substantial increases in Connecticut's level of employment, GRP, personal income, and tourist industry—provide an empirical comparison for the likely economic effect the Mohegan Sun Casino and Mohegan Sun Arena have on Connecticut. *See id.* at 1–4.

of the tax proposal set forth in this Note may argue that because Connecticut is currently not constitutionally required to issue a state tax credit and it is not in the Mohegan Tribe's best interest to levy an income tax—without prior agreement from Connecticut to issue a tax credit—the Mohegan Tribe will not attempt to levy such a tax. In other words, Connecticut has no incentive to voluntarily issue a state tax credit because the Mohegan Tribe likely will not levy a tribal tax without it. This argument is not without merit, especially given that a drop in business at the Mohegan Sun Arena would result in a more direct economic harm to the Mohegan Tribe than to Connecticut. However, such resilience by Connecticut is likely to harbor ill-feelings between Connecticut and the Tribe and may negatively impact tribal-state relations in other aspects.

Due to the importance of strong tribal-state relations, the State and Tribe should proactively enter into a tax sharing agreement. Many states and tribes have entered into such tax sharing agreements to help alleviate the common double taxation predicament.<sup>140</sup> Some states even have statutory law in place to help resolve the double taxation of state and tribal taxes as applied sales taxes and cigarette sales.<sup>141</sup> In fact, New Mexico has a statute that provides state tax credits for tribal taxes—a policy mirroring that which is proposed in this Note.<sup>142</sup> Tribal-State revenue sharing agreements are not novel to Connecticut; Connecticut and the Mohegan Tribe already have an agreement to share the slot machine revenue generated from the Mohegan Sun Casino.<sup>143</sup> Connecticut and the Mohegan Tribe should enter a similar revenue sharing agreement for purposes of the proposed tribal income tax. Settling a potential tribal/state government dispute through a voluntary tax sharing agreement is a much preferred method to violence or federal court.<sup>144</sup> A tax sharing agreement is an equitable and diplomatic way of avoiding an economically disastrous double taxation scheme.<sup>145</sup> For instance, if the Mohegan Tribe began

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<sup>140</sup> See, e.g., Cooperative Agreement between the New Mexico Taxation and Revenue Department and Santa Clara Pueblo Tax Commission (Jan. 29, 1998); Tax Agreement Between the Bay Mills Indian Community and the State of Michigan (Dec. 20, 2002); Blackfeet Nation—Montana Alcoholic Beverages Tax Agreement (July 29, 2005); Tobacco Tax Compact Between the State of Oklahoma and the Cherokee Nation (Nov. 3, 2008).

<sup>141</sup> See, e.g., ARIZ. REV. STAT. ANN. § 42-3302 (2008) (adjusting the state cigarette tax rate based on the tribal cigarette tax imposed); MINN. STAT. ANN. § 270C.19 (2009) (authorizing tax refund and sharing agreements between the state and Indian tribes); NEV. REV. STAT. ANN. § 372.805 (2007) (restricting the state sales tax to the difference between the tribal sales tax and the state sales tax, if any).

<sup>142</sup> See, e.g., N.M. STAT. ANN. §§ 7-9-88.1–88.2 (West 2009) (providing for a state tax credit for tribal sales and coal taxes).

<sup>143</sup> Mohegan Tribal Enterprises, *supra* note 135.

<sup>144</sup> See Matthew L.M. Fletcher, *The Power to Tax, the Power to Destroy, and the Michigan Tribal-State Tax Agreements*, 82 U. DET. MERCY L. REV. 1, 4 (2004) (“Tribes can no longer resort to the tomahawk, nor can Tribes expect success in federal courts.”).

<sup>145</sup> See *id.* at 5–6 (summarizing the peaceful negotiations which led to the many tax agreements entered into between the State of Michigan and Indian tribes located in Michigan).

levying the proposed three percent income tax without entering into a tax sharing agreement with Connecticut, nothing would prevent the Tribe from raising the rate of its income tax in the future and usurping that much more revenue from the State. However, if the two entities proactively agree to an equitable tax sharing agreement prior to the Tribe levying an income tax, Connecticut is at least guaranteed a share of the income tax revenue pool.<sup>146</sup>

## V. CONCLUSION

The law of Indian taxation in the United States is often convoluted; however, the law clearly authorizes both Connecticut and the Mohegan Tribe to levy an income tax on the athletes and entertainers who perform at the Mohegan Sun Arena. Because neither entity can afford to lose the economic benefits of the Arena, a workable tax agreement between the Tribe and Connecticut is a must. Thus, rather than being an issue of legality, the double taxation quandary created by the law must be resolved by asking: “what is fair?” Based on all the facts presented, the Mohegan Tribe’s interest in and control of the Mohegan Sun Arena unquestionably supersedes that of Connecticut’s. Nonetheless, Connecticut deserves at least some share of the income tax revenue generated from the Mohegan Sun Arena. Therefore this Note proposes a tax framework under which the Mohegan Tribe will benefit as the primary taxing entity of the athletes’ and entertainers’ incomes while Connecticut will continue to receive a fair proportion of the income tax revenue. In order to achieve this result in the most efficient manner, this Note proposes a tribal flat income tax with a corresponding state tax credit.

In proposing a tribal income tax that would detract from the State of Connecticut’s revenue in the midst of a national and state recession, I am cognizant of the fact that the argument made in this Note is unlikely to be well-accepted by state advocates.<sup>147</sup> However, short-term economic struggles are exactly that, short-term. In contrast, Indian reservations and conflicts over tax revenue streams with states are a continuous problem

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<sup>146</sup> The reasons for entering into tax sharing agreements are unique to each state/tribe relationship, however, the Michigan Tribal-State tax agreements were reached as a result of the tribes and State wishing to avoid potentially disastrous litigation in federal courts and both entities wanting a share of the existing tax revenue stream. *Id.* at 17–19. While the potential Mohegan/Connecticut tax controversy is admittedly different from Michigan’s experience—Connecticut does not have sufficient grounds to challenge the validity of a tribal income tax and likewise, the Mohegan Tribe cannot contest the validity of the State’s income tax on the entertainers and athletes—Michigan’s example of working with the Tribes to reach a fair tax settlement should be a persuasive inducement for Connecticut and the Mohegan Tribe to follow.

<sup>147</sup> See Christopher Keating, *Stimulus Share Less than Expected*, HARTFORD COURANT, Feb. 21, 2009, at A2, available at LEXIS, News Library, HTCOUR File (noting Connecticut’s 2008–09 budget deficit to be around \$944 million and forecasting budget deficits for the upcoming two years to be in the range of \$6–8.7 billion).

with an indefinite future. Accordingly, the income tax proposed in this Note should not be viewed as an attack on Connecticut; rather, this Note simply attempts to provide insight on a common problem, double taxation, applied to a unique circumstance—athletic and entertainment income earned on Indian reservations.

The precise amount of income revenue at stake between the Mohegan Tribe and Connecticut is unknown but the potential magnitude of such revenue is immense. Consider, for example, if a major league baseball team was to build a baseball stadium on an Indian reservation or an NBA rather than WNBA team was to play in the Mohegan Sun Arena. The salaries of the professional baseball players and professional men's basketball players are well into the millions of dollars and correspondingly, the income tax levied on these athletes would generate a significant amount of revenue. In such a case, both the Tribe and the State would be more inclined to fight for a larger piece of the income tax revenue pie. Either way, double taxation is not the answer.