



## Federal Tax ADVISORY ■

**JULY 1, 2019**

### Indian Tribe Taxes in the States

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*Washington State Department of Licensing v. Cougar Den Inc.*, 139 S. Ct. 1000 (2019), was a win for the Indian tribe against the Washington State Department of Revenue. The Indians objected to a state tax on transporting fuel outside the reservation for use on the reservation. The ruling was based on the 1855 treaty with the tribe that guaranteed to the tribe the right to use the roads in common with citizens. The plurality opinion found the tax to burden that use of the roads.

The decision turned on what the tax was “on.” The dissent thought it was “on” possession of the fuel and had nothing to do with traveling on the roads. The plurality thought it was on travel and did burden travel because it went beyond health and safety regulations.

The case illustrates two points of broader significance. First, Indian tribes have rights under treaties that can produce results quite different from cases relying solely on constitutional provisions. Second, in tax cases the determination of what a tax is “on” can be determinative.

Of course, the issue goes back to the *Pollock* decision ruling unconstitutional the income tax enacted in 1894. The Court ruled the tax was on the property that produced the income and not on the income. If had been on the income it would have been a permissible excise tax. But as a tax on the property, it was an unconstitutional unapportioned property tax.

The issue arose in *PPL Corp. v. Commissioner*, 569 U.S. 329 (2013). The question was the availability of foreign tax credits, and it turned on whether the foreign tax was on income or on property. The Court ruled it was on income because the value of the property taxed was based on the price/earnings method, which employed income as a computational tool.

So in unusual cases, often involving state taxes or federal excise taxes, beware of what the tax is “on,” so that you can identify the right arguments against it.

For more information, please contact [Jack Cummings](#) at 919.862.2302.

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