TOBACCO TAX COMPACT BETWEEN THE STATE OF OKLAHOMA AND THE COMANCHE NATION

FILED
JAN 08 2014
OKLAHOMA SECRETARY OF STATE

ARTICLE I
PURPOSE AND INTENT OF PARTIES

WHEREAS, the Comanche Nation (hereinafter referred to as "Nation"), is a federally recognized Indian tribe[1] with inherent sovereign powers of self-government, as secured by and under federal law;

WHEREAS, the State of Oklahoma (hereinafter referred to as "State") is an independent, sovereign state within the United States of America possessed of full powers of state government;

WHEREAS, both the State of Oklahoma and the Comanche Nation recognize that federal law designates each a sovereign with dominion over their respective governments, territories, and citizens; and that entry into this Compact is not intended nor shall it be construed to cause the sovereignty of either to be diminished; instead, entry into this Compact is intended to provide for the perpetuation, as modified herein, of a longstanding and mutually beneficial resolution of differences as between the Nation and State that arise under federal law and relate to their respective tax powers;

WHEREAS, the Nation and its citizens[2] are in possession of various tracts of land in its jurisdiction within the State, known and commonly referred to as "Indian Country";

WHEREAS, the State, by and through the United States Supreme Court decision *Oklahoma Tax Commission vs. Citizen Band Potawatomi Indian Tribe of Oklahoma*, is authorized to collect state taxes on cigarettes and other tobacco products sold by tribes or tribal businesses to non-tribal citizens;

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[1] *"Federally recognized" tribe means any Indian tribe which has met the requirements established by the terms of the Indian Reorganization Act, 48. Stat. 984, as amended; the Oklahoma Indian Welfare Act, 49 Stat. 1967, as amended; or is one of those tribes listed in the Federal Register pursuant to 25 CFR Part 83 as recognized by and receiving services from the Bureau of Indian Affairs, as provided for in Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs, 58 Federal Register 54364 (October 21, 1993).*

[2] *"Citizen" means an individual who meets the citizenship requirements of the Nation as set forth in the Comanche Nation Constitution and Code or is listed on the tribal roll of the Nation as a citizen, see 25 CFR §81.1(i) (1996) and 25 C.F.R. §83.11 (1996).*

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WHEREAS, federal law recognizes and effectuates tribal governmental authority to pass laws and to govern in accord with them, which authority includes protections of tribal rights to, for example, sell cigarettes and other tobacco products to tribal citizens within Indian Country free from State taxation;

WHEREAS, both the State and the Nation recognize the financial, cultural, educational and economic contributions of each sovereign;

WHEREAS, both the State and the Nation recognize the need to maintain good Tribal/State governmental relations;

WHEREAS, Article 6, Section 8 of the Oklahoma Constitution vests the power and authority to conduct the business of the State with other sovereign states and with the United States to the Governor of the State of Oklahoma; and,

WHEREAS, for the purposes of federal law, the Oklahoma Constitution, and this Compact, the Comanche Nation does hereby constitute a sovereign state;

ARTICLE II
TERMS OF TAXATION ON SALE OF TOBACCO PRODUCTS

NOW, THEREFORE, the Comanche Nation, by and through its Chairman, Wallace Coffey, and the State of Oklahoma, by and through its Governor, Mary Fallin, do hereby enter into this Compact, the terms of such Compact to commence on December 1, 2013, for the mutual benefit of the Nation and the State, to-wit:

1. The provisions of this Compact shall establish and govern the rate of taxation and payment of taxes to the Nation and the State on the retail sales of cigarettes and other tobacco products in the Nation's Indian Country as defined by federal law, including 18 U.S.C. § 1151, hereinafter referred to as "Compact Jurisdiction," when said retail sales are made by the Nation. Nothing contained herein shall impair the ability of the Oklahoma Tax Commission to regulate cigarette manufacturers, importers, wholesalers, distributors, distributing agents, jobbers, or warehousemen ("Wholesalers"); *provided*, that such regulation shall not interfere with the rights of the Nation under this Compact.

2. The Nation agrees to:

    a. Purchase cigarettes and tobacco products only from Wholesalers who are duly licensed by the State of Oklahoma and agree to allow verification of sales to state officials on a timely basis;

    b. Maintain and provide the State with a current list of all (i) Nation's facilities which sell cigarettes and tobacco products and (ii) Wholesalers from which the Nation purchases cigarette and tobacco products; and

c. Furnish to the Oklahoma Tax Commission the following information with respect to each of the Nation's facilities selling cigarettes and tobacco products:

i. Documentation or certification that each facility is located within the Compact Jurisdiction, such as trust land documentation;

ii. The location of offices; and

iii. A copy of any reports by any Wholesalers to the Nation documenting all sales of cigarettes and other tobacco products within the Compact Jurisdiction.

3. The State shall provide the following information from the Oklahoma Tax Commission to the Nation unless unavailable to the Oklahoma Tax Commission:

a. The name and address of Wholesalers licensed by the State;

b. The number and dollar amount of Compact stamps purchased by Wholesalers for sale to Nation;

c. A copy of any reports by Wholesalers to the State documenting wholesale or retail sales within the Compact Jurisdiction;

d. A current list of all Wholesalers providing the Nation with cigarettes or tobacco products; and

e. Any complaints, audit reports or concluded investigation findings related to the wholesale or retail sale of cigarettes or tobacco products within the Compact Jurisdiction; *provided*, that nothing herein authorizes the State to audit the Nation or to otherwise act in a manner inconsistent with ¶ 21 and ¶ 25.

4. The State and Nation stipulate and agree, for the sole purposes of implementing the provisions of ¶ 3 hereof, the Nation is and shall be considered by the State as (a) a "foreign country" for purposes of permissible disclosures to the Nation pursuant to 68 O.S. § 205.C.7 and (b) an "international authority" for purposes of 68 O.S. § 312.I.J.

5. The State and Nation further stipulate and agree, for the sole purposes of ¶ 3 hereof, that this Compact shall constitute a "contract" between the Nation and the Oklahoma Tax Commission for purposes of permissible disclosures to the Nation pursuant to 68 O.S. § 205.C.16. The Nation and the State, in consideration hereof, stipulate and agree that any information received from the records and files of the Oklahoma Tax Commission or the Nation will be treated and considered as confidential and privileged, to be used for the Nation's or the State's purposes in the administration and collection of the Compact Payment, state tobacco taxes and collection of tobacco manufacturer escrow payments under 37 O.S. § 600.21 through 600.23, and enforcement under 68 O.S. § 360.1 through 360.9, which are the subject of this Compact, and not be disclosed to any third party,

including, but not limited to any and all manufacturers, distributors and wholesalers of cigarettes and other tobacco products. A disclosure to a governmental agency for regulatory or enforcement purposes, to a court in response to a subpoena or other court order, for the State's collection of taxes or manufacturer's escrow payments and related actions, or to enforce the provisions of this Compact through arbitration or court action, shall not constitute a breach of this paragraph.

6. In lieu of any tax, the State and Nation agree that the Nation will make an indirect Compact Payment, as described herein, relating to all sales of cigarettes and tobacco products by the Nation within the Compact Jurisdiction. The State and Nation agree that the Compact Payment will be made without reference to the Tribal citizenship or non-citizenship status of the cigarette and tobacco products' ultimate purchasing consumer.

7. The Compact Payment for cigarette sales, which shall mean and include the sale of all rolled tobacco or any substitute therefor, wrapped in paper or any substitute therefor and weighing not to exceed three (3) pounds per thousand cigarettes, shall be equal to one-hundred percent (100%) of all State taxes in effect at the time of sale and otherwise applicable to the general sale of such product. The State and Nation agree that the Compact Payment shall be collected and distributed pursuant to ¶¶ 10, 11, and 13 of this Compact in accord with the following:

    a. From November 1, 2013, through December 31, 2015:

        i. State Portion

            1. The State shall receive thirty (30%) of all Compact Payment collected on cigarettes.

        ii. Tribal Portion

            1. The Nation shall receive seventy (70%) of all Compact Payment collected on cigarettes.

    b.From January 1, 2016, through December 31, 2016:

        i. State Portion

            1. The State shall receive thirty-five percent (35%) of all Compact Payment collected on cigarettes.

        ii. Tribal Portion

            1. The Nation shall receive sixty-five percent (65%) of all Compact Payment collected on cigarettes.

    c. From January 1, 2017, through December 31, 2017:

        i. State Portion

1. The State shall receive forty-five percent (45%) of all Compact Payment collected on cigarettes.

ii. Tribal Portion

1. The Nation shall receive fifty-five percent (55%) of all Compact Payment collected on cigarettes.

d.From January 1, 2018, through December 31, 2023:

i. State Portion

1. The State shall receive fifty percent (50%) of all Compact Payment collected on cigarettes.

ii. Tribal Portion

1. The Nation shall receive fifty percent (50%) of all Compact Payment collected on cigarettes.

8. The Compact Payment for other tobacco product sales, which shall mean the sale of any cigars, cheroots, stogies, smoking tobacco (including granulated, plug cut, crimp cut, ready rubbed and any other kinds and forms of tobacco suitable for smoking in a pipe or cigarette), chewing tobacco (including Cavendish, twist, plug, scrap and any other kinds and forms of tobacco suitable for chewing), however prepared, as well as any other articles or products made of tobacco or substitute therefor, shall be one-hundred percent (100%) of all State taxes in effect at the time of sale and otherwise applicable to the general sale of such product. The State and Nation agree that the Compact Payment shall be collected and distributed pursuant to ¶¶ 10, 11, and 13 of this Compactin accord with the following:

a. From November 1, 2013, through December 31, 2017:

i. State Portion

1. The State shall receive thirty-five percent (35%) of all Compact Payment collected on other tobacco products.

ii. Tribal Portion

1. The Nation shall receive sixty-five percent (65%) of all Compact Payment collected on other tobacco products.

b. From January 1, 2018, through December 31, 2023:

i. State Portion

1. The State shall receive fifty percent (50%) of all Compact Payment collected on other tobacco products.

ii. Tribal Portion

1. The Nation shall receive fifty percent (50%) of all Compact Payment collected on other tobacco products.

9. The State shall use the State Portion of collected Compact Payment in accord with Oklahoma law, and the Nation shall use the Tribal Portion of collected Compact Payment at its exclusive discretion.

10. In dividing monies pursuant to ¶ 7 and ¶ 8, all fees, administrative costs, and/or processing expenses shall be paid out of the State's share.

11. The Nation will make the Compact Payment to the Wholesaler when it purchases cigarette and tobacco products for resale within the Compact Jurisdiction, which payment the Wholesaler will remit to the State in accord with ¶ 12. In consideration of the Nation's making of such Compact Payment and its agreement authorizing the Wholesaler to remit such payment to the Oklahoma Tax Commission, the State shall exempt all sales of cigarettes and other tobacco products to and by the Nation from any sales and excise taxes imposed by Title 68 of the Oklahoma Statutes.

12. The State requires, and the Nation authorizes, all Wholesalers licensed by the State and selling cigarettes or tobacco products to the Nation to:

    a. Provide sufficient documentation to the Nation and to the Oklahoma Tax Commission to demonstrate that the appropriate Compact Payments have been remitted. Such documentation shall be maintained by the Wholesalers for a period of at least five (5) years following distribution or sale of cigarettes or other tobacco products. If any Wholesaler selling cigarettes or tobacco products to the Nation fails to properly collect and remit the Compact Payment, the State may take necessary enforcement measures to ensure compliance with this paragraph by the Wholesaler, including, but not limited to, entry and inspection of tobacco-related records of the Wholesaler which are held within and/or without the Compact Jurisdiction.

    b. The making of the Compact Payment on cigarettes shall be evidenced by use of a single joint stamp, sometimes known as the "unity rate" stamp, which Oklahoma licensed Wholesalers shall purchase from the Oklahoma Tax Commission and affix to packs of cigarettes sold to the Nation. The State shall bear the cost of affixing the single joint/unity rate stamp unless there is a mutual agreement otherwise. The Compact Payment shall be collected by the Oklahoma Tax Commission, by the sale of the single joint/unity rate stamp to Wholesalers.

13. The Oklahoma Tax Commission shall rebate to the Nation the Tribal Portion of the Compact Payment receipts not yet distributed to the Nation not later than thirty (30) days after the end of each calendar month.

14. The State shall notify the Nation in writing when a distribution is to be withheld and/or reduced and must state the reasons therefor, justifications for which shall be—

    a. The invocation of the right to unilaterally terminate the Compact pursuant to ¶ 19;

    b. Interference by the Nation in the collection of Compact Payment receipts; and

    c. Receipt of duly authorized Court or Arbitration orders to withhold or enjoin payment.

    Provided, that the State shall not make any unreasonable withholding or reduction of any rebate amount to which the Nation is entitled under this Compact.

15. The Nation agrees that the Compact Payment, provided for in this Compact, applies only to Nation's retail sales of cigarettes and/or other tobacco products to the consumer, and the Nation agrees not to sell or otherwise transfer cigarettes and/or other tobacco products stamped with the tax stamp authorized under this Compact to anyone other than the consumer. Except for transfers between facilities owned by Nation which are authorized to sell cigarettes and/or other tobacco products at the designated Compact Payment rate for each location under this Compact, the Nation agrees to refrain from selling or otherwise transferring cigarettes and/or other tobacco products to anyone other than the consumer at retail outlets located in the Compact Jurisdiction, including sales or transfers to other retailers outside the Compact jurisdiction.

16. The State and Nation further stipulate and agree that:

    a. Unstamped cigarettes, counterfeited stamped cigarettes, mutilated stamped cigarettes, tobacco products and brands not approved (as reflected by publication on the Oklahoma Attorney General Website), and cigarettes and tobacco products on which a Compact Payment is required to be paid pursuant to this Compact and which has not been paid, are contraband.

    b. The Nation shall prohibit the possession or use of cigarette rolling vending machines for commercial purposes, which prohibition shall be at least as stringent as, 68 O.S. § 380, and apply to all persons, businesses, and/or other entities subject to the Nation's jurisdiction.

17. The Nation agrees not to sell, distribute, transport, solicit sales for, or in any manner deal with cigarette brands and tobacco products of a manufacturer who does not fully comply with the requirements of 37 Okla. Stat. §§ 600.21 through 600.23 and 68 Okla. Stat. §§ 360.1 through 360.9, and will only deal in tobacco products of complying manufacturers, as evidenced by the placement of the manufacturer's name and its product brands on the list of complying manufacturers and brands maintained on the Oklahoma Attorney General's website.

ARTICLE III

GENERAL PROVISIONS

18. In the event of any dispute over the interpretation or performance of this Compact while it is in effect, the following shall provide the parties' sole means of recourse and remedy as against each other:

    a. The goal of the parties shall be to resolve all disputes amicably and voluntarily whenever possible. A party asserting noncompliance or seeking an interpretation of this Compact first shall serve written notice on the other party. The notice shall identify the specific Compact provision alleged to have been violated or in dispute and shall specify in detail the asserting party's contention and any factual basis for the claim. Representatives of the Nation and State shall meet within thirty (30) days of receipt of notice in an effort to resolve the dispute;

    b. Subject to the limitation set forth in paragraph (c) of this ¶ 18, either party may seek arbitration of the dispute, which arbitration shall proceed in accord with rules that substantially comport with the rules of the American Arbitration Association (AAA). Such arbitration shall be conducted by a single arbitrator who will be selected by the parties; *provided*, that if the parties cannot agree on a single arbitrator, then each party will pick one (1) arbitrator, and those two (2) arbitrators shall select a third; the arbitration will then be conducted by these three (3) arbitrators. The remedies available through arbitration are limited to injunctive and/or declaratory relief for the enforcement of the provisions of this Compact. The parties consent to the jurisdiction of such arbitration forum for such limited purposes and no other, and each waives immunity solely and exclusively with respect thereto. The parties further agree that any arbitral award issued pursuant to proceedings initiated under this section will be enforceable in a court of proper jurisdiction, for which purposes both consent to suit in federal district court having proper venue; *provided*, that the State does not consent to suit in tribal court, and the Nation does not consent to suit in state court. The expenses of arbitration shall be borne equally by the parties.

    c. For purposes of this dispute resolution mechanism, each party hereto agrees that it shall not assert, directly or indirectly, any immunity to any action filed in accord with this ¶ 18 and agrees, furthermore, not to raise the Eleventh Amendment to the United States Constitution or comparable defense to the validity of such waiver; *provided*, that nothing herein shall be construed to authorize a money judgment, other than to fulfill a party's obligation hereunder, or for damages for a party's failure to comply with an arbitration decision requiring the payment of monies.

19. Either party may unilaterally terminate this Compact without cause by giving the other party one hundred eighty (180) days' written notice in accordance with ¶ 23 hereof. Such notice shall include a statement of basis for exercise of this right, and in the event of a party's invoking such right, the parties shall meet and confer at least twice within that one hundred

and eighty (180) day period for purposes of exploring opportunities for avoiding such termination.

20. This agreement shall terminate December 31, 2023. Nothing in this Compact shall prevent the parties by mutual written agreement from establishing a later termination date or otherwise modifying this agreement, and nothing in this Compact shall prevent either party from unilaterally terminating it pursuant to ¶ 19; *provided*, that unilateral termination shall not effect rights to performance, including payment, collection, and rebate of Compact Payment under ¶¶ 7 and 8, accruing prior to such termination.

21. By entering into this Compact, the Nation does not concede that the laws of the State of Oklahoma, including its tax and licensing laws, apply to the Nation or its citizens regarding activities and conduct within the Nation's Jurisdiction.

22. Neither party shall be deemed the drafter of this Compact in the event of any action to interpret its terms. Therefore, the rule of construction that in the case of ambiguity, the ambiguity is construed against the author is not applicable. Furthermore, any rule of construction of ambiguities either in favor of or against a State or Tribal government entity is not applicable to this Compact.

23. Notice shall be by United States mail, postage prepaid. Any notice required hereunder to the State shall be delivered to the Governor of the State of Oklahoma at 2300 N. Lincoln Blvd., Room 212 Oklahoma City, Oklahoma 73105-4890. Notification by the State shall be made by the Governor or designee in writing to the Chairman of the Comanche Nation, Comanche Tribal Complex, 584 NW Bingo Road, HC 32, Box 1720, Lawton, OK 73507, with copy to D. Michael McBride III, 500 Kennedy Building, 321 South Boston Avenue, Tulsa, OK 74103. Notification by the State and Nation shall also be filed with the Office of the Oklahoma Secretary of State.

24. The effective date of this Compact shall be December 1, 2013, when fully executed by all parties. The executed document shall be accompanied by a letter from counsel for the Nation certifying that it has been executed in compliance with tribal law and was obtained in accordance with all necessary legal and procedural requirements.

25. Nothing in this Compact shall be deemed to authorize the State to regulate the Nation's government or to interfere in any way with the Nation's election of its governmental officers. This Compact shall not alter tribal, federal or state civil adjudicatory or criminal jurisdiction.

26. In consideration herefor, the State and Nation each waive and hold the other harmless with respect to any claim or potential claim of breach, known or unknown, relating to the other party's performance or nonperformance under their prior Tobacco Tax Compact.

27. This Compact comprises the entirety of the agreement between the parties hereto on this subject matter. Any and all prior or contemporaneous representations, predictions, warranties or other inducements, however denominated, are merged within the terms of this Compact, and shall not survive its execution. There are no representations, promises,

predictions, warranties, inducements or other agreements, however denominated, between the parities other than as set forth herein. This Compact may not be amended or modified except by written agreement, approved and executed by the parties hereto.

IT IS AGREED:

Each of the undersigned represents that they are duly authorized, and has the authority, to execute this agreement on behalf of the designated party.

STATE OF OKLAHOMA

01/07/2014

MARY FALLIN, GOVERNOR DATE

Attest:

Secretary of State

COMANCHE NATION

12-13-13

WALLACE COFFEY, CHAIRMAN DATE

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December 24, 2013

VIA U.S. MAIL & E-MAIL

Steven K. Mullins
General Counsel
State of Oklahoma
Office of Governor Mary Fallin
2300 N. Lincoln, Suite 212
Oklahoma City, OK 73105

Re: Tobacco Tax Contact Between The State of Oklahoma and The Comanche Nation & Settlement Agreement Certifying Compliance in Accord with the Legal and Procedural Requirements

Dear Steve:

We certify that the Settlement Agreement between The State of Oklahoma and The Comanche Nation dated on Friday, December 13, 2013, and the Tobacco Tax Compact between The State of Oklahoma and The Comanche Nation signed the same date are properly executed in compliance with Comanche Nation Law by Chairman Wallace Coffey. By way of Resolution # 141-13, approved unanimously by the Comanche Nation Business Committee on December 23, 2013, Chairman Coffey was authorized to execute these documents. You might recall that the Nation postponed the regular Business Committee scheduled for December 7, 2013 due to inclement weather and travel conditions. The Comanche Nation Constitution authorizes the Comanche Business Committee to speak and act on behalf of The Comanche Nation on all matters and Chairman Coffey is authorized to sign and execute those documents.

Sincerely yours,

D. Michael McBride III

DMM:sjm

cc: Ryan Chaffin, Assistant Attorney General, Oklahoma Attorney General Scott Pruitt (via email)
Wallace Coffey, Chairman, Business Committee of The Comanche Nation (via email)
Jimmy Goodman, Harvey Ellis & Paige Masters, Crowe & Dunlevy