

## U.S. Supreme Court Update

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### A New State Tax Preemption Petition Involving Indian Gaming Filed

On May 14, 2020, a new petition for writ of certiorari was filed with the Court in *Rogers Cnty. Bd. of Tax Roll Corrections v. Video Gaming Technologies, Inc.* (Docket No. 19-1298), ruling below at Okla. S. Ct., Docket No. 117491 (12/17/2019). The U.S. Supreme Court has been asked to review a decision of the Oklahoma Supreme Court that held that the local ad valorem tax on electronic gaming equipment (i.e., slot machines) owned by a non-Indian company and leased to a business entity of a federally recognized Indian tribe for use exclusively on tribal land in gaming operations is preempted. The Oklahoma Supreme Court based its decision on the "comprehensive nature of [the Indian Gaming Regulatory Act's] regulations on gaming, the federal policies which would be threatened, and County's failure to justify the tax other than as a generalized interest in raising revenue." In the previous issue of this column, we reported on another state tax preemption case involving federal preemption of a South Dakota use tax on goods and services sold to non-tribal members at the Royal River Casino & Hotel and First American Mart located on the Flandreau Indian Reservation in South Dakota. The Supreme Court has since denied this petition, as discussed below.

We continue to await a decision by the Court in *Espinoza v. Montana Dep't of Rev.* (Docket No. 18-1195), the case that addresses the constitutionality of Montana's Tax Credit Scholarship Program, as well as the Special Master's Report in the MoneyGram cases: *Delaware v. Pennsylvania*, 220145 and *Arkansas et. al. v. Delaware*, 220146.

# Challenge to Federal Preemption of Ad Valorem Taxes on Electronic Gaming Equipment

In *Rogers Cnty. Bd. of Tax Roll Corrections v. Video Gaming Technologies, Inc.*, ruling below at Okla. S. Ct. Docket No. 117491 (12/17/2019), Video Gaming Technologies, Inc. ("VGT") brought claims for relief that the local ad valorem tax on its gaming equipment was preempted by federal law—the Indian Gaming Regulatory Act ("IGRA," 25 U.S.C. §§2701-2721 (2018)), Indian Trader Statutes, and federal case law. The Oklahoma Supreme Court agreed with VGT, reversed the lower court's order of summary judgment, and remanded the matter to the district court to enter an order of summary judgment for VGT.

## Background

VGT is a Tennessee corporation authorized to do business in Oklahoma. VGT owns and leases electronic gaming equipment to Cherokee Nation Entertainment, LLC ("CNE"), a business entity of the Cherokee Nation, a federally recognized Indian tribe. CNE owns and operates ten gaming facilities on behalf of the Cherokee Nation.

As explained by the Oklahoma Supreme Court, CNE and VGT entered into a lease agreement whereby "VGT supplies the gaming equipment, software, and related services to CNE. The gaming equipment that VGT leases to CNE is located on tribal trust land in Rogers County and is essential to [the Cherokee] Nation's gaming operations." At issue in this appeal are the ad valorem taxes assessed by the Rogers County Assessor on the gaming equipment owned by the non-Indian company VGT in 2011, 2012, and 2013. (VGT was previously assessed and paid ad valorem taxes on gaming equipment during 2005-2010, which it did not contest. VGT has also filed complaints for ad valorem taxes assessed after 2013.)

The assessments at issue were based on the value of the property, and as noted by the Oklahoma Supreme Court as a material undisputed fact, such assessments "did not take into consideration use, possession, or specific location of the property." Another undisputed material fact set forth in the decision is "tax revenue from *ad valorem* assessments, like those imposed on VGT's gaming equipment, help fund the operation of Rogers County government, schools, law enforcement, health services, roads, and other government services within Rogers County." However, "the economic burden caused by the assessment of *ad valorem* taxes . . . would ultimately fall on Nation because it would impact the overall costs of providing gaming machines to Nation and therefore the price for which VGT would agree to lease them."

## Preemption of state taxation

VGT asserted below that the imposition of the local ad valorem tax on its gaming equipment is preempted by IGRA and the *Bracker* balancing test.

The Oklahoma Supreme Court observed that "the location of property on tribal trust land is not a *per se* bar to taxation because the legal incidence of the ad valorem tax falls on the non-Indian lessor, not on [the Cherokee] Nation. When a state or county seeks to impose a nondiscriminatory tax on non-Indians on tribal land, there is no rigid preemption rule, rather we must apply a flexible analysis to determine if taxation is proper." As such, the court determined that it must apply what is often referred to as the *Bracker* balancing test, a reference to the U.S. Supreme Court's decision in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980). The Oklahoma Supreme Court further explained that "[c]ourts must perform a 'particularized examination of the relevant state, federal, and tribal interests' which is not controlled by standards of preemption from other areas of law. *Ramah Navajo School Bd.*, 485 U.S. at 838, 102 S. Ct. 3394; *Bracker*, 448 U.S. at 143-44, 100 S. Ct. 2578." Moreover, the court made clear that "[t]he county seeking to impose a tax on non-Indians on tribal land must be able to identify regulatory functions or services the county performs to justify the assessment—interest in raising revenues is not enough. *Bracker*, 448 U.S. at 148-49, 150, 100 S. Ct. 2578."

The Oklahoma Supreme Court examined IGRA and explained that it "was intended to expressly preempt the field in the governance of gaming activities on Indian lands. S. Rep. 100-446 (1988), reprinted in 1988 U.S.C.C.A.N. 3071, 3076." It also stated that "Congress adopted IGRA in 1988 to provide for the operation and regulation of gaming by Indian Tribes" and noted that "IGRA's purpose included regulation from corrupting influences, ensuring the tribe is the primary beneficiary of the operation, and assuring that gaming is conducted fairly and honestly, by both operator and players. 25 U.S.C. §270225 U.S.C. §2702."

VGT asserted below that the district court erred in relying on the Second Circuit's decision in *Mashantucket Pequot Tribe v. Town of Ledyard*, 722 F.3d 457 (2d Cir. 2013) ("*Mashantucket II*"), in which, as explained by the Oklahoma Supreme Court, "the Second Circuit determined that *ad valorem* taxation on gaming equipment was not preempted by IGRA."

## **Bracker test analysis**

The Oklahoma Supreme Court performed its *Bracker* analysis of the ad valorem tax in three parts: (1) look[ing] to the comprehensiveness of the federal regulations in place, in the light of the broad underlying policies and notions of sovereignty in the area, (2) consider[ing] the number of policies underlying the federal scheme which are threatened, and (3) determin[ing] if the state is able to justify the tax other than as a generalized interest in raising revenue.

With respect to part one of its inquiry, as noted above, the court traced the legislative history of IGRA and comprehensive guidance on gaming set forth in IGRA. The Oklahoma Supreme Court focused on the model state compact that provides for extensive regulation requiring inspection of gaming equipment to ensure the gaming is conducted fairly and honestly, the mandatory licensure of companies leasing equipment to a tribe, as well as payment of annual assessments for oversight of the gaming equipment. The court further emphasized that IGRA established the National Indian Gaming Commission, which requires, among other items, independent audits of contracts related to Class III gaming for supplies, services, or concessions in contracted amounts in excess of \$25,000. Based on this review, the Oklahoma Supreme Court found "IGRA's regulations governing gambling are comprehensive and pervasive." It also concluded that there is no distinction for IGRA purposes between "*owning gaming equipment* used exclusively for tribal gaming versus *engaging in gaming activity*." The court concluded that, while *Bay Mills*, [a recent U.S. Supreme Court case involving IGRA preemption], focused on the action rather than the equipment—describing gaming as the "act of throwing the dice"—it was clear that regulation of gaming equipment is encompassed under IGRA in order to prevent corruption.

The court also agreed with VGT that the district court erred in relying on the Second Circuit's decision in *Mashantucket II*. Specifically, the Oklahoma Supreme Court found that "[w]hile ownership of gaming equipment does not automatically subject it to IGRA, when the gaming equipment is used exclusively in a tribal gaming operation, such as with [the Cherokee] Nation, we find it is inextricably intertwined with IGRA gaming activities such that it is absolutely directly related to and necessary for the licensing and regulation of gaming activity." In addition, the court concluded that "*Mashantucket II* also ignored the U.S. Supreme Court's guidance that courts should err toward Indians on questions of preemption. *Ramah Navajo Sch. Bd.*, 458 U.S. at 846, 102 S. Ct. 3394; *Bracker*, 448 U.S. at 143-44, 100 S. Ct. 2578. Unlike the situations in *Casino Resource* and *Barona Band*, gaming equipment is not tangential to gaming. Rather, it is *sine qua non* of gaming. Due to the United States Supreme Court's clear comments about the nature of gaming activities, and the Court's clear guidance to construe federal statutes relating to tribal activity generously, we find *Mashantucket II* unpersuasive."

With respect to part two of its inquiry regarding federal policies threatened by the ad valorem taxation, the Oklahoma Supreme Court observes that "[i]t is an undisputed fact that the burden of the *ad valorem* taxes will ultimately fall on Nation." The court further observed that "[d]ue to the success of Nation's gaming enterprise, the passed on cost will not threaten the purpose of [the Cherokee] Nation being the primary beneficiary of the gaming operation." However, it explained that "Title 68, section 3104 of the Oklahoma statutes . . . allows County to seize property when *ad valorem* taxes are not paid. 68 O.S. 2011, §3104." Thus, the Oklahoma Supreme Court concludes that "County's remedy for collection of delinquent taxes would directly affect the tribe, impact its gaming operation, and severely threaten the policies behind IGRA—including [the Cherokee] Nation's sovereignty over its land."

Finally, with respect to part three of its inquiry, the county's justification for taxation, the Oklahoma Supreme Court reviewed the county's claims and rejected such claims. Specifically, the Oklahoma Supreme Court found that the "County does not regulate gaming or equipment in any way to justify its taxation of equipment which is only located in Rogers County for use in Nation's gaming enterprise." It also concluded that Oklahoma already has use exemptions for ad valorem taxes that require the county to consider property use in certain circumstances, thereby negating the county's claim of uniform application of the law. Finally, the court made clear that "[g]aming equipment is not peripheral to gaming. Based off the U.S. Supreme Court's interpretation of gaming in IGRA and its further admonishment to interpret federal statutes regarding tribes generously, we find that gaming equipment is a *sine qua non* for gaming." Based on this, the court found that the county failed to justify the tax other than as a generalized interest in raising revenues.

Overall, under this *Bracker* analysis, the court concluded that the "*ad valorem* taxation of gaming equipment here is preempted."

## **Question presented**

Rogers County Board of Tax Roll Corrections challenges the Oklahoma Supreme Court's decision and presents the following question in its writ of certiorari:

Whether a generally applicable state *ad valorem* tax, as assessed against personal property owned by a non-Indian, out-of-state corporate entity and leased to a tribe for use in its casino operations, is preempted by the Indian Gaming Regulatory Act and the Court's "particularized inquiry" balancing test, see *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), where the tax does not infringe on any federal regulatory purpose contained in the IGRA, the tax does not interfere with any tribal sovereignty

interests, and the tax supports relevant and important government interests, such as law enforcement, schools and health services.

## Petition Denied

On May 26, 2020, the Court denied the petition for certiorari in *Noem, South Dakota Governor v. Flandreau Santee Sioux Tribe* (Docket No. 19-506). In the decision below, the U.S. Court of Appeals for the Eighth Circuit found that the Indian Gaming Regulatory Act ("IGRA") does not per se apply to preempt South Dakota's imposition of a use tax on goods and services sold to non-Tribal members at the Royal River Casino & Hotel and First American Mart located on the Flandreau Indian Reservation in South Dakota. Rather, the appellate court applied a balancing test to determine that the state's interests in imposing the use tax does not outweigh the federal and tribal interests in gaming reflected in IGRA and the history of tribal independence in gaming and, thus, the imposition of the use tax on non-Tribal member patrons' purchases of goods and services is preempted by federal law