

As Congress considers comprehensive tax reform, it must work to align current federal tax laws and overall tax policy with: (1) the United States' legal treaty and trust obligations to Indian tribes; (2) the U.S. Constitution's acknowledgment of Indian tribes as governments; and (3) the role that Indian tribes and tribal government revenues play in serving tribal jurisdictions. With a few exceptions, current federal tax laws either ignore Indian tribes or conflict with these factors.

Background

The United States Constitution acknowledges Indian tribes as governments with a bi-lateral relationship to the United States expressly recognized in the Indian Commerce Clause, and implicitly in the Treaty and the Supremacy Clauses. The Supremacy Clause recognizes treaties as among the Supreme Law of the Land and ratifies treaties already made. In addition, the Constitution's Apportionment Clause and the 14th Amendment refer to "Indians not taxed," to recognize that individual tribal citizens are excluded from representation, and thus taxation, because they were represented by tribal nations. Federal tax laws and policy should be changed to reflect this constitutionally recognized status of Indian tribes as governments.

Federal tax reform efforts should also acknowledge the existence of the hundreds of treaties that the United States entered into with Indian tribes. Tribes ceded or had taken hundreds of millions of acres of their homelands to help build this Nation. In return, the United States made treaty promises to provide for the health, education, and general welfare of Indian people as well as respecting tribal cultures and ways of life. Many of these promises are codified in federal laws such as the Indian Self-Determination and Educational Assistance Act, the Indian Health Care Improvement Act, and many dozens of other federal laws, regulations, and programs.

Federal tax policy should also be aligned with federal Indian affairs policy. For more than four decades, the federal Indian affairs policy has supported Indian Self-Determination, which seeks to reverse the paternalistic policies of the past, to respect tribal laws and culture, and to establish greater local tribal control over Indian affairs. An additional part of Indian Self-Determination is helping tribes attain economic self-sufficiency (*See e.g. the Indian Financing Act, 25 USC 1451 et seq.*). While Self-Determination has helped address many social ills in Indian Country, tribal communities – on average – are among the most economically disadvantaged in the United States. The average unemployment rate in Indian country is 49%; of the 51% who were employed, 32% earned income below the poverty line. Overall, 25% of Native Americans live in poverty, compared to 8% of the U.S. population. Federal tax policy must also be cognizant of this fact, and the role these statistics play in shaping tribal economic policy at the local tribal government level.

To this same point, federal tax policy should be changed to reflect the unique role that tribal governments play in generating reservation-based economic growth and the role tribal programs and services play in addressing the significant unmet needs of tribal communities. While the role that tribal governments play in serving their communities may be a similar in many respects to that of states and local governments, tribal governments are not able to rely on a robust tax base for revenue, and must instead rely on revenue generated from economic development ventures of the tribal government. In addition, Indian tribes have the added component of ensuring that tribal revenues are used to preserve tribal language, culture, and religion. Preservation and restoration of tribal culture remains a significant need in light of the former federal policy of Indian Assimilation, which forbid the practice of Native religions and the speaking of Native languages.

The bottom line is that that tribal leaders, as locally elected government officials, should have the ability to determine the needs of their respective communities. This is especially valid since tribes have additional cultural, religious and historic activities to protect and promote. Tribes should have full ability to take care of their many needs without having the IRS create Indian policy by determining what is and isn't acceptable. Tribes have already experienced that type of paternalism and it did not serve tribes well.