
MEMORANDUM TO COUNCIL

To: Mayor and City Council Members
From: Marjie Veeder, City Clerk
Through: Erin Reinders, City Manager
Date: December 14, 2021
Re: Qawalangin Tribe's Request for Exemption from City Sales Tax

SUMMARY: The Qawalangin Tribe of Unalaska (Q-Tribe) has requested that City Code be amended to exempt federally-recognized tribal governments from Unalaska's sales tax.

PREVIOUS COUNCIL ACTION: City Council has not taken any previous action specific to a sales tax exemption for federally-recognized tribal governments.

BACKGROUND: Tribal entities are not inherently exempt from municipal sales tax, either as a buyer or a seller. Tribal governments do not qualify for any of the present exemptions allowed in Unalaska's Code of Ordinances. The Q-Tribe continues to claim an outdated exemption as a nonprofit organization; an exemption for which they no longer qualify.

A survey was done of sales tax codes in 19 taxing jurisdictions in Alaska. Nine of the jurisdictions allow an exemption from sales tax for federally recognized tribal governments and ten jurisdictions do not. Of the nine that provided the tribal exemption, the exemption was general in nature (exempting both purchases and sales); was a "government" type exemption; and was not specific to any particular tribal entity, but rather to all federally recognized tribal governments.

DISCUSSION: City Attorney Charles Cacciola provided a comprehensive memorandum on the subject, which follows this memo in the Council Packet and will not be repeated here. Mr. Cacciola's memo covers:

- A. Federally Recognized Tribes & Taxation (p. 1)
- B. Current City Sales Tax Exemptions (p. 2)
- C. Exempting Tribes from City Sales Tax (p. 3)
 1. Exempting all tribal activities (p. 3)
 - i. § 6.40.030(Q) Nonprofit Organizations (p. 3)
 - ii. § 6.40.030(L) Government Agencies (p. 4)
 2. Exemption for tribe's governmental/non-commercial activities only (p. 4)
 3. Q-Tribe specific exemption (p. 5)

Council needs to make a decision about the Q-Tribe's request. The main question is whether Council will choose to exempt federally recognized tribal governments from city sales tax. Depending on the answer to the main question, other decisions may need to be made. The following outline provides guidance on the necessary decisions:

MAIN QUESTION:

**SHOULD FEDERALLY RECOGNIZED TRIBAL GOVERNMENTS
BE EXEMPT FROM CITY SALES TAX?**

- 1) **If Council decides not to provide an exemption**, then no action is necessary. Council can signify this decision by taking no action and providing no direction to staff. The City Clerk will then notify the Q-Tribe to cease claiming exemption from sales tax as a nonprofit organization, and will also notify local vendors to discontinue allowing sales tax exemptions to the Q-Tribe and other federally recognized tribal governments. The Q-Tribe will also be notified that they are subject to the City's sales tax code for any commercial activities, now and in the future.
- 2) **If Council decides to provide an exemption**, Council must provide direction to staff about the type of exemption, general or limited:
 - a) A general exemption would exempt both "governmental" activities (i.e. purchases related to tribal government activities and programs) and "commercial" activities (i.e. purchases and sales related to commercial "for profit" ventures).
 - b) A limited exemption would be for tribal governmental/non-profit activities only, specifically purchases in support of tribal government activities and programs. Any commercial activities would be subject to sales tax. Note that distinguishing between governmental and commercial activities may be complex if tribal entities begin commercial operations in Unalaska, such as selling broadband access, leasing property, or other commercial ventures.
 - c) Depending upon Council's direction under the preceding question, staff can prepare an ordinance that would:
 - i) Amend the nonprofit exemption 6.40.030(Q) to include federally recognized tribes;
 - ii) Amend the government exemption 6.40.030(L) to include federally recognized tribes;
or
 - iii) Create a specific exemption, with a new subsection of code. This is necessary if a limited exemption is allowed. If this option is selected, a decision needs to be made whether to:
 - (1) Exempt the Q-Tribe specifically (not recommended); or
 - (2) Exempt all federally recognized tribes.

ALTERNATIVES: Available alternatives are discussed at length in the City Attorney's Memorandum, and in the preceding section of this memo. The alternative can be summarized as:

- 1) Do nothing – Tribal entities will receive no exemption from sales tax;
- 2) Exempt everything – Both purchases and sales by federally recognized tribes will not be subject to sales tax (both "governmental" and "commercial" activities); or

- 3) Middle of the Road Approach – Provide a “limited” exemption for tribal governmental and non-profit activities only, specifically purchases made in support of tribal government activities and programs. Any commercial activities would be subject to sales tax.

FINANCIAL IMPLICATIONS: Sales tax revenue may be impacted based on a final Council decision. However, this amount, at least at present, is not deemed to be significant in relation to the City’s total revenue. Requests were made to the Q-Tribe to provide an estimate of their annual local purchases so that financial impact could be estimated, but no information was provided. The Eastern Aleutians Tribe also makes purchases in Unalaska, but the tax revenue impact is likely not significant. If the Q-Tribe or another tribal entity begin commercial operations in Unalaska, the financial impact may be more significant.

LEGAL: City Attorney Charles Cacciola authored the attached memoranda and is available by telephone for questions.

STAFF RECOMMENDATION: This is a Council decision and no formal action is requested tonight, unless Council is in agreement and ready to provide direction to staff.

PROPOSED MOTION: Staff requests direction from Council as set out in the Discussion and Alternatives sections above. The City Clerk suggests a directive from Council if the decision is made to provide a sales tax exemption, with indication as to the type of exemption (general or limited); and if general, whether to amend the existing nonprofit exemption or the governmental exemption. If a limited exemption is selected, a specific exemption will need to be written for federally recognized tribes.

CITY MANAGER COMMENTS: This seemingly simple request can quickly become complicated due to various ramifications. The purpose of tonight’s discussion is to review those ramifications. The middle of the road option is listed as an alternative as it complements the fact that City Council has historically granted funds to the Q-Tribe as part of the community support grant program for non-profit organizations, even though the Q-Tribe is not an IRS-recognized non-profit. This middle of the road approach allows for the creation of boundaries for commercial/profitable operations in the future, which would need to be clearly identified.

ATTACHMENTS:

1. [October 9, 2021 memorandum from City Attorney Charles Cacciola](#)
2. [December 22, 2020 letter from the Qawalangin Tribe to Mayor Tutiakoff](#)
3. [April 22, 1992 letter from City Clerk to Qawalangin Tribe](#)

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MEMORANDUM

To: Mayor Tutiakoff
City Council

From: Charles A. Cacciola

Date: October 21, 2021

Re: Tribal Sales Tax Exemption

The Qawalangin Tribe of Unalaska previously enjoyed exemption from city sales tax as a nonprofit. Several years ago, the city's nonprofit exemption was clarified as applying only to nonprofit charitable organizations as defined in 26 U.S.C. 501(c).¹ Q Tribe has asked the city to amend the code, specifically the exemption for governmental agencies, to include tribes.

Tribes are not inherently exempt from municipal sales tax as either a buyer or seller, but the city code can be amended to grant exemption to tribes. Should council wish to do so, the foremost issues are (1) whether to exempt all tribal activities or if an exemption should be limited to the governmental (non-commercial) tribal activities, and (2) whether to exempt both sales to and by the tribe or if a tribe should be exempt as a purchaser only.

A. Federally Recognized Tribes & Taxation

Q Tribe is a federally recognized tribe.² Federal law entitles tribes to certain privileges, generally flowing from the doctrine tribal sovereignty. Tribal tax exemption jurisprudence relies heavily on the doctrine of tribal sovereignty "which historically gave state law 'no role to play' *within a tribe's territorial boundaries.*"³ With the exception of Metlakatla, tribes in Alaska do

¹ UCO § 6.40.030(Q).

² Federal Register Volume 85, Issue 20 (January 30, 2020).

³ *Prairie Band Potawatomi Nation, 546 US at 112.*

not have territorial boundaries. As a result, the legal limitations on sales taxation of tribes are much more limited in Alaska than in areas where tribes have reservations or other territory.

In addition, to determine when federal law requires tribal exemption from sales tax requires distinguishing tribe as seller from tribe as buyer because analysis of tax immunity is based upon who bears the legal incidence of the tax.⁴

As a seller, a tribe cannot be compelled to collect sales tax on sales occurring in its territorial boundaries to members of the Tribe.⁵ Even in the tribe's boundaries, the tribe must collect applicable sales taxes on sales to non-members.⁶

The law is less developed for sales to tribes. Sales to a tribe occurring *in* the tribe's boundaries are generally exempt.⁷ On the other hand, the U.S. Supreme Court has held that states (and therefore municipalities) are not generally prohibited from enforcing revenue laws against any tribal enterprise located outside of the tribe's territorial boundaries.⁸

B. Current City Sales Tax Exemptions

Unalaska Code of Ordinances § 6.40.030 enumerates 27 sales tax exemptions. The code does *not* contain a broad exemption from sales tax for which Q Tribe is eligible.

Under § 6.40.030(Q), a "sale made to a nonprofit charitable organization as defined in Section 501(c) of the Internal Revenue Code is exempt." Q Tribe has not obtained this IRS income tax status. (Some tribes create 501(c) entities to perform nonprofit work enabling that work to take advantage of favorable tax treatment.)

Under § 6.40.030(L), a sale "directly to the United States government, or to the State of Alaska and its political subdivisions is exempt." While Q Tribe may be a government, the exemption is expressly for the federal and state governments. Q Tribe is neither. That said, certain projects undertaken by Q Tribe could be exempt under this subsection as a result of federal funding for the project.

⁴ *Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Tribe of Okla.*, 498 US 505 (1991).

⁵ *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 US 463 (1976).

⁶ *Id.*

⁷ *See Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 US 450 (1995).

⁸ *Mescalero Apache Tribe v. Jones*, 411 US 145 (1973) (tribally owned ski resort located outside of reservation subject to state gross receipts tax).

C. Exempting Tribes from City Sales Tax

The first step in a potential ordinance granting sales tax-exempt status to tribes is deciding whether to exempt *all* tribal activities or to limit the exemption to certain activities (*i.e.*, governmental versus commercial activities). If the council decides that a general exemption is preferable, it should next decide if the best method is amending the existing nonprofit exemption, the government exemption, or creating a new tribe-specific exemption. If the city decides to exempt only certain tribal activities, a new exemption subsection is a practical necessity.

1. *Exempting all tribal activities*

The primary advantage for the city of this general exemption approach is its efficiency relative to exemption for some, but not all, tribe activities. Q Tribe would also benefit from administrative simplicity of a general exemption, but the greater advantage for Q Tribe under is a broader exemption from tax if all of its activities, and both sales and purchases, are exempt.

A general tribal sales tax exemption allows tribes to engage in commercial enterprises alongside tax-paying enterprises, providing tribes a competitive advantage over tax-paying enterprises and reducing tax revenue from commercial activity. For example, a tribe could operate a hotel and avoid paying sales tax on the otherwise taxable purchases made in support of the hotel operation, to the disadvantage of a competing hotel. If sales *by* a tribe are also exempt, the tribe's competitive advantage is greater still.

Our understanding is that little tribally owned commercial enterprise currently exists in Unalaska. Thus, a general tribal exemption would not immediately cause a significant decrease in tax revenue (relative to an activity-specific exemption) nor competitively disadvantage existing commercial enterprises. But it would create incentives to move in that direction.

If the city prefers to exempt all tribal activities from city sales tax, the simplest approach is to amend either the existing nonprofit exemption — § 6.40.030(Q) — or the government exemption — § 6.40.030(L) — to include federally recognized tribes. Alternatively, a new subsection specific to tribes can be adopted if the council is not satisfied with the result of extending the nonprofit or government exemption to tribes.

i. § 6.40.030(Q) Nonprofit Organizations.

Q Tribe enjoyed exemption as a nonprofit until that exemption was limited to IRS-recognized charitable organizations. Re-extending the nonprofit exemption to tribes would align with previous practice and is the simplest code change to grant Q Tribe tax exemption.

Exemption under the nonprofit subsection is not self-executing. The nonprofit must apply for an exemption certificate as set forth in UCO 6.40.040(F). Requiring application and an exemption certificate for tribes may also be a practical necessity for administering the exemption: Unalaska merchants and the city clerk may be familiar with Q Tribe, but less familiar with the other 573 federally recognized tribes.

Finally, the existing nonprofit exemption applies to sales to *and by* the nonprofit, a significant difference from the proceeding under the government agency exemption.

ii. § 6.04.030(L) Government Agencies.

Q Tribe requests exemption under the exemption for government agencies. This exemption does not require application or an exemption certificate. Should the city decide to exempt tribes under 6.04.030(L), it should probably require tribes to apply for and present an exemption certificate because that there are 574 federally recognized tribes.⁹

Another significant difference between the code's nonprofit exemption and government exemption is that the state and federal governments can "pass through" their exemption to their construction contractors for the contractor's purchases that are incorporated into the construction project. Nonprofits do not enjoy this benefit.

Finally, adding tribes to the existing exemption for governments provides an intangible benefit to Tribes: It further acknowledges to the governmental nature of tribes.

2. Exemption for tribe's governmental/non-commercial activities only

Exempting from sales tax only those purchases made in furtherance of a tribe's governmental activities and functions may be a better fit for the policy purpose of a tribal exemption. The disadvantage of an activity-specific exemption is the complexity of distinguishing between a tribe's governmental activities and commercial enterprise activities.

Using the example from above, a tribally operated hotel seems a relatively clear example of a commercial enterprise. But the distinction is not always clear and some would argue that operation of a hotel is a government activity to the extent proceeds are used to support governmental activities. Or, for example, if Q Tribe were to construct an office building for its administrative offices but also includes revenue-generating space leased to third parties, would sales to Q Tribe related to the operation of that building be taxed pro rata based on the portion of

⁹ Such application procedure would generally follow the existing procedure for nonprofits and would require minimal code amendment.

the building used for tribal administration and that portion leased out? What if space in that building was used by Q Tribe for administrative support of its commercial enterprises? Distinguishing between governmental and commercial activities is complex.

Our understanding is that Q Tribe's current activities are generally non-commercial, government activities.¹⁰ Thus, distinguishing between governmental and commercial activities may not have much practical consequence at present or in the near future, at least as relates to Q Tribe. It could, however, mean that tribally owned remote sellers are not exempt from collecting city sales tax if the exemption were to extend to sales *by* a tribe.

3. *Q-Tribe specific exemption.*

Regardless of which, if any, approach council prefers, it may be considering granting exemption to Q-Tribe only rather than to all federal recognized tribes. Some manifestations of an exemption specific to Q-Tribe may be legally defensible, but it is generally bad policy to codify a tax exemption for a single entity.

In practice, requiring tribes to apply for an exemption certificate could achieve nearly the same result because it is unlikely that any other tribe – perhaps Eastern Aleutians Tribe – would apply and use the certificate. Alternatively, a tribal exemption could be limited to tribes providing programming and other services in the City of Unalaska. Such an approach, however, would apply only to exempt the *purchases* of the tribe – not its sales – because the remote sellers code and compact prohibit the city from discriminating between local and other sellers.

CONCLUSION

Federal law does not impose significant mandates regarding the application of city sales tax to tribal activities occurring in Unalaska. The city has significant freedom to determine what, if any, tribal tax exemption best serves the community. To best balance the city's interests and the tribe's interest, the city may wish to consult further with Q Tribe to better understand its goals.

¹⁰ We understand that Q Tribe is exploring 8(a) contracting. "8(a)" refers to the SBA 8(a) Business Development Program. The program provides preferences, including sole source, to small businesses owned by disadvantaged people or entities. Importantly for Alaska, Native-owned business qualify for the program. Several Native corporations have lucrative 8(a) contracting businesses. The overwhelming majority of the contracted activity occurs in the lower 48. Little, if any, 8(a) contracting would occur with a taxable situs in Unalaska. Moreover, the contract would be a sale to the US government and therefore exempt under § 6.40.030(L). In short, Q Tribe's potential 8(a) contracting isn't a meaningful concern for city sales tax.



December 22, 2020

Vincent M. Tutiakoff, Sr., Mayor
City Hall, 43 Raven Way
Unalaska, AK 99685

Re: Restoration of Tribal Governmental Tax Status

Dear Mayor Tutiakoff:

The Qawalangin Tribal Council asks that you take the lead with the City to amend or clarify the City Sales and Use Tax Code, Chapter 6.40, to exempt federally-recognized tribal governments from the tax, just as other governments are exempt. As you know, the Qawalangin Tribe of Unalaska (QTU) is a federally recognized native government possessing inherent sovereignty. The U.S. federal government lists such qualifying tribal government periodically and the QTU is included at 84 Fed. Reg. 1200, 1205 (Feb. 1, 2019), and in previous federal lists. As that Notice explains, "The listed Indian entities are acknowledged to have the immunities and privileges available to federally recognized Indian Tribes by virtue of their government-to-government relationship with the United States as well as the responsibilities, powers, limitations, and obligations of such Tribes." Those immunities include the provisions of the Tribal Tax Status Act, 26 U.S.C. 7871 (tax deductions and exemptions).

Our Tribe's governmental status was previously recognized by the city in an exemption letter dated April 22, 1992 (copy attached). However, that recognition was inadvertently withdrawn. The Exemptions definition in the Sales and Use Tax Code was amended in 6.40.030 to state "L. GOVERNMENTAL AGENCIES. A sale directly to the United States government, or to the State of Alaska and its political subdivisions is exempt." That code is currently interpreted to deny QTU's governmental status. Accordingly, we ask that the Council amend 6.40.030(L) to exempt: "A sale directly to the United States government, a federally-recognized tribal government, or to the State of Alaska, or their political subdivisions is exempt."

Sincerely,

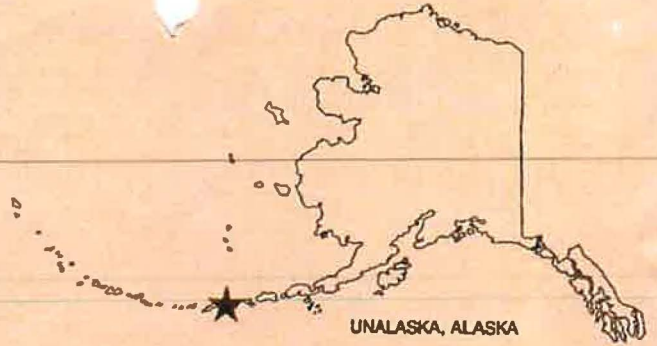
A handwritten signature in blue ink, appearing to read 'B. Shaishnikoff'.

Blaine Shaishnikoff
Tribal Council President



CITY OF UNALASKA

P.O. BOX 89
UNALASKA, ALASKA 99685
(907) 581-1251
FAX (907) 581-1417



April 22, 1992

QAWALANGIN TRIBE OF UNALASKA
P.O. BOX 334
UNALASKA, ALASKA 99685

At the Council meeting held April 14, 1992, Unalaska City Code was amended to exempt purchases made by non-profit and religious organizations from sales tax.

Enclosed is your organization's tax exempt card. This is a permanent card and does not need to be renewed annually. If there is a need for additional cards, please contact Maria Hawks at 581-1251.

If you have any questions, please give me a call at 581-1251.

Sincerely,

DEBRA K. DUSHKIN
City Clerk

CITY OF UNALASKA
Unalaska, Alaska
XXXXXXXXXXXXXXXXXXXX
Sale Tax Exemption License
1040
Tax Exemption Number
This license issued pursuant to city ordinance
6.40.030 and 6.40.040 authorizes

QAWALANGIN TRIBE OF UNALASKA
Name of Business
to be exempt for the following reasons
UNALASKA CITY CODE 6.40.030 (N)

Issued by: *Debra K. Dushkin*
City Clerk

Unalaska
Sale Tax Exemption License
1040

*This license pursuant to City Ordinance
6.40.030 and 6.40.040 authorizes
Qawalangin City Code 6.40.030 (N)
Issued by Debra Dushkin*