

# Comanche Nation Revenue Allocation Plan and Elder Assistance Payments

## What Federal Law, the NIGC, and IRS say about Per Capita Payments

- The Indian Gaming Regulatory Act (“IGRA”) and its implementing regulations require that any per capita payment from tribal gaming revenues be made under a revenue allocation plan approved by the Bureau of Indian Affairs. 25 U.S.C. §§ 2710(b)(3) and 2710(d); 25 C.F.R. Part 290.
- “Per capita payment” is defined to include the distribution of money to an identified group of members, e.g., tribal elders, paid directly from the net revenues of any tribal gaming activity. 25 C.F.R. § 290.2.
- Per capita payments do not include payments set aside by a tribe for special purposes, such as social welfare, housing, education or other “specifically identifiable needs.” *Id.* However, monetary payments from gaming proceeds outside of a bona fide tribal program are considered per capita payments which are prohibited unless made pursuant to an approved revenue allocation plan. *See Avis Little Eagle v. Standing Rock Sioux Tribal Council*, TRO-03-131 (2003) (payments not distributed pursuant to a bona fide tribal government program ordered stopped by federal court); *Ross v. Flandreau Santee Sioux Tribe*, 809 F. Supp. 738 (S.D.S.D. 1992) (federal court determined that calling per capita payments “On Reservation Lifestyle Betterment Grants” did not change the true nature of the payments and ordered them stopped).
- IGRA expressly provides that per capita payments are subject to federal taxes and requires tribes to notify members of such tax liability when per capita payments are made. 25 U.S.C. § 2710(b)(3)(D). In addition, IGRA’s regulations require a tribe’s revenue allocation plan to specify the withholding of taxes for all recipients in accordance with IRS regulations. 25 C.F.R. § 290.12(b)(4).
- Internal Revenue Code Section 3402(r) specifically imposes the withholding requirement on per capita distributions of gaming revenue, providing that, in general, every person, including an Indian tribe making a payment to a member of an Indian tribe from the net revenues of any class II or class II gaming activity conducted or licensed by such tribe shall deduct and withhold from such payment a tax in an amount equal to such payment’s proportionate share of the annualized tax.
- The IRS publication, **Gaming Tax Law for Indian Tribal Governments**, specifies, “grants received under social welfare program that did not require recipients to establish *individual need* have not qualified for tax-exempt status. Individuals are required to establish “need.” The publication notes that the tribe is required to file a 1099-MISC for each tribal member receiving a distribution, with the amount of the distribution and the amount withheld shown appropriately, in addition to properly paying and reporting the amounts to the IRS. Further, the tribal member who receives the distribution must file an IRS form 1040 which reflects the per capita payment as other income.

- The National Indian Gaming Commission (“NIGC”) has the authority to enforce civil penalties against tribes for failure to adhere to per capita requirements of the IGRA, including possible fines and closure of gaming facilities. 25 U.S.C. § 2713.
- Since 2003, the Office of the Inspector General and the IRS have voiced concern and stepped up efforts to halt per capita payments made without an approved revenue allocation plan and/or absent the appropriate withholding of federal taxes. *See Evaluation of the Bureau of Indian Affairs’ Process to Approve Tribal Gaming Revenue Allocation Plans*, US DOI, OIG, no. 2003-I-0055, June 2003 (suggesting development of list of tribes making per capita payments without an approved plan for the NIGC to bring enforcement actions against); *Letter from IRS Commissioner Everson to Senate Finance Committee*, March 30, 2005 noting “compliance issues” with tribal governments, particularly in the area of per capita payments and further complaining that “in order to reduce the tax consequences to members, certain tribes have created mechanisms to classify [per capita] payments as general welfare programs, often through liberal interpretation of what constitutes a ‘need-based’ program.”)