Washington v. American Tobacco Co., --- P.3d ---, 2023 WL 6803193 (Wash. Ct. App., Oct. 16, 2023).

- **Holding**: Washington statute authorizing governor to enter into compacts with Tribes addressing tribal taxation of cigarette sales to nonmembers did not "authorize" tribal taxation, but recognized tribal sovereignty to do so; as such, the sales were not subject to Washington state escrow deposition requirements required to be imposed on cigarette manufacturers who did not participate in the Master Settlement Agreement between a number of states and cigarette manufacturers.
- **Summary**: Pursuant to the Master Settlement Agreement (MSA) between a number of States and participating cigarette manufacturers, the participating manufacturers (PMs) must make annual cash payments to the States. Washington statues implementing the MSA provided that manufacturers who did not participate in the MSA would be subject to escrow deposits for "units sold," measured by excise taxes collected by the States on tobacco products bearing the "excise tax of the State." The PMs invoked arbitration on the issue of whether cigarettes sold by Indian Tribes to nonmembers were "units sold." The tribal sales were made under the terms of compacts between the Tribes and the State of Washington, providing that Washington would not tax such sales, and providing that the Tribes would tax such sales at the same rate as Washington imposed on non-Tribal sales. Cigarettes sold by Tribes did not bear excise tax stamps of the States, but did bear tribal excise tax stamps.

  The arbitration panel concluded that the sales by Tribes were "units sold" and pursuant to the state's escrow requirement, concluding that "Washington authorized compact tribes to collect the same tax that the state imposes," and further explain that "[t]here is no evidence that absent the authorizing statutes, the state would have permitted the tribes to impose and collect cigarette taxes."

  Following the 2004 Panel's ruling, the State moved in superior court to vacate the arbitration panel's ruling and for a declaratory judgment defining "units sold." The superior court denied the State's motion to vacate, but granted its motion for declaratory judgment. The court concluded that "units sold" did not include compact cigarettes and that its ruling "constitute[d] a binding declaration of the rights of the parties ... under the MSA and Washington law pursuant to the Declaratory Judgment[s] Act and the Consent Decree."

  The PMs appealed the declaratory judgment. After finding that there was a justiciable controversy, that the State had standing under the Uniform Declaratory Judgments Act to seek declaratory relief, and that declaratory relief was not prohibited by the MSA's arbitration provisions, the court concluded that the arbitration panel's conclusions were the result of its "fundamental misunderstanding of tribal sovereignty and the tribe's independent authority to tax." In short, the panel erred in its belief that tribal excise tax stamps were state stamps because they were "authorized" by the State through the compacts. The court of appeals, citing *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982), held that the "State cannot 'authorize' the tribes to impose taxes—the tribes possess the inherent authority to do so."

The court went on to conclude that under either the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-14, or the Washington uniform arbitration act, chapter 7.04A RCW, the superior court did not err in declining to vacate the award, because vacatur is only appropriate where an arbitration panel exceeds its powers or "so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." "Although the Panel committed an error of law in misinterpreting the [Washington statute addressing escrow deposits,] it does not amount to the sort of legal error justifying vacatur of an arbitration award."

- **Relevant (2023) Deskbook Sections**: 11:1, 11:14
- **Comment:** An accompanying unpublished opinion, available at 2023 WL 6804544, addressed whether an agreement by the Puyallup Tribe and the State to share revenue collected by the Puyallup Tribe's tax stamp transforms the Trine's tax stamp into an "excise tax stamp of the State" for purposes of the MSA. Unlike other tribal compacts, the Puyallup compact contained a revenue sharing provision by which the Tribes agreed "to transmit thirty percent of the tribal tax revenue on all cigarette sales to the state." Similar to the published opinion, the court concluded that the arbitration panel incorrectly viewed the state statute to endow the Tribe with authority to tax cigarettes, when the correct view was that "the State did not, by enacting the compact legislation, simply transfer enforcement powers to the Tribe. Rather, the State foregoes imposing its tax and the Tribe exercises its taxing authority and imposes its own tax," a fact not changed by the revenue-sharing component of the Puyallup compact.