No. 08-6017

United States Court of Appeals
Tenth Circuit

John A. “Rocky” Barrett, Jr. and Sheryl S. Barrett

Plaintiffs-APPELLANTS

v.

United States of America

Defendant-APPELLEE

Appeal
United States District Court
Western District of Oklahoma
The Honorable Joe Heaton

COVER PAGE TO APPELLANTS’ BRIEF IN CHIEF
(pursuant to Tenth Circuit General Order filed August 10, 2007)

DISTRICT COURT'S DECEMBER 5, 2007 ORDER
Attached as Exhibit "A"
(VIA SCANNED PDF)

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June 3, 2008

ORAL ARGUMENT REQUESTED

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JURISDICTIONAL STATEMENT

Plaintiffs/Appellants John A. Barrett, Jr. ("Chairman Barrett") and Sheryl S. Barrett[1] (collectively, the "Barretts") invoked the jurisdiction of the district court based on 28 U.S.C. § 1346 (a)(1) for the recovery of Federal income taxes (and related adjustments), penalties and interest erroneously or illegally assessed or collected from the Barretts, without authority, for the taxable year ended December 31, 2001.

Both the Barretts and the Defendant/Appellee United States of America ("Appellee") filed motions for summary judgment with respect to all issues in the case. On December 5, 2007, the district court issued its Order granting Appellee's motion for summary judgment. That Order was a "final order" for purposes of 28 U.S.C. § 1291. The Barretts timely filed their Notice of Appeal on January 31, 2008.

ISSUES PRESENTED FOR REVIEW

1. Did the Trial Court err in determining that the United States Congress did not impress the trust funds from which Mr. Barrett was paid with an exemption from income taxation.

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[1] During the 2001 calendar year, the Barretts were married taxpayers. The facts and issues in this case relate to Chairman Barrett. However, Appellant Sheryl S. Barrett is a necessary party to these proceedings because she filed a joint income tax return with Chairman Barrett.

2. Did the Trial Court err in granting Defendants/Appellee's Motion for Summary Judgment on the issue of taxation of amounts paid to Plaintiff/ Appellant John A. Barrett from trust funds awarded to Citizen Potawatomi Nation by the Indian Claims Commission.

3. Did the Trial Court err in failing to require Defendant/Appellee to meet its burden of production under 26 U.S.C. 7491(c).

4. Did the Trial Court err in granting Defendant/Appellee's Motion for Summary Judgment imposing the accuracy-related penalty under 28 U.S.C. Sec. 6662.

STATEMENT OF THE CASE

This case concerns the Federal income taxation of certain funds paid to Chairman Barrett, as Chairman of the Citizen Potawatomi Tribe *fka* Citizen Band Potawatomi Indian Tribe (the "Tribe"). The Barretts sought a refund of income taxes, penalties and interest assessed by the Internal Revenue Service and paid by the Barretts with respect to their joint 2001 income tax return. The sources of the funds paid to Chairman Barrett were awards by the Indians Claims Commission to the Tribe, held in trust for the benefit of the Tribe, and paid to Chairman Barrett pursuant to a Congressionally approved distribution plan that expressly provides an exemption from Federal income tax. Both the Barretts and the Appellee filed for

summary judgment. On December 5, 2007, the district court granted summary judgment to Appellee.

APPELLANTS' STATEMENT OF FACTS

Background Information

Chairman Barrett is a member of the Tribe, the ninth largest federally recognized tribe of American Indians with approximately 27,000 members across the United States. (Aplt. App. at 22) The Tribe's governing body and governmental headquarters are located in Pottawatomie County, State of Oklahoma, near Shawnee, Oklahoma. (Aplt. App. at 23 and 338)

During the calendar year 2001, Chairman Barrett was the duly elected Chairman of the Tribe. (Aplt. App. at 337) Chairman Barrett first became involved with the governance of the Tribe in 1971, when he was appointed Vice Chairman of the Tribe to complete the balance of a term until the next election. In 1971, the Tribe had less than $1,000.00 in funds and two and a half acres of land. (Aplt. App. at 23 and 338)

In 1985, Chairman Barrett was elected at the annual meeting of the Tribe (which consists of all competent members of the Tribe over 18 years of age) as Chairman of the Tribe, a position to which he has been elected by the general membership of the Tribe through today. (Aplt. App. at 23 and 338)

Through the leadership of Chairman Barrett, today the Tribe has a $350 million a year cash flow operation, including fourteen separate businesses and the management of thirty contracts for the United States government. (Aplt. App. at 339) In addition, Barrett is Chairman of the Board of Directors of the First National Bank & Trust Company, which is the largest tribally owned bank in the United States. (Aplt. App. at 24 and 339)

Chairman Barrett is a native of Shawnee, Oklahoma and a graduate of Shawnee High School. (Aplt. App. at 337) He has studied at Princeton University, the University of Oklahoma, and Oklahoma City University. Chairman Barrett earned a Bachelor's of Science degree in business and attended the Graduate School of Business at Oklahoma City University. (Aplt. App. at 2 and 337) He has also been awarded an honorary Doctorate of Commercial Sciences from St. Gregory's University. (Aplt. App. at 337)

In addition to being Chairman of the Tribe, Chairman Barrett is also: 1) president of Barrett Drilling Company, an independent oil and gas production company; 2) president of Barrett Land and Cattle Company, a registered Angus cattle ranch; 3) Chairman of the Board of Rainbow Development Corporation, through which he and a partner developed Rainbow Casino in Vicksburg, Mississippi, and Chairman Barrett currently retains a limited revenue share as payment for its sale to Alliance Gaming Corporation in 1997; 4) serves as the

Oklahoma Delegate to the National Tribal Self Governance Advisory Committee; and 5) serves as a delegate to the National Congress of American Indians. Chairman Barrett formerly served on the Board of Directors of the National Tribal Chairman's Association and the Oklahoma City Area Indian Health Advisory Board, and as an officer in the United Tribes of Western Oklahoma and Kansas. (Aplt. App. at 343 and 344) He is a founder of the National Indian Action Contractor's Association. (Aplt. App. at 344) Chairman Barrett currently holds a Class III gaming license in the State of Mississippi. (Aplt. App. at 343)

Tribal Governance

The Chairman is in the executive branch of the Tribe and has various constitutional duties. (Aplt. App. at 338) The constitutional duties of the Chairman are to head the Executive Branch of the Tribe and include general supervision of the daily affairs of the Tribe, seeing that the laws of the Tribe are faithfully enforced, and presiding over meetings of the various bodies of the government of the Tribe. (Aplt. App. at 35 and 338)

The Constitution of the Tribe also provides for a separately elected judicial branch and a legislative branch called the Business Committee. (Aplt. App. at 338) The Business Committee is comprised of the Chairman, Vice Chairman, Secretary/Treasurer and two Councilmen. (Aplt. App. at 23 and 338) All of these positions are elected by the Citizen Potawatomi Nation Indian Council at their

annual meeting. (Aplt. App. at 23 and 338) The functions of the Business Committee include developing a budget for the use of the Tribe's funds on a fiscal year basis and appropriating funds for the day-to-day operations of the Tribe. (Aplt. App. at 338) These functions include budgeting for and appropriating any compensation of the Chairman. (Aplt. App. at 338)

Indians Claims Commission

In the late 1940s and early 1950s, the Tribe brought various claims with the Indian Claims Commission against the United States Government pursuant to the Indian Claims Commission Act ("Claims Commission Act"), 60 Stat. 1049, 25 U.S.C. §§ 70 - 70v-3 (1946). This remedial legislation was to settle "claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands or compensation agreed to by the claimant." Id. at § 70a. (Aplt. App. at 24 and 339) As a result of these claims, the Tribe was awarded judgments against the United States. (Aplt. App. at 24, 25 and 339)

The Indian Tribal Judgment Funds Use or Distribution Act

The judgment awards by the Indians Claims Commission in favor of the Tribe were to be held by the Secretary of the Interior. 25 U.S.C. § 1401(b). Unlike other judgment debtors, the Tribe was not allowed to simply collect the judgment awards. Instead, any use or distribution of a judgment award was to be

made pursuant to the Indian Tribal Judgment Funds Use or Distribution Act (87 Stat. 466, codified at 25 USC §§ 1401 et seq.). 25 U.S.C. § 1401(a).

The Indian Tribal Judgment Funds Use or Distribution Act provided that use and distribution of the Indians Claims Commission judgment awards were to be done pursuant to a plan developed by the Secretary of the Interior and each of the tribes awarded judgments, including the Tribe. At least twenty percent (20%) of the funds were to be set aside and programmed for economic development, common tribal needs, educational requirements, and such other purposes as the affected tribe may justify. 25 U.S.C. § 1403(b)(5).

The Secretary of the Interior and the Tribe did develop a use and distribution plan which became final and was published in the Federal Register on September 8, 1983 (the "1983 Plan"). *See*, 48 FR 40567-01. The 1983 Plan determined the set aside and the programming funds at thirty percent (30%), to be held in perpetual trust by the Secretary of the Interior, with the income from such funds to be used for real estate acquisition, development of the Tribe, including increasing the effectiveness of the Government, and the maintenance of the property of the Tribe. (Aplt. App. at 25)

As expressly provided in the 1983 Plan, the programming funds were to be used pursuant to a Ten-Year Tribal Acquisition, Development, and Maintenance Plan, to include "the acquisition of additional lands to build upon the tribal land

base, the development of the tribe's assets and to provide for the maintenance and care of the tribal property…" Section 5(d) of the 1983 Plan. "At the end of the 10-year program period, the [Tribe] shall evaluate tribal needs as concerns the remaining balances in the program principal and interest accounts, and any changes proposed by the [Tribe] shall be subject to approval by the Secretary." Section 5(d)(iii) of the 1983 Plan.

As required by the 1983 Plan and the Indian Tribal Judgment Funds Use or Distribution Act, the Tribe and the Secretary of the Interior developed the Ten-Year Tribal Acquisition, Development, and Maintenance Plan (the "Ten-Year Plan"). Consistent with those objectives, the Ten-Year Plan included "those activities and/or actions undertaken by the Tribe to in some way cause growth, building up, expansion, strengthening, increased effectiveness or other evolutionary process toward the program of the Tribe economically and/or socially and/or governmentally." (Section 1.4 of the Ten-Year Plan, Aplt. App. at 50 and 51) Chairman Barrett was an integral part of implementation of the Ten-Year Plan.

Each year, the general membership of the Tribe would vote on the Tribe's budget for the expenditure of the income earned from the trust fund set-asides maintained by the Secretary of the Interior. (Aplt. App. at 25)

Section 6(b) of the 1983 Plan expressly provided: "None of the funds distributed per capita or made available under this plan for programing [sic] shall be subject to Federal or State income taxes…"

Subsequent Legislation Regarding Trust Funds

In 1994, Congress passed the American Indian Trust Fund Reform Act of 1994, 25 USC §§ 4001 et seq., which, *inter alia*, allowed tribes to withdraw and manage any trust funds held by the Secretary of the Interior on their behalf, subject to the approval of the Secretary of the Interior. (Aplt. App. at 25 and 340)

In 1995, the Tribe, by a general election, voted to withdraw all trust funds from the control and management of the Secretary of the Interior, and to place the control and management of the trust funds with the Tribe. After withdrawal, the funds maintained their status as trust funds. (Aplt. App. at 26 and 340)

In 1996, the Business Committee of the Tribe passed Resolution 96-44 authorizing the Chairman of the Tribe to effectuate the transfer of the management of the trust funds from the Secretary of the Interior to the Tribe pursuant to certain management policies and guidelines to be approved by the Secretary of the Interior. (Aplt. App. at 26 and 341)

As part of the request for approval of the self-management by the Tribe of the trust funds held by the Secretary of the Interior, the Tribe submitted for approval a detailed Investment Management Policy for the investment and use of

the trust funds by the Tribe. (Aplt. App. at 341) Chairman Barrett was involved in the development of the Investment Management Policy and the negotiations and discussions with the Secretary of the Interior. (Aplt. App. at 341) Under the Investment Management Policy, the purposes and uses for the expenditure of the earnings withdrawn from the trust pursuant to the annual budget approved by the electorate remained the same as those in effect during the trust management tenure of the Secretary of the Interior. (Aplt. App. at 341)

In 1996, the Secretary of the Interior approved the Tribe's removal of the trust funds, subject to the Tribe's use and management of the funds in a manner consistent with the Investment Management Policy. (Aplt. App. at 26 and 341) The Tribe now maintains the trust fund in a separate trust account held with the First National Bank & Trust. (Aplt. App. at 26) The Tribe's earnings from the trust fund that are to be expended for the year are placed in the Tribe's General Fund account as a sub-account, and accounted for separately from the remainder of the Tribe's General Fund monies. (Aplt. App. at 26) Any earnings from the trust fund that are not included in the budget or approved by the general membership of the Tribe remain with the trust fund and become part of the principal of the trust fund. (Aplt. App. at 26) At that time of withdrawal, the trust funds from the 1980s Indian Claims Commission judgments totaled approximately $3,750,000.00. (Aplt. App. at 341)

The Tribe has been successful in the management of the funds. The appreciated value of the funds under the Secretary of the Interior for the fourteen (14) year period prior to tribal management was less than six percent (6%) annually. (Aplt. App. at 341 and 342) Since assuming management of the funds, the Tribe has experienced over ten percent (10%) annual growth of the funds. Today, the trust funds total approximately $11 Million to $12 Million. (Aplt. App. at 342)

The Secretary of the Interior requires the Tribe to have performed an audit of the trust funds on a yearly basis by an independent auditor. (Aplt. App. at 26 and 342) After completion, the Tribe submits the audits to the Secretary of the Interior. (Aplt. App. at 342) A summary of the Independent Auditor's Report, entitled the Comprehensive Annual Financial Report, is provided to the Tribe's general membership at the annual meeting of the Citizen Potawatomi Nation Indian Council. (Aplt. App. at 26)

The Tribe has been awarded a Certificate of Achievement for excellence in financial reporting by the Government Finance Officers Association of the United States and Canada for twenty years straight. (Aplt. App. at 342)

Payments to Barrett from Trust Funds

In 2001, Chairman Barrett received compensation from the Tribe for his duties as Chairman in the amount of $48,057.64. (Aplt. App. at 28 and 342)

The source of the funds to pay Chairman Barrett's compensation was the trust funds self-managed by the Tribe and received from the Secretary of the Interior. (Aplt. App. at 342) The authority for the payment of the compensation from the trust funds was the Business Committee of the Tribe, which was approved by the general electorate of the Tribe at the annual meeting of the Tribe, and subsequent payment was made pursuant to that authorization. (Aplt. App. at 342 and 343)

The payments of Chairman Barrett's compensation from the trust funds were a conscious and intentional act of the Tribe because of the Tribe's firm belief that the trust funds are not subject to Federal income taxation to the recipient. (Aplt. App. at 343) This would save the Tribe money, and consequently free up funds for other tribal programs, because, in part, to hire someone, or to properly pay the Chairman, to oversee a $350 Million operation would require much more than the salary the Tribe pays Chairman Barrett. (Aplt. App. at 343)

Assessment by the Internal Revenue Service

After audit, the Internal Revenue Service (the "IRS") determined that the compensation paid to Barrett by the Tribe was taxable income to Chairman Barrett. (Aplt. App. at 28) On June 16, 2005, the IRS issued a Notice of Deficiency proposing to assess the Barretts for additional income taxes for the 2001 tax year with respect to the compensation paid to Chairman Barrett. (Aplt. App. at 29) The

proposed assessment by the IRS was for income taxes in the amount of $19,355.00, and penalties of $3,871.00, pursuant to 26 USC § 6662, which amounts were ultimately assessed by the IRS. (Aplt. App. at 29)

After payment of all amounts assessed, the Barretts, in March, 2006, filed Form 1040X, Amended U.S. Individual Income Tax Return, requesting a refund of the amounts paid pursuant to the assessments relating to the compensation paid to Chairman Barrett as Chairman of the Tribe. (Aplt. App. at 29) By letter dated May 10, 2006, the IRS denied the Barretts' refund claim in full. (Aplt. App. at 29) No part of the amounts claimed by the Barretts in their refund claim has been repaid or refunded to the Barretts. (Aplt. App. at 30)

SUMMARY OF APPELLANTS' ARGUMENT

The district court erred in granting Appellee's motion for summary judgment, thereby holding that the payments to Chairman Barrett from the trust funds awarded to the Tribe by the Indians Claims Commission pursuant to the Congressionally approved 1983 Plan were taxable. The 1983 Plan provides an express exemption from Federal income taxation for the use of those funds under the programming aspects of the 1983 Plan. The payments to Chairman Barrett were made pursuant to the 1983 Plan.

With respect to the accuracy-related penalty asserted by Appellee, the district court erred in not requiring Appellee to meet its burden of production

pursuant to 26 U.S.C. § 7491(c). The Appellee justified the penalty by claiming the Barretts failed to disclose the payments to Chairman Barrett on the Barretts' tax return. The Barretts, however, had no duty to disclose the payments. The district court also erred in granting summary judgment to Appellee with respect to the accuracy-related penalty for disregard or negligence, assuming the Appellee met its burden of production, finding the Barretts did not have reasonable cause for their position. The Barretts did have reasonable cause relying on the express Federal income tax exemption set forth in the 1983 Plan, and the various acts and legislation surrounding the 1983 Plan.

APPELLANT'S ARGUMENT

1. Applicable Standard of Review

This Court reviews summary judgment de novo, "using the same standards applied by the district court." *Stover v. Martinez*, 382 F.3d 1064, 1070 (10th Cir. 2004). Summary judgment is appropriate only when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A reviewing Court will view the record in the light most favorable to the party opposing a motion for summary judgment. *Deepwater Invs., Ltd. v. Jackson Hole Ski Corp.*, 938 F.2d 1105, 110 (10th Cir. 1991).

2. The district court erred in finding that the payments to Chairman Barrett from the trust funds were subject to Federal income tax.

The payments in 2001 to Chairman Barrett by the Tribe were from set aside and program funds paid under a use plan developed by the Tribe and Secretary of the Interior pursuant to The Indian Tribal Judgment Funds Use or Distribution Act, and, based on the express language of the Congressionally approved 1983 Plan, are not subject to, and are exempt from, Federal income taxation.

The Barretts do not dispute the general rule that American Indians, being United States citizens, are subject to Federal income tax in the same manner as other United States citizens. *Squire v. Capoeman*, 351 U.S. 1, 6 (1956). And the Barretts recognize that an exemption from the payment of Federal income tax may not be implied, and that if an exemption from the payment of such tax exists, it must derived plainly from the Federal tax statutes, or from treaties or agreements with the Indian Tribes concerned or some Act of Congress dealing with their affairs. *Squire, supra*; Rev. Rul. 59-354, 1959-2 C.B. 24; Rev. Rul. 54-456, C.B. 1954-2; and Internal Revenue Manual, Chapter 88, Section 1, Part 4.88.1.7.3.1 (06-01-2006). The Barretts do, however, assert that an exemption exists with respect to the payments made to Chairman Barrett by the Tribe in calendar year 2001, and that the express provisions of The Indian Tribal Judgment Funds Use or Distribution Act provide such exemption.

The specific language relied upon by the Barretts is: "**None of the funds distributed per capita or made available under this plan for programing [sic] shall be subject to Federal or State income taxes…**" This language is found in Section 6(b) of the 1983 Plan as approved by Congress under The Indian Tribal Judgment Funds Use or Distribution Act. The 1983 Plan provided for the use of the judgment awards to the Tribe by the Indians Claims Commission. It was from these funds that payments were made by the Tribe to Chairman Barrett. (Aplt. App. at 28 and 342)

Under Section 5(d) of the 1983 Plan, the programming aspect was the Ten-Year Plan. This was defined to include "those activities and/or actions undertaken by the Tribe to in some way cause growth, building up, expansion, strengthening, increased effectiveness or other evolutionary process toward the program of the Tribe economically and/or socially and/or governmentally." As explained below, these provisions were carried forward under the Investment Management Policy to the current funds held by the Tribe in trust under the American Indian Trust Fund Reform Act.

Thus, as is clear, the funds available for programming are not subject to Federal income tax. These funds are available to be used to help strengthen or increase the effectiveness of the Tribe from an economic and/or governmental perspective. This includes compensation necessary to pay a Chairman of the Tribe

such as Chairman Barrett whose duties include overseeing the various aspects of the programming.

Providing compensation to the Chairman of the Tribe on a tax exempt basis does further the governmental and economic growth, expansion, strengthening, effective or evolutionary process of the Tribe. Because the Chairman is responsible for the day-to-day oversight of the operations of the Tribe, the full-time participation of the Chairman is important, particularly as the Tribe has grown, both governmentally and economically. Moreover, the real estate acquisition and other programs under the 1983 Plan do not operate in a vacuum. The Chairman of the Tribe has to oversee these programs. Chairman Barrett has been involved in all aspects of these successful operations. Even with tax exemption, it is submitted that the compensation Chairman Barrett received for overseeing the operations of a $350 Million enterprise is woefully inadequate.

The tax exemption provided under the 1983 Plan is consistent and part of Congress' desire to migrate away from Federal domination of programs and the provision of services to Indians and, instead, to develop strong and stable tribal governments. This is the express Congressional intent of the Indian Self-Determination and Education Assistance Act of 1975 (88 Stat. 2203 codified at 25 U.S.C. § 450 et seq.) which began a marked shift in Federal policy by Congress in its approach to Indian tribes and their members. 25 U.S.C. § 450a; *California v.*

Cabazon Band of Mission Indians, 480 U.S. 202, 216 fn. 19, 107 S.Ct. 1083 (1987).

Since the passage of the Indian Self-Determination and Education Assistance Act of 1975, and the Indian Finance Act of 1974 (88 Stat. 77 codified at 25 U.S.C. § 1451 et seq.), various Acts of Congress, Executive Branch policies and judicial opinions have consistently reaffirmed the strong Federal interests in promoting strong tribal economic development, self-sufficiency, and self-governance. *Prairie Band Potawatomi Nation v. Wagnon*, 476 F.3d 818, 824 fn 9 (10th Cir. 2007). These acts at the highest levels of the various branches of the Federal government are designed to achieve the goal of Indian self-government, and the over-riding goal of encouraging self-sufficiency and economic development. *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 510, 111 S.Ct. 905, 910 (1991).

Section 5 of the Congressionally approved 1983 Plan concerning the programming aspects of the plan dovetails into this strong Federal policy by providing for the use of the trust funds to "in some way cause growth, building up, expansion, strengthening, increased effectiveness or other evolutionary process toward the program of the Tribe economically and/or socially and/or governmentally." The breadth of the language was intended to promote and encourage the discretion of the elected officials of the Tribe in determining the best

uses of trust funds available under the programming aspects of the 1983 Plan. The Tribe's decision to compensate the Chairman of the Tribe from the trust funds, and that such compensation would fit within the parameters of the allowed uses of the trust funds, can not reasonably be questioned. For the Federal government, in the form of the IRS, to now step back into an area in which Congress and the Secretary of the Interior have conferred and approved substantial discretion for the Tribe, is contrary to the strong Federal policy of tribal self governance.

Because the payments to Chairman Barrett were part of the programming aspects of the 1983 Plan, the express language of Section 6 of the 1983 Plan provides an exemption from Federal income tax for those payments. And, contrary to the finding of the district court, the Barretts do not take "provisions of [statutes] which are directed to taxation of the Tribe" and apply them to the Barretts. (Aplt. App. at 409) The exemption from income taxation contained in the 1983 Plan is not directed at the Tribe. As was well known at the time Congress approved the 1983 Plan, "[i]ncome tax statutes do not tax Indian tribes." Rev. Rul. 67-284, 1967-2 C.B. 55. The district court's reading of the 1983 Plan, contrary to rules of statutory construction, would render the words in the 1983 Plan exempting the funds used for programming from income taxation superfluous. *United States v. Brown*, 334 F.3d 1197, 1207 (10th Cir. 2003) (court should refrain from construing a statute so as to render words superfluous).

In short, payment of compensation to the Chairman of the Tribe from the trust funds previously held by the Secretary of the Interior and now managed by the Tribe is in comport with the objectives and mandate agreed upon and approved by the Secretary of the Interior, the Tribe and Congress. The payments do cause growth, building up, expansion, and increased effectiveness toward the economic and governmental effectiveness of the Tribe. Under the 1983 Plan, these programming expenditures are not subject to Federal income taxation. Accordingly, the compensation paid to Chairman Barrett for the 2001 tax year is exempt from Federal income taxation. The district court erred in denying summary judgment to the Barretts.

The Ten-Year Plan did not expand the income exemption created by Congress.

The district court erred in determining that the Ten-Year Plan expanded the income exemption created by Congress under the Indian Tribal Judgment Funds Use or Distribution Act. (Aplt. App. at 402) First, the Ten-Year Plan does not mention income taxation. That was the exclusive province of the 1983 Plan approved pursuant to the Indian Tribal Judgment Funds Use or Distribution Act. Second, the 1983 Plan approved by Congress stated that the Ten-Year Plan shall "include" the acquisition of additional lands to build upon the tribal land base, the development of the tribe's assets and to provide for the maintenance and care of the tribal property. It was not, as the district court found, the exclusive mandate.

In fact, the Indian Tribal Judgment Funds Use or Distribution Act itself states that the set aside funds, in addition to economic development purposes, shall be "used to serve common tribal needs, educational requirements and such other purposes as the circumstances of the affected Indian tribe may justify." 25 U.S.C. § 1403(b)(5). The Ten-Year Plan developed by the Tribe and the Secretary of the Interior are all consistent with these mandates and clearly not limited as found by the district court. Third, assuming there is doubt in the construction of the statutes, the 1983 Plan or the Ten-Year Plan, "statutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed to favor Indians." *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976). Last, even if one could argue that the language was limited as suggested by the district court, these programs and activities do not operate own their own. Someone has to implement and oversee these programs and activities. That person, with respect to the Tribe, was Chairman Barrett.

The Ten-Year Plan did continue after the 1983 Plan expired.

The district court erroneously concludes that the 1983 Plan and the accompanying Ten-Year Plan "do not apply to any distributions after the 1983 Plan expired."[2] (Aplt. App. at 403) However, the Investment Management Policy submitted by the Tribe to, and approved by, the Secretary of the Interior in 1996

[2] The district court does not suggest or cite any rules that would apply to the use and distribution of the trust funds if the 1983 Plan and the Ten-Year Plan did not apply. The Tribe certainly was not able to do so on its own volition. 25 U.S.C. § 4026(c).

continued the 1983 Plan. The Investment Management Policy was submitted to the Secretary of the Interior as part of the Tribe's request to manage the trust funds itself pursuant to the American Indian Trust Fund Reform Act of 1994, 25 USC §§ 4001 et seq, which, *inter alia*, allowed tribes to withdraw and manage any trust funds held by the Secretary of the Interior on their behalf, subject to the approval of the Secretary of the Interior. This legislation followed years of well documented mismanagement of the trust funds by the Secretary of the Interior through the Bureau of Indian Affairs. U.S. General Accounting Office, Financial Management: BIA's Management of the Indian Trust Funds, GAO/T-AIMD-93-4 (1993); U.S. General Accounting Office, Financial Management: Status of BIA's Efforts to Reconcile Indian Trust Fund Accounts and Implement Management Improvements, GAO/T-AIMD-94-99 (1994); and *Cobell v. Norton*, 240 F.3d 1081 (D.C. Cir. 2001).

As is evident from a reading of the Investment Management Policy, the primary focus was to ensure the proper investment of the trust funds, not necessarily the use of the trust funds. Section 5(d)(iii) of the 1983 Plan stated that the Tribe would evaluate tribal needs or concerns at the end of the Ten-Year Plan and "any changes" proposed by the Tribe was to be submitted to approval by the Secretary of the Interior. Thus, it was contemplated that the 1983 Plan would continue. The Investment Management Policy states that "[t]he purpose and use of

the earnings from the Investment Accounts, will continue to be consistent with the original claims settlements to wit: for medical devices (i.e. prosthetics, dentures, eyeglasses), higher education/scholarships and a general purpose investment fund." Contrary to footnote 12 of the district court's order (Aplt. App. at 403), the general purpose investment fund is the 1983 Plan and the Ten-Year Plan. This is evident by Exhibit A and Exhibit C to the Investment Management Policy which specifically mention the Ten-Year Economic Development Plan. Exhibit A requires that the integrity of medical and education account on the one hand, and the Ten-Year Plan account on the other hand, as separate accounts be maintained. Again, a reading of the Investment Management Policy shows that its provisions were primarily concerned with guidance for the Tribe in the investment of the funds in the two trust fund accounts which were now to be invested by the Tribe. The continuation of the 1983 Plan was a given.

The continuation of the 1983 Plan and the Ten-Year Plan under the Investment Management Policy is not only evident in the Investment Management Policy itself but is required under the express terms of the 1983 Plan and 25 U.S.C. § 4023, which required the purpose and use of any judgment funds withdrawn from the Secretary of the Interior "will continue to be followed by the Indian tribe." This was done by the Tribe.

3. The Trial Court erred in failing to require Defendant/Appellee to meet its burden of production under 26 U.S.C. § 7491(c).

The district court erred in not requiring Appellee to meet its burden of production pursuant to 26 U.S.C. § 7491(c)[3], which is a requirement that Appellee must meet to establish the applicability of the penalties under 26 U.S.C. § 6662 for "negligence or disregard of rules or regulations."[4] Appellee failed to meet its burden, and, accordingly, summary judgment should have been entered in favor of the Barretts with respect to the assertion of the accuracy-related penalty.

In its opinion, despite the Barretts raising the issue (Aplt. App. at 331 and 359), the district court does not mention § 7491. Instead, the district court only discusses the reasonable cause and good faith exception under 26 U.S.C. § 6664(c)(1).

To satisfy the requirements of § 7491, Appellee must produce sufficient evidence that it is appropriate to apply the penalty to the Barretts. *Myrick v. Commissioner*, T.C. Summ.Op. 2007-143, 2007 WL 2325196 (August 15, 2007)

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[3] 26 U.S.C. § 7491(c) provides: "Notwithstanding any other provision of this title, the Secretary shall have the burden of production in any court proceeding with respect to the liability of any individual for any penalty, addition to tax, or additional amount imposed by this title."

[4] In footnote 16, the district court states that a "penalty can also be imposed for 'any substantial understatement of income tax,' but the defendant [Appellee] seeks imposition of the penalty based solely on the taxpayers' asserted negligence or disregard. However, as the Barretts demonstrated, the substantial understatement penalty is inapplicable because the alleged deficiency sought by Appellee is less than 10 percent of the tax required to be shown on the return. See, 26 U.S.C. § 6662(d). (Aplt. App. at 332)

citing *Higbee v. Commissioner*, 116 T.C. 438, 446 (2001). The Appellee asserted that the Barretts were liable for the penalty under § 6662 for negligence or disregard of rules or regulations. "Negligence" is generally defined as any failure to make a reasonable attempt to comply with the provisions of this title, and the term "disregard" is generally defined as any careless, reckless, or intentional disregard. 26 U.S.C. § 6662(c).

The basis claimed by Appellee for the assertion of the penalty was that the "[Barretts] intentionally failed to disclose Barrett's income…" (Aplt. App. at 277) In support of its position, Appellee referenced IRS Notice 90-20, 1990-1 C.B. 328 and Form 8275, which provide for disclosure of a "nonfrivolous" position taken on a tax return, and Form W-2 and Form 1099 which require reporting of wages and nonemployee compensation. (Aplt. App. at 277 and 278) Indeed, the district court stated in its opinion, in analyzing the reasonable cause exception, that the Appellee's arguments were that the plaintiffs made no efforts to determine their tax liability and took affirmative steps to prevent the IRS from determining the tax owed by prevent the Tribe from issuing W-2 or 1099. (Aplt. App. at 407)

These arguments do not meet the requirements of § 7491. There is absolutely no duty imposed on the Barretts to disclose the position to the IRS. Neither § 6662 nor its regulations require disclosure. The reasonable cause regulations do not mention disclosure. *See*, 26 C.F.R. § 6664-4. The penalty

statute only mentions disclosure in terms of reducing the substantial understatement penalty (which does not apply here). *See*, 26 U.S.C. § 6662(d)(2)(B). In fact, the regulations specifically state "[t]he penalties for negligence….may not be avoided by disclosure." 26 C.F.R. § 6662-7(b).

And, the Appellee presented no evidence to support its allegations that the Barretts made no efforts to determine their tax liability. While there was some evidence of steps Chairman Barrett did take, there was no evidence that those were his sole efforts.

In short, Appellee failed to meet its burden of production with respect to the assertion of the accuracy-related penalties under 26 U.S.C. § 6662.

4. The Trial Court erred in granting Defendant/Appellee's Motion for Summary Judgment imposing the accuracy-related penalty under 28 U.S.C. Sec. 6662.

The district court erred in concluding that the Barretts did not have reasonable cause with respect to the asserted negligence or disregard penalty.

26 U.S.C. § 6664(c)(1) provides that no penalty shall be imposed under § 6662 "if it is shown that there was a reasonable cause for such [underpayment] and that the taxpayer acted in good faith . . . ." 26 U.S.C. § 6664(c)(1). According to the Treasury regulations, "[c]ircumstances that may indicate reasonable cause and good faith include an honest misunderstanding of fact or law that is reasonable in

light of all of the facts and circumstances, including the experience, knowledge, and education of the taxpayer." 26 C.F.R. § 1.6664-4(b)(1).

The district court noted that the evidence presented at least a fact question as to good faith, but found the Barretts did not have reasonable cause because the "only authority" upon which the Barretts "point in justifying the reasonableness of their filing was their reading of Revenue Ruling 59-384 [sic]." (Aplt. App. at 408) The district court found the Barretts argument "relatively convoluted" and "contrary to general principles of taxability of payments to tribal members."

However, the Barretts argument was not solely based on Revenue Ruling 59-354. As the Barretts readily conceded, as noted by the district court, the Barretts did not dispute the general rule of taxability of payment to tribal members. (Aplt. App. at 326, 349 and 350) As discussed above, the 1983 Plan approved by the Secretary expressly stated: "None of the funds distributed per capita or made available under this plan for programming shall be subject to Federal or State income taxes…" That is the authority upon which the Barretts relied.

While the district court may have found the argument convoluted, the entire history of the United States government attempting to fulfill its obligations to the various Indian tribes, including the Tribe, has been convoluted, at best, and unsuccessful. A reading of the various opinions in *Cobell v. Kempthorne*, Case No. 96-1285, (D.D.C.) shows that not only does the convoluted nature continue to

this day, but will continue in the future. See, *Cobell v. Kempthorne*, 532 F.Supp.2d 37, 103 (D.D.C. 2008) (In a 165-page opinion, after 11 years of litigation, Judge Robertson concluded "the Department of Interior has not – and cannot – remedy the breach of its fiduciary duty for the IIM trust.")

Moreover, the Internal Revenue Manual states: "The following items are excluded from the taxable income of *individual* tribal members: … D. Income received from land claim settlements and judgments pursuant to 25 U.S.C. 1401 [the Indian Tribal Judgment Funds Use or Distribution Act]" (emphasis added), which is the act which required development of the 1983 Plan. There are no qualifiers to the IRS's statement. It does not say only the "per capita" payments are excluded from taxable income.

To oversimplify this case based on generalizations is in error. The district court accuses the Barretts of "taking provisions of [the various acts and statutes] which are directed to taxation of the Tribe and applying them instead to taxation of the recipients of tribal funds." The district court does not, and cannot, explain why the Congressionally approved 1983 Plan would direct an income tax exemption provision applicable to the Tribe only when Indian tribes are not subject to income taxation in the first instance. See, Rev. Rul. 67-284, 1967-2 C.B. 55 and Rev. Rul. 2004-50, 2004-22 I.R.B. 977. The short answer, and the Barretts' position, is that the provision was intended to not subject to Federal income tax the payments made

under the 1983 Plan for programming, such as the payments made to Chairman Barrett. And, with respect to the penalties, that is reasonable cause.

CONLUSION

The payments to Chairman Barrett in 2001 were approved programming funds under the 1983 Plan. As expressly stated in the 1983 Plan, "None of the funds … made available under this plan for programing [sic] shall be subject to Federal or State income taxes…" The Barretts seek a remand to the district court directing the district court to enter judgment in favor of the Barretts on their claim for refund. Alternatively, in the event the Court finds that the district court properly granted summary judgment to Appellee with respect to the Federal taxability of the payments to Chairman Barrett under the 1983 Plan, the Barretts seek a remand to the district court directing the district court to enter judgment in favor of the Barretts with respect to the accuracy-related penalty asserted by Appellee. Appellee failed to meet its burden of production under § 7491, and the Barretts established that they had reasonable cause for the positions taken by the Barretts on the payments to Chairman Barrett from the trust funds held by the Tribe pursuant to the 1983 Plan.

STATEMENT REGARDING ORAL ARGUMENT

The Barretts request an oral argument in this matter and believe that oral argument would assist the Court to better understand the nature of the arguments

relating to the various legislative enactments affecting the Tribe as they relate to the issues in this case, and the implementation of the 1983 Plan through the 2001 tax year.

Dated this 3rd day of June, 2008.

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Dated this 3rd day of June, 2008.

s/William H. Whitehill, Jr.

PROOF OF SERVICE

This is to certify that on the 27th day of May, 2008, true and correct copies of Volumes 1 and II of Appellants' Appendix, and on the 3rd day of June, 2008, Appellants' Brief in Chief were served on the following by electronic means and by third-party commercial carrier for next-day delivery:

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