

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

CASE NO. 10-CV-21332-CIV-GOLD/McALILEY

MICCOSUKEE TRIBE OF INDIANS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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**UNITED STATES' REPLY TO PETITIONER'S RESPONSE TO THE MOTION TO
DENY PETITION TO QUASH**

The Internal Revenue Service ("IRS"), in examining whether Billy Cypress, former Chairman of the Miccosukee Tribe of Indians (the "Tribe"), received funds from a bank account held in the name of the Tribe and failed to report the same as income, issued an administrative summons to Morgan Stanley Smith Barney ("Morgan Stanley") as a third party recordkeeper for the relevant account. The Tribe filed a petition to quash the summons. The United States filed a motion to deny the petition to quash (doc. 15 ("Motion")), and the Tribe responded on July 21, 2010 (doc. 17 ("Response")).

Despite the Tribe's inaccurate portrayals of the summons, this case does not involve a request for Tribal records; therefore, there is no issue of Tribal immunity. Rather, the summons only seeks third party records, i.e. records of Morgan Stanley, as discussed in the government's Motion at pages 9-11. A summons addressed to a non-tribal entity for records of that entity does not impinge on the Tribe's sovereign immunity.

The Tribe's response to the United States' motion to quash attempts to rewrite the law of tribal sovereign immunity and makes unsubstantiated assertions regarding the motives of the IRS. The Tribe, however, does not deny that Cypress was using money from tribal accounts for his personal benefit and that the IRS is entitled to investigate whether to tax him on those funds. The summons in this case meets the legal requirements for the issuance of a summons without affecting the Tribe's sovereign immunity. Therefore, the Court should deny the Tribe's motion to quash and deny the Tribe's inevitably futile requests for further discovery and hearings.

I. The summons does not infringe on the Tribe's sovereign immunity.

This case involves a valid summons by the IRS that does not infringe on the Tribe's sovereign immunity. Sovereign immunity, at most, protects tribes from legal processes that have some effect on the tribe's ability to govern itself either by restraining the tribe or compelling its action. *See United States Environmental Protection Agency v. General Elec. Co.*, 197 F.3d 592 (2d Cir. 1999); *see also Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-56 (1978); *cf. Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 161 (1980) (allowing a state sales tax scheme challenged by a Tribe in part because it did not "contravene the principle of self-government").¹ The summons here has no effect on the Tribe's ability to manage its affairs and it does not restrain the Tribe or require it to do anything. *See Fisher v. United States*, 425 U.S. 391, 397 (1976). Therefore, the Tribe's sovereign immunity is not implicated.

¹The Tribe agrees with this statement of the law: "The court in *Catskill* explained that, among other things, a proceeding is against the sovereign if the result could serve to restrain the government from acting or compel it to act." (Response at 8.)

Throughout its response, the Tribe equates the IRS summons with inapposite examples, including a suit against the Tribe (Response at 3, 6, 9), an entry by a non-member onto tribal land (Response at 8-9 (citing *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982))), and an unlimited request for Tribal records (Response at 1, 3, 15). The Tribe's categorization of the summons is incorrect. The summons is directed to a third party, Morgan Stanley, in an investigation of an individual, not the Tribe, and falls squarely within the authority of the IRS. 26 U.S.C. § 7602. This case involves the IRS's authority to issue a routine summons in an investigation that it has the responsibility to pursue. 26 U.S.C. § 7601, *et seq.* The Tribe's attempts to recast this case are unavailing.

Furthermore, the Tribe's attempts to explain how this summons interferes with tribal sovereignty are not persuasive. For example, the Tribe claims that the summons interferes with the Tribe's ability to investigate misappropriation of tribal funds. (Response at 7 ("But the question of whether misappropriation of Tribal funds took place is not for the IRS to determine in the first instance, but rather for the Tribe.")). But the IRS examination of Cypress need not determine whether there was a misappropriation of funds from the Tribe, only whether Cypress realized unreported income. 26 U.S.C. § 61 ("[G]ross income means all income from whatever source derived"). The federal government's enforcement of discrete federal laws has no effect on a tribe's power to exercise its own sovereign authority in this case. *See e.g., United States v. Lara*, 541 U.S. 193, 210 (2004). The summons in this case simply does not infringe on the Tribe's sovereignty immunity.

The majority of the Tribe's arguments assume that there is a Tribal sovereignty interest in the records at issue such that processes requiring their production might implicate the Tribe's

immunity. As detailed in our motion to deny the petition, this is simply not the case. (Motion at 9-11.) The Tribe does not dispute that the IRS has the authority to tax Cypress on any unreported income from the tribal accounts. The Tribe has no sovereign authority to prevent the IRS from doing its job. This should end the inquiry regarding tribal sovereignty.

And even if the Court determines that the Tribe has a sovereignty interest in the records, the United States as a superior sovereign clearly has the authority to examine the records. *E.g.*, *Florida Paraplegic Ass’n v. Miccosukee Tribe of Indians of Florida*, 166 F.3d 1126, 1134-35 (11th Cir. 1999). The IRS’s actions are authorized by the generally applicable laws requiring compliance with IRS summonses. *See United States v. Euge*, 444 U.S. 707, 711 (1980) (“[I]f the summons authority claimed is necessary for the effective performance of congressionally imposed responsibilities to enforce the tax code, that authority should be upheld absent express statutory prohibition or substantial countervailing policies.”). The Tribe has failed to explain why it should be exempt from these laws.

II. The summons meets all the legal requirements.

A. As detailed in our motion to deny the petition, the summons meets the four-part “prima facie” test.

1. Legitimate purpose

The IRS issued the summons for a legitimate purpose, to determine whether it could support an income tax assessment against Billy Cypress for his personal use of tribal funds. To oppose enforcement of the summons, the Tribe “bear[s] the burden to disprove the actual existence of a valid civil tax determination or collection purpose by the Service.” *See United States v. LaSalle Nat’l Bank*, 437 U.S. 298, 316 (1978), *superseded by statute as codified in* 26 U.S.C. § 7602. The Tribe does not dispute that the investigation of Cypress is a legitimate

purpose under 26 U.S.C. § 7602 and was in fact a reason that the IRS issued the summons. Therefore, the Tribe cannot meet its heavy burden.

The Tribe's allegations of improper purpose, instead of attacking the summons, focus on the manner in which the United States has defended this action. Specifically, the Tribe incorrectly claims that the United States' descriptions of the circumstances surrounding the summons somehow malign the Tribe and that the evidence the United States used to defend this action is somehow improper. (Response at 2, 15 (describing government statements as "inadmissible, highly irrelevant and incendiary"), 17.) The IRS has the authority to issue summonses to investigate "merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." *See United States v. Powell*, 379 U.S. 48, 57-58 (1964). In defending this suit *brought by the Tribe*, the United States described its suspicions leading to the summons and introduced evidence to justify its statements. Had the Tribe not brought this suit, there would be no need to describe the United States' suspicions or beliefs. That the United States defended this action proves nothing and in no way evidences an institutional purpose to impugn the Tribe. The Tribe's arguments serve only to distract from the apparent agreement that the investigation of Cypress was a legitimate purpose for issuing the summons. That legitimate purpose for issuing the summons is all the United States need establish.

Despite arguing that the propriety of the summons may be determined "on its face," the Tribe asks the Court to allow it to conduct discovery, depose the IRS agents, and hold an evidentiary hearing on this issue. (Response at 16.) Under Eleventh Circuit law, alleging an improper purpose generally entitles the Tribe to a "limited adversarial hearing" and an

explanation of the Service's reasons for issuing the summons; however, "[d]epositions, interrogatories, and the rest of the panoply of expensive and time-consuming pretrial discovery devices may not be resorted to as a matter of course and on a mere allegation of improper purpose." *Nero Trading LLC v. United States*, 570 F.3d 1244, 1249 (11th Cir. 2009) (quoting *In re E.E.O.C.*, 709 F.2d 392, 397-98 (5th Cir. 1983)). Further, "the scope of any adversarial hearing in this area is left to the discretion of the district court." *Id.* Significantly, in *Nero*, the Eleventh Circuit faulted the district court in *Nero* for inadequately explaining its decision not to hold an evidentiary hearing, not for failing to hold one. *Id.* at 1250.

The Court should make a determination in this case based on the parties' arguments and submissions. The Court should exercise its discretion to deny additional hearings and discovery based on the nature of the Tribe's allegations and the extent of the existing record. This is especially appropriate because the Tribe's allegations are less concerned with the events leading to the issuance of the summons than the manner in which the United States' has defended this suit.

2. The Tribe's other arguments

The declarations attached to the motion to deny the petition to quash establish that the IRS has made out a *prima facie* case to support its summons. It is well established that the United States may meet its burden by offering a declaration from an IRS employee. *E.g., United States v. Morse*, 532 F.3d 1130, 1132 (11th Cir. 2008). Here, the United States has offered not one but two such declarations.

The Tribe attempts to counter these declarations by arguing that they are not based on personal knowledge. As is clear from the face of the declarations, Revenue Agent Furnas and

Revenue Agent Johnson's statements are based on personal knowledge. (Furnas Decl. ¶¶ 2-6 (describing Furnas's personal involvement in the investigation of Cypress and stating "[e]verything contained in this declaration is based upon my personal knowledge"); Johnson Decl. ¶¶ 2-4 (describing Johnson's personal involvement in the investigation of Cypress and stating "[e]verything contained in this declaration is based upon my individual knowledge").) The Tribe's proposed distinction between "personal" and "individual" knowledge is preposterous. One cannot have knowledge individual to oneself without it being personal knowledge. The declarations attached to the United States' motion satisfy the legal requirements for enforcement of the summons.

The Tribe also suggests without evidentiary support that the IRS possesses a portion of the requested documents. To the contrary, the declarations clearly state that the requested material is not in possession of the IRS. (Doc. 15, Furnas Decl. ¶ 12; Johnson Decl. ¶ 12.) The Tribe's reiteration that the IRS previously requested some of the documents (Response at 18) does not establish in any way that the IRS possesses these documents. Indeed, the declarations expressly refute that any documents responsive to the present summons were produced in response to the prior summons. (Furnas Decl. ¶ 12; Johnson Decl. ¶ 12.) The Court should reject the Tribe's arguments that the IRS has failed to establish a prima facie case to support its summons.

B. The summons is not overbroad.

The summons is of appropriate breadth to determine Cypress's tax liabilities. The Tribe argues that the summons is overbroad by arguing that the summons may include years beyond the statute of limitations. (Response at 10.) The Tribe does not say what statute of limitations that it is referring to. The applicable statute of limitations for assessment of tax could be from three years to an unlimited amount of time depending on whether a situation falls within one of the exceptions in 26 U.S.C. § 6501(c) or (e). Without more information regarding any failure to report, it is impossible to know the applicable statute of limitations. The summons is not overbroad.

C. The United States did nothing improper in responding to the Tribe's lawsuit.

Though irrelevant to this Court's determination whether to deny the Tribe's motion to quash, the Tribe argues that exhibits to the United States' motion violate 26 U.S.C. § 6103. (Response at 16.) Section 6103 limits the ability of the federal government to disclose certain taxpayer return information. Section 6103 contains several exceptions including § 6103(h)(4) allowing disclosure of return information in "a Federal or State judicial or administrative proceeding pertaining to tax administration." Disclosure under § 6103(h)(4) is proper if the taxpayer is a party to the proceeding or the proceeding is in connection with determining or collecting the taxpayer's liability, if treatment of an item is directly related to the resolution of the proceeding, and if the information relates to a transactional relationship, that information directly affects resolution of an issue in the proceeding. Even assuming the challenged material qualifies as return information, the exhibits to the United States' motion plainly meet the requirements in § 6103(h)(4). The disingenuousness of these allegations is shown by the fact

that the Tribe's response to the United States' motion argues both that the United States has not done enough to support the summons *and* that it has disclosed too much.

Conclusion

The Tribe has failed to show that sovereign immunity could apply to the records at issue, or even if it did, that the Tribe could assert sovereign immunity against the IRS here. The Tribe also has not met its heavy burden of refuting the United States' showing or demonstrating that enforcement would be an abuse of the Court's process. The Court, therefore, should deny the petition to quash.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 2, 2010, I electronically filed the foregoing document with the Clerk of Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record, via transmission of Notices of Electronic Filing generated by CM/ECF or other approved means.

/s/ Robert L. Welsh
ROBERT L. WELSH