IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
Miami Division

Case No. 11-MC-23107-GOLD

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA, a federally recognized Indian Tribe,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.
_____/

MICCOSUKEE TRIBE'S RESPONSE TO UNITED STATES' MOTION TO DENY PETITIONS TO QUASH

COMES NOW Petitioner, Miccosukee Tribe of Indians of Florida (hereinafter, "the Miccosukee Tribe"), by and through the undersigned, and hereby files this Response to United States' Motion to Deny Petition to Quash. In support thereof the Miccosukee Tribe states:

I. THE MICCOSUKEE TRIBE'S PENDING APPEAL SUSPENDS THE COLLATERAL ESTOPPEL EFFECT OF THIS COURT'S FINAL JUDGMENT

Respondent argues that collateral estoppel precludes the Miccosukee Tribe from raising the issues it raised in its Petition to Quash IRS Summonses issued to Morgan Stanley, American Express, Citibank, and Wachovia because these issues were already raised and rejected by this Court in *Miccosukee Tribe v. United States*, No. 10 Civ. 23507 (hereinafter, "Miccosukee II"). In footnote 7 of the United States Motion to Deny Petition to Quash, Respondent notes that "Under federal law, the existence of a pending appeal does not affect a judgment's preclusive effect. *E.g.*, *Hunt v. Liberty Lobby, Inc.*, 707 F.2d 1493, 1497-98 (D.C. Cir. 1983). Respondent, however, fails to note the exception to the general rule, namely that a pending appeal does not

affect a judgment's preclusive effect "*unless de novo review is permitted on appeal*." *Cerbone v. County of Westchester*, 508 F.Supp. 780, 785 (1981) (citing *Huron Holding Co. v. Lincoln Mine Operating Co.*, 312 U.S. 183, 188-189; *Neeld v. National Hockey League*, 439 F.Supp. 446, 450 n.4 (W.D.N.Y. 1977); *Rodriguez v. Beame*,423 F.Supp. 906, 908 (S.D.N.Y.1976); *United States v. Nysco Laboratories, Inc.*,215 F.Supp. 87, 89 (E.D.N. Y.), *aff'd*,318 F.2d 817 (2d Cir. 1963); *International Carrier-Call & Television Corp. v. Radio Corp. of Amer.*,51 F.Supp. 156, 157 (S.D.N.Y. 1943); *Parkhurst v. Berdell*, 110 N.Y. 386, 392, 18 N.E. 123 (1888); *Engel v. Aponte*,51 A.D.2d 989, 380 N.Y.S.2d 739, 740 (2d Dep't 1976); *Klein v. Oscar Gruss & Son*,18 A.D.2d 1085, 239 N.Y.S.2d 434, 435 (2d Dep't 1963); *Duverney v. State*, 96 Misc.2d 898, 410 N.Y.S.2d 237, 245 (Ct.Cl.1978). *But cf. Duverney v. State*, 96 Misc.2d 898, 410 N.Y.S.2d 237, 246 (Ct.Cl. 1978)). [Emphasis added].

The 11th Circuit has clearly stated that it reviews *de novo* the district court's ruling on the issue of a sovereign's immunity from suit. *Fla. Paraplegic Ass'n v. Miccosukee Tribe of Indians of Fla.*, 166 F.3d 1126, 1128 (11th Cir. 1999); *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians of Fla.*, 177 F.3d 1212, 1224 (11th Cir. 1999).

The Miccosukee Tribe filed a Notice of Appeal of this Court's Order of August 2, 2011 Granting the United States Motion to Deny Petitions to Quash in case no. 10 Civ. 23507. In the appeal, case no. 11-14825, the 11th Circuit will be reviewing this Court's ruling on the issue of the Miccosukee Tribe's sovereign immunity from suit. Consequently, this Court's final judgment of August 2, 2011 will not preclude the Miccosukee Tribe from presenting the issues presented in its Petition to Quash IRS Summons.

The issues in *Miccosukee Tribe v. United States*, case no. 10 Civ. 21332 (hereinafter, "Miccosukee I"), are not identical to the issues presented in this Petition to Quash because the

immunity at issue was that of a tribal member not acting within the scope of tribal official duties and not that of the Miccosukee Tribe, a governmental entity that is federally recognized as such. Therefore, arguments presented by the Miccosukee Tribe in its Petition to Quash the IRS Summonses are not barred by the doctrine of issue preclusion because the first element of the doctrine is not met.

II. THE GOVERNMENT FAILS TO SHOW THAT TRIBAL IMMUNITY DOES NOT APPLY OR HAS BEEN WAIVED

The Government fails to address the authority cited by the Tribe. It argues that tribal immunity does not exist in this case. [D.E. No. 10 at 16]. However, as explained in the Tribe's Petition, tribal immunity exists unless abrogated by the United States' Congress or by the Tribe. [D.E. No. 1 at 9-13]. No such abrogation or waiver has occurred under the facts of this case.

The Government finding support in this Court's decisions in *Miccosukee I* and *Miccosukee II* states that tribal sovereignty and sovereign immunity cannot be invoked against the United States. There have instances where courts have found that it can. In *United States v. James*, 980 F.2d 1314, 1319 (9th Cir. 1992), the 9th Circuit found that tribal sovereign immunity barred the Government from enforcing a subpoena in federal court. In *In Re Matter of Grand Jury Subpoenas* (FGJ 97-7), (S.D. Fla. July 11, 1998)(attached as Exhibit A), the court held that Indian tribes, their agencies and employees working in their official capacity were immune from the processes of federal courts, including compulsory process, unless their immunity has been waived. *Id.* at 2 (citing *United States v. James*, 980 F.2d 1314, 1319 (9th Cir. 1992)). Indeed, the court stated that "the mere fact that a statute, …, grants jurisdiction to a federal court does not automatically abrogate the Indian tribe's sovereign immunity. *Id.* at 3 (citing *James*, 980 F.2d at 1319). Thus the government's contention that tribal sovereign immunity can never be invoked to bar a suit or legal process against the United States government is simply not true.

The IRS is bound, not just with respect to its dealings with the Tribe, but with respect to all of its functions, by the limits of its statutory authority and by the federal Constitution. Here, the IRS lacks statutory authority to initiate this action against the Tribe by seeking the Tribe's financial records. It is Congress that speaks for the United States on this matter. [D.E. No. 1 at 8-16]. Congress has not waived tribal immunity here. *Id.* at 6-16. It is inconsistent with constitutional separation of powers principles, with Supreme Court precedent, and with the tribal immunity doctrine to permit a United States agency or agent to unilaterally abrogate tribal immunity where Congress has not done so. The IRS has no place legislating tribal immunity and it may not do so here.

Moreover, as noted in the Petition, because the IRS lacks statutory authority to abrogate the Tribe's immunity, the Summonses are improper. [D.E. No. 1 at 8-13] (provisions relied upon by the IRS apply only to "persons", not Indian tribes). The term "person" in statutes presumptively excludes the sovereign. *Id.* at 10-11. In drafting the statutes that give the IRS authority to issue summonses, Congress was clearly aware of how to include Indian tribes within the scope of desired provisions. It did not do so with respect to these. If Congress intended these provisions to apply to tribes, it would have said so expressly, particularly in light of the tribal immunity doctrine, which requires express abrogation by Congress, and the presumption that "person" does not include the sovereign.

The Government cites *Chickasaw Nation v. United States*, 208 F.3d 871, 878 (10th Cir. 2000) in arguing for a blanket application of the term "person" in the IRC to Indian tribes. In *Chickasaw*, the Tenth Circuit held that the term "person" in IRC § 4401, which provides that each "'person who is engaged in the business of accepting wagers shall be liable for and shall pay' the federal wagering excise tax." *Id.* The court of appeals in *Chickasaw* relied upon the IRC

§ 7701(a)(1) definition of person to conclude that Indian tribes were subject to the § 4401 excise tax. *Id*. First, the Tenth Circuit in *Chickasaw* did not address the presumption that the term "person" excludes the sovereign. Second, even assuming that presumption was properly overcome in *Chickasaw* with respect to the excise tax, a similar analysis would have to apply here to overcome the presumption in the provisions cited by the IRS. Just because the Tenth Circuit found that the definition of persons included Indian tribes for purposes of § 4401 does not mean that the definition of person includes Indian tribes for purposes of any and all sections of the IRC. The provisions granting authority to issue summons use the word "person" and do not reference Indian tribes, despite references to Indian tribes elsewhere in the statute. The IRS has not overcome that presumption here and a statute specific analysis must be done in this case.

A fundamental factual distinction between this case and *Chickasaw*, is that the Tribe in *Chickasaw* was apparently "engaged in the business of accepting wagers," as stated in the provision. Here, the Tribe is not engaged in any activity that gives rise to a duty or liability under the provisions cited by the Government. The Tribe is not responsible for withholding or reporting the funds which the IRS improperly seeks to tax as income to individual tribal members. Thus, the IRS has no basis for investigating the Tribe on the withholding and reporting requirements cited, D.E. No. 10 at 2, because no withholding or reporting requirement attaches to the tribal distributions the IRS seeks to tax. The IRS is well aware that the taxability of tribal distributions to its members is currently being contested at the administrative level. If the Tribe's distributions to individual dependent members are held not taxable, then the Tribe does not have a withholding or reporting requirement, there is nothing to investigate, and the Summonses are clearly improper.

Moreover, to the extent this Court concludes that the "general applicability" analysis applies (as explained in the Petition, the Tribe believes it does not), D.E. No. 1 at 13-16, the Government fails to show that Congress intended the IRC provisions relied on here to apply [1] generally to Indian tribes. *Id.* As noted in the Tribe's Petition, if the "general applicability" analysis applies, then the Government must show, at minimum, that: (1) the IRC provisions cited by the IRS apply generally to Indian tribes and (2) no exception applies. *Id*. at 15. The Government has not, and cannot, show this because these provisions do not apply generally to Tribes. D.E. No. 1 at 13-16 (IRC provisions relied upon do not apply generally to Indian tribes, which are exempt from major portions of the IRC, such as federal income taxation, and which are not "persons" based on the presumption that the term "person" in statutes does not include the sovereign). Moreover, the Tribe falls under two exceptions. Specifically, as shown in the Petition, applying the IRC provisions generally to the Tribe would interfere with matters touching the Tribe's exclusive rights of self-governance by affecting the Tribe's treasury, as well as sovereign decisions such as how, and with whom, the Tribe uses, maintains or invests its own

[1] *See Squire v. Capoeman*, 351 U.S. 1 (1956) (affirming the principle that tribal distributions which come from the land are not taxable to dependent tribal members and extending the non-taxability of those distributions to an allotted tribal member because he was not yet emancipated and therefore the member's distributions from the land could not be taxed as an ordinary citizen's). The IRS's incorrect application of *Squire* (incorrectly restated in some subsequent case law), is currently in dispute in a collateral matter. However, Supreme Court precedent makes clear that tribal distributions to dependent members are not subject to federal income taxation. Thus, no federal withholding or reporting requirement attaches and the IRS has no proper basis for investigating the Tribe. *See Squire*, 351 U.S. 1 (holding that the tax exempt status of distributions to dependent tribal members [such as the Miccosukee tribal members] would extend to proceeds from the sale of timber derived from a dependent tribal member's allotted trust land); *see also Chouteau v. C.I.R.*, 38 F.2d 976 (10th Cir. 1930) (holding that restricted tribal member was not liable for income tax, whereas tribal member with certificate of competency was liable for income tax on share of tribal mineral lease); 35 Op. Atty. Gen. 107, 109 (1926) (income of unallotted tribal members derived from business conducted on the reservation is not subject to federal income tax); Dep. Interior Op., 1926 WL 2751 (1926) (income of dependent tribal members derived by tribe from its common reservation trust lands was not subject to federal income taxation); *State of New York v. United States*, 326 U.S. 572, 582 (1946) (a sovereign's own tax revenue is not subject to federal income taxation [tribal distributions to members come from the Tribe's own tax revenue, therefore taxing distributions as income improperly taxes the Tribe itself]); IRC § 61 (containing a non-exclusive list of items taxable as income, none of which resemble tribal distributions to its members).

revenue for the welfare of its members. *Id*. at 16. Additionally, it would contradict Congress' intent to promote tribal self-sufficiency and self-governance. *Id*.

The Government further argues that tribal immunity does not apply because this is not a suit "against the sovereign." D.E. No. 10 at 16. [2] However, tribal sovereign immunity is not so narrow as to apply only when a tribe is named as a defendant by a private party in a civil suit for damages. "Tribal sovereign immunity is rooted in federal common law and 'is a necessary corollary to Indian sovereignty and self-governance.'" *Burlington N. & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085, 1090 (9th Cir. 2007) (quoting *Three Affiliated Tribes of Ft. Berthold Reservation v. Wold Eng'g*, 476 U.S. 877, 890 (1986)). The immunity afforded Indian tribes has thus been recognized to encompass the immunity "'traditionally enjoyed by sovereign powers,' such as the United States." *NGV Gaming, Ltd. v. Upstream Pointe Molate, LLC*, 2009 WL 4258550, at *4 (N.D. Cal. Nov. 24, 2009) (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978)). It endures absent explicit congressional abrogation or tribal waiver. *See Santa Clara Pueblo*, 436 U.S. at 58. Accordingly, the principles of immunity from suit traditionally enjoyed by Indian tribes in the context of civil actions for monetary damages also apply to suits seeking declaratory or injunctive relief, *see id.*, and protect Indian tribes from legal processes, such as the instant Summons, *see NGV Gaming, Ltd.*, 2009 WL 4258550, at *4 ("This immunity has also been found to protect tribes and their officers from legal processes such as a subpoena or a search warrant.").

[2] As it did in the Cypress matter, the Government again cites *Dugan v. Rank*, 372 U.S. 609, 620 (1963), but fails to address the Tribe's argument that this action falls squarely under *Dugan* because "the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration." *Id*.; *see also* D.E. No. 1 at 17. As noted in the Tribe's Petition, the summonses are clearly acts against the sovereign because they compel production of the Tribe's financial information in connection with a direct investigation of the Tribe itself, and force the Tribe to take measures to protect its privacy and sovereignty. They restrain the Tribe in making financial decisions, including how to distribute its own internal revenue. As noted herein, the Tribal distributions which the IRS seeks improperly to tax come from the Tribe's own revenue and are distributed for the welfare of its dependent members. This investigation clearly affects the Tribe's treasury and public administration, thus, tribal immunity applies.

In *United States v. James*, 980 F.2d 1314 (9th Cir. 1992), for example, the Ninth Circuit upheld a claim of sovereign immunity by a non-party tribe [3] to quash a subpoena seeking documents from a tribal agency. The party seeking the tribal documents argued on appeal that "the tribe's immunity does not protect it from complying with a valid subpoena from a federal district court." *Id.* at 1319. The Ninth Circuit rejected this contention and stated: "It is clear that Indian tribes' ***immunity from suit*** remains intact 'absent express and unequivocal waiver of immunity by the tribe or abrogation of tribal immunity by Congress.'" *Id.* (quoting *Burlington N. R.R. Co. v. Blackfeet Tribe*, 924 F.2d 899, 901 (9th Cir. 1991)) (emphasis added). Finding neither an abrogation by Congress nor waiver by the tribe with respect to the tribal agency documents, the Ninth Circuit concluded that the tribe "was possessed of tribal immunity at the time the subpoena was served" and affirmed the district court's decision to quash the subpoena based upon sovereign immunity. *Id.* at 1319-20. Thus, in the context presented here – tribal immunity asserted in reference to a tribe's petition to quash a summons or subpoena – the assertion of immunity has been recognized as immunity from suit.

Similarly, in *Bishop Paiute Tribe v. County of Inyo*, the Ninth Circuit found that Inyo County and its agents violated a non-party tribe's sovereign immunity when, as part of a welfare fraud investigation against three tribal member Casino employees, they obtained and executed a search warrant against the tribe and tribal property. 291 F.3d 549, 554 (9th Cir. 2002), *vacated and remanded on other grounds sub nom. Inyo Cnty. v. Paiute-Shoshone Indians of the Bishop Cnty. of the Bishop Colony*, 538 U.S. 701 (2003). In rejecting the characterization of the execution of the warrant against the tribe as merely a "'customary inconvenience' that would accompany the service on any business," the court relied on its earlier decision in *James*:

[3] Note that here, the case for immunity is even stronger than in the cited authority because the summonses are issued pursuant to a direct investigation of the Tribe itself.

> The ruling in *James* is directly relevant to our review of this case. The *James* Court ***correctly focused on the status of Indian tribes as sovereigns and denied the federal government the authority to compel disclosure of tribal documents***. That the federal government may not pierce the sovereignty of Indian tribes, not withstanding its constitutionally preemptive authority over Indian affairs, *see* U.S. Const. art. I, § 8, carries considerable weight in our review of this case.

Id. at 558 (emphasis added). *James* and *Bishop Paiute Tribe* thus make clear that the assertion of tribal sovereign immunity by a tribe in defense to the enforcement of an investigatory summons or subpoena, such as the Tribe's assertion of sovereign immunity as a defense to the IRS summons issued for the Tribe's bank records in a direct investigation against the Tribe, is in fact an assertion of immunity from suit. *See also Cash Advance & Preferred Cash Loans v. Colorado*, 242 P.3d 1099 (Colo. 2010); *Colorado v. Cash Advance & Preferred Cash Loans*, 205 P.3d 389, 398 (Colo. App. 2008) (affirming principle that tribal sovereign immunity carries with it immunity from enforcement actions absent clear waiver or abrogation, but holding that the State could obtain documents under the statutes at issue where the Attorney General was investigating off-reservation conduct).

Finally, the fact that the present case involves documents held by a third party does not change the fact that the Tribe's assertion of sovereign immunity as a defense to the enforcement of the Summonses is an assertion of immunity from suit, the denial of which is immediately appealable. In *Catskill Development, LLC v. Park Place Entertainment Corp.*, 206 F.R.D. 78 (S.D.N.Y. 2002), the plaintiffs served a subpoena on Key Bank, N.A., a third-party record keeper, seeking financial records of a non-party tribe. While the district court judge did not reach the issue,[4] the magistrate judge, upon the tribe's objection, quashed the summons to the bank on sovereign immunity grounds. The magistrate judge stated: "Clearly, … had plaintiffs subpoenaed *the Tribe* demanding that it produce these bank records, the Tribe's sovereign immunity would

[4] The district court judge found the magistrate judge correctly quashed the subpoena because the request for documents amounted to no more than a fishing expedition, which the district court would not tolerate. *Id.* at 93.

prevent enforcement of the subpoena. The outcome does not change simply because the subpoenaed documents are held by a third party and not by the Tribe itself." *Id.* at 92 (emphasis in original). As in *Catskill*, the fact that the Tribe's records were held by a third party does not change the fact that the financial records sought belong to the Tribe, and, accordingly, principles of tribal sovereign immunity apply. *See Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 760 (holding that a tribe's immunity from suit applies both on and off the reservation and without distinction between governmental or commercial activities).[5] The IRS could not obtain these records from the Tribe itself. Therefore, it should not be able to obtain them from the Tribe's banks or other third parties.

III. THE GOVERNMENT FAILS TO MAKE THE REQUISITE SHOWING THAT THE SUMMONSES COMPLY WITH APPLICABLE LAW

The Government asserts that it has satisfied its initial burden of making a *prima facie* showing that the *Powell* requirements were met.[6] D.E. No. 10 at 10. As demonstrated below, the Government failed to meet its burden and therefore the Summonses cannot be enforced.

A. The Government Fails To Establish That Its Investigation Has A Legitimate Purpose

To sustain the Summonses, the Government bears the burden of establishing a *prima facie* case that the Summonses were issued for a legitimate purpose. For purposes of an IRS summons, a legitimate purpose is limited to: (1) ascertaining the correctness of any return; or (2)

[5] The Tribe brought its Petition to Quash pursuant to 25 U.S.C. 7609(b)(2)(A), which provides the only means by which the Tribe was guaranteed an opportunity to object to the summons. The Government may contend, as it has previously, that the Tribe's claim of sovereign immunity is not "immunity from suit" because the Tribe is not seeking the dismissal of a suit brought by the Government, but rather the Tribe is the party that filed an action pursuant to I.R.C. § 7609 to quash a summons. Such argument ignores the fact that it was the Government that brought an action by serving a summons for tribal records in the possession of a third party. The Petition to Quash under § 7609 merely provides the Tribe a means by which to assert its sovereign immunity as a defense to the Government's action against it. Moreover, the case law discussed above clearly indicates that tribal sovereign immunity cannot be construed so narrowly and applies equally in the context of administrative subpoenas.

[6] In *United States v. Powell*, 379 U.S. 48 (1964), the Court held that in order to sustain an IRS civil summons, the government must establish a *prima facie* case that: (1) the investigation has a legitimate purpose; (2) the summoned materials may be relevant to that purpose; (3) the information sought is not already within the IRS' possession; and (4) the IRS followed administrative steps required under the Internal Revenue Code. *Id.* at 57-58.

determining the liability of any person for any internal revenue tax. *United States v. Richards*, 631 F.2d 341, 345 (4th Cir. 1980) (citing 26 U.S.C. § 7602). If a summons is issued for any other purpose, it exceeds the authority of the Government, *id.*, and lacks a proper purpose. *See Nero Trading LLC v. United States Dep't of Treasury, IRS*, 570 F.3d 1244, 1250 n.4 (11th Cir. 2009). Enforcement of a summons issued for an improper purpose would result in an abuse of this Court's process. *See Powell*, 379 U.S. at 57-58. Such are the circumstances here. The Government argues that the Tribe's Petitions to Quash should be denied so that it can obtain all of the Tribe's confidential financial records even though the Tribe is a sovereign Indian nation that is not subject to federal income taxation, and the United States has attendant trust obligations which are owed to the Tribe.

In *Powell*, the Supreme Court recognized that "an abuse would take place if the [IRS] summons had been issued for an improper purpose such as to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation." *Id.* at 58. Subsequent decisions have explained those parameters. *See, e.g., United States v. Caltex Petroleum Corp.*, 12 F. Supp. 2d 545, 554 (N.D. Tex. 1998) (improper purpose includes circumstances in which the IRS planned to unlawfully disclose the summoned documents and includes circumstances in which the government engages in fraud, deceit or trickery); *United States v. Deak-Perera & Co.*, 566 F. Supp. 1398, 1402 (D.D.C. 1983) (IRS committed fraud in gathering information used to issue the summons). *See also SEC v. ESM Gov't. Sec.*, 645 F.2d 310, 317 (5th Cir. 1988) (fraud, deceit and trickery constitute an abuse of process); *Richards*, 631 F.2d at 345-46 (which upheld the trial court's limitation of questioning of the taxpayer's president because failure to do so would: (1) allow the IRS to

venture into testimony for which it had no legitimate purpose; and (2) would result in an abuse of the court's process). These grounds are not exhaustive:

> We find the notion that passage of I.R.C. § 7602(b) and (c) created a bright-line rule precluding a determination of improper motive in the absence of a Justice Department referral unpersuasive. First, we are aware of no Eleventh Circuit precedent recognizing such a rule. Second, such a rule implies that improper motive or purpose can only mean the issuance of a summons in order to conduct a criminal investigation. Our reading of improper motive or purpose is not so narrowly circumscribed.

See Nero Trading, 570 F.3d at 1250 n.4 (internal citation omitted).

Here, the IRS issued the Summonses in an effort to obtain confidential financial (and other sensitive records) of the Tribe, posited with the Tribe's third party record keepers, for a supposed administrative examination as to whether the Tribe: (a) failed to "withhold taxes from certain payments of American Indian casino profits" pursuant to 26 U.S.C. 3402(r); (b) failed to backup withhold under 26 U.S.C. § 3406, to the extent the Tribe did not possess a payee's tax identification number prior to the Tribe making a payment and for non-employee compensation; (c) failed to report on Form 945 backup withholding or withholding on certain payments of American Indian casino profits; and, (d) failed to file information returns "including Form 1099-MISC for payments made in the course of its trades or businesses." DE 10 at 2. In so doing, the Government cites several cases as authority for the Summonses now before the Court. However, review of the Government's own argument reveals that none of these authorities provide support for the Summonses here.

None of the authorities cited by the Government suggests that the Government has the unbridled authority to demand production of every single piece of paper and every byte of information that relates to the Tribe in connection with an administrative examination. The Government seeks shelter from its improper Summonses based on the Tenth Circuit's decision in *Chickasaw Nation v. United States*, 208 F.3d 871, 873 (10th Cir. 2000). However, that case

concerned a "claim for a refund of federal wagering and occupational excise taxes," none of which are at issue here.[7] Additionally, the holding and the implications of the holding in *Chickasaw* are in direct conflict with the holding and the implications of the holding in *James*. In order to protect Indian sovereignty and tribal sovereign immunity, this Court should adopt the approach and holding of *James*.

The IRS campaign was to spread misinformation to try the Tribe in the court of public opinion to force the Tribe to settle a collateral issue. Agent Furnas testified that he taught a class to the Enforcement Division of the National Indian Gaming Commission during which he discussed the examination of the Tribe using materials that made their way to what he said was "the public record" and Miami Herald (but which he admitted in deposition, as discussed above, contained false or misleading information).

> I did in that [class Agent Furnas taught to the National Indian Gaming Commission Enforcement Division] discuss an article that was in the Miami Herald, which described some of the credit card expenses that were involved, and I neither confirmed nor denied information in that article, except to the extent that it's become public record, which as far as I could tell the whole article was based on public record.

Furnas Depo. 64:16-22. Such actions further maligned the Tribe and perpetuated false allegations, which obviously is not a proper purpose.

The impropriety of such disclosures is rendered more acute because: (1) as the Government is well-aware this matter is far from resolved and is currently being appealed internally within the IRS; and (2) even if such information were either relevant or admissible the Government should have clarified the situation to avoid misleading the reader and/or filed this

[7] Indeed, Agent Furnas admitted during his deposition that he is not aware of any "[c]ases, IRS information, material, IRS publications, revenue rulings," or anything else "that would support the position of the [Internal Revenue] [S]ervice and [his] position in seeking th[e] information [sought by the Summonses] that's been published where tax revenues of a Tribe are being distributed to members." Deposition of Revenue Agent James M. Furnas, January 12, 2011 at 39 ("Furnas Depo.").

material under seal. The Government's failure to do so, provides further support to the Tribe's argument that the issuance of the Summonses, and the Government's conduct related thereto, was for an improper purpose, constitutes an abuse of authority and abuse of this Court's process.

For these reasons alone, the Summonses should be quashed.

B. The Government Fails To Establish That The Summoned Material Is Relevant To A Legitimate Purpose

To satisfy its obligation to show that the Summonses seek information that is relevant to a legitimate purpose, the Government states that this Court has already found that an examination to determine if the Miccosukee Tribe has met its withholding and reporting requirement is a legitimate purpose. DE 10 at 11-12. Assuming for purposes of argument only that the Tribe's sovereign immunity does not protect the Tribe from the Government's improper and invasive attempt to "determin[e] the applicability of the Internal Revenue Code," it does not mean that Tribal sovereignty and tribal sovereign immunity should not be a consideration when applying the Powell factors. Any analysis of what records are relevant must include the nature of the Miccosukee Tribe as a sovereign. Additionally, a review of the Summonses reveals that they specifically do not seek information that would throw light on "distributions from the Tribe's casino profits."

The Government has admitted that the third party record keepers could not provide information regarding whether the Tribe obtained taxpayer identification numbers. *See* Furnas Depo. at 29:9-11 ("The third-party record-keepers aren't going to be able to tell me whether the Tribe obtained taxpayer identification numbers."). This goes directly to the Government's allegations on the issue of withholding, which they admit would not apply as long as the Tribe has obtained taxpayer identification numbers from the payees prior to payment. *See id.* at 29:15-18. *See also id.* at 34:18-20 ("If the Tribe was not required to withhold on non-wage payments,

then there would be no requirement to file Form 945."). Nor has the Government adequately explained how the third party credit card record keepers could provide information regarding whether 1099s were issued for distributions. The IRS can certainly determine from its own records whether 1099s were filed with regard to distributions. In addition, the IRS is aware from random samples given by the Tribe to the IRS with regard to the prior audits that 1099s were filed with regard to vendors. Thus, there is no basis to justify the invasive review of the Tribe's credit card records that the IRS seeks, and there is no support for the unbridled search of Tribal records simply to fulfill this Agent's vivid, but incorrect, imagination. It also has not explained how "credit and/or background investigations" that may have been performed if the Tribe obtained a loan, or any "records of rental fees paid" on any safe deposit boxes that the Tribe may have obtained are relevant to a legitimate examination of the Tribe's "reporting and withholding obligations."

C. The Government Fails To Establish That The IRS Is Not Already In Possession Of The Requested Documents

The Government also fails to establish that the IRS is not already in possession of at least a portion of the requested documents. The Declaration of Agent Furnas states that the IRS is not in possession of the summoned information. DE 16-1, ¶¶ 16, 26, 36, 46. However, review of the Summonses reveals that they plainly seek information that should already be in the IRS's possession. The summons issued to Morgan Stanley, for example, requests copies of Forms 1099 issued to the Tribe. *See* DE 1-3 at p. 4, ¶¶ 4 & 7. So do the summonses issued to Citibank, American Express, and Wachovia. *See* DE 1-3 at pp. 1-3, ¶¶ 1-2, 5-7, filed under Case No. 11-23111 and consolidated herein (Citibank Summons); DE 1-1 at pp. 5-6, ¶¶ 1-2, 5-7, filed under Case No. 11-23129 and consolidated herein (American Express Summons); DE 1-2 at pp. 5-6, ¶¶ 1-2, 5-7, filed under Case No. 11-23512 and consolidated herein (Wachovia Summons). The

filing of these Form 1099s would be made as a general business practice by their issuer, and there is no allegation that Morgan Stanley, Citibank, American Express or Wachovia issued Form 1099s to the Tribe and then failed to transmit them to the IRS.[8] The Government's failure to admit that it already possesses these documents and its persistent refusal to attempt narrowing the overbroad Summonses to at least eliminate the information that it already has in its possession provides further support to the Tribe's allegations of harassment and overbreadth of the Summonses.[9]

IV. THE SUMMONSES ARE CLEARLY OVERBROAD

The Government argues that the Summonses are not overly broad. DE 10 at 17-18. According to the Government, this Court already decided that identical summonses were not overbroad. *Id.* at 18. In the context of a summons seeking records of an Indian tribe, not just records of a regular taxpayer, the Court should take special care to protect the tribe from the release of records that go beyond the scope of the examination. The unique nature of the entity being examined must influence this Court application of the Powell factors. The entity is not a corporation or business but a sovereign government. The application of the Powell factors to this case must reflect the unique and sensitive consequences that will result from such an examination. The ability of the Miccosukee Tribe to be self sufficient is at stake.

A summons which is overbroad or seeks irrelevant information is unenforceable. *See, e.g., United States v. Monumental Life Ins. Co.*, 440 F.3d 729 (6th Cir. 2006). Such are the circumstances here.

[8] *See, e.g,* Furnas Depo. at 104:16-18 ("Q . . . Is it your experience that these institutions [summoned by the Government] would issue 1099s? A These institutions issue 1099s, yes, ..."); *Id.* at 105:2-4 ("I'm not auditing Smith Barney to determine if they filed 1099s that they should have filed").

[9] *See, e.g.*, DE No. 10 at 18 (wherein the Government claims that "[t]here is no way to narrow the summons (sic)").

Review of the Summonses reveals that they are so broadly drawn that they can only be construed as seeking unfettered access to all of the financial account information of the Tribe, including the contents of all its sensitive and confidential communications concerning the finances of its sovereign government. *See, e.g.*, DE No. 10 at 4 (summons to Morgan Stanley demands all: "[r]ecords maintained of transactions for or communications with the Miccosukee Tribe, including all notes, memoranda (informal or formal), correspondence, financial statements, background or credit investigations, and records identifying the stock transfer agent and dividend disbursing agent"), D.E. No. 10 at 5-6 (summons to Citibank demands production of: "all documents reflecting correspondence or other communications regarding the Miccosukee Tribe"), *Id.* (summons to American Express demands production of: "all documents reflecting correspondence or other communications regarding the Miccosukee Tribe"), *Id.* (summons to Wachovia demands production of: "all documents reflecting correspondence or other communications regarding the Miccosukee Tribe").[10]

The Summonses issued to Citibank, American Express and Wachovia also seek "all loan documents, including but not limited to applications, financial statements, . . . credit and/or background investigations, . . . loan correspondence files and internal bank memoranda" and "all

[10] The Instructions contained in the summonses broadly define the term "Miccosukee Tribe" as follows:

> The term "Miccosukee Tribe" refers to the Miccosukee Tribe of Indians of Florida, whose address is Box 440021, Tamiami Station, Florida 33144, and includes any entity, corporate or otherwise, owned, operated or controlled, whether wholly or in part, by the Miccosukee Tribe or officials or representatives of the Miccosukee Tribe, as well as any other entity in which the Miccosukee Tribe may have a financial or proprietary interest, excluding the Miccosukee Tribe of Indians of Florida Indian Bingo, also known as Miccosukee Indian Gaming, whose records we are not requesting.

DE 1-3 at 3, ¶ 1 (Morgan Stanley Summons). The same language is found in the summonses issued to Citibank, Wachovia and American Express.

In addition, the Instructions state: "this request is for all documents pertaining to the Miccosukee Tribe in any capacity, whether held jointly or severally, as trustee, fiduciary, custodian, executor, guardian and/or beneficiary. [and] [t]his request encompasses all open and/or closed accounts." DE 1-3 at 2, ¶¶ 5 (Morgan Stanley Summons). The same language is found in the summonses issued to Citibank, Wachovia and American Express.

safe deposit box documents, including but not limited to contracts, access records, and records of rental fees paid." DE 1-1 at 6, filed under Case No. 11-23111 and consolidated herein (Citibank Summons) (identical language is found in American Express Summons and Wachovia Summons). Assuming, *arguendo*, that the IRS is examining whether the Tribe met its withholding and reporting obligations for the 2010 tax year, these materials are far outside the scope of a legitimate examination. Quite simply, the "credit and/or background investigations" that may have been performed if the Tribe obtained a loan, and any "records of rental fees paid" on any safe deposit boxes that the Tribe may have obtained are in no way relevant to an examination of whether the Tribe "met its withholding and reporting obligations for the 2010 tax year." *Cf.* DE 10 at 11. Additionally, the Government fails to explain how every communication between the Miccosukee Tribe and Morgan Stanley, Wachovia, Citibank and American Express is relevant to a legitimate examination. The Government has presented nothing to counter the obvious overbroad and improper demand for production of confidential information regarding the Tribe's sovereign governmental operations that is obviously not relevant to any legitimate examination of "withholding and reporting." *Cf.* D.E. No. 10 at 11.

CONCLUSION

Based upon the foregoing, the Miccosukee Tribe of Indians of Florida moves this Honorable Court to enter an Order granting the Tribe's Petitions to Quash and denying the United States Motion to Deny Petitions to Quash.

Respectfully submitted this 17th day of November 2011.

/s/Bernardo Roman III
Bernardo Roman III, Esquire
Fla. Bar No. 0002739
Tribal Attorney, Miccosukee Tribe of Indians of Florida
P.O. Box 440021, Tamiami Station

Miami, Florida 33144
Tel: (305) 894-5214
Fax: (305) 894-5212
E-mail: bromanlaw@bellsouth.net

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 17, 2011, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that on November 17, 2011 the foregoing document is being served on all counsel of record or pro se parties identified on the attached Service List via NEF by CM/ECF.

/s/Bernardo Roman III
BERNARDO ROMAN III

SERVICE LIST

Miccosukee Tribe of Indians v. United States
Case No. 10-MC-23107-GOLD (Lead Case)
United States District Court for the Southern District of Florida

William E. Farrior
Robert L. Welsh
United States Department of Justice
Tax Division
Civil Trial Section, Southern Region
PO Box 14198
Washington, DC 20044
william.e.farrior@usdoj.gov
Robert.l.welsh@usdoj.gov
Sent via NEF by CM/ECF

Noticing AUSA
usafls-civ@usdoj.gov
Sent via NEF by CM/ECF