UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 1:11-mc-23107-ASG

MICCOSUKEE TRIBE OF INDIANS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

_____/

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

The United States submits this reply in support of its motion to deny the Miccosukee Tribe's four petitions to quash summonses that the IRS issued in its examination into whether the Tribe met its withholding and reporting obligations for the 2010 tax period. As noted in the United States' motion, the summonses at issue are identical to those this Court previously considered and refused to quash in *Miccosukee Tribe of Indians v. United States (Miccosukee II)*, No. 10-cv-23507 (S.D. Fla.) except they seek records for a different tax year, 2010. Additionally, the Tribe makes many of the same arguments that this Court previously rejected in *Miccosukee Tribe of Indians v. United States (Miccosukee I)*, No. 10-21332, 730 F. Supp. 2d 1344 (S.D. Fla. 2010).

Proceedings involving IRS summonses are to be summary in nature. The Tribe has not provided any reason for the Court to reconsider its previous rulings. Therefore, the Tribe's petitions to quash should be summarily denied to allow the IRS to carry out its duties imposed by Congress.

I. The Tribe's Renewed Arguments in its Response Still Lack Merit

The Tribe maintains, contrary to this Court's prior decisions, that it may assert sovereign immunity to protect against the IRS summonses to third-party financial institutions. In support of this assertion, the Tribe cites *Bishop Paiute Tribe v. County of Inyo*, 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 County*, 538 U.S. 701 (2003), *United States v. James*, 980 F.2d 1314 (9th Cir. 1992), and *Catskill Development, LLC v. Park Place Entertainment Corp.*, 206 F.R.D. 78 (S.D.N.Y. 2002). As we stated previously in *Miccosukee II*, the court in *Catskill* addressed the Ninth Circuit's decisions in *James* and *Bishop Paiute Tribe*. 206 F.R.D. at 86-87. The *Catskill* court explained that there is a distinction between the *James* line of cases, where a tribe seeks to quash a subpoena for documents sought by a private litigant (or a state), and cases where "the federal government itself subpoenaed the tribe." *Id.* at 88. The *Catskill* court concluded that "[a] tribe cannot assert sovereign immunity against the United States." *Id.* The *Catskill* court cited the Ninth Circuit's decision, two years after *James*, which arrived at the same conclusion. *Id.* (citing *Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1459-60 (9th Cir. 1994)). Regardless whether a tribe may assert sovereign immunity to quash a subpoena by a private litigant or a warrant by a state, the Tribe may not assert sovereign immunity to quash the IRS summonses at issue here.[1]

[1]The Tribe additionally cites and attaches to its response an apparently sealed order issued in the matter of a grand jury subpoena. (Doc. 13 at 3, Attachment A (citing *In Re Matter of Grand Jury Subpoenas*, FGJ 97-7 (S.D. Fla. Jul. 11, 1998).) Due to Fed. R. Crim. P. Rule 6(e), we are constrained from discussing the sealed order of the United States District Court for the Southern District of Florida in a grand jury matter.

In its response the Tribe persistently ignores the Court's prior findings applicable to this case. Specifically, in support of its assertion that sovereign immunity applies despite the summonses being issued to third-party financial institutions, the Tribe argues that the summonses greatly infringe on tribal sovereignty. (Doc. 13 at 6-7 & n.2.) The Court gave the Tribe an opportunity to demonstrate this point at the evidentiary hearing in *Miccosukee II*. Following the evidentiary hearing, the Court issued an order rejecting the Tribe's contentions, stating:

> 26. I do not find persuasive the Tribe's argument that "[t]he 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, and force the Tribe to take measures to protect its privacy and sovereignty."
>
> 27. As Agent Furnas testified at the evidentiary hearing, he has no authority to tell the Tribe how to collect or distribute revenue, nor is he making any attempt to do so.
>
> 28. The authority that the IRS possesses in regard to this investigation is merely to instruct the Tribe on any reporting and withholding requirements.

Miccosukee II, 2011 WL 3300164, at *13 (citations omitted). Thus, the Court found contrary to the Tribe's arguments that the nature of the summonses did not infringe on the Tribe's ability to govern itself.

The Tribe additionally mischaracterizes the testimony of Agent James Furnas and raises repeatedly rejected allegations of impropriety. The Tribe argues that the existence of a dispute regarding the Tribe's distributions in the 2000 through 2005 tax years render these summonses improper. (Doc. 13, at 12-13.) The Tribe cites deposition testimony of Agent Furnas in an attempt to lend credence to its arguments in that dispute. (Doc. 13, at 13 n.7.) In contrast, the Court declined to hold, following the evidentiary hearing in *Miccosukee II*, that Agent Furnas's beliefs regarding the Tribe's arguments rendered the summonses improper. *See Miccosukee II*,

2011 WL 3300164, at *8 & n.8 ("Agent Furnas testified at the evidentiary hearing that he is 'convinced that [the Tribe's] position does not have any merit, that it does not meet the criteria of the type of revenues that can be distributed to tax members without it being taxable income to those members.'"). Additionally, the Tribe argues that prior assertions and articles published in the Miami Herald regarding whether the Tribe delivered cash to Tribal members in armored cars or SUV's with police escorts suggest impropriety. The Court previously considered the Tribe's allegations and rejected them.[2]

II. The Tribe is Precluded from Contesting Factual Matters Established in Prior Litigation

The Tribe argues that it is not precluded from raising an issue currently on appeal reviewed de novo. (Doc. 13, at 2.) The Tribe, however, does not contest that issue preclusion is otherwise applicable. *E.g.*, *Cerbone v. County of Westchester*, 508 F.Supp. 780, 785 (S.D. N.Y. 1981) ("[B]oth the federal and the New York rules hold that, unless de novo review is permitted on appeal, the pendency of an appeal does not suspend the collateral estoppel effect of an otherwise final judgment."); *see I.A. Durbin, Inc. v. Jefferson Nat. Bank*, 793 F.2d 1541, 1549

---

[2]The Court found as follows:

> Regarding the armored car allegations, Agent Furnas determined that the Tribe distributed cash to tribal members, the armored car went to the reservation as far as the casino, and Agent Furnas eventually learned that from there it was taken in SUVs with armed police escorts to the reservation and distributed to tribal members.

Id. at *16. The Court ultimately determined "The Tribe's argument that 'the Government's actions here have been aimed at harassing and maligning the Tribe to force it to submit to the Government's improper demands' is not persuasive." *Id* at *17.

(11th Cir. 1986). In this case, the "order enforcing [the] IRS summons will not be reversed unless clearly erroneous." *Nero Trading, LLC v. United States*, 570 F.3d 1244, 1248 (11th Cir. 2009). Thus, while the Tribe's assertion of sovereign immunity may be reviewed de novo, the Tribe is precluded from contesting the Court's remaining determinations including that the investigation had a legitimate purpose, the relevancy of the documents sought to that legitimate purpose, and that the summonses are not overbroad. Accordingly, if the Court does not have any reason to reconsider its legal conclusions or the applicability of tribal sovereign immunity here– and we submit that it does not– the Court should summarily deny the petitions to quash.

Conclusion

The Tribe 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 petitions to quash.

Respectfully submitted,

JOHN A. DICICCO
Principal Deputy Assistant Attorney General

/s/ William E. Farrior
ROBERT L. WELSH
S.D. Fla. Bar No. A5500117
WILLIAM E. FARRIOR
S.D. Fla. Bar No. A5501479
Trial Attorney, Tax Division
U.S. Department of Justice
Post Office Box 14198
Ben Franklin Station
Washington, D.C. 20044
Telephone: (202) 514-6068
Facsimile: (202) 514-9868
Robert.L.Welsh@usdoj.gov
William.E.Farrior@usdoj.gov

Of Counsel:

WILFREDO A. FERRER
United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that on November 28, 2011, 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