

HON. BENJAMIN H. SETTLE

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA,

Plaintiff,

v.

PUYALLUP TRIBE OF INDIANS,

Defendant.

Case No.: 3:13-CV-05122-BHS

DEFENDANT PUYALLUP TRIBE OF
INDIANS' MOTION FOR SUMMARY
JUDGMENT

NOTE ON MOTION CALENDAR:
December 20, 2013

Defendant Puyallup Tribe of Indians ("Tribe") respectfully moves the Court for an order on summary judgment under Fed. R. Civ. P. 56 ruling that an IRS levy notice issued to the Tribe under 26 U.S.C. §§ 6331 and 6332 does not attach to a future per capita payment from the Tribe to its members unless the Tribe receives the notice after the Tribe's governing body adopts a formal Resolution authorizing a payment.

This Motion is based on the set of Stipulated Facts and attached exhibits submitted by the parties (Dkt. 19). Those facts set forth all of the information the parties consider necessary for argument and determination of the issue here presented to the Court.

INTRODUCTION

This case involves a very narrow issue concerning the reach of a levy notice issued by the Internal Revenue Service. Tribal law authorizes per capita payments to each Tribal member. Under applicable case law, a two-part test determines whether an IRS levy notice attaches to a future per capita payment. In this case, that two-part test provides that Tribal law determines what rights, if any, a Tribal member has in future per capita payments; federal law then determines whether those rights qualify as “property” or “rights to property” subject to a levy notice.

Tribal law is very clear. The Tribe has no legal or even moral obligation to make any per capita payment. It is a discretionary choice by the Tribal Council, the Tribe’s governing body, whether a payment will be made. A Tribal member thus has no right to receive a per capita payment – in fact there may never be another per capita payment – unless and until the Tribal Council adopts a resolution authorizing a particular payment. Before that point, a Tribal member does not have a property right.

If, however, the Court does find that a property right exists under Tribal law, federal law holds that a property right is subject to an IRS levy notice only if the Tribe’s obligation to make a payment and therefore the Tribal member’s right to receive the payment is fixed and determinable. The authorities interpreting that phrase consistently hold that payments with the characteristics of the Tribe’s per capita payments are contingent and not fixed. They are therefore not subject to an IRS levy notice.

RELEVANT STIPULATED FACTS

The parties have submitted with their simultaneous motions for summary judgment a set of Stipulated Facts (Dkt. 19). The parties agree that their stipulation includes all of the facts needed by the parties to present and for the Court to decide the narrow issue in this case. The critical facts are as follows. (Paragraph references are to the Stipulated Facts.)

The IRS levy notices. Joshua Turnipseed is an enrolled member of the Tribe who has an outstanding federal tax liability. ¶¶ 3, 4. In an effort to collect that obligation, the IRS sent a levy notice directing the Tribe to turn over Turnipseed's per capita payments to the IRS. ¶¶ 16, 17. Several years later, the IRS sent another levy notice for a different unpaid tax obligation of the same taxpayer. ¶ 25.

On both occasions the Tribe determined whether it had any property or obligation to the taxpayer at the time it received the levy notice. The Tribe did not have any such property or obligation on either occasion and therefore notified the IRS that it had no money to convey to the IRS. ¶ 22.

The Tribe's per capita payments. The Tribe operates a casino on the Puyallup Indian Reservation from which it generates net gaming revenue. The Tribe operates the casino in compliance with the requirements of the Indian Gaming Regulatory Act, 25 U.S.C. § 2701, et seq., and a compact between the Tribe and the State of Washington. Stipulated Facts, Exhibits 1a and 1b.

1 The Tribe makes per capita payments to its enrolled members using gaming
2 revenue as well as others funds, ¶¶ 5, 6, under a program authorized by and whose
3 procedures are spelled out in Tribal law. ¶¶ 34-37. The payments are gifts to the
4 membership made in the discretion of the Tribal government; they are payments the
5 Tribe has no obligation, moral or legal, to make. ¶ 34, 36. The payments are not
6 compensation for services, federal payments, unemployment benefits, worker's
7 compensation benefits, or public assistance; eligibility for the payments is not based on
8 need. ¶¶ 7, 8.

10 The Tribe has made the same size per capita payment (\$2,000) to each Tribal
11 member each month since May, 2002. ¶ 10. The membership of the Tribe has increased
12 since that point from about 2800 to more than 4600. ¶ 38. The amount required to make
13 the monthly per capita payments has thus undergone an increase of the same magnitude.

15 The Tribal Council, the Tribe's governing body, decides each month whether a per
16 capita payment will be made. It bases that decision on legal factors, dictated in large part
17 by federal law, and on financial, budgetary considerations. ¶ 35. While the money for the
18 payments is still in the hands of the Tribe it is "not subject to seizure, execution, levy,
19 garnishment, forfeiture, lien or encumbrance for any debt or obligation." ¶ 36; Section
20 1.08.160(a) of the Tribe's Per Capita Code, Exh. 14 to Dkt. 19.

I. SUMMARY JUDGMENT IS APPROPRIATE

Summary judgment is appropriate “if there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed.R.Civ.P. 56(a); *Sentry Select Ins. Co. v. Royal Ins. Co. of America*, 481 F.3d 1208, 1216 (9th Cir. 2007); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The parties have stipulated to the facts relevant to the issue in this case and agree that there is no genuine issue of material fact. Dkt. 19, p. 1. Disposition by summary judgment is appropriate if a stipulation of facts by the parties leaves no material fact in dispute. *State Farm Mutual Automobile Insurance Co. v. Pan*, 2011 WL 4944976 (W.D.Wash. 2011). Where, as here, the parties have filed simultaneous motions for summary judgment, the Court rules on each motion separately and individually. *Fair Hous. Council of Riverside County, Inc. v. Riverside Two*, 249 F.3d 1132, 1136 (9th Cir. 2001); *State Farm Mutual, supra*.

II. LEGAL FRAMEWORK FOR IRS LEVIES

The Internal Revenue Code authorizes the IRS to pursue unpaid tax obligations by executing on property of the taxpayer that is in the hands of third parties. A levy notice is a typical way the IRS pursues this route. 26 U.S.C. §6331(a) and §6332(a) provide that authority.

If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary to collect such tax ... by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person ... [§6331(a)]

1
2 Except as otherwise provided in this section, any person in possession of
3 (or obligated with respect to) property or rights to property subject to levy
4 upon which a levy has been made shall, upon demand of the Secretary,
5 surrender such property or rights (or discharge such obligation) to the
6 Secretary... [§6332(a)]

7 The Code makes clear that a levy notice applies only to property and rights to
8 property that a third party possesses at the time it receives the notice. “Except as
9 otherwise provided in subsection (e), a levy shall extend only to property possessed and
10 obligations existing at the time thereof.” 26 U.S.C. §6331(b).

11 The IRS by regulation defines the property, rights to property, and obligations to
12 which levy notices apply.

13 Except as provided in § 301.6331-1(b)(1) with regard to a levy on salary or
14 wages, a levy extends only to property possessed and obligations which
15 exist at the time of the levy. Obligations exist when the liability of the
16 obligor is fixed and determinable although the right to receive payment
17 thereof may be deferred until a later date.

18 26 C.F.R. §301.6631-1(a)(1).

19 Case law confirms the limitations on a levy notice. *Tull v. United States*, 69 F.3d
20 394, 397 (9th Cir. 1995), citing with approval, *In re Hawn*, 149 B.R. 450
21 (Bankr.S.D.Tex. 1993) (“[A]n IRS levy will *not* reach a taxpayer's claim to receive
22 payments in the future where the taxpayer does not, at the time of the levy, have a fixed
23 and determinable right to those payments. For example, the IRS has ruled that a levy will
24 *not* reach unvested, contingent rights to future payments.” 149 B.R. at 457).

A. A Two-Part Test Determines Whether an IRS Levy Attaches to Per Capita Payments

We look initially to state law to determine what rights the taxpayer has in the property the Government seeks to reach, then to federal law to determine whether the taxpayer's state-delineated rights qualify as "property" or "rights to property" within the compass of the federal tax lien legislation.

Drye v. United States, 528 U.S. 49, 58 (1999). *Accord*, *Fourth Inv. LP v. United States*, 720 F.3d 1058, 1067 (9th Cir. 2013). A two-part test thus results: (1) the courts look first to the jurisdiction that creates a right to determine the nature of the property or right that is being targeted by a levy notice, which is state law in most cases including *Drye* and *Fourth Inv. LP*; (2) the inquiry is then whether federal law includes those “state-delineated” rights within the “compass of the federal tax lien” provisions. *Drye*, *supra*. (The test originated in cases prior to *Drye*. *See*, *United States v. Bess*, 357 U.S. 51 (1958); *United States v. Aquilino*, 363 U.S. 509 (1960); *United States v. National Bank of*

1 *Commerce*, 472 U.S. 713 (1985). We will refer to the legal standard as the test under
 2 *Drye*, or words to that effect.

4 **B. Part One of the Test**

5 **1. Tribal Law Determines the Nature of the Rights Created in Per Capita** 6 **Payments Under the First Part of the Test**

7 Where rights are created, if at all, by an Indian tribe and its laws, tribal law is the
 8 applicable law for determining the nature of the property rights under the first part of the
 9 test. The test typically looks to state law for that inquiry because it is usually state law
 10 that has created the rights under consideration. *Aquilino v. United States*, 363 U.S. 509,
 11 513 (1960). On occasion, however, the property interest has been created by a different
 12 source. If the property right in a particular case is created by federal law, then federal
 13 rather than state law is used for the first step of the test. *In Re Airadigm Communications,*
 14 *Inc.*, 519 F.3d 640, 650 (7th Cir. 2008). In *Airadigm*, the Court ruled that because the
 15 property at issue, an FCC license, is “a creature of federal law,” federal law applies to
 16 define “the FCC’s retained interest in that license.” *Id.* at 651.

18 In the same manner, if the property right is created by tribal law, then tribal rather
 19 than state law is used for the first step of the test. *In re Fess*, 408 B.R. 793 (W.D.Wis.
 20 2009); *In re DeCora*, 396 B.R. 222 (W.D.Wis. 2008). The Bankruptcy Court in *DeCora*
 21 applied tribal law to determine the extent of a creditor’s claim on the right to receive
 22 future per capita payments of a Ho-Chunk Nation member.
 23
 24

1 The tribal interest in regulating distribution of tribal assets to tribal
 2 members is a type of internal regulation within tribal sovereignty upon
 which state law is usually not permitted to intrude.

3 In a subsequent case, *In re Fess, supra*, the court cited *Airadigm* and *DeCora* and
 4 again ruled that tribal law applies to determine whether future per capita payments are a
 5 property interest which becomes property of a bankruptcy estate. *Id.* at 798. The *Fess*
 6 court held that the debtor had merely an expectancy of receiving future per capita
 7 payments that did not rise to the level of a legal property right.

8
 9 In our case, Puyallup Tribal law applies to determine the nature of the property or
 10 rights to property belonging to Turnipseed on the date of the levy. The Tribe's "interest in
 11 regulating distribution of tribal assets to tribal members is a type of internal regulation
 12 within tribal sovereignty upon which state law is usually not permitted to intrude." *In re*
 13 *DeCora*, 396 B.R. at 225. Here, state law should not intrude to define the Tribal
 14 member's property interest in per capita payments in a manner inconsistent with Tribal
 15 law.
 16

17
 18 **2. Puyallup Tribal Law Does Not Give a Tribal Member Any Enforceable**
 19 **Property Right to a Per Capita Payment Until, at the Earliest, the**
Tribal Council Has Authorized the Payment by Formal Resolution

20 The Tribe's gaming laws have their genesis in the Indian Gaming Regulatory Act
 21 (IGRA), 25 U.S.C. § 2701 et seq., a Congressional Act that authorizes the conduct of
 22 gaming by Indian tribes as a means of promoting tribal economic development. § 2702.
 23 IGRA requires that a tribe adopt an ordinance or resolution applicable to its gaming
 24

1 activities and the disposition of gaming revenues and obtain approval of that law from the
2 Bureau of Indian Affairs. § 2710. IGRA specifically prohibits a tribe from making per
3 capita payments with gaming revenue unless it first has an approved plan to allocate
4 gaming revenue. § 2710(b)(3).

5
6 As required by IGRA, the Puyallup Tribe enacted a Per Capita Ordinance, Chapter
7 1.08 of the Puyallup Tribal Code. The ordinance states that the Puyallup Tribal Council
8 will direct the Tribe to make per capita payments when the Council “feels it is
9 appropriate to do so” but the “Tribe is not obligated by federal or Tribal law or by any
10 other source to make” per capita payments. § 1.08.040. The Ordinance also provides that
11 “funds for a scheduled per capita payment, **while still in the possession of the Tribe**
12 **before distribution**, shall not be subject to seizure, execution, levy, garnishment,
13 forfeiture, lien or encumbrance for any debt or obligation.” § 1.08.160(a) (emphasis
14 supplied). See, Exhibit 14 to Stipulated Facts, Dkt. 19.

15
16 The Tribe also adopted its current Revenue Allocation Plan (RAP) to comply with
17 IGRA. See, Exhibits 1a and 1b to Stipulated Facts, Dkt. 19. The RAP grants full
18 discretion of the Tribal Council to make determinations as to whether per capita
19 payments will be made and the amount of the payments. Stipulated Facts, ¶ 14.

20
21 Tribal law is absolutely clear that there is no advance certainty whether a per
22 capita payment will be issued, and there is no obligation on the Tribe or its governing
23 body to issue a payment. ¶¶ 34-37 of the Stipulated Facts. “[W]hen circumstances permit
24 and the Council feels that it is appropriate to do so, it will direct that the Tribe make a per

capita payment to each Tribal member..." ¶ 36, quoting section 1.08.040 of the Tribe's Per Capita Ordinance, Exhibit 14 to the Stipulated Facts, p. 3. Puyallup Tribal members therefore have no right to require the Tribe to make a per capita payment, and no right to such a payment at least until the Tribal Council in its discretion chooses to authorize such a payment. Although Turnipseed has received per capita payments on a regular basis, Puyallup Tribal law does not establish a property right to which a levy can attach until distribution. If the Court finds that no property right exists under Puyallup Tribal law, the inquiry ends. As the court concluded in a similar situation in *Fess*, 408 B.R. at 799, and *DeCora*, 396 B.R. at 225, a tribal member does not have a property interest in the per capita payments until they are distributed.

C. Part Two of the Test

1. If the Court Finds That a Property Right Exists Under Tribal Law, Then the Second Part of the Test Under *Drye* Requires Application of Federal Law

In the event the Court finds that, under Puyallup Tribal law, Turnipseed's expectancy of receiving future per capita payments does rise to the level of a legal property right, the second part of the test under *Drye* is invoked. The issue is whether under federal law the property interest is subject to the levy on the date of the levy notice. This second inquiry is "a question of timing implicating the present obligation requirement in § 6331(b)". *U.S. v. Hemmen*, 51 F.3d 883, 888 (9th Cir. 1995).

1 The Treasury Regulation to § 6331 states that the levy only extends to obligations
2 that exist at the time of the levy and that obligations exist at the time of the levy if the
3 obligation is “fixed and determinable.” 26 C.F.R. § 301.6631-1(a)(1). The obligation to
4 pay is fixed if the acts giving rise to the obligation have all occurred. *United States v.*
5 *Hemmen, supra; Tull v. United States, supra.*
6

7 For example, where a corporation intends to pay a dividend, the obligation to pay
8 the dividend, and thus the shareholders’ right to receive the dividend, is not fixed until
9 the declaration date. The declaration date is generally the date on which the corporation
10 announces the next dividend payment. With respect to the levy of a shareholder’s
11 dividend, the IRS resolved the timing question in Revenue Ruling 75-554. In that ruling,
12 the IRS made clear that a levy issued to collect corporate dividends does not extend and
13 attach to the dividend until the corporation declares that there will be a dividend, because
14 before the declaration date, the obligation is not fixed and determinable.
15

16 When a notice of levy is served before the declaration date, the liability of
17 the obligor is not fixed and determinable. Therefore, since the corporation
18 has no obligation which exists at the time of the levy, the Service could not
19 assert liability against the corporation under section 6332 of the Code.

20 Accordingly, the inquiry under the second part of the test turns on whether the
21 Puyallup Tribe’s per capita payments are fixed and determinable.
22
23
24

1 **2. A Tribal Member's Interest in Future Per Capita Payments From the**
 2 **Tribe is Not a Fixed and Determinable Right to Which an IRS Levy**
 3 **Attaches**

4 The Puyallup Tribe's per capita payments fail to meet the requirement that the
 5 property right be "fixed." There is no certainty that a payment will be made. Neither
 6 federal nor tribal law requires that the Tribe make per capita payments. The decision
 7 whether to make a payment is within the discretion of the Tribe's governing body, the
 8 Tribal Council. Stipulated Facts, ¶ 14. The authorization is not finalized until the Tribal
 9 Council adopts a resolution. Stipulated Facts, ¶ 12.

10 The Tribe does not have an obligation to pay Turnipseed until after the Tribal
 11 Council decides to make a per capita payments to its members. As the Tribe's Per Capita
 12 Ordinance explicitly spells out, it is within the discretion of the Tribe's governing body to
 13 determine each month whether a payment will be made that month. A Tribal member
 14 does not have a legal right to a payment, and the Tribe has no obligation to make a
 15 payment, unless and until the Tribal Council has made the decision to issue a per capita
 16 payment for a particular month. On the dates the IRS issued its levies to the Tribe, the
 17 Tribe was not holding funds payable to Turnipseed as a result of having decided to make
 18 per capita payments. The decision to make per capita payments had not yet occurred.
 19 There does not exist at any point a fixed right to any future payments.

20 It is the obligation of the Tribe that must be fixed in order to put the payments in
 21 this category, according to Treasury's own regulations. The Tribe, however, has no such
 22 obligation here. If the Tribal Council decided not to make a per capita payment next
 23 24

1 month, there would be no legal basis for a Tribal member to require a payment. There is
2 no legal right to a per capita payment; the Tribe does not have a legal obligation to make
3 the payment.

4 Although the per capita payments have been made every month since 2002, that
5 could change at any time. As the Stipulated Facts indicate, the Tribe is under both
6 financial and legal constraints. Federal law and/or financial reality may at any time
7 require the Tribe to reduce or eliminate a payment or payments.
8

9 An example is the impact of the Tribe's RAP. It limits per capita payments to a
10 share of gaming revenue from 40 to 55%. Dkt. 19, ¶ 37. As the Tribal membership
11 continues to grow, the total funds required to make the payments increases. ¶ 38. It is an
12 entirely realistic and imminent possibility that the payments may have to change or be
13 halted. Thus, because future per capita payments are contingent on many factors
14 including the Tribe's finances, the right to receive future payments is not fixed.
15

16 In certain circumstances, a stream of payments payable to a taxpayer can be
17 levied. Social Security benefits present such a case. Because the taxpayer has an
18 unqualified statutory right to receive the payments, the right is fixed and an IRS levy
19 notice attaches. *Bowers v. Commissioner*, 861 F.Supp.2d 921, 923 (C.D. Ill. 2012). Our
20 case is not such a circumstance. The critical distinction is whether the stream of payments
21 was a fixed obligation on the date of the levy was served.
22

23 Case law confirms that a taxpayer's interests in such payments do not constitute a
24 fixed and determinable property right. In *Tull, supra*, the levy did not attach to the sale

1 proceeds because the sale had not yet occurred when the levy was issued. On the date of
2 the levy, it was not even known whether a sale would occur. The auction house had no
3 obligation to pay the taxpayer any amount and a levy does not attach to after-acquired
4 property.

5
6 The best analogy to the Tribe's per capita payments, at least for the purpose of this
7 issue, is a stock dividend, the subject of Revenue Ruling 75-554, *supra*. Per capita
8 payments cannot be paid until the Tribal Council adopts a resolution in much the same
9 manner that dividends will not be paid until a corporate board declares a dividend.

10 Moreover, regular payments do not constitute fixed payments. Per capita payments
11 have been paid every month for 11 years and the amounts of each monthly payment have
12 been the same. But the test is neither whether the payments are regular nor whether the
13 payments are likely to occur. The test under federal law is whether the payments are
14 fixed. There does not exist at any point a fixed right to future payments. Although
15 Turnipseed has received per capita payments on a regular basis, he does not have a right
16 any particular payment until the Tribal Council authorizes a payment. Thus, the levies did
17 not attach to Turnipseed's future per capita payments because he does not have an
18 unqualified right to those payments.
19
20

21 CONCLUSION

22 An IRS levy notice issued to the Tribe under 26 U.S.C. §6331(a) does not attach to
23 a future per capita payment from the Tribe to its member unless the Tribe receives the
24

1 notice after the Tribe's governing body adopts a formal Resolution authorizing a
2 payment.

3 DATED this 22nd day of November, 2013.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of November, 2013, I filed a copy of the foregoing with the Court through the ECF system, which will send copies of the filing to:

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