14-13843-EE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES,

Petitioner-Appellee

v.

COLLEY BILLIE, AS CHAIRMAN, MICCOSUKEE GENERAL COUNCIL, MICCOSUKEE TRIBE OF INDIANS OF FLORIDA,

Respondent-Appellant

ON APPEAL FROM THE ORDER OF
THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA

BRIEF FOR THE APPELLEE

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United States v. Colley Billie, as Chairman, Miccosukee General Council, Miccosukee Tribe of Indians of Florida

(11th Cir. – No. 14-13843-EE)

CERTIFICATE OF INTERESTED PERSONS

AND CORPORATE DISCLOSURE STATEMENT

C-1 of 2

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, counsel for the United States hereby certify that, to the best of their knowledge, information, and belief, the following persons and entities have an interest in the outcome of this appeal:

Ashford, Tamara W., Acting Assistant Attorney General, Tax Division, Dept. of Justice

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Furnas, James M., Revenue Agent, Internal Revenue Service

United States v. Colley Billie, as Chairman, Miccosukee General Council, Miccosukee Tribe of Indians of Florida

(11th Cir. – No. 14-13843-EE)

CERTIFICATE OF INTERESTED PERSONS

AND CORPORATE DISCLOSURE STATEMENT

C-2 of 2

Gold, Alan S., United States District Judge

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McAliley, Chris M., Magistrate Judge

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STATEMENT REGARDING ORAL ARGUMENT

Pursuant to 11th Cir. R. 28-1(c) and Fed. R. App. P. 34(a), counsel for the United States respectfully inform this Court that they believe that oral argument may be helpful to the disposition of this appeal in the event that the Court has questions that are not fully answered in the briefs.

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STATEMENT OF JURISDICTION

1. Jurisdiction in the District Court

The United States instituted this proceeding by filing a petition to enforce an IRS administrative summons. (Doc. 1.)[1] The District Court had jurisdiction pursuant to Sections 7402(b) and 7604(a) of the Internal Revenue Code of 1986 (26 U.S.C.) (the Code or I.R.C.)

2. Jurisdiction in the Court of Appeals

The District Court entered an order enforcing the summons. (Doc. 26.) The order was a final, appealable order that disposed of all the claims of all the parties in this case. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

3. Timeliness of the appeal

The District Court entered its order on August 13, 2014. (Doc. 26.) Appellant filed a notice of appeal to this Court on August 25, 2014. (Doc. 27.) The notice of appeal was timely under 28 U.S.C. § 2107(b).

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[1] "Doc." References are to the documents contained in the record on appeal, as numbered by the clerk of the District Court. "Br." references are to appellant's opening brief.

IN THE UNITED STATES COURT OF APPEALS
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No. 14-13843-EE

UNITED STATES,

Petitioner-Appellee

v.

COLLEY BILLIE, AS CHAIRMAN OF THE MICCOSUKEE GENERAL COUNCIL, MICCOSUKEE TRIBE OF INDIANS OF FLORIDA,

Respondent-Appellant

ON APPEAL FROM THE ORDER OF
THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF FOR THE APPELLEE

STATEMENT OF THE ISSUE

Whether the District Court correctly ordered enforcement of an Internal Revenue Service administrative summons where the Indian tribe opposing the summons did not dispute that the United States had established a *prima facie* case for enforcement and argued only that an Indian tribal court, and not the District Court, had jurisdiction to decide the matter or, alternatively, that the representative of the tribe to

whom the summons was issued did not have possession or control of the summoned documents because the tribe had not given him written authorization to produce the documents.

STATEMENT OF THE CASE

(i) Course of proceedings and disposition in the court below

The United States instituted this proceeding on March 12, 2014, to enforce an IRS administrative summons issued to Colley Billie as a representative of the Miccosukee Tribe of Indians of Florida (the Tribe). (Doc. 1.) The District Court (Judge Altonga) ordered the summons enforced. (Doc. 26.) Billie filed a notice of appeal (Doc. 27) and sought a stay of the enforcement order from the District Court during the pendency of the appeal. (Doc. 31.) The District Court denied the stay request on September 24, 2014 (Doc. 34), and this Court followed suit on October 28, 2014.

(ii) Statement of the facts

a. Administrative efforts to obtain information for completion of the examination

IRS Revenue Agent James Furnas is investigating whether the Tribe has complied with its withholding and reporting obligations, and whether the Tribe satisfied its tax liabilities, for the taxable periods

ending December 31, 2006, December 31, 2007, December 31, 2008, December 31, 2009, and December 31, 2010. (Doc. 1-1, ¶ 2.) The examination began in 2005, after the IRS learned of allegations that the Tribe regularly distributed payments to its members without withholding on or reporting the payments to the IRS. (*Id.* at ¶ 4.) Based in part on these allegations, the IRS began an examination to determine whether the Tribe was meeting its reporting and withholding requirements for the years 2000 through 2005, and subsequently expanded the examination to include the periods at issue in the instant summons (*i.e.*, 2006 through 2010). (*Id.* at ¶ 7.)

The purpose of the examination is to determine whether the Tribe made required withholdings under I.R.C. § 3406 (Backup Withholding) and/or I.R.C. § 3402(r) (Extension of Withholding to Certain Taxable Payments of Indian Casino Profits) and whether the Tribe filed required forms reporting the required withholdings, payments to members of the Tribe, and payments of non-employee compensation to service providers. In addition, the examination seeks to determine whether any of the Tribe's failures to withhold or file forms are subject to penalties pursuant to I.R.C. § § 6651, 6721 and 6722. (*Id.* at ¶¶ 8-9.)

As a result of previous summonses, the IRS obtained records from third-party financial institutions showing over $300 million in payments to members of the Tribe and service providers for which it appeared that the Tribe should have filed information returns (Forms 1099). (*Id.* at ¶ 7.) Although the third-party records demonstrated significant noncompliance, they were not sufficient to show the complete amount and nature of the payments. (*Id.* at ¶ 7.) Accordingly, Agent Furnas attempted to obtain additional information from the Tribe by issuing informal Information Document Requests ("IDRs") and through telephonic requests. On May 18, 2012, after these informal efforts failed to produce the necessary information from the Tribe, Agent Furnas issued an administrative summons to Billie, as Chairman of the Miccosukee General Council, to give testimony and to produce for examination books, papers, records and other data relevant to the investigation. (Doc. 1-1, ¶ 10.) Agent Furnas served the summons by leaving an attested copy with Billie's wife, Consuela Billie, at Billie's last and usual place of abode, on June 27, 2012. (Doc. 1-1, ¶ 11.)

Instead of complying with the summons, the Tribe filed a petition to quash it in the United States District Court for the Southern District

of Florida (S.D. Fla. No. 12-22638).[2] (Doc. 1-1, ¶ 15.) The court dismissed the petition to quash for lack of jurisdiction on February 11, 2013,[3] and the Tribe did not appeal the court's decision. After dismissal, Agent Furnas notified Billie that certain of the documents sought in the summons were no longer required because Billie had produced them in response to a summons in a different matter. (Doc. 1-1, ¶¶ 14, 16.A.) Agent Furnas thereafter repeatedly contacted Billie, counsel for the Tribe, or both to arrange a time for Billie to appear in response to the summons, but to no avail. (Doc. 1-1, ¶ 16.) Accordingly, in March 2014, the United States filed the instant petition to enforce the summons. (Doc. 1.)

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[2] The Tribe also commenced a suit (S.D. Fla. No. 13-22802) in the same court on August 5, 2013, against the United States, Agent Furnas, the Secretary of the Interior, the Secretary of the Treasury, and the United States Attorney General, seeking various forms of relief. In dismissing the complaint, the court characterized the allegations as arising "from an ongoing disagreement and investigation between the Internal Revenue Service and the Tribe concerning the applicability of certain tax laws to the Tribe and its members' compliance with their federal tax obligations." *Miccosukee Tribe of Indians of Florida v. Jewel*, 996 F. Supp. 2d 1268, 1270 (S.D. Fla. 2013).

[3] Congress has authorized persons other than the person summoned to petition to quash certain "third-party" summons. *See* I.R.C. § 7609. It has not authorized the person to whom the summons is issued to file a petition to quash.

b. Judicial proceedings

The United States' petition was supported by a declaration from Agent Furness which stated: (1) the purpose of investigation for which the summons was issued, (2) that Billie's testimony and the requested documents may be relevant to that purpose, (3) that with the exception of certain documents specified in the declaration, the IRS did not already possess the summoned information, and (4) that the administrative steps required by the Internal Revenue Code for issuing a summons were followed. (Doc. 1-1.) After the reviewing the petition and supporting declaration, the District Court entered an order to show cause directing Billie to obey the summons or show cause in writing by April 4, 2014, why he should not be ordered to do so. (Doc. 3.)

After obtaining several extensions of time, Billie filed a 4-page response on July 23, 2014. (Docs. 9, 11, 15, 18, 19.) In his response, Billie contended (1) that the District Court lacked jurisdiction to enforce the summons because it involved "matters of tribal self governance and requires interpretation of tribal law," and (2) despite his position as Chairman of the Tribe's General Council, he lacks possession or control of the records unless the General Council approves release of the

records. (Doc. 19 at 2.) Billie further asserted that the General Council had passed a resolution on June 12, 2014 – approximately two years after the service of the summons – denying a request from the Tribe's "Business Council" regarding compliance with the summons. (Doc. 19 at 3-4; *see also* Doc. 19-1.)

The District Court ordered the summons enforced. (Doc. 26.) It subsequently denied Billie's motion for a stay of enforcement. (Doc. 34.) Billie now appeals from the order enforcing the summons.

(iii) Statement of the standard or scope of review

"Whether a court has jurisdiction over a particular case is a question of law subject to plenary review." *United States v. Maduno*, 40 F.3d 1212, 1215 (11th Cir. 1994). Whether tribal sovereign immunity bars enforcement of an IRS summons directed to a tribe is a legal issue reviewed de novo. *Florida Paraplegic Ass'n v. Miccosukee Tribe of Indians of Florida*, 166 F.3d 1126, 1128 (11th Cir. 1999); *Miccosukee Tribe of Indians of Florida v. United States*, 698 F.3d 1326, 1330 (11th Cir. 2012).

SUMMARY OF ARGUMENT

The Internal Revenue Service is investigating whether the Tribe has complied with various tax obligations that Congress has imposed upon it. After the Tribe would not provide information relevant to the investigation, the IRS issued an administrative summons to the Chairman of the Tribe's General Council, Colley Billie, requiring him to provide testimony and produce relevant tribal documents. After Billie failed to comply with the summons, the United States filed a petition to enforce the summons supported by a declaration from the investigating agent making out a prima facie case for enforcement of the summons. The District Court then issued a show-cause order to Billie. In responding to the show-cause order in his capacity as Chairman, Billie did not dispute that the United States had established a prima facie case for enforcement and argued only that the District Court lacked jurisdiction and, alternatively, that he lacked possession or control of the summoned documents. The District Court correctly ordered the summons enforced.

The Tribe's jurisdictional argument asserts that Indian tribal courts, and not the District Court, have jurisdiction to determine

whether the summons can be enforced. It is misconceived. Congress has provided jurisdiction to the district courts to enforce IRS summonses in I.R.C. §§ 7402(b) and 7604(a), and that jurisdiction extends to a summons issued to an Indian tribe. Moreover, longstanding Supreme Court precedent establishes that Congress has plenary authority to limit, modify, or eliminate the powers of self-governance that the Indian tribes otherwise possess. Consequently, neither tribal law nor tribal sovereign immunity can eliminate the jurisdiction that Congress has provided to the district courts over summons enforcement actions.

The Tribe's lack-of-possession-or-control defense fares no better. The Tribe bore the burden of providing credible evidence establishing that Billie lacked possession or control of the summoned documents. It did not meet its burden. The United States adduced a declaration showing that Billie had already produced some of the summoned documents pursuant to a summons in a different matter, and the Tribe did not provide any evidence showing that Billie did not have similar possession or control over the remaining summoned documents or that someone other than Billie had such possession or control. The Tribe

instead maintains that it can make laws preventing its officers from providing tribal records in response to an IRS summons. Thus, the Tribe incorrectly assumes that it has the right to negate the congressionally enacted summons statutes. Again, its argument ignores longstanding Supreme Court precedent.

The Tribe's argument asserting that enforcing the summons violates the congressional policy of protecting tribal self-determination has no merit. Congress has the ability to impose tax obligations on Indian tribes and, through legislation, has done so to a limited extent. Congress has also provided the IRS with the summons power as a means of ensuring that the persons upon whom it imposes tax obligations, including Indian tribes, live up to those obligations. When a tribe attempts to make laws interfering with the use of the summons power, it is defying congressional tax policy that has been implemented by legislation, and is not promoting tribal self-governance.

The District Court properly enforced the summons and its decision should be affirmed.

ARGUMENT

The District Court Correctly Ordered Enforcement of the Summons

A. The IRS's summons authority

Congress has conferred upon the Secretary of the Treasury the responsibility to make accurate determinations of tax liability and has given the Secretary broad authority to conduct investigations for that purpose. The Commissioner of Internal Revenue, as the Secretary's delegate, is charged with the duty "to make the inquiries, determinations, and assessments of all taxes" imposed by the Internal Revenue Code, including assessable penalties. I.R.C. § 6201(a); *United States v. Clarke*, 134 S. Ct. 2361, 2365 (2014); *Donaldson v. United States*, 400 U.S. 517, 523-24, 91 S. Ct. 534, 538-39 (1971). *See also* I.R.C. §§ 6301, 7601.

The summons power is the means provided by Congress to allow the Commissioner to discharge this investigative responsibility. Section 7602(a) of the Code authorizes the Commissioner, "[f]or the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax, . . . or collecting any such liability, . . . [t]o examine any

books, papers, records or other data which may be relevant or material to such inquiry" and to summon any person to appear and produce such documents and to give relevant testimony. In addition, § 7602(b) further specifies that a summons may be issued for "the purpose of inquiring into any offense connected with the administration or enforcement of the internal revenue laws."

The IRS has the authority to summon not only the person liable for the tax or required to perform the act, but also "any officer or employee of such person," or "any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary may deem proper." I.R.C. § 7602(a)(2); *Clarke*, 134 S. Ct. at 2365 n.1. The Supreme Court has "consistently construed congressional intent to require that if the summons authority claimed [under Section 7602] 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." *United States v. Euge*, 444 U.S. 707, 711, 100 S. Ct. 874, 878 (1980).

To obtain enforcement of a summons, the United States need only make a "minimal" initial showing that (1) the summons was issued in good faith, *i.e.*, that the investigation is being conducted for a legitimate purpose; (2) the information sought may be relevant to that purpose; (3) the information sought is not already within the Commissioner's possession; and (4) the administrative steps required by the Internal Revenue Code have been followed. *United States v. Powell*, 379 U.S. 48, 57-58, 85 S. Ct. 248, 255 (1964); *Clarke*, 134 S. Ct. at 2365; *United States v. Medlin*, 986 F.2d 463, 466 (11th Cir. 1993). "[A]bsent contrary evidence, the IRS can satisfy that standard by submitting a simple affidavit from the investigating agent." *Clarke*, 134 S. Ct. at 2367. *Accord La Mura v. United States*, 765 F.2d 974, 979 (11th Cir. 1985).

If the district court determines that the United States has made its *prima facie* showing for enforcement, then the court should issue an order to the summoned party to show cause why the summons should not be enforced. *United States v. Bichara*, 826 F.2d 1037, 1039 (11th Cir. 1987); *see also United States v. Newman*, 441 F.2d 165, 169-70 (5th Cir. 1971). The district court acquires personal jurisdiction over the

summoned party by the service of the show-cause order and the petition for enforcement of the summons. *Bichara*, 826 F.2d at 1039.

The party opposing enforcement then bears the burden of "disprov[ing] one of the four elements of the government's *prima facie* showing or convinc[ing] the court that enforcement of the summons would constitute an abuse of the court's process." *La Mura*, 765 F.2d at 979-80. *See also Miccosukee Tribe of Indians of Florida v. United States*, 698 F.3d at 1331. That burden is a "'heavy one.'" *United States v. Leventhal,* 961 F.2d 936, 940 (11th Cir. 1992) (quoting *United States v. Balanced Fin. Mgmt., Inc.*, 769 F.2d 1440, 1444 (10th Cir. 1985)).

B. The United States made out a *prima facie* case for enforcement of the summons

In the proceedings below, the United States adduced a declaration from the investigating agent demonstrating that the four elements necessary to make out a *prima facie* case for enforcement had been satisfied (Doc. 1-1) and thereafter the District Court entered an order requiring the Tribe to show cause why the summons should not be enforced (Doc. 3). In responding to the show-cause order, the Tribe did not dispute that the United States established all of the requisite elements for enforcement of the summons through the agent's

declaration. (Doc. 19.) And, in its brief on appeal, the Tribe does not argue that it has refuted any of the four elements. Accordingly, the United States established a *prima facie* case for enforcement in the proceedings below.

C. The Tribe has not established any basis to preclude enforcement of the summons

As noted above, the Tribe did not challenge the United States' *prima facie* case in the proceeding below. Instead, it asserted two arguments. First, the Tribe argued that the District Court "lack[ed] jurisdiction to enforce the Internal Revenue Service's summons . . . because it involves matters of tribal self governance . . .." (Doc. 19 at 2.) According to the Tribe, the "Petition to Enforce the IRS Summons present[ed] an intra tribal dispute" that "must . . . be adjudicated in tribal court" (*id.* at 3). Second, the Tribe argued, in the alternative, that its Chairman, Billie, did not have possession or control of the summoned documents because "Tribal records can only be released by written authorization of the general council, which was denied by the Miccosukee General Council, the Tribe's legislative body on June 12, 2014." (*Id.* at 4.) The Tribe renews these arguments on appeal. (Br. 7-8, 10). As we demonstrate below, they have no merit.

1. The District Court had jurisdiction to order compliance with the summons

Section 7602(a)(2) of the Internal Revenue Code authorizes the IRS to summons not only the person liable for tax, but also "any other person the ... [IRS] may deem proper" to appear and produce records and give testimony under oath as may be relevant to the inquiry. I.R.C. § 7602(a)(2). Section 7402(b) of the Code provides the districts courts with jurisdiction to compel "any person . . . summoned under the internal revenue laws" to provide the summoned testimony or to produce the summoned records. I.R.C. § 7402(b). Using substantially identical language, § 7604(a) of the Code provides the same grant of jurisdiction to the district courts. I.R.C. § 7604(a). The term "person" for purposes of §§ 7402(b) and 7604(a) is defined in I.R.C. § 7701(a)(1) and has been interpreted to include Indian Tribes and tribal organizations *Chickasaw Nation v. United States*, 208 F.3d 871, 878-79 (10th Cir. 2000), *aff'd*, 534 U.S. 84, 122 S. Ct. 528 (2001).[4] *See also Flandreau Santee Sioux Tribe v. United States*, 197 F.3d 949, 952 (8th

[4] The petitioner in *Chickasaw* did not seek certiorari on the Tenth Circuit's interpretation of I.R.C. §7701(a)(1). Thus, the Supreme Court, in affirming the Tenth Circuit, did not address I.R.C. § 7701(a)(1)

Cir. 1999) (tribe is a "person" for purposes of I.R.C. §§ 6421 and 6675); *Sokaogon Chippewa Cmty. Tribal Council v. United States*, 959 F. Supp. 1032, 1037 (E.D. Wis. 1997) (tribe is "person" for purposes of I.R.C. § 6672). Thus, the Tribe is a "person" for purposes of §§ 7402(b) and 7604(b), and the District Court had jurisdiction to enforce a summons issued to its representative seeking tribal records.

The Tribe in its brief below and in its brief on appeal does not contend that §§ 7402(b) and 7604(b) do not provide the District Court with jurisdiction.[5] It instead argues (Br. 7) that "the IRS summons [at

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[5] The Tribe is aware of this Court's decision in *Miccosukee Tribe of Indians of Florida v. United States*, 698 F.3d 1326, which implicitly recognizes that the Tribe is a "person" for purposes of §§ 7402(b) and 7604(a). There, the Tribe brought petitions to quash Internal Revenue summonses under I.R.C. § 7609. In order to do so, the Tribe had to be a "*person* who is entitled to notice." I.R.C. § 7609(b)(2)(A) (emphasis added). And, this Court could not have exercised subject matter jurisdiction over the petitions unless the Tribe was a "person." *See* I.R.C. § 7609(h) (conferring subject matter jurisdiction over proceedings brought under § 7609(b)(2)). Thus, this Court in *Miccosukee Tribe of Indians of Florida* tacitly determined that the Tribe was a "person" for purposes of § 7609. *See Stoll v. Gottlieb*, 305 U.S. 165, 171–72, 59 S. Ct. 134 (1938) ("Every court in rendering a judgment tacitly, if not expressly, determines its jurisdiction over the parties and the subject matter.") There is no basis for interpreting the term "person" in I.R.C. §§ 7402(b) and 7604(a) differently from the term "person" in the I.R.C. § 7609(h). All of these Code sections are provisions providing the

(continued…)

issue] presents an intra tribal dispute over which the district court did not have jurisdiction." According to the Tribe, whether the summons can be enforced "requires the interpretation [of] written and unwritten Miccosukee Law and Customs." (*Id.*) In other words, the Tribe maintains that tribal law and customs are superior to the laws of the United States and that a tribal court must decide whether tribal law and customs allow Billie to comply with the summons. (Br. 8.)

The Tribe's argument is not well founded because it ignores longstanding Supreme Court precedent establishing that Congress has plenary authority to limit, modify or eliminate the powers of local self-governance which Indian tribes otherwise possess. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56, 98 S. Ct. 1670, 1675-76 (1978). While Indian tribes retain attributes of sovereignty, including the power of regulating their internal and social relations, they remain "subject to ultimate federal control." *United States v. Wheeler*, 435 U.S. 313, 322, 98 S. Ct. 1079,1085 (1978); *see also Three Affiliated Tribes of*

(…continued)
district courts with jurisdiction over petitions involving challenges to IRS summonses.

Fort Berthold Reservation v. Wold Engineering, 476 U.S. 877, 890-91, 106 S. Ct. 2305, 2313 (1986) (an Indian tribe has a "peculiar 'quasi-sovereign' status" that "is subject to plenary federal control."). Here, Congress has determined that Tribes are subject to certain Federal tax obligations as well as to the IRS summons power and the jurisdiction of district courts to enforce IRS summonses. *See, supra* at pp. 16-17, *infra* at p. 25 n.8. Tribal law may not be used to circumvent this Federal law.

At bottom, the Tribe's argument is little more than a recycling of the tribal sovereign immunity argument that this Court rejected in *Miccosukee Tribe of Indians of Florida v. United States*, 698 F.3d 1326. That case involved the same IRS examination as the instant case. After Agent Furnas issued summonses to several third-party financial institutions seeking records of the Tribe's financial activities, the Tribe filed petitions to quash the summonses, arguing primarily that tribal sovereign immunity barred the summonses. The District Court rejected the Tribe's sovereign-immunity argument and dismissed the petitions.

In affirming the District Court's dismissal, this Court held that the Tribe's sovereign immunity argument failed for two reasons. First, this Court held that tribal sovereign immunity did not apply because

United States sought information from third-parties and did not seek to compel the Tribe to do anything. 698 F.3d at 1330-31. Alternatively, this Court held that tribal sovereign immunity could not be asserted against the United States, explaining as follows:

> Even if the summonses could be considered suits against the Tribe, tribal sovereign immunity would not bar a suit by the United States. Although Indian tribes "remain a separate people, with the power of regulating their internal and social relations," they are no longer "possessed of the full attributes of sovereignty." The Supreme Court has described tribal sovereign immunity as having passed to the United States to be held for the benefit of the tribes, much like the tribal lands. Indian tribes may not rely on tribal sovereign immunity to bar a suit by a superior sovereign.

Id. at 1331 (citations omitted). *Accord, Florida Paraplegic v. Miccosukee*, 166 F.3d 1126, 1134-35 (11th Cir. 1999) (although the Tribe was immune from suit brought under the Americans with Disabilities Act by disabled-advocacy groups, the United States was not barred from bringing a civil action against the Tribe to compel compliance); *E.E.O.C. v. Karuk Tribe Housing Auth.*, 260 F.3d 1071, 1075 (9th Cir. 2001) (administrative summons for employment records enforceable against a tribe); *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174, 182 (2d Cir. 1996) (OSHA not barred from levying fines on tribe-owned construction business); *United States v. Red Lake Band of Chippewa Indians*, 827

F.2d 380, 383 (8th Cir. 1987) (suit by the United States under the Federal Records Act for return of tribal court records not barred by tribal sovereign immunity).

In sum, the Tribe's contention that the District Court lacks jurisdiction to enforce the summons has no merit. Sections 7402(b) and 7604(a) of the Code provide the court with jurisdiction to enforce the summons, and neither tribal law nor tribal sovereign immunity can eliminate that jurisdiction.

2. The Tribe failed to meet its heavy burden of showing that Billie, its Chairman, lacked both possession and control of the summoned records

As noted above, p. 15, in addition to asserting a jurisdictional defense (which we showed above is meritless), the Tribe asserted, in the alternative, a defense claiming that Billie, the Chairman of its General Council, lacked possession or control of the summoned documents. (Doc. 19 at 3-4.) The Tribe fares no better on this defense.

Lack of possession or control of summoned documents is a valid defense to an application for a summons enforcement order seeking the production of documents. *United States v. Rylander*, 460 U.S. 752, 757, 103 S. Ct. 1548, 1552 (1983); *United States v. Lawn Builders of New*

England, Inc., 856 F.2d 388, 393 (1st Cir. 1988); *United States v. Huckaby*, 776 F.2d 564, 567 (5th Cir. 1985); *United States v. Barth*, 745 F.2d 184, 187 (2d Cir. 1984). The defense, however, must be established. As the party resisting enforcement, the Tribe bore "the burden of producing credible evidence that [Billie] does not possess or control the documents sought." *Huckaby*, 776 F.2d at 567. *Accord Lawn Builders of New England, Inc.*, 856 F.2d at 393. The Tribe did not meet its burden.

The United States adduced a declaration from Revenue Agent Furnas stating that the IRS had obtained some of the summoned documents from Billie "[p]ursuant to a summons in a different matter." (Doc. 1-1 at 8.)[6] Thus, the evidence in the record shows that Billie had possession and control over at least some of the summoned documents. Because the Tribe did not adduce any evidence showing that Billie did not have the same possession and control over the remaining summoned documents, it failed to meet the heavy burden that was upon

[6] After those documents were produced, Agent Furnas notified Billie in writing that the Tribe did not need to produce them again in connection with the instant summons. (Doc. 1-1, ¶ 16.A.)

it. This failure was amplified by the fact that the Tribe did not adduce any evidence showing that someone other than Billie had possession or control of the summoned documents. *See also* Doc. 19-1, where the Miccosukee General Council refers to Billie as the "Chairman and Records Custodian for the Miccosukee Tribe."

Rather, the Tribe based its defense on the assertion that "Tribal records can only be released by written authorization of the general council, which was denied by the Miccosukee General Council, the Tribe's legislative body on June 12, 2014."[7] (Doc. 19 at 4.) Thus, the Tribe suggests that tribal law can trump the Federal statutory obligation to respond to the IRS summons. The Tribe's argument is not well founded.

As discussed above, Congress has authorized the IRS to summon a representative of the Tribe and require him to provide testimony and

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[7] The June 12, 2014 tribal resolution upon which the Tribe relies was not passed until nearly two years after the summons was served on June 27, 2012. (Doc. 1-1 at ¶ 11; Doc. 19-1.) A summoned party's obligation to comply with a summons becomes fixed when the summons is served. *Couch v. United States*, 409 U.S. 322, 329 n.9, 93 S. Ct. 611, 616 n.9 (1973); *United States v. Wylie*, 730 F.2d 1401, 1402 n.3 (11th Cir. 1984). This belated resolution thus cannot change Billie's obligation to comply with the summons.

relevant documents, and it was squarely within Congress's authority to do so. *Santa Clara Pueblo v. Martinez*, 436 U.S. at 56, 98 S. Ct. at 1675-76 (Congress has plenary authority to limit, modify or eliminate the powers of local self-governance which Indian tribes otherwise possess). *See also* cases cited at pp. 18-19, *supra.* Consequently, the Tribe is not free to disregard a summons on the ground that it has not authorized its representative with possession or control of its records to produce the records. *See also Karuk Tribe Housing Auth.*, 260 F.3d at 1075 (administrative summons for employment records enforceable against a tribe). The Tribe is once again attempting to recycle the tribal sovereign immunity argument that this Court rejected in *Miccosukee Tribe of Indians of Florida*, 698 F.3d at 1330-31.

Finally, assuming, *arguendo*, that the Tribe could prevail on its lack-of-possession-or-control defense (which it plainly cannot), the District Court's order should still be affirmed in part. The summons at issue seeks both documents and testimony. The lack-of-possession-or-control defense addresses only the summoned documents. It provides no basis for reversing the District Court's ruling that Billie must appear and testify as required by the summons.

3. Enforcement of the summons does not violate Congress's policy

In its brief on appeal (at 8-10), the Tribe further argues that enforcement of the summons violates "Congress's longstanding 'policy of furthering Indian self-government.'" *Id.* (citing *Santa Clara Pueblo*, 436 U.S. at 62, 98 S. Ct. at 1679. This argument also misses the mark.

First, the Tribe has not pointed to any specific statute or congressional policy statement that would immunize the Tribe from responding to the IRS summons. To the contrary, Congress has enacted statutes which provide that Indian Tribes have certain Federal tax obligations[8] and has also provided the Secretary with the summons

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[8] *See, e.g.*, I.R.C. § 3402(r)(1) (imposing tax withholding obligations on an Indian Tribe making a payment to a member of an Indian Tribe from the net revenues of any class II or class III gaming activity conducted or licensed by such tribe); I.R.C. § 6041(a) (requiring information returns (*i.e.*, IRS Forms 1099) for certain payments of $600 or more); I.R.C. § 3406 (imposing various backup withholding requirements, including ones pertaining to the reporting requirements under § 6041(a)). *See also Chickasaw Nation v. United States*, 534 U.S. 84, 122 S. Ct. 528 (2001) (holding that a tribe is liable for federal excise taxes imposed on its gambling operations); *Flandreau Tribe,* 197 F.3d at 951 (tribe is a "person" subject to penalties under I.R.C. § 6675 for seeking an excessive refund of gasoline excise tax); *Campbell v. Commissioner*, 164 F.3d 1140, 1142 (8th Cir. 1999) ("[T]he Indian Gaming Regulatory Act explicitly provides that per capita distributions of income from tribal casinos are subject to federal taxation"); *Cabazon*

(continued…)

power as a means of ensuring that the persons upon whom it imposes tax obligations, including Indian Tribes, live up to those obligations. These statutes govern here.

The Tribe's argument (Br. 9) that the District Court "nullifies the laws of the Miccosukee Tribe" by attempting to confer upon Billie rights which he does not have under tribal law is misconceived. The record shows that Billie did produce some summoned documents to the IRS (pp. 5, 22, *supra*), and the Tribe has not asserted that anyone other than its Chairman, *i.e.*, Billie, has the authority to produce the summoned documents. Rather, the Tribe, in the final analysis, is contending that it can make laws that provide that its records custodian cannot comply with an IRS summons seeking records,[9] and that the United States must obey those laws. In declining to subject itself to

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(…continued)
Indian Casino v. Internal Revenue Service, 57 B.R. 398 (BAP 9th Cir. 1986) (Indian tribes are also liable for employment taxes under I.R.C. §§ 3101-3126 and 3301-3311 on compensation paid to their employees other than tribal council members).

[9] If the Tribe were contending that someone in the Tribe other than its Chairman is the custodian of its records, the IRS could have long ago mooted this litigation by serving a summons on that individual. The Tribe, however, is not arguing that someone other than its Chairman has possession or control of its records.

such laws, the United States does not violate a policy of encouraging self-governance; rather, it prevents the avoidance of congressionally authorized tax obligations. Such tribal laws cannot override the statutes that Congress has enacted. *E.g.*, *Santa Clara Pueblo v. Martinez*, 436 U.S. at 56, 98 S. Ct. at 1675-76.

Finally, the Tribe's hypothetical (Br. 9-10) under which the International Court of Justice orders the President of the United States to produce financial documents of United States citizens in violation of the United States Constitution does not advance its argument. As we have discussed above, while Indian tribes retain attributes of sovereignty, including the power of regulating their internal and social relations, they remain "subject to ultimate federal control." *Wheeler*, 435 U.S. at 322, 98 S. Ct. at 1085. The International Court of Justice, by contrast, does not have the authority to control the President of the United States. *See* http://www.icj-cij.org/jurisdiction/index.php?p1=5 (The jurisdiction of the International Court of Justice is limited to providing advisory opinions and deciding disputes of a legal nature that are submitted to it by States). Moreover, the information that the IRS has been able to obtain indicates that there has been significant non-

compliance with the tax laws that Congress has enacted. *See* Doc. 1-1 at ¶ 12 (evidence obtained through third-party summonses indicates that reporting obligations have not been complied with for over $300 million in payments). Congress has the ability to impose tax obligations on Indian tribes and has done so to a limited extent. A tribe cannot thwart those obligations by making laws that prevent the disclosure of information that is relevant to an investigation into a tribe's compliance with the obligations that Congress has legislated. *Cf. Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for the S. Dist. of Iowa*, 482 U.S. 522, 544 n.29 , 107 S. Ct. 2542, 2556 n.29 (1987) ("It is well settled that [a blocking statute enacted by a foreign government] do[es] not deprive an American court of the power to order a party subject to its jurisdiction to produce evidence even though the act of production may violate that statute.")

CONCLUSION

The order of the District Court is correct and should be affirmed.

Respectfully submitted,

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Dated: November 10, 2014

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I hereby certify that on November 10, 2014, this brief was filed with the Clerk of the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system, and seven (7) paper copies were sent to the Clerk by First Class Mail. Counsel for the appellant is a CM/ECF user and will be served by the CM/ECF system.

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