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

BILLY CYPRESS, et al.,	)	
	)	Case No. 1:14-cv-22066-KMW
Plaintiff,	)	
	)	
v.	)	
	)	
UNITED STATES, et al.,	)	
	)	
Defendant.	)	
	)	

MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

The United States moves to dismiss this action for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. In this case, sixteen members of the Miccosukee Tribe of Indians of Florida seek declaratory relief against the United States to avoid payment of federal income tax on distributions from the Tribe. The Anti-Injunction Act and the Declaratory Judgment Act bar the requested relief, and the tribal members have otherwise failed to identify a valid waiver of the United States' sovereign immunity. Therefore, the Court should dismiss this case.

BACKGROUND

For at least fourteen years, the Miccosukee Tribe of Indians has been making distributions to tribal members of revenue from gaming proceeds. *Miccosukee Tribe of Indians of Fla. v. United States*, 698 F.3d 1326, 1329 (11th Cir. 2012) (citing the testimony of Revenue Agent James Furnas); *see* Compl., Docket No. 1, at ¶ 59. The Internal Revenue Code requires the Tribe to report and withhold income taxes from these distributions. *See* 26 U.S.C. § 3402(r); *Miccosukee Tribe of Indians*, 698 F.3d at 1329. Individual tribal members, in turn, are required to report and pay tax on such distributions. *See* 26 U.S.C. § 61 (defining gross income as "all

income from whatever source derived"). For several years, the Tribe failed to report distributions and pay the withholding taxes owed. *See Miccosukee Tribe of Indians*, 698 F.3d at 1329. The Tribe claimed that it could avoid federal taxation and regulations on per capita distributions of net proceeds from gaming because it paid tribal members out of a "gross receipts tax" which it levied on its gaming operations rather than directly distributing gaming proceeds to tribal members. *See* Compl. at ¶¶ 59-62.[1]

The Tribe has since disavowed the rationale behind this scheme. The Tribe and one member, attempting to bring a class action on behalf of all tribal members, sued the Tribe's former attorney, Dexter Lehtinen, for malpractice in Florida state court. *Miccosukee Tribe of Indians of Florida v. Lehtinen*, No. 11-39362-CA-21 (11th Jud. Cir. Fla. filed Nov. 28, 2011). A copy of the complaint is attached as Exhibit 1 to this motion. The suit alleged that the Tribe and its members relied on incorrect legal advice when it failed to report distributions and pay tax on such distributions. Ex. 1 at 22. Specifically, the suit alleged that Lehtinen made several representations that "were in fact false," including that: "any distribution [tribal members] might receive from the Miccosukee Tribe was not income, that any such distributions were not taxable and that they did not have to report them on their individual federal returns." Ex. 1 at ¶ 101(n). Litigation in that case remains ongoing.

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[1] The complaint acknowledges that a portion of the distributions originate from gaming proceeds. Compl. at ¶86. The complaint additionally alleges that a portion of the distributions come from the Tribe's "fuel tax on the Tribe's fueling station" and "its income from tribal leases, licenses and enterprises on other tribal trust land." *Id*. The United States contends, to the contrary, that the vast majority, if not every dollar, of the Tribe's distributions can be traced to net revenue from the Tribe's gaming operations. *See Miccosukee Tribe of Indians of Fla. v. United States*, No. 10-23507; 2011 WL 3300164, at *8 & n.7, 14 (S.D. Fla. Aug. 2, 2011) (citing and crediting Revenue Agent Furnas's testimony). The Court need not resolve this factual disparity in order to find that it lacks jurisdiction in this case.

The plaintiffs in this case are members of the Miccosukee Tribe, who received distributions from the Tribe and who failed to report and pay taxes on such distributions. *E.g.*, Compl. at ¶¶ 14, 85-86. The IRS has determined that tribal members are required to pay income tax on the distributions from the Tribe, and at least twelve of the sixteen named plaintiffs are currently disputing the IRS's determinations in the United States Tax Court. *Billy Cypress v. Comm'r*, No. 015157-10 (Tax Ct. filed Jul. 6, 2010); *Johnson Billie v. Comm'r*, No. 013105-11 (Tax Ct. filed June 2, 2011); *Nina Billie v. Comm'r*, No. 22976-13 (Tax Ct. filed Oct. 8, 2013); *Agnes Brady v. Comm'r*, No. 002805-12 (Tax Ct. filed Jan. 30, 2012); *Betty Clay v. Comm'r*, No. 011729-11 (Tax Ct. filed May 18, 2011); *Edna Tigertail v. Comm'r*, No. 026518-13 (Tax Ct. filed Nov. 12, 2013); *Evelyn Cypress v. Comm'r*, No. 25476-13 (Tax Ct. filed Oct. 25, 2013); *Greg Kelly v. Comm'r*, No. 011750-11 (Tax Ct. filed May 18, 2011); *Heather Cypress v. Comm'r*, No. 020287-13 (Tax Ct. filed Sept. 3, 2013); *Luther Tiger v. Comm'r*, No. 026748-13 (Tax. Ct. filed Nov. 14, 2013); *Mary Kelly v. Comm'r*, No. 020038-12 (Tax. Ct. filed Aug. 9, 2012); *James Clay v. Comm'r*, No. 007870-13 (Tax Ct. filed April 8, 2013). In the Tax Court, those twelve plaintiffs assert grounds similar, if not identical, to the arguments set forth in the complaint.

The IRS began investigating the Tribe in 2005 for its failure to report and withhold income tax from distributions to tribal members. *Miccosukee Tribe of Indians*, 698 F.3d at 1329. The IRS's investigation has resulted in several disputes submitted to this Court. *Miccosukee Tribe of Indians of Fla. v. United States*, No. 12-cv-22638-UU, 2013 WL 7728831 (S.D. Fla. Feb. 11, 2013); *Miccosukee Tribe of Indians of Fla. v. United States*, 877 F. Supp. 2d 1331 (S.D. Fla. 2012); *Miccosukee Tribe of Indians of Fla. v. United States*, No. 10-cv-23507-ASG; 2011 WL 3300164 (S.D. Fla. Aug. 2, 2011). The IRS has additionally investigated Billy Cypress, a

former chairman of the Tribe and one of the named plaintiffs, resulting in additional disputes with the Tribe submitted to this Court. *United States v. Billie*, No. 13-mc-21096-KMW (S.D. Fla. May 20, 2013); *Miccosukee Tribe of Indians of Fla. v. United States*, 730 F. Supp. 2d 1344 (S.D. Fla. 2010). This Court has uniformly rejected the Tribe's attempts to impede the IRS and deny it access to information necessary to determine the Tribe's tax liability.

Of particular importance for this case, the Tribe previously sued the United States, three cabinet members, and IRS Revenue Agent James Furnas attempting to raise *Bivens* claims against Agent Furnas and seeking injunctive and declaratory relief to restrain the IRS from collecting taxes on distributions to tribal members. *Miccosukee Tribe of Indians of Fla. v. Jewell*, --- F. Supp. 2d ----, 2013 WL 7158023 (S.D. Fla. Dec. 4, 2013). This Court dismissed the Tribe's case with prejudice noting among other things that the Tribe failed to identify a waiver of sovereign immunity and that "the Anti–Injunction Act and the Declaratory Judgment Act prohibit the Tribe's prayer for injunctive and declaratory relief." *Id*. at *5 (collecting cases).

Even though this Court has already held that it lacks jurisdiction to declare that the distributions are not subject to tax, individual tribal members brought the current suit seeking the same relief. This case, like the previous case, fails to identify a valid waiver of the United States' sovereign immunity and fails to overcome the prohibition against the requested relief in the Anti-Injunction and Declaratory Judgment Acts. Therefore, the Court should dismiss this case for lack of jurisdiction.

ARGUMENT

THE COURT SHOULD DISMISS THIS CASE FOR LACK OF SUBJECT MATTER JURISDICTION BECAUSE THE UNITED STATES HAS NOT WAIVED ITS SOVEREIGN IMMUNITY.

The United States may only be sued to the extent it explicitly waives its sovereign immunity. Here there is no valid waiver of the United States' sovereign immunity. The statutes

identified by the tribal members contain no waiver applicable to this case, and the Anti-Injunction and Declaratory Judgment Acts explicitly prohibit the relief requested. Therefore, the Court should dismiss the suit for lack of subject matter jurisdiction.

A challenge to subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1) may constitute either a facial or factual attack. *Miccosukee Tribe*, 2013 WL 7158023, at *1. Though we refer to matters outside the complaint, such as several plaintiffs' pending Tax Court cases, the Court may consider this a facial attack because it need not look beyond the complaint to determine that it lacks jurisdiction. The Court may thus accept the allegations in the complaint as true, but the Court does not have to "accept as true a legal conclusion couched as a factual allegation." *Id*. at *1-2 (collecting cases).

I. The Complaint Should Be Treated as an Action against the United States Requiring an Explicit Waiver of Sovereign Immunity

The United States, as sovereign, is immune from suit unless it consents, and the terms of the United States' consent define the Court's jurisdiction. *United States v. Dalm*, 494 U.S. 596, 608 (1990). Any waiver of the United States' sovereign immunity does not extend beyond the clear and unambiguous language of the statute. *Id.* The plaintiff bears the burden of establishing subject matter jurisdiction and "must prove an explicit waiver of immunity." *Ishler v. Internal Revenue*, 237 Fed. Appx. 394, 2007 WL 749746, at *4 (11th Cir. 2007). Where the sovereign has waived immunity, no suit can be maintained unless it is in exact compliance with the terms of the statute under which the sovereign has consented to be sued. *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33-34 (1992).

Sixteen individual tribal members filed this case against the United States, the Department of Treasury and Secretary Jacob Lew in his official capacity, and the Department of the Interior and Sally Jewell in her official capacity. Official capacity complaints should be

treated the same as a complaint filed against the United States. *See Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985); *Choctaw County Bd. of Educ. v. United States*, 417 F.2d 845, 846 (5th Cir. 1969). Like complaints against the United States, official capacity complaints require an explicit waiver of sovereign immunity. *E.g.*, *Graham*, 473 U.S. at 165-66. Complaints against agencies of the United States, including the Department of Interior and the Department of Treasury, also require explicit waiver of sovereign immunity. *JBP Acquisitions, LP v. U.S. ex rel. F.D.I.C.*, 224 F.3d 1260, 1263 (11th Cir. 2000). The plaintiffs brought this case against the United States, two agencies of the United States, and two cabinet members in their official capacities, and thus must show an explicit waiver of the United States' sovereign immunity.

II. The Statutes Identified by the Plaintiffs Do Not Provide a Waiver for this Suit

The complaint fails to identify a valid waiver of sovereign immunity applicable to this suit. In its complaint, the plaintiffs claim that this Court has subject matter jurisdiction based on general statutes including 28 U.S.C. § 1331 and § 1361. *See* Compl. at ¶¶ 9-13, 17. General statutes such as these do not waive sovereign immunity. *Harbert v. United States*, 206 Fed. Appx. 903, 2006 WL 3298385, *2 (11th Cir. Nov. 14, 2006); *Lonsdale v. United States*, 919 F.2d 1440, 1444 (10th Cir. 1990) (holding that sovereign immunity not waived by general jurisdiction statutes like §§ 1331 or 1361); *Brewer v. Comm'r*, 430 F. Supp. 2d 1254, 1258 (S.D. Ala. 2006) (Section 1331). "Because general jurisdiction statutes . . . do not waive the Government's sovereign immunity, a party seeking to assert a claim against the government under such a statute must also point to a specific waiver of sovereign immunity in order to establish jurisdiction." *Normandy Apartments, Ltd. v. United States Dept. Of Housing and Urban Dev.*, 554 F.3d 1290, 1295 (10th Cir. 2009). The plaintiffs may not rely on general jurisdictional statutes to identify a valid waiver of sovereign immunity.

The plaintiffs appear to recognize that they need an explicit waiver of sovereign immunity; thus, they point to the Miccosukee Reserved Area Act of 1998. Compl. at ¶ 18. This statute neither waives sovereign immunity for suits involving taxes nor applies to suits brought by individual tribal members. The Miccosukee Reserved Area Act of 1998 delineates the Miccosukee Tribe's rights to certain areas of land. Miccosukee Reserved Area Act (MRAA), Pub. L. 105-313, Oct. 30, 1998, 112 Stat. 2964. The Act has nothing to do with taxes and grants no rights to individual tribal members to sue the United States to avoid taxes.

Indeed, the very language the plaintiffs cite as waiving sovereign immunity only applies to the Tribe not individual members: "*[T]he Tribe* may bring a civil action in the United States district court for the district in which the MRA is located to enjoin the United States from violating any provision of this Act." Compl. at ¶ 18 (quoting MRAA, § 8(i)(2)) (emphasis added). In a similar circumstance, several courts have held that the Indian Tucker Act, 28 U.S.C. § 1505, which provides jurisdiction for claims by "any tribe, band or other identifiable group of American Indians" does not waive jurisdiction for claims brought by individuals. *E.g.*, *Whiting v. United States*, 99 Fed. Cl. 13, 16 (2011). Implying a waiver of sovereign immunity for individuals where the act waives sovereign immunity for suits by the Tribe would contravene the requirement that waivers must be construed narrowly and do not extend beyond the exact terms defined by Congress. *E.g.*, *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33-34 (1992). Because the identified waiver in the Miccosukee Reserve Area Act applies to the Tribe not tribal members, the Court may not find jurisdiction based on this act.

In addition to its inapplicability to suits brought by tribal members, the Miccosukee Reserve Area Act does not authorize any suits involving taxes. The Act does not exempt distributions to tribal members from taxation, and in fact, the Act never mentions a tax. The

notion that the Act nevertheless waives the United States' sovereign immunity in this case is belied by the Act itself, which states that "[e]xcept as otherwise specifically provided in this Act, nothing in this Act supersedes any requirement of any other applicable Federal law." MRAA, § 8(c)(3). Thus, the Act cannot be construed as superseding applicable federal law requiring tribal members to pay income tax on distributions. The Miccosukee Reserve Act does not apply to this case, and it does not waive sovereign immunity for the Tribe or its members to bring a suit contesting their tax liabilities.

Neither the general statutes cited by the plaintiffs or the Miccosukee Reserve Area Act provide an applicable waiver of sovereign immunity.

III. The Anti-Injunction Act and the Declaratory Judgment Act Bar the Relief Sought in This Case

Not only is there no waiver of sovereign immunity in this case, two statutes expressly forbid the declaratory relief that the plaintiffs seek. The Anti-Injunction Act and the Declaratory Judgment Act prohibit injunctions and declaratory judgments in tax cases and demonstrate "congressional antipathy for premature interference with the assessment or collection of any federal tax." *Bob Jones Univ. v. Simon*, 416 U.S. 725, 732 n.7 (1974). In this case, these statutes ensure that the plaintiffs may not skirt the normal procedures for contesting their tax liabilities and demonstrate that the plaintiffs are not entitled to declaratory judgments that they owe no taxes.

The plaintiffs repeatedly cite the Declaratory Judgment Act as a basis for jurisdiction in this case, but the Declaratory Judgment Act expressly prohibits claims for declaratory relief in tax cases like this one. 28 U.S.C. § 2201(a). Although the Declaratory Judgment Act generally authorizes federal courts to issue declaratory judgments, it does so "except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of

1986." 28 U.S.C. § 2201(a).[2] Under the Declaratory Judgment Act, suits for declaratory relief in federal tax cases are impermissible. *See e.g., Branca v. United States*, 312 Fed. Appx. 160, 161 (11th Cir. 2008); *Mobile Republican Assembly v. United States*, 353 F.3d 1357, 1362 n.6 (11th Cir. 2003). "There is no dispute . . . that the federal tax exception to the Declaratory Judgment Act is at least as broad as the Anti-Injunction Act," discussed below. *Bob Jones Univ. v. Simon*, 416 U.S. 725, 732 n.7 (1974).

Because the plaintiffs seek a declaratory judgment that they are not subject to taxation, the Declaratory Judgment Act prohibits the requested relief. In Count I, the plaintiffs ask the Court to declare that certain treaty obligations exist to allow the Miccosukee to be left alone "without federal interference, burdens or taxation." Compl. at 42-43. The only federal interference or burden mentioned in Count I and, indeed, throughout the entire complaint is taxation. Thus, Count I seeks a declaration "with respect to Federal taxes" and is prohibited. Counts II and III seek further declaratory relief that "paying monies to the Defendants," *i.e.*, paying taxes, violates treaty obligations and federal laws. Compl. at 46-47. Count IV seeks a declaration that plaintiffs "are exempt from paying taxes." Compl. at ¶ 140. Count V seeks a declaration that "incurring income tax liability" violates portions of the Indian Gaming Regulatory Act. Compl. at ¶ 144. Finally, Count VI seeks a declaration that "imposition of income-tax liability upon Plaintiffs" violates the Indian Commerce Clause and the Supremacy Clause of the Constitution. Compl. at ¶ 148. This requested relief is clearly with respect to federal taxes. Thus, the Declaratory Judgment act explicitly prohibits the relief sought in Counts

[2] Internal Revenue Code § 7428 does not apply here. It addresses declaratory judgments relating to the status and classification of organizations under § 501(c)(3).

I through VI. Because declaratory judgments regarding federal taxes are impermissible, the Court lacks jurisdiction to grant the plaintiffs the relief that they request.

The complaint in this case solely seeks a declaratory judgment. Nonetheless, prohibitions against both declaratory judgments and injunctions in tax cases apply to this case. *Wyoming Trucking Ass'n, Inc. v. Bentsen*, 82 F.3d 930, 933 (10th Cir. 1996) ("[A]n injunction of a tax and a judicial declaration that a tax is illegal have the same prohibitory effect on the federal government's ability to assess and collect taxes.").

The Anti-Injunction Act prohibits the plaintiffs' claims in this case by denying injunctive relief in tax cases. The Anti-Injunction Act states that "no suit for the purposes of restraining the assessment or collection of any tax shall be maintained in any court by any person." 26 U.S.C. § 7421(a).[3] This statutory language "could scarcely be more explicit." *Bob Jones Univ. v. Simon*, 416 U.S. 725, 736 (1974). The purpose of the Anti-Injunction Act is "to permit the United States to assess and collect taxes alleged to be due without judicial intervention, and to require that the legal right to the disputed sum be determined in a suit for refund." *Enochs v. Williams Packing Navigation Co.*, 370 U.S. 1, 7 (1962). Any attempt to obtain an injunction to prevent the imposition of taxes violates the Anti-Injunction Act. *See Kemlon Prod. and Dev. Co. v. United States*, 638 F.2d 1315, 1320 (5th Cir. 1981).

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[3] Section 7421(a) contains a list of statutory exceptions, none of which are applicable here. 26 U.S.C. § 7421(a) (citing 26 U.S.C. §§ 6015(e), 6212(a) and (c), 6213(a), 6225(b), 6246(b), 6330(e)(1), 6331(i), 6672(c), 6694(c), 7426(a) and (b)(1), 7429(b), and 7436). Internal Revenue Code Sections 6015(e), 6212, and 6213 concern proceedings in Tax Court; Sections 6625(b) and 6246(b) concern tax assessments involving partnerships; Sections 6330(e)(1) and 6331(i) concern levies; Section 6672(c) applies only to penalties assessed under that provision; Section 6694 applies to certain return-preparer penalty proceedings; Section 7426 applies to certain third-party wrongful levy actions; Section 7429 applies in proceedings to review jeopardy assessments; and Section 7436 addresses proceedings to determine employment status.

Because the Anti-Injunction Act and the Declaratory Judgment Act prohibit the plaintiffs' requested relief, the citation in the complaint to the Administrative Procedure Act also fails. The plaintiffs reference § 702 of the Administrative Procedures Act as waiving sovereign immunity in this case. Compl. at ¶ 93 (citing 5 U.S.C. § 702). Section 702 states that:

> Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

5 U.S.C. § 702. Thus, the APA does not waive sovereign immunity where other statutes, such as the Anti-Injunction Act and the Declaratory Judgment Act, limit the available relief. Indeed, the legislative history states that § 702 does not affect the prohibitions in the Anti-Injunction Act and the Declaratory Judgment Act. H.R. Rep. No. 94-1656, at 12 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6121, 6132-33. Because of the statutory prohibitions against declaratory relief in tax cases, the plaintiffs' invocation of § 702 of the APA also fails.

IV. There Is No Applicable Exception to the Anti-Injunction Act

There is a judicial exception to the Anti-Injunction Act; however, it is inapplicable to this case. In *Williams Packing*, the Supreme Court held that a district court may enjoin the collection of taxes if (1) it is clear from the information available at the time of the suit that the United States could not prevail under any circumstances and (2) equity jurisdiction otherwise exists, *i.e.*, no adequate remedy at law exists and irreparable injury will occur if the suit is not allowed to proceed. 370 U.S. at 7; *see also South Carolina v. Regan*, 465 U.S. 367, 372-73 (1984). Neither element is present here.

A. Alternative Remedies Demonstrate Lack of Equity Jurisdiction

Here, there is no question that alternative, adequate remedies exist; thus, the *Williams Packing* and *Regan* exceptions do not apply. The federal tax laws provide several avenues for taxpayers to challenge asserted deficiencies and protest collection activities. 26 U.S.C. § 6213; §7422, § 7433; 28 U.S.C. § 1346(a)(1). While the complaint argues that the plaintiffs should not have to use these remedies, Compl. at ¶¶ 96-97, the complaint never explains how or why doing so in any way prejudices the plaintiffs beyond requiring them to comply with clearly applicable procedural requirements. The existence of alternative remedies is most clearly demonstrated by the fact that twelve of the sixteen plaintiffs *are currently pursuing these remedies* by protesting deficiencies in the United States Tax Court. *Supra* p. 3. Because alternative remedies exist and because plaintiffs are currently pursuing them, the exception in *Williams Packing* is inapplicable.

B. Plaintiffs Are Not Certain to Prevail on the Merits

Furthermore, plaintiffs have failed to establish that they will prevail in this lawsuit under all circumstances. The plaintiffs in this case are citizens of the United States and are subject to federal income tax, which applies to "every individual" and "all income from whatever source derived." 26 U.S.C. § 61. "[American] Indians are subject to payment of federal income taxes, as are other citizens, unless an exemption from taxation can be found in the language of a Treaty or Act of Congress." *E.g.*, *Comm'r v. Walker*, 326 F.2d 261, 263 (9th Cir. 1964). An exemption from taxation may not "rest upon implication" and must be clearly expressed even in cases involving American Indian tribes. *See Chickasaw Nation v. United States*, 534 U.S. 84, 95 (2001) (citing *United States Trust Co. v. Helvering*, 307 U.S. 57, 60 (1939)). Congress's clear intention is that tribal members must pay tax on distributions of gaming proceeds. *E.g.*, *Campbell v. Comm'r*, 28 Fed. Appx. 613, 614 (8th Cir. 2002) ("[T]ribal members must pay

federal taxes absent an express exemption, and . . . Congress had explicitly stated per capita distributions of income from tribal casinos are subject to federal taxation."); *see also* 26 U.S.C. § 3402(r). The plaintiffs admit that they receive distributions from the Miccosukee Tribe and that one of the sources of those distributions, if not the primary source, is gaming proceeds.[4] There is no question that such income is taxable.

The complaint fails to identify any express exemption from taxation for distributions from the Tribe, and none exists. The plaintiffs attempt to circumvent the clear intention of Congress by asserting among other things that the distributions constitute income from the land. Under the plaintiffs' theory, income from the land is exempt from taxation in the hands of the Tribe and can therefore be distributed tax free to individual tribal members. Compl. at ¶¶ 65-66, 87. However, the complaint fails to adequately allege that the distributions constitute income from the land.

The exemption for income from certain tribal lands can be traced to *Squire v. Capoeman*. 351 U.S. 1 (1956). In *Squire v. Capoeman*, the Supreme Court addressed provisions of the

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[4] The Tribe has employed a crude technique in order to attempt to disguise the nature of its distributions by placing a "gross" tax on its enterprises including its gaming facility, then paying its distributions from an account holding the "gross" tax proceeds. Compl. at ¶ 86. By intermingling gaming proceeds with other funds and by labeling the funds a "gross" tax, the Tribe sought to avoid provisions of the Internal Revenue Code applicable to net gaming proceeds. Taxation however depends on the substance instead of the form of a transaction and does not depend on labels applied for tax purposes. *E.g.*, *Ocmulgee Fields, Inc. v. Comm'r*, 613 F.3d 1360, 1368 (11th Cir. 2010). In substance, the vast majority, if not all the distributions to the tribal members are distributions of net gaming proceeds and are subject to withholding tax pursuant to 26 U.S.C. § 3402(r). Regardless whether the distributions are of net gaming proceeds or from any other source, the distributions remain taxable in the hands of individuals as income from whatever source derived.

General Allotment Act of 1887, which restricted taxation of certain allotted lands.[5] 25 U.S.C. § 349. The Supreme Court construed sections of the act "to create an express tax exemption for an Indian deriving income directly from his own trust allotment." *United States v. Anderson*, 625 F.2d 910, 914 (9th Cir. 1980) (citing *Squire v. Capoeman*, 351 U.S. 1 (1956)). *Squire v. Capoeman* and other cases have established that to qualify as income from the land for purposes of tax exemption, the income must be "directly derived" from the land. *See Critzer v. United States*, 597 F.2d 708, 713 (Ct. Cl. 1979). This exemption, where it applies, exempts income from things like farming and ranching operations, oil and gas leases, and mineral deposits. *Id*. (citing *Stevens v. Comm'r*, 452 F.2d 741 (9th Cir. 1971); *United States v. Daney*, 370 F.2d 791 (10th Cir. 1966); *Big Eagle v. United States*, 300 F.2d 765, 156 Ct.Cl. 665 (1962)). This exemption does not apply to income generated more from commercial activity including income from gaming. *In re Cabazon Indian Casino*, 57 B.R. 398, 402 (9th Cir. 1985) ("The income derived from operating a casino stems in a far more important fashion from card playing, liquor sales and food preparation, than it does from the land alone."); *Doxtator v. Comm'r*, T.C. Memo. 2005-113 at * 9. Far from establishing that the plaintiffs will prevail under all circumstances, the complaint concedes that at least a portion of the distributions come from the "fixed tax assessments on the gross revenues of the Tribe's gaming enterprises." Compl. at ¶ 86. In substance, this portion of the distribution does not constitute income from the land and is not subject to the exemption that plaintiffs claim. Thus, even accepting as true the allegations in the complaint, plaintiffs' arguments fail.

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[5] *See e.g.*, Taiawagi Helton, *Nation Building in Indian Country: The Blackfoot Constitutional Review*, 13-Fall Kan. J. L. & Pub. Pol'y 1, 6 (2003) (describing the General Allotment Act and the government's repudiated policy to allot community-held lands to individual tribal members).

Plaintiffs' other citations to various authorities similarly do not suggest that the plaintiffs will prevail under all circumstances as required to qualify for the exception to the Anti-Injunction Act. Below is a list of plaintiffs' cited authorities and a brief, non-exhaustive explanation why each does not support the requested relief.

The Treaty of 1842 – The plaintiffs' explanation of the Treaty of 1842 suggests that the treaty had nothing to do with taxes and does not contain any express exemption from tax. Compl. at ¶¶ 26-27.

25 U.S.C. § 349 – This statute is § 6 of the General Allotment Act, addressed in *Squire v. Capoeman*. This statute only applies to allotments held in trust by the Secretary of the Interior for a specific individual; it does not create any exemption for income derived from a tribe's or any other tribal member's trust land. 25 U.S.C. § 348; *United States v. Anderson*, 625 F.2d 910, 914 (9th Cir. 1980). Where it applies, this statute does not create an exemption for income from gaming proceeds or other income not directly derived from the land.

25 U.S.C. § 459e – This statute exempts distributions of receipts from "Submarginal Land" described in 25 U.S.C. § 459a. This statute has nothing to do with this case, it does not address any land belonging to the Miccosukee Tribe, and it does not apply to any distribution at issue in this case.

25 U.S.C. § 1750e – This statute codifies a settlement between the Miccosukee Tribe and the federal government. While it states that certain *lands* are not taxable, it does not create an express exemption for distributions to individual tribal members and does not apply to anything other than income directly derived from the land.

25 U.S.C. § 2210 – This statute exempts certain land from taxation. It does not create an express exemption for distributions to individual tribal members and does not apply to anything other than income directly derived from the land.

25 U.S.C. § 2703(9) – This statute defines "net revenues" for purposes of the Indian Gaming Regulatory Act. The Indian Gaming Regulatory Act reinforces Congressional intent to tax distributions of gaming proceeds, but it does not exempt distributions from taxation nor prohibit the United States from enforcing the Internal Revenue Code. *Campbell*, 28 Fed. Appx. at 615 ("[T]his [Act] means the tribe must have an approved plan in effect before making the per capita distributions, not that tribes without such a plan can make tax-free per capita distributions.").

U.S. Const. Art. I, Sec. 8, cl. 3, Art. VI cl. 2 – The Indian Commerce Clause and the Supremacy Clause of the Constitution contain no express exemption from taxation for individual tribal members.

The Court does not need to reach the merits to determine the inapplicability of the plaintiffs' claimed exception to the Anti-Injunction Act. Nonetheless, the complaint in this case fails to establish that the plaintiffs will prevail under all circumstances. Instead, it suggests plaintiffs' claims are doomed to fail.

The Anti-Injunction Act and the Declaratory Judgment Act expressly prohibit declaratory relief in tax cases. Because plaintiffs seek a declaration with regard to their federal tax liabilities and because plaintiffs do not qualify for the exception to the Anti-Injunction Act, the Court should find that plaintiffs' complaint is barred.

CONCLUSION

The plaintiffs brought this suit against the United States seeking a declaration that they do not owe taxes. The plaintiffs have failed to identify a waiver of the United States' sovereign immunity, and in fact the Anti-Injunction Act and the Declaratory Judgment Act prohibit the relief requested. Therefore, the Court should dismiss this case for lack of subject matter jurisdiction.

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Certificate of Service

I hereby certify that a true and correct copy of the foregoing was served by electronic means on August 19, 2014, on all counsel or parties of record on the Service List below.

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