UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 14-22441-CIV-ALTONAGA/O'Sullivan

UNITED STATES OF AMERICA,

Plaintiff,

v.

SALLY JIM,

Defendant, and

MICCOSUKEEE TRIBE OF INDIANS OF FLORIDA

Intervenor-Defendant.
_______________________________________/

DEFENDANT SALLY JIM AND INTERVENOR-DEFENDANT MICCOSUKEE TRIBE OF INDIANS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Defendant Sally Jim and Intervenor-Defendant the Miccosukee Tribe of Indians of Florida ("Miccosukee Tribe" or "Tribe"), by and through undersigned counsel, respectfully submit these Proposed Findings of Fact and Conclusions of Law as requested by the Court.[1]

I. FINDINGS OF FACT

a. Tribal Structure

1. The Miccosukee Tribe is a federally recognized Tribe of Indians residing in its traditional homeland of the Florida Everglades, specifically on the Miccosukee reserved area, which is situated within the geographic boundaries of Miami-Dade County.

[1] Pursuant to the Court's direction, Sally Jim and the Tribe prepared the foregoing in the timeframe requested by the Court and without access to the trial transcript. Sally Jim and the Tribe request the opportunity to submit a post-trial memorandum or a revised version of the foregoing once the parties have the benefit of the trial transcript.

2. The Tribal members speak the language of the Miccosukee as their primary language with some members also able to speak and understand English.

3. Many words in the English language do not translate into the Miccosukee language or are terms that do not exist within the Miccosukee language. Examples of words and concepts that are not present or used by the Miccosukee people are "tax, lease, ownership or possess, denomination, coin, gasoline" and others. General concepts known outside the Tribe such as "generally accepted accounting principles" or "depreciation of assets" are concepts of the Non-Indian government that the Tribe is forced to work with in government-to-government relationships.

4. The Miccosukee Tribe was formally recognized by the United States Congress in 1962 as a federally recognized Indian Tribe. To permit government-to-government relations, the United States required the Tribe to create a formal written document that would be approved by the Bureau of Indian Affairs ("BIA") and the United States Congress. Pursuant to this requirement a formal Constitution of the Tribe was enacted and adopted by the members of the Tribe and approved by Congress. (*See* Defs.' Ex. 8).

5. The Constitution affirms the structural organization of the Tribe that predates federal recognition. Specifically, the Constitution, as approved and acknowledged by the federal government, affirmed the Tribe's purpose as set out in the Preamble to "promote the general welfare [of the Tribe] and to conserve our lands and resources." (*See* Defs.' Ex. 8, Art. IV, Section 3). The Constitution further affirmed the inherent right of the Tribe to levy and collect fees or taxes associated with the use of the Tribe's lands.

6. All actions taken by the Tribe, including the day to day operations, creation of laws and ordinances and protection of Tribal lands and resources are governed by its General Council, which consists of all adult enrolled members who are 18 years or older.

7. The members of the Tribe collectively hold title and control to all property and land within the Reservation and held in Trust by the United States for their benefit. (*See* Defs.' Ex. 8, at Art. VI Sec. 1)

8. The day-to-day operations of the Tribe are managed by the Business Council, at the direction and approval of the General Council. The Business Council consists of the following elected positions: Chairman, Assistant Chairman, Secretary, Lawmaker and Treasurer. All authority of the Business Council to act and bind the Tribe is vested within the General Council who meets at least quarterly to, among other items, approve actions of the Business Council taken subsequent to the last General Council meeting; ratify or approve proposed expenditures of the Tribe including contracts and other financial matters; approve proposed uses of Tribal lands, including compensation to be paid to the members for said uses; approve ordinances, laws, and resolutions involving the Tribe and its sovereignty; and ratify or deny actions of the Business Council.

9. The Tribe, with the consent and approval of the General Council, hires advisers, including attorneys and accountants, to assist them with certain legal and financial concerns, including in assisting the Tribe in exercising its inherent sovereign authority.

10. The Tribe, in exercising self-government and sovereign authority, has created and maintained the following: a Tribal Police Department; an independent Miccosukee culture based education system; an embassy; regularly meetings with foreign

dignitaries, including those associated with the United Nations; lobbied and consulted with U.S. government officials to protect the Tribe's vast interest in the environmental health of the Everglades; and pursuant to the Indian Self Determination Act of 1974, Pub. Law 93-638, ("SDA") took steps to preserve its culture, tradition and way of life by contracting away from the federal government all of the services, responsibilities, and authority and ability to interpret and apply the laws and policies governing the Tribe. *See* 25 U.S.C. § 450

11. After 1962, the year of Tribe's formal establishment, the Tribe, in exercising its sovereign authority, took action to recover lands taken by the United States in violation of treaties and agreements, and to protect its cultural identity and the lands where the tribal members resided, hunted, fished and lived a subsistence life. As a result of the culmination of these actions, the Tribe entered into settlement agreements with the United States, believing that these agreements would affirm the Tribe's long-standing position to be left alone, free from the interference and imposition of the United States government. (*See* Pl's Ex. 74).

12. In these settlements, the Tribe gave up claims to millions of acres of land in return for independence, including the right to be free of any federal or state taxes on any revenue derived from the remaining aboriginal lands of the Tribe which, by now were substantially reduced from the lands previously controlled by the Tribe.

13. Some of the settlement agreements were codified in the United States Code, including provisions relating to and regarding tax issues. *See* 25 U.S.C. § 1750, *et seq.*; 25 U.S.C. § 459e.

b. Interpretation and Legal Advice

14. Pursuant to 25 U.S.C. § 1a and the provisions of the SDA, the Chairman of the Tribe is authorized to assume the duties, responsibilities and affirmative obligations of interpreting federal statutes applicable to the Tribe, including those obligations identified in Title 25 of the United States Code and the policies and procedures adopted and set out by the Secretary of the Interior and codified at Title 25 of the Code of Federal Regulations. Title 25 of the Code of Federal Regulations contains the policies and procedures approved by the Assistant Secretary of Interior over "all matters arising out of Indian relations." *See* 25 U.S.C. § 2.

15. At all relevant times for this action, Billy Cypress was the Chairman of the Tribe. Pursuant to this duly delegated authority, the Chairman of the Tribe acted as the Superintendent of the BIA office over the Tribe who, when necessary, interpreted applicable statutes under Title 25 of the United States Code and Title 25 of the Code of Federal Regulations regarding the Tribe's lease, and compensation for the use of lands within the Tribe's reservation and belonging to all members of the Tribe.

16. In this capacity, as Chairman of the Tribe, Billy Cypress complied with the provisions of 25 C.F.R. § 1.2, acting in the "best interests of the Indians." The Chairman communicated this interpretation in duly constituted meetings of the General Council and Business Council. *See* 25 C.F.R. § 1.2.

17. Consistent with this authority, Chairman Cypress advised the Tribe that pursuant to his understanding and interpretation of 25 C.F.R. 162, *et seq.* and its

predecessors[2] the gross receipts distributions at issue in this lawsuit were not taxable to the members. The Chairman also interpreted the provisions of 25 U.S.C. § 459e as applying to the receipts received by the Tribe and distributed to the members as being in the "best interests of the Indians" and consistent with the Secretary's mandate that the regulations contained in Title 25 would be of "general application" to all Tribes. *Id.*

18. As set out in the Constitution, and with the guidance of legal counsel and approval of the Secretary and its duly appointed Superintendent, the Tribe enacted laws and ordinances to govern those within its jurisdiction. These ordinances were approved by the BIA and its appointed officials.

19. With the guidance and direction of legal counsel, in 1984, the Tribe enacted a means to obtain revenue for the Tribe and to compensate the members for use of the Tribe's lands and resources by enacting a gross receipts tax ordinance imposing a gross receipts tax on all businesses operating within the jurisdiction of the Tribe, including all tribal businesses. (*See* Pl's Ex. 75). The BIA reviewed, approved and ratified the ordinance.

20. Between 1992 - 2010, Dexter Lehtinen served as primary outside legal counsel to the Tribe on general legal matters, including interactions with U.S. government officials and Indian gaming. Dexter Lehtinen's position as primary outside legal counsel received approval from the General Council. The General Council considered him counsel to the Tribe as evidenced by his regular presence at General Council meetings.

[2] Plaintiff's assertion that this regulation was not enacted until 2001 is without merit. In 1995, a substantively identical predecessor could be found at 25 C.F.R. § 162.3 (4-1-1995 version).

c. Opening of Gaming Facility

21. In 1989, the Tribe entered into an agreement with Tamiami Partners Limited ("Tamiami Partners") to construct an Indian gaming facility on reserved lands at the intersection of Krome Avenue and Tamiami Trail. (*See* Defs.' Ex. 7). In the contract with Tamiami Partners, the Tribe agreed not to impose its gross receipts tax on Tamiami Partners so that Tamiami Partners could recoup its investment in the intended construction of the gaming facility. The Agreement, including the provisions waiving the imposition of the gross receipts tax, was submitted to the Office of Indian Gaming ("OIG") and the BIA for approval and was approved. (*Id.*)

22. In 1990, the Tribe opened its gaming facility known as Miccosukee Indian Bingo ("MIB"). Pursuant to the provisions of the Indian Gaming Regulatory Act ("IGRA") the Tribe was the "Owner" of MIB and Tamiami Partners acted as the developer and manager of the MIB.

23. In or around 1993, the Tribe removed Tamiami Partners from the management of the MIB due to a dispute over the proper payment and accounting of revenues due to the Tribe under the agreement.

24. Dexter Lehtinen, in his role as legal counsel to the Tribe, guided the transition of the management from Tamiami Partners to the Tribe. As a result of this transition, the Tribe became the exclusive operator of the MIB.

25. In or around 1994 to 1995, Dexter Lehtinen advised the Tribe that, for the sake of consistency, and after the removal of the management team of Tamiami Partners, the Tribe should apply the gross receipts tax to the MIB. Dexter Lehtinen's legal opinion was that, although the prior ordinance enacted in 1984 applied to the MIB, the Agreement

approved by the OIG and BIA had provisions waiving the tax and, in order to provide clarity, the Tribe should enact a new ordinance to make clear that MIB would be subject to tax by the Tribe. The Tribe, with the approval of the General Council, passed an additional ordinance that explicitly applied the gross receipts tax to the MIB. (*See* Pl's Ex. 1).

26. The General Council believed that the MIB should be treated the same as all other tribally owned businesses already existing on the Miccosukee reservation and pay a gross receipts tax in order to compensate tribal members for use of their land.

27. In or around 1995, the OIG sent an inquiry to the Tribe that sought information as to whether the Tribe was distributing "net gaming revenue" as defined under IGRA.

28. Dexter Lehtinen responded to the OIG inquiry by fully disclosing that the Tribe was not distributing net revenue, as defined by IGRA, and instead was distributing revenue from a gross receipts tax on all business on the reservation as a means of compensating the members for use of lands held in an undivided interest similar to a lease payment for undeveloped lands, including the MIB.

29. From the first day that MIB began its operation, and continuing to this date, the Tribe, as required by IGRA, has submitted annual accountings and reports to the National Indian Gaming Commission ("NIGC") detailing all aspects of the MIB operation, accounting, expenditures, compliance, rules, regulations and fees paid by the MIB.

30. Other than the inquiry in 1995 by OIG, at no time in the past 26 years has any agency questioned or disapproved of the Tribe's distributions to its members. Likewise there has been no notice of any violation of any laws or regulations applicable to Indian Tribes conducting gaming from any state or federal agency.

31. Dexter Lehtinen advised the Tribe and tribal members that distributions would not be subject to tax if they were derived from tribal lands. (*See* Pl's Ex. 3 at 5).

32. Dexter Lehtinen testified that the 1995 ordinance was consistent with prior ordinances of the Tribe and the distributions of the gross revenue to tribal members was not devised in an effort to avoid taxation but instead as a means of compensating the members of the Tribe for the use of their lands.

33. The position taken by the Tribe concerning the taxation of distributions from the gross receipts tax was made in good faith based on the advice given by attorneys representing the Tribe.

34. The Tribe's position concerning taxation of distributions was also made with the consent and approval of the BIA and its duly appointed Superintendent.

d. Sally Jim

35. In 2001, Sally Jim was a member of the Tribe. She was one of four members of her household who were eligible for distributions from the Tribe. The other members of her household in 2001 were her husband, Alex Osceola, her daughter, Alexis Osceola and her adopted daughter, Tamara Jim.

36. The Miccosukee Tribe is a matriarchal society. In each family, the mother is the head of the family and is in charge of all clan related matters. Tribal custom requires that Sally Jim use distributions provided to her on behalf of her daughters or for financial obligations that promote the general family welfare.

37. In 2001, the Tribe provided NTDR distributions to Sally Jim (as compensation for the use of lands to which Sally Jim and her family hold undivided

interests in, on behalf of her), her husband and her two daughters in the total amount of $272,000.00.

38. Pursuant to Tribal law, custom and tradition Sally Jim frequently received the distributions on behalf of all four members of her household in cash. Indeed, the distribution checks Sally Jim received were endorsed to both her and her husband. (*See* Pl's Ex. 36). Upon receiving the distributions in 2001, as was her custom and practice, Sally Jim gave one-fourth of the distribution to her husband.

39. During that year, Sally Jim saved portions of her daughters' distributions for the benefit of her children and used the remaining funds to provide for herself, her children and their general welfare needs.

40. Sally Jim was educated in the Miccosukee Tribal school system up to and through the eighth grade. The Miccosukee Tribal school system provides students with a non-traditional education taught almost entirely in Miccosukee and is geared toward learning traditional tribal customs, not secular education subjects commonly associated with non-Indian schooling.

41. Although Sally Jim worked during her life, her understanding of financial matters, even basic issues of addition and subtraction, as well as technical terms familiar to the non-Indian community, were foreign to her.

42. The distributions made to Sally Jim and her family were made pursuant to Tribal law and at the direction of the Tribe's General Council in accordance with the Miccosukee Constitution requiring that all members participate in the economic benefits of the use of Tribal resources.

43. There is no evidence that Sally Jim improperly used her daughters' distributions or otherwise used those distributions for any purpose other than to provide for her children's welfare. Had she used her daughters' distributions improperly, the Tribe, at the request of her clan, would have taken steps to prevent her from using her daughters' share of the distributions for anything other than her daughters' benefit – e.g., putting the distribution in trust for her daughters.

44. Sally Jim attended numerous General Council meetings, including certain meetings where Dexter Lehtinen advised on numerous legal issues, including distributions of gross receipt revenues and the taxability of those revenues. Sally Jim and tribal members understood, based on the advice and presentations during General Council meetings, that the distributions were not taxable. Dexter Lehtinen and tribal leaders – in accordance with tribal custom, tradition and the clan system – advised members that the distributions were not taxable. As such, the Tribal members, including Sally Jim, relied on that advice.

45. At each meeting the members, including Sally Jim, would speak in Miccosukee language which would be translated into English so that the attorneys and others could understand not only the question but be able to respond to the question. Consistent with this practice the advice provided by attorneys and others in English would be translated into the Miccosukee language so that the members in attendance, including Sally Jim, would understand the response.

46. Sally Jim reasonably relied on that advice and acted according to her belief that distributions were not subject to income tax.

47. Alex Osceola reasonably relied on the advice and acted according to his belief that distributions were not subject to income tax.

48. On the dates and in the amounts set forth below, a delegate of the Secretary of Treasury made assessments against Sally Jim for federal income tax liabilities, penalties, and interest for tax year 2001.

Tax Year	Date Assessed	Tax Assessed	Penalties Assessed	Interest Assessed
2001	09/13/2004	$15,498.00	$2,551.95* $1,644.59** $430.55***	$1,783.72
	06/26/2006		$1,190.91**	
	12/31/2012	$95,823.00	$21,560.18* $3,833.70***	

*alleged late filing penalty – 26 U.S.C. § 6651(a)(1)
**alleged failure to pay penalty – 26 U.S.C. § 6651(a)(2)
***alleged estimated tax penalty – 26 U.S.C. § 6654

49. Sally Jim did not pay the amounts assessed by the United States.

50. Sally Jim also received wages of $25,990 in 2001 from her employment in the Tribe's health care facility.

51. Sally Jim did not file a tax return when due for the 2001 tax year. Apart from a small amount of tax withheld from her wages, Sally Jim did not make any estimated payments of tax in 2001.

52. Sally Jim did not pay any taxes associated with the distributions because she believed, after relying on the advice of the Tribe's lawyers, the Chairman, and the Business Council that the distributions were not subject to federal income tax.

53. Prior to federal recognition the members of the Tribe, including Sally Jim, lived in the everglades of South Florida surviving on what they could grow and what they could hunt or fish for food. Some revenue was generated by the sale of crafts and Native clothing to tourists traveling the Tamiami Trail.

54. Grocery stores and other conveniences normally found outside the reservation to this day do not exist and the members, including Sally Jim, continue to maintain their desire to be "left alone".

55. Over time, due to actions of U.S. Sugar and others, the waters and lands upon which the members relied for food and sustenance became toxic so that many members had to avail themselves of other means to support their general welfare. During this time many members formally known as "Independents."

II. CONCLUSIONS OF LAW

A. Sally Jim Should Not Be Assessed Tax Liability for Distributions Made to Other Members of Her Household

1. Sally Jim did not have complete dominion or an unfettered right over the $272,000 in distributions that form the basis of the IRS' assessment because such distributions were intended for the use and benefit of her daughters and her husband.

2. Distributions made to other members of her household are not income to Sally Jim because she did not have an unfettered right over such distributions. Sally Jim's husband took possession of his distribution and used it as he deemed appropriate. Sally Jim was obligated to use her daughters' distributions for their benefit.

3. The IRS's assessment of tax against Sally Jim for 2001 is incorrect as it is based upon distributions she received on behalf of others which are not income to her.

4. The IRS's assessment is incorrect because the IRS incorrectly included distributions made to Sally Jim's husband and children as gross income of Sally Jim.

5. Sally Jim's income and resulting tax liability cannot be determined based on the income of others.

6. The IRS's own guidance dictates that if a child's "unearned income" exceeds $7,500.00, it cannot be reported in a parent's gross income for purposes of taxation. *See* Tax Rules for Children and Dependents at 6, IRS Publication 929, for use in preparing 2001 Returns, attached at Exhibit A.

7. Ms. Jim and her husband's income must be assessed separately as they did not file a joint return. *See Johnson v. United States*, 422 F. Supp. 958, 968 (N.D. Ind. 1976), *aff'd sub nom. Barter v. United States*, 550 F.2d 1239 (7th Cir. 1977) ("If married persons each elect to file separate returns, each may do so, and the tax computed is based solely upon each taxpayer's own separate income.").

8. Thus, the government's tax assessment against Ms. Jim is erroneous.

9. Distributions paid to Sally Jim in 2001, as opposed to her family members, totaled $68,000.00.

10. The only taxable income Sally Jim received in 2001 was $25,990.00 in 2001 from her employment in the Tribe's healthcare facility.

B. Sally Jim Should Not Be Assessed Penalties

11. Section 6651(a)(1) of Title 26 imposes a penalty against a taxpayer for failure to file a return on the prescribed date of 5 percent of the tax required to be shown on the return for each month or fractional month for which there is a failure to file, not to exceed 25 percent. 26 U.S.C. § 6651(a)(1). The penalty is added to the tax owed for the year "unless it is shown that such failure is due to reasonable cause and not due to willful neglect." 26 U.S.C. § 6651(a)(1).

12. Section § 6651(a)(2) of Title 26 imposes a penalty for failure to pay the tax liability shown on the taxpayer's return on or before the prescribed date. This penalty is

added to the tax owed "unless it is shown that such failure is due to reasonable cause and not due to willful neglect." 26 U.S.C. § 6651(a)(2).

13. It is well-founded that courts will not impose penalties on a tax payer like Sally Jim. *See, e.g., Jourdain v. Commissioner*, 71 T.C. 980 (1979) (rejecting IRS' proposed penalties against members of the Red Lake Band of Chippewa Indians "because of the special status of the Red Lake Band and petitioner's apparently sincere, albeit erroneous, belief that the United States Constitution and the Treaty of Greenville protected any member of the Red Lake Band living on the reservation from Federal taxation of income derived from any sources."); *McGowen v. Commissioner*, T.C. Memo. 2011-186 (T.C. 2011) (rejecting IRS' proposed penalties where the taxpayer "lacked the knowledge and experience in tax law" and reasonably believed payment was not taxable.").

14. Sally Jim relied on the Tribe's leaders and attorneys in determining that the distributions were not subject to tax.

15. Sally Jim did not act with willful neglect.

16. Given her education, tribal dynamics and custom, and that she is not a sophisticated taxpayer, Sally Jim acted reasonably in relying on tribal leaders and attorneys in determining that her distributions were not subject to tax.

C. Impact of Agreements with the Miccosukee Tribe

a. Indian Land Claims Settlement Act of 1982

17. Subject to certain excepted interests, Courts have held that any "aboriginal" rights that the Miccosukee Tribe had to Florida land were extinguished when, as part of a 1982 court settlement, the United States paid $16 million to the Seminole Nation of Indians to compensate its members for their territory. Strikingly, even though courts consider the

Miccosukee Tribe a successor in interest to the Seminole Nation, none of the proceeds went to or have been accepted by the Tribe. This settlement is commonly known as the Indian Land Claims Settlement Act of 1982 codified at 25 U.S.C. §§ 1741–1749 ("1982 Settlement Act").

18. The Tribe agreed to give up all aboriginal title claims to land in Florida subject to certain "excepted interests" identified in paragraph 3(c) of the Settlement Agreement. *See also* 1982 Settlement Agreement at 2, 3, 7, 8. The 1982 Settlement illustrates the framework of non-interference and 25 U.S.C. § 1744 provides that nothing in the Indian Land Claims Settlement Act of 1982 would, extinguish "any right, title, interest or claim to lands" in Florida "which is based on use or occupancy. . ." That same legislation further provided that the United States would hold the subject lands transferred from the State of Florida "to be held in trust for the use and benefit of the Miccosukee Tribe of Indians. . . 25 U.S.C. § 1747(a).

b. The Intervening Passage of the IGRA

19. In 1988 Congress enacted the IGRA, 25 U.S.C. §§ 2701-2721. The intent of the IGRA was to, among other things, provide a statutory basis for the operation of gaming by Indian tribes to promote tribal economic development, self-sufficiency, and strong tribal governments and a statutory basis for the regulation of Indian gaming to ensure the tribes are the primary beneficiaries.

20. The IGRA accords special recognition to Miccosukee gaming rights pursuant to 25 U.S.C. § 2719. While generally prohibiting gaming on lands acquired in part by the United States for the benefit of an Indian Tribe after October 17, 1988, a special recognition and exemption was created for the Tribe, providing that:

> (2) Subsection (a) of this section shall not apply to--
>
> (B) the interest of the Miccosukee Tribe of Indians of Florida is approximately 25 continuous acres of land, more or less in Dade County, Florida located within one mile of the intersection of State Road Numbered 27 (also known as Krome Avenue) and the Tamiami Trail.

21. In 1990, the Tribe started its gaming operations at this location. At the time that the gaming operations opened, the Tribe already had in place its gross-receipts tax, which the Tribe passed in 1984. The gross-receipts tax was passed pursuant to the Tribe's constitutional authority "to levy and collect assessments and to impose fees . . . upon members and non-members doing business within the reservation." *See* Ex. 8, Art. V, §3. As noted earlier, the Miccosukee Constitution explicitly provides that tribal members shall share in the "economic resources" of the Tribe and, thus, a member's share of the Tribe's tax collections was an essential attribute of self-governance. Significantly, the Miccosukee Constitution had been approved federally several decades earlier.

22. In contrast to taxing a member's share of tax collections, IGRA levied federal taxes only on "net revenues" from tribal gaming, defined as "gross revenues of an Indian gaming activity less amounts paid out as, or paid for, prizes and total operating expenses, excluding management fees." 25 U.S.C. § 2703(9). Accordingly, Congress must be presumed to have not intended to cover the existing gross receipts tax imposed by the Tribe , which already existed at the time and was well-known to Congress which had accorded a specific and special recognition to Miccosukee gaming rights.

23. The DOI has promulgated guidelines governing the review and approval of Per Capita Distribution Plans which expressly apply to distribution from "net revenues."

25 C.F.R. §290, *et. seq*. The Guidelines define "per capita payments" as "the distribution of money or other thing of value to all members of the tribe, or to identified groups of members, which is paid directly from the net revenues of any tribal gaming activity." *Id.* at §290.2. This definition "does not apply to payments which have been set aside by a tribe for special purposes or programs, such as payments made for social welfare, medical assistance, education, housing or other similar, specifically identified needs." *Id.* Thus, even under the "net income" scheme, IGRA recognizes that governmental and other distributions to tribal members are not subject to federal income tax.

24. Thus, the IGRA does not address distributions made to tribal members arising from a gross-receipts tax applied to all of a tribe's businesses. As a result of IGRA's precise and ultimately inapplicable language, and based further on the Tribe's unique relationship with the United States as reflected in treaty obligations and other relevant laws, distributions from a gross-receipts tax to Miccosukee Tribe members are not taxable.

c. Miccosukee Settlement Act of 1997

25. Passed against the backdrop of the 1982 Settlement Act and the IGRA, was the Miccosukee Settlement Act of 1997 ("1997 Settlement Act"). The 1997 Settlement Act arose from a lawsuit brought by the Tribe involving the taking of certain lands in connection with the State of Florida's construction of highway Interstate 75. *See* 25 U.S.C. §1750(1). As part of that settlement, in exchange for transferring certain lands to Florida, the Tribe received certain monetary payments and new reservation lands. *Id.* at §1750(5); §1750d ("The lands transferred and held in trust for the Miccosukee Tribe under section 1750c(4) of this title shall be Miccosukee Reservation lands."). Thus, in accordance with the statutory framework, including the Indian Reorganization Act of 1934, the Tribe -

through its tribal leaders - serves as co-trustee with the United States for the benefit of its tribal members. As a historical matter, the lands conveyed were once part of the Tribe's vast ancestral homeland.

26. Among those lands conveyed and taken into trust for the Tribe were 6.09 acres located at Krome Avenue as well as parcels that are on the north side of current U.S.-41 (i.e., the Tamiami Trail). The Tamiami Trail runs in an east and west direction north of the boundary of the Everglades National Park and the Miccosukee Reserved Area. The Tamiami Trail transports an estimated 5,200 vehicles per day between Miami and Naples and it is estimated that it will transport 9,200 vehicles per day in 2020.

27. The 1997 Settlement Act, 25 U.S.C. § 1750c, also reflects the policy of non-interference with the Tribe and explicitly states:

> a) Rule of construction
>
> Nothing in this part or the Settlement Agreement shall—
>
> (1) affect the eligibility of the Miccosukee Tribe or its members to receive any services or benefits under any program of the Federal Government; or
>
> (2) diminish the trust responsibility of the United States to the Miccosukee Tribe and its members.

28. Moreover, consistent with policy accords and Treaty obligations reached between the United States and Miccosukee clans, the 1997 Settlement Act further provided:

> (b) Taxation
>
> (1) In general
>
> (A) Moneys

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> None of the moneys paid to the Miccosukee Tribes under this part of the Settlement shall be taxable under Federal or State law.
>
> (B) Lands
>
> None of the lands conveyed to the Miccosukee Tribe under this part or the Settlement Agreement shall be taxable ***under Federal*** or State ***law***.
>
> (2) Payments and conveyances not taxable events
>
> No payment or conveyance referred to in paragraph (1) shall be conserved to be a taxable event.

29. This federal tax exemption applied to lands that would be taken into trust and located in the area where the Miccosukee Tribe was already engaging in gaming. As stated previously, among the lands taken into trust as part of the 1997 Settlement Act were 6.09 acres located along Krome Avenue. Congress, in passing the 1997 Settlement Act, and approving the underlying Settlement Agreement dated April 28, 1996, did so with the knowledge that the lands being taken into trust included lands located in the Krome Avenue area. This is the same area where Congress provided in IGRA a unique and emphatic endorsement of the Tribe's gaming activities in 25 acres "located within one mile of the intersection of . . . Krome Avenue and the Tamiami Trail" for gaming purposes. 25 U.S.C. §2719(b)(2). Importantly, while the other federal legislation governing the Tribe's land holdings has provided for substantial limitations on the Tribe's economic opportunities, the Krome Avenue area is a fundamentally different matter. That area is the only area that Congress has taken a deliberate "hands off" approach to development with the full knowledge that it would be used for gaming.

30. Indeed, the fact that the Miccosukee Reserved Area Act of 1998 ("MRAA"), discussed further below, was making its way through Congress and passed in or around the same time that the Interior Secretary approved the April 28, 1996 Settlement Agreement, suggests that the federal government, including Congress, knew that the effect of the MRAA's provision limiting Class II and Class III gaming on the MRA was to confirm the understanding between the Miccosukee Tribe and the federal government that the Tribe would conduct gaming only in the Krome Avenue area. In sum, in light of the contemporaneous nature of the 1997 Settlement Act and the 1998 MRAA one must impute to Congress knowledge of what was being done in both of these statutory enactments specific to the Miccosukee Tribe.

31. Thus, the statutory exemption in the 1997 Settlement Act extends to the Tribe's gaming operations in the Krome Avenue area that was in existence at the time and, indeed, had been explicitly granted to the Tribe when Congress passed IGRA in 1988. Not only was this the intent of the federal government at the time the Tribe's leaders negotiated the Settlement Agreement at issue in the 1997 Settlement Act and confirm the same understanding: in substance, vast lands were being given to the Florida Department of Transportation in exchange for those Krome Avenue lands and further confirmation of a federal and state tax exemption running with the 6.09 acres it was receiving as well as the 25 acres where they were already operating their gaming operations.

32. The no-federal-taxation language in the 1997 Settlement Act also presents a statutory issue arising from the fact that Indian tribes are not entities subject to federal income tax. While Indian tribes do not pay income tax, the 1997 Settlement Act nevertheless states that "none of the moneys [or lands conveyed] to the Miccosukee Tribe

. . . shall be taxable under Federal or State law" or considered a "taxable event." Under these circumstances, the use of the phrase "Miccosukee Tribe" must be equated or viewed coextensively with *individual* Tribe members. Failing to do so gives no import to the phrase and renders the entire subsection surplasage in so far as it restates what is already well-established law. Accordingly, because statutory-interpretation principles require that real meaning and content be given to the no-federal-taxation language that language necessarily must encompass *individual* Tribe members within its plainly stated federal tax exemption.

d. The Miccosukee Reserved Area Act

33. From approximately 1964 to 1998, the Miccosukee Tribe lived and governed their own affairs on an area located within the Everglades Park as recognized by a "Special Use Permit" issued by the National Park Service. The Special Use Permit Area was comprised of 333.3 acres on the northern boundary of the Park. Despite the indisputable fact that the Everglades Park was the ancestral homeland of the Miccosukee people the Tribe's members have had to fight for the most basic of necessities: housing.

34. In the early 1990s, the Tribe and the National Park Service had a dispute over whether the Tribe could build housing for its members on the portion of the Park it inhabits along the Tamiami Trail. In 1996, Secretary of Interior Babbitt authorized the Tribe to build 30 houses along this parcel, but refused a requested expansion. Although the Army Corps of Engineers had granted a "dredge and fill" permit for a larger project, the Park Service refused. The Tribe sued for their rights to build housing.

35. The dispute led to the passage in 1998 of the Miccosukee Reserved Area Act (MRAA), Pub. L. No. 105–313 (1998), which replaced the permit system with a more

permanent legal framework. The MRAA ultimately provides for the permanent residence of Miccosukee-Tribe members on 666.6 acres located on the Everglades Park without the need for the Tribe to seek and obtain any further permission or approval from the federal land management agency. The vast majority of the members and leaders of the Tribe reside within the MRA's reservation housing, which has been provided to them by the Tribe. In addition to being used for individual housing, the MRA land is also used by the Tribe to provide tribal governmental and administrative offices, judicial chambers, police and fire stations, school buildings, a health clinic, a library, a water tower an various cultural and recreational facilities for the benefit of the tribal members. The MRA also has tribal cultural exhibits, attractions, services and enterprises for both tribal members and visitors to this reservation enclave.

36. "The MRAA is replete with traditional notions of tribal self-determination and non-interference." *See Micccosukee Tribe of Indians of Florida v. United States*, No. 00–3453-CIV, 2000 WL 35623105 at *7 (S.D. Fla. Dec. 15, 2000). In the MRAA, Congress found, among other things, that "[s]ince the commencement of the Tribe's permitted use and occupancy of the Special Use Permit Area, the Tribe's membership [had] grown, as [had] the needs and desires of the Tribe and its members for modern housing, governmental and administrative facilities, schools, and cultural amenities, and related structures." §2(2). One of the stated "Purposes" of the MRA Act was therefore to "replace the special use permit with a legal framework under which the Tribe [could] live permanently and govern [its] own affairs in a modern community within the Park." §3(1). Section 5(b) of the MRAA further provides that "the Tribe shall have the exclusive right to use and develop the MRA in perpetuity in a manner consistent with this Act for purposes

of the administration, education, housing, and cultural activities of the Tribe, including commercial services necessary to support those purposes." The actions of the Treasury in an attempt to impose limitations on the method by which the Tribe exercises this "exclusive right" is an infringement on not only the inherent sovereignty of the Tribe but a violation of the terms of the MRA settlement agreement and what the Tribe believed it was getting by entering into the settlement.

37. These statutes must be construed in a light most favorable to the Miccosukee Tribe and its members. Furthermore, these statutes must be interpreted as the Miccosukee Tribe and its members understood them. Interpreted in this light, these statutes exempt from income the distributions Sally Jim received from the Tribe.

38. However, even without interpreting these statutes as the Miccosukee Tribe understood them, the plain language of the statutes confirms that income derived from the use of tribal lands is exempt from taxation.

39. The IRS' "Internal Revenue Manual" guidelines narrowly "define 'per capita payments' as those payments made or distributed to all members of the tribe or to identified groups of members which are paid directly from the net revenues of any gaming activity.' IRS Internal Revenue Manual, 4.88.1.6.1-2. Likewise, the Department of Interior Bureau of Indian Affairs regulations define "per capita payment" as "the distribution of money ... which is paid directly from the net revenues of any tribal gaming activity." 25 C.F.R. Section 290.2.

40. These definitions of taxability simply do not apply to distributions received by Sally Jim. The Tribe's trust distributions to its tribal members are not per capita distributions made directly from the net revenues of its gaming operations as defined by

IGRA. To the contrary, the trust distributions are made from a separate tribal trust account of distributable tribal revenues, which are comprised of: (1) its revenues from the Tribe's fixed tax assessments on the gross revenues of the Tribe's gaming enterprises; (2) its fuel tax on the Tribe's fueling station; and (3) its income from tribal leases, licenses and enterprises on other tribal trust lands. All of these tribal revenues - the assessments on gross revenues, the fuel tax revenues and the income revenues - are derived by the Tribe through its self-governing powers of taxation of enterprises and activities located on and using the resources of tribal lands held in trust by the United States.

41. These revenues are not only plainly derived from the land, but are also anchored upon self-governance. The federally-approved Miccosukee Constitution provides that each member of the Tribe shall have the opportunity to "participate in the economic resources and activities of the Tribe." (*See* Defs.' Ex. 8). The Constitution also authorizes its General Council "[t]o levy and collect assessments and to impose fees ... upon members and non-members doing business within the reservation." *Id.* Pursuant to this authority, the Tribe's current reservation tax assessment is a 7.75% levy on the gross revenues generated by all enterprises located on tribal trust land, including a 7.75% assessment on gaming and other resort revenues from the Krome trust land. From 1985 to the present, the Tribe has consistently used portions of both its reservation tax assessment revenues and its other trust land the periodic trust distributions to its tribal members have been funded entirely by portions of the Tribe's reservation tax assessment revenues and other trust land income distributions.

42. Derived from tribal lands held in trust by the United States, the determinations of the Tribe's trust account funds are applied in the sole discretion of the

Tribe's independent tribal government. They are not based on any right or property interest of the tribal members or upon the performance of any work or service by the tribal members. To the contrary, these are distributions of trust income, founded upon the Tribe's historic relationship with its members, whose tribal identity and continued participation in tribal affairs is deemed vital to the perpetuation of the Tribe's traditional life and culture. The disbursements of trust income are essential to sustaining tribal members in their existing communities where they continue to maintain this separate language, identity and culture. Disruption and interference with the ability of Tribe to live together on what is left of their tribal lands might well force, in effect, the removal of Tribe to find livelihoods elsewhere, thereby effectively imposing an assimilation that the Tribe continues to oppose.

43. As described earlier, IGRA’s narrow authorization for federal taxation applies only to direct, per capita distributions from net gaming revenues. This restricted, explicit taxation is explainable only if Congress itself assumed that the imposition of such taxation on the distribution of tribal trust land income would otherwise be precluded. Indeed, Congress gave no indication – except with respect to per capita distributions that might be made from the net revenue of tribal gaming – that it intended to abolish any existing exemptions for distributions of tribal trust taxation and trust income to dependent tribal members. Moreover, as a statutory exception, IGRA's "federal taxation" provision must be strictly and narrowly construed under established federal precedents that require any imposition of tax burdens upon Native Americans must be specific and explicit. Similarly, under the terms of Revenue Ruling 67-284, these exempt trust funds would not be taxable absent an express imposition of federal income taxation by Congress. Even under “ordinary” rules of taxation, its limited applicability to per capita distributions made

directly from gaming "net revenues" could not be broadened to include other types of tribal revenues derived from tribal trust lands.

44. US Supreme Court decisions in *United States v. Kagama*, 118 U.S. 375 (1885) and *Lone Wolf v. Hitchcock* 187 US 553 (1903) established that Congress has full or plenary authority over Tribes. However, in spite of the nearly unfettered power recognized by the Courts in *Kagama* and *Lone Wolf*, the Tribe retains its inherent sovereignty and power to govern itself and define the roles of those activities that occur within its boundaries. The US Supreme Court has established clearly canons of construction which require that interpreting treaties and settlements with a tribe must adhere to the following: 1) a treaty should be interpreted as the Indians would have understood them; 2) any and all ambiguities or questions should be resolved in favor of the Tribe and its members: and 3) all substantive rules should be interpreted to overpower technical rules. See *United States v. Winans*, 198 U.S. 371, 380-81(1905) ("**We will construe a treaty with the Indians as that unlettered people understood it and as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection and counterpoise the inequality by the superior justice which looks only to the substance of the right without regard to the technical rules")** (emphasis added)

45. It is clear that any interpretation of treaty language codified by Congress in statute depends almost exclusively on how the Tribe interpreted the terms of the treaty and settlement.

46. Plaintiff's cite in support of their position the following statutes codified by Agreement and Treaty with the United States in Settlement of Claims for lands owned by the Miccosukee Tribe of Indians of Florida but taken illegally by the United States.

47. The interpretation of these statutes rests within the sole authority of the Secretary of the Interior and/or its duly designated delegate. There has been no challenge by the United States to the appointment of the Chairman of the Miccosukee Tribe as a duly appointed delegate of the Secretary of Interiors authority. In that capacity, and pursuant to 25 CFR 1.2 the Superintendent, and the BIA through submission of ordinances of the Tribe, interpreted the statutes contained in Title 25 of the United States Code to have application to the Miccosukee Indian of Indians of Florida. Included in this application are the aforementioned statutes.

48. In addition, even without the clear approval of the BIA, the Tribe and its members, in resolving disagreements over lands and holdings taken from them by the United States, believed that the terms of the settlement agreements included provisions for economic benefits free from taxation by the United States and others. The United States Supreme Court has made clear that interpreting agreements with Indian Tribes requires that the agreements be viewed as "an unlettered people understood it". *United States v. Winans*, 198 U.S. 371, 380-81 (1905), resolving any disagreements and ambiguities in favor of the Tribes.

Respectfully submitted this 16th day of August, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on August 16, 2016, all the parties in this case have been served in accordance with the notice of electronic filing, which was generated as a result of electronic filing in this Court.

By: */s/ George B. Abney*
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