No. 16-17109

United States Court of Appeals for the Eleventh Circuit

UNITED STATES OF AMERICA,

Appellee,

v.

THE MICCOSUKEE TRIBE OF INDIANS OF FLORIDA,

Intervenor-Appellant, and

SALLY JIM,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA, No. 1:14-cv-22441-CMA

REPLY BRIEF OF INTERVENOR-APPELLANT THE MICCOSUKEE TRIBE OF INDIANS OF FLORIDA

ALSTON & BIRD LLP

GEORGE B. ABNEY
DANIEL F. DIFFLEY
MICHAEL J. BARRY
1201 WEST PEACHTREE STREET
ATLANTA, GEORGIA 30309-3424
PHONE: (404) 881-7000

Counsel for Intervenor-Appellant the Miccosukee Tribe of Indians of Florida

CERTIFICATE OF INTERESTED PARTIES AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1, counsel for the Miccosukee Tribe of Indians of Florida hereby certifies that, to the best of counsel's knowledge, the following individuals, firms, entities, and corporations have an interest in the above-captioned appeal:

1. Abney, George B., Attorney for the Miccosukee Tribe of Indians of Florida.
2. Alston & Bird LLP, Attorneys for the Miccosukee Tribe of Indians of Florida.
3. Altonaga, Cecilia M., United States District Judge.
4. Bahnsen, Nicholas S., Attorney for the United States of America.
5. Barry, Michael J., Attorney for the Miccosukee Tribe of Indians of Florida.
6. Bolen, Sarah, Attorney, Internal Revenue Service.
7. Branman, Robert, Attorney for the United States of America.
8. Calli, Paul A., Attorney for third-party defendant Guy A. Lewis.
9. Ciraolo, Caroline D., Principal Deputy Assistant Attorney General, Tax Division, Department of Justice.
10. Davis, Daniel Ezra, former Attorney for Sally Jim.
11. Diffley, Daniel F., Attorney for the Miccosukee Tribe of Indians of Florida.
12. Farrior, William, Attorney for the United States of America.
13. Ferrer, Wilfredo A., United States Attorney.
14. Furnas, James, Revenue Agent, Internal Revenue Service.

15. *Benjamin G. Greenberg, Acting United States Attorney*.

16. Hubbert, David A., Deputy Assistant Attorney General.

17. Kearns, Michael J., Attorney, Tax Division, Department of Justice.

18. Lewis, Guy A., third-party defendant.

19. Lothamer, Casey, Attorney, Internal Revenue Service.

20. McAiley, Chris M., United States Magistrate Judge.

21. *Teresa E. McLaughlin, Attorney for the United States of America*.

22. Miccosukee Tribe of Indians of Florida.

23. Nez, Berlinda, Revenue Agent, Internal Revenue Service.

24. Roman III, Bernardo, former Attorney for Sally Jim.

25. Rothernberg, Gilbert S., Attorney, Tax Division, Department of Justice.

26. Salyer, Kathleen M., Attorney, U.S. Attorney's Office.

27. Saunooke, Robert O., Attorney for Sally Jim.

28. Sewell, Pamela, Attorney, Internal Revenue Service.

29. Toulou, Tracy, Director Office of Tribal Justice, Department of Justice.

30. Van Doran, Shelly, Attorney, Internal Revenue Service.

31. Welsh, Robert L., Attorney for the United States of America.

Appellant the Miccosukee Tribe of Indians of Florida further certifies that it is a sovereign nation and federal recognized Indian Tribe, and has no parent corporation or stock.

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INTRODUCTION

I. Distributions to Ms. Jim Constitute Non-Taxable General Welfare Benefits and are not Subject to IGRA.

The Tribe's distributions to Sally Jim in 2001 are non-taxable general welfare benefits under the Tribal General Welfare Exclusion Act of 2014 ("Tribal GWE Act"). The Tribe makes these distributions from the tax revenue it collects through the imposition of its gross receipts tax ("GRT"), not from "net gaming revenue." Thus, the Indian Gaming Regulatory Act ("IGRA") does not apply. Additionally, the Tribe's GRT is not, as the Government argues – in a position not articulated in the District Court – "a mere formalism" designed to convert net gaming revenue into tax revenue. The Tribe's GRT has formally been in place since at least 1984, long before the Tribe opened its gaming facility and long before IGRA was enacted. Furthermore, the tax revenue the Tribe collects and distributes to its members though the imposition of its GRT bears no relationship to the net revenues of its gaming facility. Lastly, the Tribe's distributions to Ms. Jim are consistent with the statutory definition of non-taxable general welfare benefits under the Tribal GWE Act, and were not "lavish and extravagant."

II. Distributions to Ms. Jim's Family Members Are Not Taxable Income to Ms. Jim.

The Government's response ignores the record evidence and asks this Court to apply the wrong standard for determining when income received by an individual

on behalf of others is taxable to that individual. Specifically, the standard proposed by the Government applies only to the taxability of income obtained through fraud – not an issue in this case. The Government's response also ignores the testimony at trial that Ms. Jim promptly gave her husband "his share," and that she used distributions received for her daughters for their benefit. Even if these distributions are taxable income, Ms. Jim cannot be liable for taxes on her family member's income.

III. Ms. Jim Cannot be Penalized for Her Failure to Question Tax Advice She Received From the Tribe's Attorney.

It is undisputed that Ms. Jim has a limited education. She is not fully fluent in English, as her primary language is Miccosukee. Indeed, she testified at trial with the aid of a Miccosukee interpreter. These facts underscore her inability to understand complex issues such as legal advice regarding tax matters, much less to recognize that the legal advice she received may have been incorrect. Yet this is precisely what the Government argues in its response. Ms. Jim cannot be held to such a standard.

IV. The Government Provided No Notice of its Intent to Seek a Judgment Against the Tribe.

The Government did not assert a single claim against the Tribe and the District Court's Findings of Fact and Conclusions of Law directed that judgment be entered only against Ms. Jim. The Government's only argument in support of including the

Tribe in the final judgment is that "other lawsuits" and "general notice" of potential tax liability was sufficient notice. The federal courts and the rules of civil procedure do not operate this way. The eleventh-hour inclusion of the Tribe in the judgment, specifically when not even ordered by the District Court, cannot be upheld.

ARGUMENT AND CITATION OF AUTHORITY

I. Distributions to Ms. Jim Constitute Non-Taxable General Welfare Benefits and are not Subject to IGRA.

A. The Tribe's GRT is a *bona fide* tax, not a "mere formalism."

IGRA does not apply to this matter because the distributions the Tribe made to Ms. Jim were derived from the proceeds of the Tribe's GRT, not from "net gaming revenue." The Government's contention that the Tribe's GRT is a "mere formalism" meant to avoid federal taxation of distributions to tribal members is not supported by the record or the applicable case law. (Gov. Br. 45-48).

1. *The Tribe's gross receipts tax predates the Tribe's gaming facility and IGRA.*

In its response, the Government cites *Commissioner v. Estate of Sanders*, 834 F.3d 1269 (11th Cir. 2016) and *Commissioner v. Court Holding*, 324 U.S. 331 (1945), to support its assertion that the Tribe's gross receipts tax is a "mere formalism" for the distribution of net gaming revenue. Although both *Estate of Sanders* and *Court Holding* found that the mechanism employed by the taxpayer was

a "mere formalism," both cases involved mechanisms employed *after* the taxpayers entered into the transactions at issue.

In *Estate of Sanders*, this Court reversed and remanded the Tax Court's holding that a taxpayer's was a *bona fide* resident of the U.S. Virgin Islands and thus entitled to a lower tax rate, stating that the taxpayer's residency claim could be a mere formalism and that the Tax Court failed to make the appropriate factual findings on that issue. 834 F.3d at 1282. This Court noted that after-the-fact events – in which the taxpayer purported to be employed by a company in the Virgin Islands, although he had not changed job roles, descriptions or responsibilities from his prior U.S. based job – could be creations for "funneling his earnings through the USVI to claim a tax benefit." *Id.* at 1282.

Similarly, in *Court Holding* a corporation had agreed to sell a corporate asset to a purchaser. Rather than sell the asset directly from the corporation, the corporation put the sale on hold and transferred the asset to the two shareholders through a liquidating distribution. The two shareholders then sold the asset to the purchaser. 324 U.S. at 334. The Supreme Court found that there could be no other reason for the delay than to use the liquidation as a mere formalism to eliminate corporate tax on the sale. *Id.* Had the liquidation been contemplated and set in motion before the agreement to sell, it would not have been a mere formalism. *See, e.g., U.S. v. Cumberland Pub. Serv. Co.*, 338 U.S. 451, 453-54 (1950)

(distinguishing *Court Holding* and rejecting the IRS' claim that a liquidation followed by a sale was a "mere formalism" because the trial court made explicit findings that "at no time did the corporation plan to make the sale itself" and the "liquidation and dissolution genuinely ended the corporation's activities and existence").[1]

Thus, in both instances, the mechanism found to be a "mere formalism" was employed *after* the transaction in question. The liquidation in *Court Holding* and the new employment in *Sanders* were formalisms designed to avoid tax consequences. In sharp contrast, in this matter the Tribe's gross receipts tax was in place long before the Tribe made the distributions to Ms. Jim, long before the Tribe began operating its gaming facility, and long before Congress enacted IGRA.

The record confirms that in 1984, the Tribe's General Council enacted its GRT. (Pl. Ex. 75). Under the GRT, the Tribal government imposed a tax on the gross receipts of all business operating on tribal land – including business owned or operated by the Tribe or Tribal members. (*Id.*) Pursuant to Tribal law and custom,

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[1] The District Court made no factual findings regarding the Tribe's GRT. (DE 188 at 3-4). And in its order granting partial summary judgment, the trial court misconstrued IGRA by holding that distributions of "gaming revenue" are subject to Federal taxation. (DE 173 at 9-11). IGRA, however, is specific in that it only subjects certain distributions from "net revenues" from gaming to Federal taxation. *See* 25 U.S.C. § 2710(b)(3)(D); *see also, Steward Dry Goods Co. v. Lewis*, 294 U.S. 550, 558-59 (1935) (recognizing the important and practical distinction between "gross" revenue and "net" revenue).

proceeds from this tax were then distributed to tribal members to provide for the welfare of each member. (DE 168 at ¶¶ 15, 18). Enactment of the GRT kept with the long-standing custom and tradition of the Tribe to share resources and revenue equally among tribal members. (Tr. Aug. 15, 2016 at 30:20-31:14). Thus, the enactment of the GRT merely recognized a system that had already been in place for many years. (*Id.*)

In 1988, four years after the Tribe enacted the GRT, Congress passed the IGRA. Under that statute, distributions of the "***net revenues***" of any applicable Indian gaming facility are taxable income to the members. Two years later, the Tribe opened its gaming facility, Miccosukee Indian Bingo ("MIB"). (Defs. Ex. 5). Although the Tribe – on advice of counsel – believed the GRT already applied to MIB, it passed an additional ordinance to make clear that the GRT did indeed apply to MIB. (Pl. Ex. 1). Proceeds from the GRT are placed in the NTDR account and distributed to tribal members. (Tr. Aug. 11, 2016 at 108:22-109:19). Because the GRT was in place long before the Tribe opened its gaming facility, and long before IGRA was enacted, it could not have been designed for purposes of avoiding taxes IGRA imposes on net gaming revenues, and it cannot be considered a "mere formalism."

2. *The Tribe's administration of the GRT in 2001 and 2002 demonstrates that NTDR distributions do not equal net gaming revenue*.

Even if the Government can get past the timing issue, for the GRT to be a "mere formalism" for conveying net gaming revenue, the Government must show that, in 2001 and 2002, the GRT matched or at least approximated the net gaming revenues of MIB facility. This Court has rejected attempts by the government to deem an action a mere formalism when, like here, the numbers simply do not reveal that the mechanism is a mere pass through. *See Dothan Coca-Cola Bottling Co., Inc. v. U.S.*, 745 F.2d 1400 (11th Cir. 1984). In *Dothan*, the Court rejected the government's argument that rents paid to the taxpayer were actually payout of royalties because (i) the taxpayer had a lease, (ii) the payments were made as rents, and (iii) rent payments were not above the rental value of the property. *Id.* at 1404-04. Like in *Dothan*, the GRT is collected in the form of a tax, MIB makes payments as tax, and the amount collected is not higher than the GRT rate of 7.75%.

The Government makes no effort to compare, let alone match these two figures together in its response. This is for good reason; the facts demonstrate that the argument will not work.

i. GRT collected on MIB receipts do not equal net gaming revenue.

In each of 2001 and 2002, the total receipts for MIB included MIB's (i) operating revenues, (ii) interest income, and (iii) receipts from pulltab and bingo games paid out as prizes. These combined amounts are taxed at the GRT rate of 7.75%:

	2001	2002
MIB Operating Revenues[2]	$119,737,257	$130,779,794
MIB Interest Income[3]	$533,536	$359,284
Receipts from Pulltab and Bingo Games[4]	$290,725,472	$335,232,391
Total Subject to GRT	$410,996,265	$466,371,469
Total GRT Collected on MIB (Taxed at 7.75%)[5]	$31,852,923	$36,153,045

Thus, the Tribe collected a GRT from MIB of $31,852,923 in 2001 and $36,153,045 in 2002. (*Id.*)

In that same time, MIB realized an operating income – i.e., net gaming revenue – of $44,838,999 in 2001 and $49,522,978 in 2002.[6] Thus, the Tribe's GRT

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2 Pl. Ex. 52 at 3.

3 *Id*.

4 *Id*. at 13; these amounts represent pulltab and bingo receipts paid out as prizes and thus excluded from operating revenues, but included in the amount subject to the GRT. Specifically, for 2001, $279,601,146 of pulltab receipts and $11,124,326 of bingo receipts were paid out as prizes; for 2002, $324,102,243 of pulltab receipts and $11,130,148 of bingo receipts were paid out as prizes.

5 *Id* at 3.

6 Pl. Ex. 52 at 3.

generated tax revenues separate and apart from the "net revenues" of its gaming facility. And the GRT applies regardless of whether the Tribe's gaming facility is profitable, and is not merely a pass-through of net gaming revenue.

ii. The Tribe collected GRT from non-MIB tribal businesses.

Moreover, the Tribe took in GRT tax receipts from non-MIB businesses of $92,414 in 2001 and $87,500 in 2002. (Pl. Ex. 53). Although these amounts are lower, they are far from nominal and underscore that the Tribe, in 2001 and 2002, applied the GRT the same as it always has – by taxing all the gross receipts of all operations on its land at a consistent percentage.

Overall, the amount the Tribe collects through the GRT from gaming operations and other tribal businesses emphasize that the GRT is operated not as a pass through but, instead, is consistent with its long-standing, pre-IGRA purpose to provide tribal members with a share of revenues generated from tribal lands.

B. The Tribal GWE Act Governs the 2001 Distributions at Issue.

The Government argues only that the Tribe's NTDR distributions do not constitute general welfare benefits and that its distributions are lavish and extravagant.[7] Neither argument holds weight.

[7] The Government's heading (Gov. Br. at 41) argues that payments made to Ms. Jim were not based on need, but provides no analysis to that effect. Nevertheless, the Tribe submitted uncontroverted evidence at trial that NTDR payments are made to maintain Miccosukee identity, and allow tribal members to remain on the lands and preserve tribal cultural institutions. (DE 181-4 at 10:5-8, 130:23-131:2).

1. *The Tribe's NTDR payments are general welfare payments.*

To support its argument that the Tribe's distributions to Ms. Jim are not general welfare payments, the Government relies entirely on cases and IRS Revenue Rulings issued before the Tribal GWE Act was enacted. Specifically, the Government cites Revenue Ruling 2005-46 for the proposition that, in order to qualify for general welfare exclusion, payments must "(i) be made from a governmental fund, (ii) be for the promotion of the general welfare, generally based on individual needs, and (iii) not represent compensation for services." (Gov. Br. at 34). From there, the Government points to Revenue Procedure 2014-35, which extends Revenue Ruling 2005-46 to tribal welfare payments. (*Id.* at 35, citing 2014-26 I.R.B. §§ 2.02-2.03). Under Revenue Procedure 2014-35, "per capita payments to tribal members of tribal gaming revenues that are subject to the IGRA are gross income . . . and are not excludable from gross income under the general welfare exclusion or this revenue procedure." *Id.* at Sec. 2.03. The Government argues that this definition of general welfare must apply. The Tribal GWE Act, however, was enacted after Revenue Procedure 2014-35 and supersedes it, applying a broader definition of general welfare meant to support and uphold tribal traditions and institutions. (Tribe Br. at 27).

The Government argues that the Tribal GWE Act has no impact on existing schemes of taxation and merely codifies Revenue Procedure 2014-35, leaving in

place the purportedly existing meaning of general welfare benefits. (Gov. Br. at 37-38). But the legislative intent of the Tribal GWE Act is neither clear nor uniform as to how to define general welfare. The Tribe cited numerous statements that demonstrate that the point of the Tribal GWE Act is to give greater respect to tribal institutions – such as the Miccosukee Tribe's GRT and NTDR distributions – than there had been under the previous taxation scheme. (Tribe Br. at 27). Moreover, the fact that Congress, in the Tribal GWE Act, authorized the creation of a Tribal Advisory Council to advise the Secretary of Treasury on how to implement and interpret the Tribal GWE Act underscores that Congress expected the Tribal GWE Act to deviate from the existing system, and even allow tribal governments to shape its interpretation. *See* 26 U.S.C. § 139E(c)(3). This manifests an intent to deviate from what had been operative under the prior taxation scheme. Thus, the use of general welfare is ambiguous under the Tribal GWE Act and must be interpreted in favor of the Tribe. *See* Tribal GWE Act of 2014, 128 Stat 1883, 1884 (mandating that all ambiguities in the law "be resolved in favor of Indian tribal governments" and requires that "deference . . . be given to Indian tribal governments for the programs administered and authorized by the tribe to benefit the general welfare of the tribal community"); *see also, Florida. v. Seminole Tribe of Fla.*, 181 F.3d 1237, 1242 (11th Cir. 1999) ("[A]mbiguities in federal laws implicating Indian rights must be resolved in the Indians' favor.")

2. *Payments made to Ms. Jim are not lavish and extravagant*.

Here, the Government injects evidence that the median income in Florida – not Miami-Dade County – in 2001 was less than Ms. Jim's welfare payments. (Gov. Br. at 42). The apparent reason for this citation is to suggest that since the distributions at issue are more than the median income that they must, as a matter of law, be "lavish and extravagant." This, however, is a meaningless comparison, as the point of the Tribe's welfare program is to encourage tribal members to remain connected to the Tribe and its lands in order to preserve tribal customs, traditions, and language. (DE 159-3 at 10:5-8, 130:23-131:2). And this aim is also shared by the Tribal GWE Act. (Tribe Br. at 27). The median income of non-tribal members, especially those not living in Miami-Dade County is irrelevant to this end goal.

The District Court principally relied on *In re Hutchison* in concluding that the distributions at issue did not fall under the Tribal GWE Act. As the Tribe argued in its brief, the District Court's reliance was mistaken because in *Hutchinson* the taxability of tribal welfare benefits turned on a Kansas statute that defines "public assistance benefits," not general welfare, and those tribal benefits did not fit the statutory definition. (Tribe Br. at 25-26). The Government downplays the role of the Kansas statute in that decision, stating that the District Court "consider[ed] Kansas statute," among other law, in order to create a narrow definition of public assistance benefits and therefore general welfare. (Gov. Br. at 43). This is flatly

wrong as the bankruptcy court found that the payments *were* general welfare payments, but the Kansas statute controlled and superseded that holding, rendering the payments taxable because "despite being for the 'general welfare' of the tribal members…the per capita distributions ***are not public assistance benefits***, and thus not exempt." *In re Hutchinson*, 354 B.R. 523, 531 (Bankr. D. Kan. 2006) (emphasis added). The Government citation to *In re McDonald* reiterates this point, as that case refers, once again, to the Kansas statutory definition of *public assistance benefits* to conclude that the payments "are not an exempt public assistance benefit," and makes no broader conclusion regarding the definition of general welfare payments. 519 B.R. 324, 341 (Bankr. D. Kan. 2014). The Kansas statute is inapplicable here, and the Government cites no operative law that would inject that narrow local definition of public assistance benefit into this case.

II. Distributions to Ms. Jim's Family Members are not Taxable Income to Ms. Jim.

In its response, the Government submits that the distributions Ms. Jim received on behalf of her family members are taxable solely to her despite evidence that she either (i) directly gave the distributions to her family members, (ii) used those distributions for the benefit of the family or family members, or (iii) held those funds in trust for her children.[8] To reach this conclusion the Government both

[8] The Government's argument that the Tribe lacks standing to challenge this holding or the holding concerning penalties charged to Ms. Jim lacks merit for two

overlooks substantial evidence and authority, and argues that the Court should apply the wrong standard, and one different from that applied by the District Court.

A. The Government urges the Court to apply a standard applicable to income obtained through fraud or deceit.

The appropriate standard for determining whether the income received by Ms. Jim on behalf of her family members is taxable to her is whether she exhibits "complete dominion" over the monies "without restriction as to their disposition." (*See* Tribe Br. at 36, citing *Comm'r v. Indianapolis Power & Light*, 493 U.S. 203, 209-10 (1990)). The Government instead argues for a significantly more lenient standard that finds distributions to family members taxable to Ms. Jim if she had "control over" the income or received an economic benefit from it. (Gov. Br. at 51-52, citing *Rutkin v. United States*, 343 U.S. 130, 137 (1952) & *United States v. Rochelle*, 384 F.2d 748, 751 (5th Cir. 1967)). The Court should not apply that standard as both of the cases adopting that test address the taxability of *unlawful* gains, not income legally received on behalf of family members.

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reasons. First, although done so erroneously, the District Court imposed judgment against the Tribe, so these holdings apply just as equally to the Tribe as they do Ms. Jim. Second, these holdings pertain to the Tribe's system of distribution of GRT proceeds to its members and the taxability of those distributions. Thus, the Tribe has an interest in opposing precedent that could affect its other members. *See Knight v. State of Ala.*, 14 F.3d 1534, 1555 (11th Cir. 1994) ("defendant ordinarily has standing to appeal any ruling on the plaintiff's cause of action that is adverse to the defendant's interests.")

The Supreme Court in *Rutkin* held that income is taxable if it "allows the recipient freedom to dispose of it at will, *even though it may have been obtained by fraud* and his freedom to use it may be assailable by someone with a better title to it." *Rutkin*, 343 U.S. at 137 (emphasis added). In that instance, the income subject to tax liability had been obtained through harassment and threat to the lawful owner of it. *Id.* at 136-37. Rather than create a perverse incentive in which someone could unlawfully obtain funds and then use that fact to their advantage in a tax enforcement matter, the Supreme Court held that even minimal control over ill-gotten funds created a tax liability. *Id.*

The former Fifth Circuit echoed this policy incentive in *Rochelle*, finding that it would be unjust that a bad actor "could avoid the tax consequences of their transactions by merely adding a false promise to repay their other representations. Such a distinction between fraudulently obtained 'loans' and fraudulently obtained outright grants is not tenable here." *Rochelle*, 384 F.2d at 752.

In sharp contrast to the facts of *Rutkin* and *Rochelle*, Ms. Jim took possession of legal general welfare benefit payments, distributed to her by her sovereign tribal government, which were earmarked for her, her husband, and their two children. There is no indication of suggestion that she took possession of the payments for her husband and children by fraud or deceit. Thus, the policy rationale underpinning *Rutkin* and *Rochelle* is inapplicable here.

B. The Government's argument incorrectly paraphrases record evidence that evinces that Ms. Jim lacked "complete dominion" over distributions received on behalf of her family.

The Government first tries to portray Ms. Jim as if she only gave her husband "some of the cash" and only when she decided to "turn[] it over to [him]." (Gov. Br. at 52). This is contradicted by the evidence introduced at trial. Both Ms. Jim and her husband, Mr. Osceola, testified that Ms. Jim promptly gave him the entirety of his share of distribution. (Tr. Aug. 12, 2016 at 38:12-15 & 100:8-14). Moreover, Ms. Jim attached no strings to the distributions – Mr. Osceola could use it however he wished. (*Id.* at 100:15-18). There was no choice for Ms. Jim as the money was Mr. Osceola's distribution and – according to tribal custom – she merely received it so she could transmit it to him.[9]

Second, it is completely inconsequential that Ms. Jim could cash the jointly endorsed check without her husband present. (Gov. Br. at 52). She had permission

[9] The Government relies solely on *Helvering v. Clifford*, 309 U.S. 331 (1940) to argue that Ms. Jim, as head of household, is liable for any income flowing to other family members. But in *Helvering*, the head of household used *his own* assets to create family trusts to divert *his* income to other family members. *Id.* at 336. The Supreme Court recognized that the head of household, in that instance, had dominion over the family trusts. *Id.* In other words, family trust or not, the *Helvering* head of household would have received the income. In contrast, Ms. Jim simply took temporary possession of her husband's distribution and then promptly turned it over to him. Likewise, she took possession of her daughters' distributions and used them, or set them aside, for their benefit. Confirming that these distributions were never hers, Ms. Jim could no longer take possession of her daughter Alexa's distribution once Alexa moved out of the family home and got married. (Tr. Aug. 12, 2016 at 121:14 – 25).

to do so, and as the Government concedes, the Tribe's distributions are administered according to tribal custom. (DE 159-3 at 10:5-8). As part of that custom, the Tribe is a matriarchal society and distributions made to any family member are distributed through the mother. (DE 168 at ¶ 5). According to tribal custom, the General Council of the Tribe may choose to restrict the distributions if Ms. Jim misused them. (DE 159-3 at 113:12-115:8).[10] That Ms. Jim was able to cash the jointly endorsed check underscores that she correctly gave the distributions to her husband. Otherwise, the Tribe's General Council would have stepped in and prohibited Ms. Jim from cashing the check on her own.

Next, as the Tribe explained in its brief, Ms. Jim did not fully understand the 2001 tax return when Bernardo Roman – the Tribe's now former attorney – asked her to sign it fourteen years after the tax year in question. (Tr. Aug. 12, 2016 at 45:7 -46:10). She did not review it, nor did she understand it. (*Id.*) Ms. Jim lacks both the education and the experience to question the legal and/or tax advice of Mr. Roman. (*Id.*) The fact that Ms. Jim identified the entirety of the $272,000.00 as a non-taxable general welfare benefit on her return cannot be construed as an admission by her that she had "complete dominion" over the funds.

[10] In its brief, the Tribe cited an excerpt of Colley Billie's deposition. (Tribe Brief at 38). The Government correctly noted the pin cite was incorrect. (Gov. Br. at 54. The correct pin cite is to DE 159-3 at 113:12-115:8.

The same failings belie the Government's arguments regarding distributions made to Ms. Jim on behalf of her daughters. That there is no evidence that Ms. Jim put money in a trust does not negate that Ms. Jim used the money for the benefit of her daughters. (Tr. Aug. 12, 2016 at 62:1-24). Moreover, contrary to the Government's position, Ms. Jim never testified that she used the entirety of her daughters' distribution for household expenses, and the Government cites no evidence to support their conclusory statement. (Gov. Br. at 53). More troubling to the Government's argument is their failure to deal with the IRS' own guidance that, for tax purposes, a child's income must be reported separately from a parent's gross income if the child's unearned income exceeds $7,500.00. (DE 186-1). As the daughters' incomes exceed $7,500.00, by IRS guidance, the income cannot be attributed to Ms. Jim.

III. Ms. Jim Cannot be Penalized for Her Failure to Question Tax Advice She Received From the Tribe's Attorney.

Ms. Jim has a limited education from non-traditional Miccosukee schools. (Tr. Aug. 12, 2016 at 29:2-10). Financial matters, such as taxation, are foreign to Ms. Jim. (*Id.*). For matters involving the non-Miccosukee world, Ms. Jim is reliant on the tribal government and those hired by the tribal government. (*Id.* at 46:4-10). Nevertheless, the Government argues that Ms. Jim should have been skeptical of the tax advice she received at General Council meetings. This conclusion ignores the reality that Ms. Jim's education level and exposure to the non-Miccosukee world

make it highly improbable that she could reasonably reject the advice she received at General Council meetings.

Initially the Government tries to cast doubt on Ms. Jim's testimony that she received any tax advice at all. To do this, the Government annotates Ms. Jim's testimony by saying "[n]o advice is described." (Gov. Br. at 58). But tax advice, however limited, is described in that testimony. (Tr. Aug. 12, 2016 at 81:16-82:4). The Government points to this testimony to highlight Ms. Jim's inability to articulate the advice she received – an issue of education and ability to understand the English language. (Tr. Aug. 12, 2016 at 28:2-11). To criticize Ms. Jim because she could not fully articulate tax advice she received nearly 15 years ago from an attorney at a large tribal meeting does nothing for the Government's position, except to expose that Ms. Jim was in no position to question the authority of the advice she received.

Next the Government argues that Ms. Jim did not have a personal relationship with the Tribe's attorney, Mr. Lehtinen, so she should not have relied on his advice. (Gov. Br. at 59). But tribal members, including Ms. Jim, depend on the Tribe to engage experts, including lawyers, to provide advice to tribal members. (Tr. Aug. 12, 2016 at 46:4-10, 81:16-82:4). In fact, this duty – for tribal government to hire qualified experts – is set forth in the Tribe's Constitution. (Defs. Ex. 8). To expect tribal members to doubt experts hired by the tribal government for the sole reason that the individual member does not have a personal relationship is at odds with the

realities of tribal custom and the trust tribal members, like Ms. Jim, puts in tribal leaders and tribal attorneys. (Tr. Aug. 12, 2016 at 6:9-20).

Finally, the Government states that Ms. Jim (i) should have seen through the qualifications of Mr. Lehtinen as a tax expert, and (ii) recognized that Chairman Cypress' advice to members that they not reveal NTDR distributions to the outside world was an effort to hide payments from the IRS. (Gov. Br. at 59). To the first point, the Government submits that because other members of the Tribe knew Mr. Lehtinen was not a tax attorney, Ms. Jim should have known too. Their evidence of tribal members' knowledge of Mr. Lehtinen's tax expertise is Gabriel Osceola's testimony that Mr. Lehtinen was not a tax expert. (*Id.*). But Mr. Osceola is not Ms. Jim. In contrast to Ms. Jim, Mr. Osceola received a non-Miccosukee education, lived off the reservation for considerable time and is now on the Tribe's Business Council. (DE 181-2 at 8:10-9:13). In other words, he has education and experience that would allow him to discern a tax lawyer from any other lawyer. Ms. Jim does not, and whether to impose penalties must be evaluated from her perspective. *See, e.g.*, *Southgate Master Fund, L.L.C. v. United States*, 659 F.3d 466, 493 (5th Cir. 2011).

As to the effect of Chairman Cypress' advice that tribal members not reveal the amount of their distributions, this advice is consistent with Miccosukee culture, which is skeptical of the non-Miccosukee world. (Tr. Aug. 15, 2016 at 139:8-140:1).

Viewed through this lens, it is reasonable that Chairman Cypress would want tribal members to avoid revealing their income, for example, to avoid members being taken advantage of by individuals who are not Miccosukee or spending beyond their means. (Tr. Aug. 15, 2016 at 42:18-44:12). That Ms. Jim should have realized Chairman Cypress' advice was allegedly an attempt to avoid the IRS is unsupported by any evidence. In fact, the Government cites no evidence at all for this proposition. (Gov. Br. at 59-60).

IV. The Government Provided No Notice of its Intent to Seek a Judgment Against the Tribe.

There is no dispute that the Government – in pleadings, summary judgment or at trial – never presented any claims against the Tribe or implied any intent to enter judgment against the Tribe. (Tribe Br. at 47-48). They did not ask the Court to enter judgment against the Tribe at the conclusion of the case and the District Court, in its Findings of Fact and Conclusions of Law, only directed that judgment be entered against Ms. Jim. The Government does not contest any of these points. Instead, it states that *other* lawsuits put the Tribe on notice that it may face a preclusive judgment in *this* case.[11] (Gov. Br. at 61-62).

This theory, however, ignores one of the most fundamental elements of the judicial process: a judgment is only entered against a party following a finding of

[11] The preclusive effect of the District Court's findings – if upheld – in other cases involving the Tribe should be determined by those courts. But, if this Court

liability on a claim. It is therefore not surprising that the Government cites no on-point authority to support its argument that the Tribe should be included in the judgment as there were no claims asserted against the Tribe in the case. Indeed, the cases cited by the Government underscore that claims must actually be presented against the intervenor or are completely unrelated to the present issue.[12] *See United States v. State of Ore*., 657 F.2d 1009, 1011 (9th Cir. 1981) (granting injunction against intervenor after another party "applied to the [court] for an injunction against [the intervenor's] fishing of spring chinook."); *Alvarado v. J.C. Penney Co.*, 997 F.2d 803, 805 (10th Cir. 1993) (holding that intervenor was liable for judgment when the original party had *directly* asserted claims against the intervenor); *D.C. v. Merit Sys. Prot. Bd*., 762 F.2d 129, 132 (D.C. Cir. 1985) (granting that an original party

affirms judgment against the Tribe, the Tribe will be bound by this decision, even in factually different scenarios. *See E.E.O.C.*, 383 F.3d at 1286. The Tribe will effectively be precluded from intervening in lawsuits involving tribal members defending tax enforcement issues.

[12] The other cases cited by the Government have nothing to do with whether an intervenor can be held liable for claims not presented against it. *See Marcaida v. Rascoe*, 569 F.2d 828, 831 (5th Cir. 1978) (holding that an intervenor could file a motion related to a right held by an original party); *Matter of First Colonial Corp. of Am*., 544 F.2d 1291, 1297 (5th Cir. 1977) (holding that intervenor has standing to appeal an order for attorneys' fees when intervenor has a financial interest in the party paying the fee award).

could *pursue* relief against the intervenor once the case was remanded). In each case an intervenor was liable because claims were actually made against him or her.

These cases all reiterate that the original party must actually present claims against the intervenor, and underscores that a party cannot seek judgment against the intervenor without first asserting a claim. Accordingly, it was improper of the District Court to enter judgment against the Tribe.

CONCLUSION

For the reasons set forth above, the Tribe respectfully requests that the Court reverse the holdings of the District Court and hold (i) that distributions made to Ms. Jim are not taxable under the Tribal GWE Act; (ii) to the extent portions of those distributions are taxable, that the IRS incorrectly assessed income of Ms. Jim's husband and daughters to Ms. Jim; (iii) no penalties should be imposed on Ms. Jim; and (iv) judgment should not have been entered against the Tribe because the Government never sought relief from the Tribe.

Respectfully submitted this 10th day of April, 2017.

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/s/ *George B. Abney*
George B. Abney
Daniel F. Diffley
Michael J. Barry
ALSTON & BIRD LLP
1201 West Peachtree Street
Atlanta, Georgia 30309-3424
Telephone: 404-881-7000
Facsimile: 404-881-7777
george.abney@alston.com
dan.diffley@alston.com
mike.barry@alston.com

Counsel for Intervenor-Appellant
The Miccosukee Tribe of Indians of Florida

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(B), I hereby certify that the within and foregoing was prepared using Times New Roman 14-point font and contains 5,803 words.

This 10th day of April, 2017.

/s/ *George B. Abney*
George B. Abney
Daniel F. Diffley
Michael J. Barry
ALSTON & BIRD LLP
1201 West Peachtree Street
Atlanta, Georgia 30309-3424
Telephone: 404-881-7000
Facsimile: 404-881-7777
george.abney@alston.com
dan.diffley@alston.com
mike.barry@alston.com

Counsel for Intervenor-Appellant
The Miccosukee Tribe of Indians of Florida

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the within and foregoing has been filed using CM/ECF which has automatically generated electronic notice on the following counsel of record:

Robert Joel Branman
Direct: 202-307-6538
U.S. Department of Justice
Chief Appellate Section Tax Division
RM 4635
Firm: 202-514-2915
PO BOX 502
950 PENNSYLVANIA AVE NW
WASHINGTON, DC 20044

Robert L. Welsh
William E. Farrior
Nicholas S. Bahnsen
U.S. Department of Justice
Tax Division
Firm: 202-514-2000
PO BOX 14198
WASHINGTON, DC 20044-0000

Bernardo Roman, III
Law Office of Bernardo Roman III, PA
Firm: 305-643-7993
1250 SW 27TH AVE ST 506
MIAMI, FL 33135

Robert O. Saunooke
Law Office of Robert O. Saunooke
Firm: 561-302-5297
18620 SW 39TH CT
MIRAMAR, FL 33029

This 10th day of April, 2017.

/s/ *George B. Abney*
George B. Abney
Daniel F. Diffley
Michael J. Barry
ALSTON & BIRD LLP
1201 West Peachtree Street
Atlanta, Georgia 30309-3424
Telephone: 404-881-7000
Facsimile: 404-881-7777
george.abney@alston.com
dan.diffley@alston.com
mike.barry@alston.com

Counsel for Intervenor-Appellant
The Miccosukee Tribe of Indians of Florida