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

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

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

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

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

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

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

20. Miccosukee Tribe of Indians of Florida.

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

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

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

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

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

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

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

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

29. 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.

STATEMENT REGARDING ORAL ARGUMENT

Appellant the Miccosukee Tribe of Indians of Florida requests oral argument. This appeal presents an issue of first impression as it relates to the applicability of the Tribal General Welfare Exclusion Act. In addition, this case presents unique questions on issues of federal income tax – which are not ordinarily before this Court. Further, important questions of federal civil procedure – mainly whether judgment can be entered against a party when the trial court does not direct entry of judgment in its findings of fact and conclusions of law – are presented in this case as well. Given the complexity of the issues on appeal and the lengthy record below, oral argument will assist the Court in the resolution of this appeal.

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STATEMENT OF JURISDICTION

Appellees brought this lawsuit against Sally Jim, seeking to reduce to judgment the 2001 Federal income tax assessment the IRS made against Ms. Jim. (DE 1). Accordingly, the District Court had federal question subject matter jurisdiction over this case under 28 U.S.C. § 1331.[1]

The District Court entered Final Judgment against Sally Jim and the Tribe on August 24, 2016. (DE 190). On September 6, 2016, the Tribe filed a motion to alter or amend the judgment. (DE 192). On September 16, 2016, the District Court denied the Tribe's motion. (DE 196). The Tribe filed a timely notice of appeal on November 15, 2016. (DE 201). The Court, therefore, has jurisdiction pursuant to 28 U.S.C. § 1291 and Rule 4 of the Federal Rules of Appellate Procedure.

[1] The District Court alternatively had jurisdiction over this case under 28 U.S.C. §§ 1340, 1345 and 26 U.S.C. § 7402.

STATEMENT OF THE ISSUES

1. Did the District Court err in holding that no portion of the distributions made to Ms. Jim constitute non-taxable general welfare benefits under the Tribal General Welfare Exclusion Act, 26 U.S.C. § 139E(b)?

2. Did the District Court err in holding that Ms. Jim should be taxed on distributions the Tribe made for the benefit of her husband and minor children?

3. Did the District Court err by holding that Ms. Jim, who speaks limited English and has no formal education beyond the ninth grade in a Tribal school, should be subject to substantial late payment and late filing penalties?

4. Did the District Court err by entering judgment against the Tribe where the United States did not assert any claims against the Tribe and the District Court's findings of fact and conclusions of law directed that judgment be entered only against Ms. Jim?

STATEMENT OF THE CASE

The Miccosukee Tribe of Indians of Florida (the "Tribe") is a federally recognized Tribe of Indians. (Defs. Ex. 8). Its lands sit within the Florida Everglades. (Tr. Aug. 12, 2016 at 28:25-29:1). The primary language of the Tribe is its native language of Miccosukee, with many members speaking little to no English. (*Id.* at 30:2-3; Tr. Aug. 11, 2016 at 62:16-24). Many words in the English language do not translate into the Miccosukee language, often because the specific terms do not exist within Miccosukee culture. (Tr. Aug. 12, 2016 at 29:6-10). For instance, the English words "tax," "lease," "ownership," "denomination," "coin," and "gasoline" have no Miccosukee equivalent. (*Id.*). As a result, Tribal members often rely on the advice of their tribal leaders and outside advisors on issues that are not rooted in Miccosukee culture, such as Federal tax obligations. (*Id.* at 46:1-10).

Sally Jim is a member of the Tribe. (DE 168 at ¶ 3). Miccosukee is her primary language and she speaks and understands limited English. (Tr. Aug. 12, 2016 at 29:6-10). In 2001, she received distributions from the Tribe. (DE 168 at ¶ 7). In 2001, her husband and minor children also received distributions from the Tribe. (Tr. Aug. 12, 2016 at 37:22-23; DE 168 at ¶¶ 7-8). This appeal arises out of the Internal Revenue Service's effort – fifteen years later – to tax and penalize Ms. Jim not only on distributions she received, but also on distributions her husband and minor children received. (DE 1).

I. Factual Background

A. The Tribe is a federally recognized Indian tribe and receives all protections associated with federal recognition.

In 1962, Congress declared the Tribe a federally recognized Indian Tribe. (Defs. Ex. 8). To permit government-to-government relations, the United States required the Tribe to create a formal written constitution that would be approved by the Bureau of Indian Affairs ("BIA") and Congress. (*Id.*) Pursuant to this requirement, a formal Constitution of the Tribe was enacted and adopted by the members of the Tribe, and was subsequently approved by Congress. (*Id.*)

The Miccosukee Constitution affirms the structural organization of the Tribe that predates federal recognition. (*Id.*) Specifically, its Constitution, as approved and acknowledged by the federal government (*id.* at 9), 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." (*Id.* at Art. IV, Sec. 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. (*Id.* at Art. IV, Sec. at 4). 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. (*Id.* at Art. VI, Sec. 1)

All actions taken by the Tribe, including 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 enrolled members of the Tribe who are 18 years or older. (*Id.* at Arts. III & IV). The day-to-day operations of the Tribe are managed by the Business Council, at the direction and approval of the General Council. (*Id.* at Arts. III & V). The Business Council consists of five elected positions: Chairman, Assistant Chairman, Secretary, Lawmaker and Treasurer. (*Id.* at Art III, Sec. 2). All authority of the Business Council to act and bind the Tribe is vested within the General Council which 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. (*Id.* at Arts. III, IV, & V).

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. (*Id.* at Art. V, Sec. 3).

B. The Tribe Implements its Gross Receipts Tax.

In 1984 the Tribe formally implemented a gross receipts tax. (Pl. Ex. 75). The gross receipts tax imposes a tax on the gross receipts of all businesses operating within the jurisdiction of the Tribe, including all tribal businesses. (*Id.*)

C. The Tribe opens its gaming facility.

In 1989, the Tribe, in conjunction with a third-party investor/ manager, began construction of an Indian gaming facility on reserved lands. (Defs. Ex. 7). So that the third-party investor/ manager could recoup its investment, the Tribe agreed not to impose its gross receipts tax on the gaming facility for the initial years of operation. (*Id.*) In 1990, the Tribe's gaming facility, known as Miccosukee Indian Bingo ("MIB"), opened for business. (Defs. Ex. 5). Pursuant to the provisions of the Indian Gaming Regulatory Act ("IGRA") the Tribe owned MIB. (*Id.*)

From 1992 until 2010, Dexter Lehtinen served as primary legal counsel to the Tribe on general legal matters, including interactions with U.S. government officials and Indian gaming. (Tr. Aug. 11, 2016 at 60:13-16 & 61:2-15). As evidenced by Mr. Lehtinen's regular presence at General Council meetings, the General Council considered him counsel to the Tribe. (*Id.* at 61:16-24).

In his role as legal counsel to the Tribe, Mr. Lehtinen advised the Tribe that once the third-party investor/ manager was no longer involved with MIB, the Tribe's gross receipts tax should apply to MIB just as it applied to all other tribal businesses.

(Tr. Aug. 11, 2016 at 79:11-25). Although Mr. Lehtinen's legal opinion was that the 1984 gross receipts tax applied to MIB, he recommended that the Tribe enact a new ordinance in order to clarify that MIB would be subject to the tax. (Tr. Aug. 11, 2016 at 107:5-108:12). Consistent with Mr. Lehtinen's advice, the Tribe, with the approval of the General Council, passed an additional ordinance that explicitly applied the gross receipts tax to MIB. (Pl. Ex. 1). The Tribe began collecting a gross receipts tax on the gaming operations. (DE 168 at ¶¶ 13-14). The gross receipts taxes collected by the Tribe are placed into a "non-taxable distributable revenue" account, commonly referred to as the "NTDR" account. (Tr. Aug. 11, 2016 at 108:22-109:19).

D. The Tribe makes distributions to its members from revenues from its gross receipts tax.

Prior and subsequent to the opening of its gaming facility, the Tribe used funds derived from its gross receipts tax to make distributions to each individual tribal member. (DE 168 at ¶¶ 15, 18). This began in 1984, and the distributions have grown over time. (*Id.*) The distributions at issue are distributed pursuant to a long standing tribal custom, or tribal government practice, which is to provide distributions to each member of the Tribe. (Tr. Aug. 15, 2016 at 30:20-31:14). This custom and practice was in place long before the Tribe enacted its gross receipts tax, and long before it opened its gaming facility. (*Id.*)

Miccosukee culture is a matriarchal society, with women serving as head of the household. (Tr. Aug. 12, 2016 at 35:5-7). Pursuant to Tribal custom, distributions to individual tribal members are generally provided to the head of the household. (Tr. Aug. 15, 2016 at 46:11-22). The head of the household then distributes the distributions to members of her household. *Id.* For minor children who receive distributions, the head of household uses the distributions for their benefit or saves the distributions for them until they reach maturity. (DE 181-4 at 113:12-115:8). If the tribal member does not do so, the Tribe can stop providing the distributions to the head of household and can hold them in trust for the benefit of the child. (*Id.*; *see also* Tr. Aug. 15, 2016 at 46:23-47:8). This furthers the purpose of the distributions, which is to preserve the Tribe's culture by allowing tribal members to live on the Miccosukee reservation without assistance from the outside world.

Members of the Miccosukee Tribe are wholly dependent on the Miccosukee Tribal Government for their general welfare. (Defs. Ex. 1 at 2). The Tribe has determined that the distributions at issue here are necessary to provide for the members' needs and the needs of the Tribe. (DE 159-3 at 10:5-8). The Tribe has always taken the position that it will help all of its people; a principle that pre-dates even the establishment of the United States. (*Id.*). One of the Tribe's former Chairmen explained, "the spirit of our distribution has never changed with the Tribe.

As I mentioned earlier, the distribution was meant to assist tribal members." (*Id.* at 130:24-131:2).

The distributions are essential for sustaining members of the Miccosukee Tribe in their existing community where they continue to maintain their separate language, identity, and culture. Disruption of and interference with the ability of members of the Tribe to live together on what is left of their tribal lands would force tribal members to make their livelihoods elsewhere, thereby eroding the cohesion of the Tribe and forcing assimilation onto tribal members.

Tribal leaders and outside advisors regularly advised the Tribe and tribal members that distributions would not be subject to tax if they were derived from tribal lands. (Pl. Ex. 3 at 5). Tribal leaders made these recommendations at General Council meetings at which Mr. Lehtinen was present. (Tr. Aug. 11, 2016 at 61:16-24). The Tribe's beliefs regarding the taxation of distributions derived from the gross receipts tax were held in good faith based on the advice given by attorneys representing the Tribe. (Pl. Ex. 2).

E. Ms. Jim and her family receive distributions from the Tribe.

Sally Jim is a member of the Tribe. (DE 168 at ¶ 3). In 2001 she was eligible to receive distributions from the Tribe. (*Id.* at ¶ 7). In 2001 three other members of her household were also eligible for distributions: her husband, Alex Osceola, her

daughter, Alexis Osceola, and her adopted daughter, Tamara Jim. (*Id.*) Both daughters were minors in 2001. (*Id.*)

In 2001, the Tribe provided distributions to Sally Jim, her husband, and her two daughters of $68,000 each, for a total household amount of $272,000.00. (Pl. Ex. 36). The distribution checks Sally Jim received were made payable to, and endorsed by, both her and her husband. (Pl. Ex. 36). The Tribe made the distributions quarterly. (*Id.*) In 2001, upon receiving the quarterly distributions, as was her custom and practice, Sally Jim gave one-fourth of the funds to her husband. (Tr. Aug. 12, 2016 38:12-13). It is not disputed that Mr. Jim used his share for his own purposes. (*Id.* at 100:8-21). During that year, Sally Jim saved a portion of her daughters' distributions for their benefit, and used the remaining portion for their general household needs. (*Id.* at 38:9-11; 38:24-40:2).

Ms. Jim was educated in the Miccosukee school system up to and through the ninth grade. (Tr. Aug. 12, 2016 at 29:2-10). The Miccosukee 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.[2] (*Id.* at 85:25-86:24). Although Ms. Jim worked during her life, financial matters, even basic

[2] Ms. Jim speaks and understands limited English and presented her testimony with the assistance of a Miccosukee interpreter. (Tr. Aug. 12, 2016 28:2-11)

addition and subtraction, as well as technical terms familiar to the non-Indian community, were foreign to her. (*Id.* at 29:2-10)

The distributions made to Ms. Jim and her family in 2001 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. (DE 168 at ¶¶ 15, 18). Ms. Jim did not use her daughters' distributions in an improper manner or for any purpose other than to provide for her children's welfare. (Tr. Aug. 12, 2016 at 38:9-11; 38:24-40:2). 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. (DE 181-4 at 113:12-115:8).

Ms. Jim attended numerous General Council meetings, including certain meetings where Mr. Lehtinen advised on numerous legal issues, including distributions of gross receipt revenues and the taxability of those revenues. (Tr. Aug. 12, 2016 at 56:7-58:13). Ms. Jim understood, based on the advice and presentations during General Council meetings, that the distributions were not taxable. (*Id.* at 81:16-82:4). Tribal leaders – in accordance with tribal custom, tradition and the clan system – advised members that the distributions were not taxable. (*Id.* at 87:12-24).

F. The IRS seeks to tax and penalize Ms. Jim.

Ms. Jim did not file a tax return when due for the 2001 tax year. (DE 168 at ¶ 10). On the dates and in the amounts set forth below, the IRS made assessments against Ms. 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

(DE 168 at ¶ 1). Ms. Jim did not pay the amounts assessed. (*Id.* at ¶ 2).

Ms. Jim did not pay any taxes associated with the distributions because she relied on the advice of Tribal leaders and attorneys that the distributions were not subject to federal income tax. (Tr. Aug. 12, 2016 at 81:16-82:4)

In January 2015, Bernardo Roman, a former attorney for the Tribe, prepared a 2001 tax return for Ms. Jim without Ms. Jim's knowledge. (Tr. Aug. 12, 2016 at 45:7 - 46:10). He then brought the tax return to Ms. Jim and urged her to sign it. (*Id.*) Ms. Jim signed the 2001 tax return on January 20, 2015, without reviewing it.

(*Id.*) The 2001 return listed the $272,000 in distributions made by the Tribe to Ms. Jim and her family as non-taxable general welfare benefits. (Pl. Ex. 67).

II. Procedural History

A. The Government's Complaint

On July 1, 2014, the Government filed a one-count complaint against Ms. Jim seeking to reduce its tax assessment in the year 2001 to a judgment. (DE 1). Specifically, the Government sought unpaid federal income tax for the year 2001 in the amount of $267,237.18, plus statutory additions and interest. (*Id.* at 3). The Government's claims were brought solely against Ms. Jim. (*Id.*)

B. The Tribe Intervenes

On March 16, 2016, the Tribe filed a motion to intervene under Federal Rule of Civil Procedure 24 because a ruling in this case, "if unfavorable to Ms. Jim, will set a precedent" regarding the taxability of the Tribe's distributions. (DE 90 at 7). The Government opposed the Tribe's motion, but the District Court allowed the Tribe to intervene because judgment "has the potential for negative *stare decisis* effects" if adverse to Ms. Jim. (DE 114 at 4).

C. The Government's Motion for Summary Judgment

On April 1, 2016, the Government moved for summary judgment against Ms. Jim, asking the District Court to "enter judgment in favor of the United States and against Sally Jim." (DE 156 at 30). The Tribe and Ms. Jim, pursuant to the District

Court's direction, filed a joint opposition to the Government's motion for summary judgment, arguing that (i) the income paid to Ms. Jim is non-taxable pursuant to the Tribal General Welfare Exclusion Act of 2014 ("Tribal GWE Act"); (ii) the IRS incorrectly calculated Ms. Jim's tax liability; (iii) Ms. Jim should not need to pay penalties; (iv) distributions derived from the land are non-taxable. (DE 159).

On June 3, 2016, the District Court issued an order granting in part and denying in part the Government's summary judgment motion. (DE 173). In its Order, the District Court held Ms. Jim was liable for tax on distributions derived from "gaming revenue." (*Id.* at 11). The District Court, however, held that summary judgment was not warranted: (i) regarding Ms. Jim's tax liability on distributions derived from non-gaming sources; (ii) regarding the amount of the 2001 IRS assessment (specifically whether she should be taxed on distributions to her family members); and, (iii) whether penalties should be imposed on any tax attributable to distributions received from the Tribe. (*Id.* at 20).

D. Trial and Final Judgment

The District Court conducted a four day bench trial in August 2016, on the remaining issues in the case. (DE 182, 183, 184, 187). Prior to the conclusion of the trial, the parties submitted proposed findings of fact and conclusions of law. (DE 185-86). The District Court issued its findings of fact and conclusions of law and held that the IRS had correctly calculated Ms. Jim's tax liability and that Ms. Jim

owes penalties for failure to file a timely tax return. (DE 188). In its order, the District Court further ordered the Government to submit a proposed judgment "in favor of the United States of America and against Sally Jim." (*Id.* at 12).

The Government submitted a proposed judgment on August 23, 2016. (DE 189). The Government's proposed judgment asked the Court to enter judgment against both Ms. Jim and the Tribe, contrary to the direction of the District Court. (Compare DE 188 at 12 to DE 189-1 at 1). The next morning, on August 24, 2016, the District Court adopted the Government's proposed judgment and entered judgment against Ms. Jim *and the Tribe* finding that the distributions were taxable income and Ms. Jim owes $278,758.83 as of April 9, 2015, in unpaid federal income taxes, penalties and interest. (DE 190).

E. Motion to Reconsider the Final Judgment Against the Tribe

On September 6, 2016, the Tribe moved to reconsider the Final Judgment on the sole basis that Final Judgment should not have been entered against the Tribe. (DE 192). The Tribe, in its motion, argued that the Government never presented any claims against the Tribe at any point in the case and, up until submitting its proposed final judgment, there had been no mention of seeking judgment against the Tribe. (*Id.* at 192 at 1-2). On September 9, 2016, the Government opposed this motion, arguing that by intervening the Tribe subjected itself to judgment. (DE 194). The

District Court denied the Tribe's motion for reconsideration on September 16, 2016. (DE 196).

SUMMARY OF THE ARGUMENT

This case concerns the taxability of distributions made by an Indian tribe to its members for their general welfare, and for the general welfare of the Tribe as a whole. This case also concerns the IRS's aggressive tactic of seeking to tax a female head of household not only on funds she received, but also on funds other members of her household received. Due to numerous errors by the District Court, the Tribe, as well as Ms. Jim, are now facing a Final Judgment premised upon a flawed 2001 IRS tax assessment solely against Ms. Jim. As set forth herein, the Court should reverse the District Court's errors.

I. The District Court Erred by Refusing to Acknowledge that Some Portion of Distributions Made to Ms. Jim Are Non-Taxable Income Under the Tribal General Welfare Act.

Under the recently enacted Tribal General Welfare Exclusion Act of 2014 ("Tribal GWE Act"), distributions made to tribal members, including Ms. Jim, are non-taxable. The District Court erroneously held that distributions made to Ms. Jim did not satisfy the statutory requirement because they were (i) not for the promotion of the general welfare; and (ii) were lavish and extravagant.

First, the distributions at issue satisfy the statutory requirement that the distributions be made "for the promotion of general welfare." 26 U.S.C. § 139E(b). The District Court erred in concluding that distributions made to a tribal member only fall within the statute if they are based on individual need – i.e., to assist a tribal

member suffering from disability. The record in this case includes a host of undisputed facts showing that the distributions at issue in this case satisfy the "promotion of general welfare" under the Tribal GWE Act.

Second, the District Court ruled at summary judgment that the distribution to Ms. Jim of $272,000 was "lavish and extravagant" and therefore outside the parameters of the Tribal GWE. But in the same ruling, she found factual questions as to whether the $272,000 was solely attributable to Ms. Jim. At worst, this indicates a predisposition to the issue at trial. At best, this is a clear error by the District Court – ruling on a key legal issue while acknowledging factual questions remain on that very issue. Further, in concluding that the entire $272,000 distribution to Ms. Jim was "lavish and extravagant", the District Court never once acknowledged what that means or that some portion of it might not be lavish and extravagant. Further, there is no guidance on this issue, and the Tribal GWE specifically asks parties to defer interpretation of its requirements until further regulatory guidance issues, which the District Court did not.

II. The District Court Erred in Holding Ms. Jim Should be Taxed on Distributions the Tribe made to Her Husband and Minor Children.

As is Miccosukee custom, Ms. Jim took initial possession of distributions the Tribe made to her husband and minor children. She distributed her husband's funds directly to him, and she used, or saved, her children's distributions for their benefit. Ms. Jim did not have an unfettered right to the funds the Tribe paid to her husband

and children, and long-standing precedent confirms that she cannot be taxed on funds due to others. *See, e.g., Hoeper v. Tax Comm'n of Wis.*, 284 U.S. 206, 218 (1931) ("[A]ny attempt by a state to measure the tax on one person's property or income by reference to the property or income of another is contrary to due process of law . . . . That which is not in fact the taxpayer's income cannot be made such by calling it income."). But, the District Court lumped together all of the funds received by Ms. Jim and her family members and imposed a substantial tax liability solely on Ms. Jim. The District Court erred as Ms. Jim cannot be taxed on funds received by other members of her household.

III. The District Court Erred by Finding that Ms. Jim Did Not Have "Reasonable Cause" For Failing to File a 2001 Tax Return and Pay Taxes.

Ms. Jim lacks a traditional secular education. Her education is devoid of traditional western concepts, such as finance, taxation and even the English language. Her ability to interact with the non-Miccosukee world is often dependent on the advice of the Tribal government. In this case, the Tribal government – with attorney advisors present – recommended that Ms. Jim not report the 2001 distributions as income. So she did not.

But the District Court upheld penalties against Ms. Jim for failing to file a timely tax return in 2001, finding no reasonable cause for her reliance on the Tribal government. This contradicts well-founded authority that declines to impose

penalties on members of Indian tribes in similar contexts. *See e.g.*, *Jourdain v. Comm'r*, 71 T.C. 980 (T.C. 1979). It also ignores the undisputed facts concerning Ms. Jim and the realities of Miccosukee culture and their reliance on Tribal government to interpret external influences, such as federal taxes.

IV. Final Judgment Against the Tribe was in Error – Nothing Prior to the Final Judgment Indicated the Government Sought Judgment Against the Tribe.

After trial, in its Finding of Facts and Conclusions of Law, the District Court held that "final judgment will be entered by separate order in favor of the United States of America and against Sally Jim" (DE 188 at 12) and directed the Government to submit a judgment consistent with this finding. In its proposed judgment, however, the Government inserted a request that final judgment also be entered against the Tribe. This request came only after omitting any request for judgment against the Tribe in its summary judgment motion or trial presentation, and basing its request for judgment on its own proposed findings of fact and conclusions of law that asks for judgment only against Ms. Jim. But the District Court took the Government's invitation and entered Final Judgment against the Tribe as well as Sally Jim.

The Tribe was not on notice that Final Judgment would be entered against it. The Government never sought relief against the Tribe until the last possible moment when the Tribe could no longer respond. And the Final Judgment is confusing,

leaving ambiguity as to what applies to the Tribe and what applies to Ms. Jim. Finally, contrary to the District Court's erroneous reading of Federal Rule of Civil Procedure 24 and the surrounding case law, it is of no moment that the Tribe intervened in this case – the Government still must present claims against the Tribe to obtain judgment, which never happened in this case.

STANDARD OF REVIEW

The District Court's evidentiary rulings are reviewed for an abuse of discretion. *United States v. Eckhardt*, 466 F.3d 938, 946 (11th Cir. 2006). The District Court's conclusions of law are reviewed *de novo*. *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward Cnty.*, 450 F.3d 1295, 1303 (11th Cir. 2006).

Orders granting summary judgment are reviewed *de novo*, "applying the same legal standards which bound the district court." *See Whatley v. CNA Ins. Companies*, 189 F.3d 1310, 1313 (11th Cir. 1999). Summary judgment is appropriate only when "there is no genuine issue as to any material fact and…the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. Pro. 56(c). In making the determination, the Court must "view all evidence and make all reasonable inferences in favor of the party opposing summary judgment." *Whatley*, 189 F.3d at 1313.

Orders granting or denying a motion to alter or amend judgment are "committed to the sound discretion of the district judge and will not be overturned on appeal absent an abuse of discretion." *Am. Home Assur. Co. v. Glenn Estess & Assocs., Inc.*, 763 F.2d 1237, 1238–39 (11th Cir. 1985).

ARGUMENT AND CITATION OF AUTHORITY

I. The District Court Erred by Refusing to Acknowledge that Some Portion of Distributions Made to Ms. Jim Are Non-Taxable Income Under the Tribal General Welfare Act.

This is an issue of first impression for the Court.[3] According to the plain terms of the Tribal General Welfare Exclusion Act ("Tribal GWE Act"), distributions – or some portion thereof – made to a Tribal member pursuant to a Tribal government welfare program are exempt from taxation. The District Court made multiple errors in ruling on summary judgment that the distributions to Ms. Jim were not exempt under the Tribal GWE. First, the District Court applied the wrong standard and misinterpreted the factual record to determine that distributions were not for the promotion of the general welfare and were lavish and extravagant. Second, the District Court erred by failing to acknowledge that, even if $272,000.00 is the correct taxable amount to Ms. Jim, which it is not, only part of that amount is lavish and extravagant.

[3] In an unpublished opinion, this Court, only after acknowledging the issue was not properly before the Court because it was raised for the first time in a reply brief, noted in *dictum* that "there is a high likelihood the present [assistance] payments would not qualify as 'general welfare payments.'" *United States v. Billie*, 611 F. App'x 608, 612 (11th Cir. 2015). The Court, however, did not have the benefit of a complete briefing on the applicability of the Tribal GWE.

The distributions made to Ms. Jim are general welfare payments, as defined in the Tribal GWE Act, and therefore are excluded from taxation. The Court erroneously granted summary judgment to the Government on this issue.

The Tribal GWE was passed by Congress in 2014. Under this Act, the term "Indian general welfare benefit" includes distributions made to a Tribal member pursuant to a Tribal government program if:

> (1) the program is administered under specified guidelines and does not discriminate in favor of members of the governing body of the tribe, and
>
> (2) the benefits provided under such program—
>
> (A) are available to any tribal member who meets such guidelines,
> (B) are for the promotion of general welfare,
> (C) are not lavish or extravagant, and
> (D) are not compensation for services.

26 U.S.C. § 139E(b).

Importantly, the Tribe and its Members receive the benefit of any ambiguities in the Tribal GWE Act. Consistent with Congress' intent to stop IRS abuse and reestablish the tradition of respecting Tribal self-governance, the Tribal GWE Act mandates 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." Tribal GWE Act of 2014, 128 Stat 1883, 1884.

Thus, any ambiguity in the statute – such as the meaning of a benefit subject to the general welfare exclusion – should be interpreted according to the meaning the tribal government gave to it. If any doubt exists, the dispute must be resolved in favor of the Tribe's interpretation. The Act's deferential standard of statutory interpretation is consistent with the "Indian Canon of Statutory Construction" which has been recognized repeatedly by the United States Supreme Court and the lower courts. *See, e.g.*, *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, P.C.*, 467 U.S. 138, 149 (1984) ("Statutes passed for the benefit of dependent Indian tribes are to be liberally construed, with doubtful expressions being resolved in favor of the Indians."); *Florida v. Seminole Tribe of Fla.*, 181 F.3d 1237, 1242 (11th Cir. 1999) ("Ambiguities in federal laws implicating Indian rights must be resolved in the Indians' favor.").

Applying the deferential standard required by the Act demonstrates that the IRS was not entitled to summary judgment because the distributions made to Ms. Jim are general welfare payments, or at a minimum, the District Court should have concluded that there remains a factual dispute over whether the payments at issue in this matter meet these broad criteria.

A. The Benefit is for the Promotion of General Welfare.

The Tribal GWE does not define "general welfare." The statutory construction provision of the Tribal GWE Act, described above, confirms that

Congress intended the term "general welfare" to be construed broadly, and for tribal governments to be afforded deference in establishing general welfare programs for their members. Under the Act, "deference shall be given to Indian tribal governments for the programs administered and authorized by the tribe to benefit the general welfare of the tribal community." Tribal GWE Act of 2014, 128 Stat 1883, 1884.

Rather than give deference to the Tribal government's choices in providing for the Tribe's general welfare, the District Court determined that, because the distributions are not given according to individual need, "it is unlikely they fall within the purview of general welfare payments." (DE 173 at 13). To reach this conclusion, the District Court ignored facts in the record and relied solely on *In re Hutchinson*, 354 B.R. 523, 530 (Bankr. D. Kan. 2006), a case interpreting what is deemed "public assistance" under a Kansas statute, not what is to promote general welfare. (DE 173 at 13).

In *Hutchinson*, a tribal member asserted that distributions he received from the Indian tribe were exempt from a bankruptcy proceeding because it was a public assistance benefit, as defined under a Kansas statute. *Id.* at 529. The *Hutchinson* court interpreted "public assistance benefits," not "general welfare," to mean "'government aid to the needy blind, aged or disabled persons and to dependent children.'" *Id.* (quoting *In re Longstreet*, 246 B.R. 611, 614-15 (S.D. Iowa 2000)).

It then concluded that "[d]espite being for the 'general welfare' of the tribal members,…the per capita distributions are ***not public assistance benefits***, and thus not exempt." *Id.* at 531. In other words, the *Hutchinson* court found that it was irrelevant whether the payments were made for the general welfare of tribal members – which they were – because the Kansas statute referring to "public assistance benefits" controlled. *Id.* Although that Kansas statute has no meaning here, the District Court gave the same import to it here as *Hutchinson* did when directly invoked by the parties to the bankruptcy case.

Whether the distributions to Ms. Jim promote the general welfare is the only question here. In *Hutchinson*, the Kansas statute added an entirely additional step (applying the Kansas statute) and term (public assistance benefit) to the evaluation. That is how the *Hutchinson* court found the payments to be non-exempt. And *Hutchinson* **did** find that the payments there were for the promotion of the general welfare. *Id.* at 531.

Under the Tribal GWE, the question is whether the distribution were "for the promotion of general welfare." The District Court's statement that "*Hutchinson* and the Tribal GWE differ slightly textually" is a vast understatement. (DE 173 at 13). The extra step interpreting "public assistance benefits" – not the interpretation of general welfare – imputed the requirement that distributions be made on an

individual basis if they are non-exempt. Accordingly, the District Court's use of the bankruptcy court's reading of a different term in a Kansas statue is without any basis.

The legislative history of the Act reinforces the broad construction of "general welfare." The Act "gives greater respect to tribal institutions and programs"[4] and "include[s] no limitation of a tribe's ability to address community needs."[5] It is intended to recognize "the role that general welfare programs play in maintaining tribal culture and tradition"[6] and to prevent a narrow approach to general welfare benefits from "deter[ring] tribes from preserving culture and tradition or pursuing self-determination."[7] Congress intended the Act to give "necessary deference and flexibility to these *tribal governments* so that they can develop programs and determine priorities that promote the general welfare in their own communities."[8] The Act "fully recognize[s] that Indian tribes, as sovereign nations, are responsible for making certain governmental programs and services best fit the needs of their citizens. . . . [W]e have to recognize that tribal governments have the right to make those decisions without tax consequences."[9]

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[4] 160 Cong. Rec. S5687 (2014) (statement of Senator Ron Wyden).
[5] 160 Cong. Rec. H7601 (2014) (statement of Congressman Devin Nunes).
[6] *Id.*
[7] *Id.*
[8] 160 Cong. Rec. H7601 (2014) (statement of Congressman Ron Kind) (emphasis added).
[9] 160 Cong. Rec. S5617 (2014) (statement of Senator Heidi Heitkamp).

Beyond the context of the Tribal GWE Act, federal income tax law uses "general welfare" to describe benefits provided for the public good. From the earliest days of the tax code, Congress has allowed an exemption for certain organizations on the theory that the government is relieved of significant financial burdens by "the benefits resulting from the promotion of the general welfare." *Christian Echoes Nat. Ministry, Inc. v. United States*, 470 F.2d 849, 854 (10th Cir. 1972) (quoting H.R. Rep. No.1860, 75th Cong., 3d Sess. 19 (1939)). The IRS has reiterated this understanding by allowing an income tax exemption for organizations "primarily engaged in promoting in some way the common good and general welfare of the people of the community." Treas. Reg. § 1.501(c)(4)-1(a)(2). A wide range of organizations meet this qualification, including those that work to improve public services, those that encourage industrial development, and – importantly for this case – those devoted to preserving community traditions and religious customs. *See* Internal Revenue Service, *Social Welfare Organization Examples* (Oct. 14, 2016), https://www.irs.gov/Charities-&-Non-Profits/Other-Non-Profits/Social-Welfare-Organizations-Examples. Thus, the federal tax law itself understands "general welfare" broadly, applying the term to any benefit provided for the common good of a community.

Taken together, the plain text of the Tribal GWE Act, its legislative history, and the broad construction of "general welfare" in the federal tax law confirm that

the distributions made to Ms. Jim – and all other members of the Tribe – are "for the promotion of the general welfare."

Members of the Miccosukee Tribe are wholly dependent on the Miccosukee Tribal Government for their general welfare, and the Tribe has determined that the distributions at issue here are necessary to provide for the members' needs and the needs of the Tribe. (DE 181-4, Billie Depo. at 10:5-8 ("The Tribe itself has always taken the position, and this goes back before the establishment of this country, that it helps all its people, and the Tribe has always maintained that it will help its own people."); DE 181-1, Billie Depo. at 130:24-131:2 ("But our distribution – the spirit of our distribution has never changed with the Tribe. As I mentioned earlier, the distribution was meant to assist tribal members.")). The distributions are essential for sustaining members of the Miccosukee Tribe in their existing community where they continue to maintain their separate language, identity, and culture. (*Id.*)

Disruption of and interference with the ability of members of the Tribe to live together on what is left of their tribal lands would force tribal members to make their livelihoods elsewhere, thereby eroding the cohesion of the Tribe and forcing assimilation onto tribal members. *See Rupert v. Director, U.S. Fish & Wildlife Serv.*, 957 F.2d 32, 35 (1st Cir. 1992) (finding a compelling interest in protecting Indian cultures from extinction, growing from government's "historical obligation to respect Native American sovereignty and to protect Native American culture");

Peyote Way Church of God, Inc. v. Thornburgh, 922 F.2d 1210, 1216 (5th Cir. 1991) (noting that preservation of Indian culture is "fundamental to the federal government's trust relationship with tribal Native Americans"); *see also* John W. Ragsdale, Jr., *Indian Reservations and the Preservation of Tribal Culture: Beyond Wardship to Stewardship*, 59 UMKC L. Rev. 503, 514 (1991) ("Federal policy makers increasingly view preservation of a substantial tribal land base as essential to the existence of tribal society and culture."); *Revitalizing Native Cultures*, available at http://www.pbs.org/indiancountry/challenges/cultures.html ("In the 21st century, almost two-thirds of Native Americans live in urban areas, losing contact with their reservations and other members of their tribe. This makes it harder for these urban Indians to express and reinforce their cultures."). The Tribe's determination of how to best serve its wholly dependent members and preserve its tribal culture should not be second-guessed.

Moreover, these distributions are derived from the gross receipts tax the Tribe applies to *all* business using the Tribe's land and resource, not just the MIB. (Pl. Ex. 75). The Tribe has elected to use the proceeds from gross receipts tax in an effort to serve its members and provide for their welfare, including preservation of their way of life. (Tr. Aug. 15, 2016 at 30:20-31:14). Making a determination as

to how the Tribe should promote its members' general welfare – especially based on legally tenuous grounds – out of its own land and resources is error.[10]

[10] The District Court also erred by presuming that the distributions the Tribe made to Sally Jim and her family members were derived from "gaming revenue" and, therefore, subject to tax. In reaching its conclusions, the District Court ignored the plain language of the statutes it cited. Specifically, the Court cited provisions of the Indian Gaming Regulatory Act (25 U.S.C. § 2710(b)(3)) and the tax code (26 U.S.C. § 3401(r)) for the proposition that distributions of "gaming revenues" are generally subject to tax. (DE 173 at 7; DE 188 at 2). Section 2710(b)(3), however, does not address gaming revenues generally. Rather, it imposes certain regulatory requirements only on distributions of "***net*** revenues" from tribal gaming activities. *See* 25 U.S.C. § 2710(b)(3). Similarly, Section 3401(r) of the Internal Revenue Code imposes tax withholding requirements only on tribal distributions of "***net*** revenues of . . . gaming activity." *See* 26 U.S.C. § 3401(r).

"Net revenues" from gaming activity are the equivalent of gaming profits. The Tribe, however, does not distribute gaming profits to its members. Rather, the Tribe makes distributions to its members from the tax revenue it derives from applying its gross receipts tax to the businesses operating on Tribal lands, including MIB. (Pl Ex. 7; Pl Ex. 1). At trial, Dexter Lehtinen, the Tribe's counsel at the time the MIB began operating, testified regarding the Tribe's gross receipts tax and the distribution of tax revenue derived therefrom. According to Mr. Lehtinen's undisputed testimony, the Tribe made no distributions from the net revenues of its gaming operations. (Tr. Aug. 12, 2016 at 9:21-22). Rather, all of the distributions the Tribe made were derived from its gross receipts tax. (Tr. Aug. 12, 2016 at 9:23-24). Mr. Lehtinen further testified that the Tribe fully disclosed the source of its distributions to the IRS, and that at no point was the Tribe engaged in a "scheme" to avoid tax obligations. (Tr. Aug. 12, 2016 at 10:2-6). According to Mr. Lethinen, the only "scheme" he was aware of was the U.S. government ignoring generally accepted accounting and auditing standards and claiming that the term "net revenue" as used in the applicable statutes included gross receipts. (Tr. Aug. 12 2016 at 10:6-10).

B. The Benefit is Not Lavish or Extravagant.

As an initial matter, the District Court examined the wrong dollar amount in determining whether the distributions are "lavish and extravagant." The entire $272,000 of the distributions is not income attributable to Ms. Jim. This alone, as described in the next section below, requires a reversal.

The District Court concluded that the amount of the assessment of $272,000 was, as a matter of law, "lavish and extravagant." (DE 173 at 12). But in the same order, she ruled that there were factual questions surrounding whether the $272,000 was income attributable to Ms. Jim. (DE 173 at 15). This is entirely inconsistent. If only $68,000 is attributable to Ms. Jim – a separate analysis must be done to determine whether $68,000 is lavish and extravagant. The District Court never gave either the Tribe or Ms. Jim that chance.

Next, the Tribal GWE Act does not define "lavish or extravagant." Rather, the Act directs the Secretary of the Treasury to consult with the Tribal Advisory Council to establish guidelines defining what types of general welfare benefits may be considered lavish or extravagant. Thus, today, no standard exists for determining whether the benefits received by Ms. Jim are lavish or extravagant. Indeed, the District Court's holding underscores this point, as the District Court points only to this Court's dicta that tribal distributions in another case might be lavish and extravagant. (DE 173 at 12) (citing *United States v. Billie*, 611 F. App'x 608, 609

(11th Cir. 2015). In that case, however, the applicability of the GWE was not fully briefed and the Court did not have the benefit of IRS guidance on what is lavish and extravagant.

Other provisions of the Internal Revenue Code, however, rely on the "lavish or extravagant" standard. Those provisions, as well as case law and IRS guidance construing them, are instructive here. For example, pursuant to section 274 of the Internal Revenue Code, 50 percent of business meal expenses are deductible unless they are "lavish or extravagant" under the circumstances. *See* 26 U.S.C. § 274(k). In its published guidance, the IRS has made it clear that when evaluating the deductibility of such expenses only the portion of the expense that is lavish or extravagant is disallowed, not the entire expense. The portion of the expense that is not lavish or extravagant remains deductible. *See* IRS Publication 463, p. 11, Example 1 ("You spend $200 for a business-related meal. If $110 of that amount is not allowable because it is lavish and extravagant, the remaining $90 is subject to the 50% limit. Your deduction cannot be more than $45 (50% x 90).").

In related contexts, courts have recognized the difficulty of applying the lavish or extravagant standard because what may appear to be lavish or extravagant to one person may be reasonable and necessary to another. For example, in *Sanders v. U.S.*, 509 F.2d 162, 168 (5th Cir. 1975), the Fifth Circuit upheld a district court decision granting a widow a refund of taxes and penalties based on her claim that she was an

innocent spouse and was unaware of any unreported income. In doing so, the Fifth Circuit rejected the IRS's assertion that a new home and improvements, new cars, gambling trips, and a condominium in the Bahamas were lavish and unusual such that the widow should have been aware of unreported income. *See id.*, at 166. Recognizing the difficulty in determining whether an expense is lavish or extravagant, the Fifth Circuit noted that "one person's luxury can be another's necessity." *See id*.

Similarly, in *Cavalaris v. Commissioner*, T.C. Memo. 1996 WL 380695, the IRS disallowed certain business expense deductions of the taxpayer which it deemed "lavish or extravagant." *See id*. at *5. According to the IRS, the lavish or extravagant expenses included lodging charges at "deluxe" hotels, and at resorts and spas. *See id*. *6. The Tax Court rejected the IRS's assertion that the lodging expenses were lavish and noted that while the expenses were not "frugal" they were reasonable and, therefore, deductible. *See id.*

Although these authorities do not specifically address the "lavish or extravagant" standard in the context of the GWE, they are instructive on several points. First, whether a distribution or an expense is lavish or extravagant cannot be evaluated solely from the government's perspective and cannot be based solely on the dollar amount at issue. Rather, the evaluation must take into consideration all of

the relevant facts and circumstances. *See Sanders*, at 166 ("[O]ne person's luxury can be another's necessity."). None of that was done here.

Second, only the portion of the distribution or expense that exceeds the lavish or extravagant threshold is subject to tax. The remaining amount that is not lavish or extravagant remains nontaxable or deductible. (DE 186-1).

These complexities and nuances, combined with the fact that the Court ruled $272,000 was lavish and extravagant while at the same time acknowledging a factual question as to whether $272,000 was the right number to work from, highlight that whether the distributions Ms. Jim received are lavish or extravagant is a highly fact specific inquiry, particularly absent specific guidance from the Tribal Advisory Council. Summary judgment, therefore, was improper, and the District Court should have determined that issues of fact remained for trial on this question. At the least, a factual issue remained over how much of Ms. Jim's distributions are lavish and extravagant – i.e., anything over a certain amount is lavish and extravagant; everything below that threshold is not.

II. The District Court Erred In Holding Ms. Jim Should be Taxed on Distributions the Tribe made to her Husband and Minor Children.

As is Miccosukee custom, the Tribe provided Ms. Jim, as the head of household, with the distributions for her husband and two daughters. (DE 168 at ¶ 5). These distributions are attributable to those family members, not Ms. Jim. The very checks paying these distributions convey this conclusion. (Pl. Ex. 36). The

District Court ignored these facts and reached the erroneous conclusion that all $272,000 was income was attributable only to Ms. Jim. [11]

Taxpayers are subject to tax on funds they receive on behalf of other household members only if they have "complete dominion" over such funds and are "without restriction as to their disposition." *See Comm'r v. Indianapolis Power & Light*, 493 U.S. 203, 209-10 (1990) (including in gross income only those funds over which the taxpayer had "complete dominion" and was "without restriction as to their disposition.") (citing *James v. United States*, 366 U.S. 213 (1961)). Consistent with this principle, spouses who do not file joint tax returns must have their income assessed separately. *See Johnson v. United States*, 422 F. Supp. 958, 968 (N.D. Ind. 1976) ("If married persons elect to file separate returns, each may do so, and the tax computed is based solely upon each taxpayer's own separate income."), *aff'd sub nom. Barter v. United States*, 550 F.2d 1239 (7th Cir. 1977). And, the IRS, in the event a child's unearned income exceeds $7,500.00, like it did here, mandates that the child's income be reported separate from a parent's gross income for purposes of taxation – i.e., the child must file a separate return. (DE 186-1).

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[11] As discussed in prior sections of this brief, none of the distributions at issue are taxable income. But in considering the issues in this case, the analysis must examine the amount of any possible assessment. This is particularly true given the nature of the Tribal GWE which examines the specific amount in question provided to an individual Tribal member.

Here, the $272,000 initially received by Ms. Jim on behalf of her family should not have been attributed entirely to her. The Tribe is a matriarchal society in which the mother serves as head of the household. (DE 168 at ¶ 5). In this position, the Tribe frequently entrusts the head of household – the mother – with the distributions paid to their husbands, as well as their minor children. *Id.* This was the case with Ms. Jim. (*Id.* at ¶ 6). As enrolled members of the Tribe, Ms. Jim, her husband, and her two daughters each received quarterly distributions; Ms. Jim, however, took initial possession of the distributions on behalf of her family. (DE 181-1, Deposition of Sally Jim at 38:21-38:22; Tr. Aug. 12, 2016 at 37:20-24). The Tribe never intended for Ms. Jim to have "complete dominion" over the distribution distributions she initially received on behalf of her family. Indeed, the bank checks by which the Tribe paid the distributions to Ms. Jim and her family were made payable to "Sally Jim and Alex Osceola." (Pl. Ex. 36).

As her husband testified at trial, after receiving distributions on his behalf, Ms. Jim would provide him with his one-fourth share. (Tr. Aug. 12, 2016 at 38:12-15 ("Q. Okay. So what did you do with Alex's money? A. Alex's money I give it to him. Q. So he got that money, that was his? A. Yeah.) & 100:10-12 ("Q. Would she give you cash or would she keep it to herself? A. Yeah, she gave me.")). Her husband would then use his funds without any interference from Ms. Jim. (*Id.* at 100:15-18).

Likewise, Tribal custom requires that Ms. Jim use her daughters' distributions for their benefit and to promote her family's general welfare. (DE 159-3 at 10:5-8). Complying with these customs, Ms. Jim saved a portion of her daughters' distributions in trust for their future benefit and used the remaining funds to provide for her family's general welfare. (Tr. Aug. 12, 2016 at 38:9-11 ("Q. And when you got home what did you do with the money? A. I take it and put it away and I put some away in a trust account at the tribal office for Tamara and Alexis."); *id.* at 38:25-39:3 ("Q. And the money that you got, what did you use it for? A. I use it for gas to go into town to get groceries or buy, like, clothing for the kids or pay for medical stuff, medications.")).

Had Ms. Jim failed to use her daughters' distributions for their benefit the Tribe could have intervened by denying Ms. Jim access to the distributions and holding them in trust for her daughters. (DE 181-4 at 113:12-115:8). The Tribe, however, did not intervene because Ms. Jim used her daughters' distributions consistent with their intent. Therefore, she did not have an "unfettered right to use" the distributions. *See Jefferson Mem'l Gardens, Inc. v. Comm'r*, 390 F.3d 161, 167 (5th Cir. 1968) (including funds in taxable gross income because the taxpayer "had the unfettered right to use the funds as it desired upon receipt.").

At no point did Ms. Jim have complete dominion over the distributions she initially received on behalf of her family members. Funds she received on her

husband's behalf immediately went to her husband. Similarly, although her daughters did not immediately take physical possession of their distributions, those distributions were used on their behalf or kept in trust for later use by her daughters.

Ms. Jim's initial receipt of her family members' distributions does not render such payments income to her. *See Hoeper v. Tax Comm. of Wis.*, 284 U.S. 206, 215 (1931) (attempting "to measure the tax on one person's property or income by reference to the property or income of another is contrary to due process of law"); *see also Allen v. Comm'r*, 50 T.C. 466, 477 (1968) (holding that the entire $70,000 of a minor child's professional baseball signing bonus was taxable income to the child even though $40,000 of the bonus was paid directly to his mother), *aff'd per curiam* 410 F.2d 398 (3d Cir. 1969). As members of the Tribe, Ms. Jim's husband and daughters were entitled to receive their distributions, and they "enjoy[ed] the benefit" of them. *See Helvering v. Horst*, 311 U.S. 112, 119 (1940) ("The dominant purpose of the revenue laws is the taxation of income to those who earn or otherwise create the right to receive it and enjoy the benefit of it when paid.").

The District Court relied on only one fact to reach its conclusion that Ms. Jim "sufficiently controlled" her family's distributions – the 2001 tax return Ms. Jim signed in 2015. (DE 188 at 10). This is in error. First, "sufficiently controlled" is the incorrect standard to apply. The correct standard, which the District Court overlooked, is whether or not the taxpayer had "complete dominion" over such funds

"without restriction as to their disposition," or an "unfettered right to use the funds as it desired upon receipt." *See Indianapolis Power & Light*, 493 U.S. at 209-10; *Jefferson Mem'l Gardens*, 390 F.3d at 167. A tax return signed by Ms. Jim fourteen years after the fact cannot constitute evidence of "complete dominion" over her family members' distributions, or an unfettered right to use" such distributions as she desired.

Second, given all of the other evidence at trial, this one fact cannot control, particularly given the circumstances surrounding the preparation and signing of the return in 2015. The undisputed evidence shows that Ms. Jim's former attorney advised her to sign the return without explaining to her how or why it had been prepared:

> Q. Now, there was a return that was prepared for you for 2001; do you recall that?
>
> A. **Yes. I signed it but I didn't really review what it was**.
>
> Q. Did you prepare it?
>
> A. **I didn't prepare it, no**.
>
> Q. What were the circumstances to which that return was given to you; do you remember?
>
> A. I don't understand.
>
> Q. How did you get the return?
>
> A. **It was filled [in] by somebody and brought to me and I signed it**.

Q. Were you told to sign it?

A. Yes.

Q. Who told you that?

A. Bernie.

Q. Is that Bernie Roman?

A. Yes.

Q. Was he the attorney for the Tribe at the time?

A. Yes.

Q. Now, as a tribal member, do you rely on the advice and counsel of the business council in making decisions?

A. Yes.

Q. And do you also rely on the individuals that come to represent the Tribe, like the lawyers who come; do you rely on their advice when you make your decisions with the General Council?

A. Yes, I would think so because if they are attorneys and they were hired by the Miccosukee tribal members, I would rely on them.

(Tr. Aug. 12, 2016 at 45:7 - 46:10 (emphasis added)).

Ms. Jim has limited education and relied on the erroneous advice of former tribal attorney, Bernardo Roman. (Tr. Aug. 12, 2016 at 45:7-46:10). Ms. Jim's lack of knowledge and understanding regarding the nuances of federal tax law cannot be held against her. *See Allen*, 50 T.C. at 472 (holding that a mother did not realize income from the receipt of part of her son's signing bonus, even though she reported

the distributions as taxable ordinary income on her federal individual income tax return).

Furthermore, the belated 2001 tax return specifically disavows that any of the distributions the Tribe made to Ms. Jim and her family constitute taxable income. (Pl. Ex. 67). The 2001 tax return does not list the distributions as income. (*Id.*). Rather, it discloses the distributions and specifically states that they are "excluded from gross income" pursuant to 26 U.S.C. § 139E, the Tribal General Welfare Exclusion Act. (*Id.* at 3). And the distributions were disclosed on IRS Form 8275, which is used to disclose items that are not otherwise disclosed on a return in order to avoid penalties. *See* Internal Revenue Service, *Form 8275, Disclosure Statement* (Aug. 30, 2016) (available at https://www.irs.gov/uac/about-form-8275)

The District Court's use of the wrong standard for determining income, and its exclusive reliance on an after-the-fact tax return, without properly consider the circumstances surrounding the preparation and signing of that return, constitute clear error. No evidence supports the District Court's conclusion that the $272,000 in distributions to Ms. Jim and her family members constitutes income solely to Ms. Jim. At best, the only amount attributable to Ms. Jim is her share of the distributions which totals only $68,000.00.

III. The District Court Erred by Finding that Ms. Jim Did Not Have "Reasonable Cause" for Failing to File a 2001 Tax Return and Pay Taxes.

The IRS may impose a penalty if a taxpayer fails to timely file a tax return or fails to timely pay the required taxes, "unless it is shown that such failure is due to reasonable cause and not due to willful neglect." *See* 26 U.S.C. §§ 6651(a)(1) and 6651(a)(2). Ms. Jim established that she had "reasonable cause" for failing to timely file a return and pay taxes.[12] The District Court's finding to the contrary should be reversed.

At General Council meetings, the Tribe's lawyer, Mr. Lehtinen, and the Business Council advised Ms. Jim and the other tribal members present that they need not report distributions as income. (Tr. Aug. 12, 2016 at 81:16-82:4). Based on this advice, Ms. Jim acted in good faith and with reasonable cause in not filing a tax return or paying tax on the distributions. (*Id.*) A taxpayer may reasonably rely on an expert's advice that no return is required. *See James v. United States*, No. 8:11-CV-271-T-30AEP, 2012 WL 3522610, at *7-8 (M.D. Fla. Aug. 14, 2012)

The conclusion does not change even if a court disagrees with the advice provided. A taxpayer does not have reasonable cause to rely on the advice of a

[12] Determining "what elements *must* be present to constitute reasonable cause is a question of law." *United States v. Boyle*, 469 U.S. 241, 249 n.8 (1985) ("Whether the elements that constitute 'reasonable cause' are *present* in a given situation is a question of fact, but what elements *must* be present to constitute "reasonable cause" is a question of law.").

professional if the advice is "based on unreasonable factual or legal assumptions, that is, upon a representation or assumption which the taxpayer knows, or has reason to know, is unlikely to be true." *Southgate Master Fund, L.L.C., v. United States*, 659 F.3d 466, 493 (5th Cir. 2011). But such an inquiry is unnecessary here, as Ms. Jim did not know and had no reason to know if her advisors' legal assumptions were untrue. The District Court acknowledged, "the issue of whether the tribal distributions constitute taxable income is a new and unsettled area of the law." (DE 173 at 19.) Furthermore, Ms. Jim had no knowledge of tax law, let alone knowledge sufficient to question their advice. Ms. Jim, like many other members of the Tribe, attend the Tribal school system, learned from a curriculum based on tribal custom and, even then, only attended school through the ninth grade. (Tr. Aug. 12, 2016 at 29:2-10; 85:25-86:24). As a result, she was unfamiliar with basic financial matters, even basic addition and subtraction. (*Id.* at 29:2-10).

Courts have repeatedly refused to impose penalties on taxpayers like Ms. Jim. *See e.g., Jourdain v. Comm'r*, 71 T.C. 980 (T.C. 1979) (refusing to allow the IRS to impose penalties against a member 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."); *McGowan v. Comm'r*,

T.C. Memo 2011-186 (T.C. 2011) (rejecting the IRS's proposed penalties where the taxpayer "lacked the knowledge and experience in tax law" and reasonably believed that the distribution was not taxable.). Here, the District Court lacked "substantial basis in the evidence" for its conclusion that Ms. Jim did not sincerely believe that the distribution were not subject to tax; therefore, the appellate court can make its "own inferences and conclusions." *See Hatfried, Inc. v. Comm'r*, 162 F.2d 628, 631 (3d Cir. 1947) (reversing the imposition of penalties for failure to file where the Tax Court lacked "substantial basis in the evidence" for its finding that the taxpayer did not have reasonable cause).

The only evidence the District Court cites in support of Ms. Jim's "bad faith" is its conclusion that Chairman Cypress instructed Tribal members to conceal distributions from the IRS. (DE 188 at 12). But it is Ms. Jim's intentions, not Chairman Cypress's, that are at issue here. Neither the District Court nor the government cited any evidence that *Ms. Jim* actively tried to conceal her distributions from the IRS. She acted in good faith and with reasonable cause on the advice of the Tribe's attorney and Business Council that the she did not need to file a tax return or pay taxes on the Tribe's distributions. Therefore, Ms. Jim is not liable for penalties under 26 U.S.C. § 6651(a)(1) and (2).

IV. Final Judgment Against the Tribe was in Error – Nothing Prior to the Final Judgment Indicated the Government Sought Judgment Against the Tribe.

Despite the Government never having pled a claim against the Tribe and entirely omitting the Tribe from its briefing and trial presentation, the District Court, after directing that judgment only be entered against Sally Jim, entered judgment against the Tribe. (DE 190). This was error.

A. Including the Tribe in the Final Judgment is inconsistent with the District Court's Findings of Fact and Conclusions of Law.

Adopting the United States' proposed judgment verbatim, and before either the Tribe or Sally Jim could file a response, the District Court entered its Final Judgment "in favor of Plaintiff, the United States and against Defendant, Sally Jim and Intervenor-Defendant, the Miccosukee Tribe of Indians of Florida." (DE 189-1, 190). Including the Tribe in the Final Judgment exceeded the District Court's decision as set forth in its Findings of Fact and Conclusions of Law ("Findings"). (DE 188). Throughout its Findings, the District Court applied the facts and law to Ms. Jim, not the Tribe. (*Id.*). In its opening sentence, the District Court states "[t]his case involves the tax liability of Defendant, Sally Jim [], a member of the Intervenor-Defendant, the Miccosukee Tribe of Indians of Florida [], for the 2001 tax year." (*Id.* at 1). At no point in its Findings does the District Court address any liabilities of the Tribe. And the District Court concluded "that final judgment will be entered by separate order in favor of the United States of America ***and against Sally Jim***."

(*Id.* at 12 (emphasis added)). Nowhere in its Findings did the District Court state or indicate that judgment should be entered against the Tribe. Given that the District Court made no findings of liability against the Tribe, there was no basis to enter a judgment against the Tribe.

B. Including the Tribe in the Final Judgment is Manifestly Unjust as the United States Never Pursued Any Claims or Theories of Liability Against the Tribe.

The Government sued Ms. Jim to reduce its tax assessment to a monetary judgment and never sought to establish any liability of the Tribe. Specifically, in its proposed findings of fact and conclusions of law, the government stated, "Sally Jim is liable to the Government in the amount of $278,758.83," and never sought to impose that that liability on the Tribe. (DE 185 at 16). And prior to trial, even *after* the Tribe intervened in the case, the Government consistently stated that the liability should be imposed against Ms. Jim and never sought to impose liability against the Tribe. Examples of the government's statements prior to trial are as follows:

- ***Government's First Motion for Summary Judgment***: "The Court should enter judgment in favor of the United States and *against Sally Jim*…." (DE 111 at 29 (emphasis added)).
- ***Government's Motion to Reopen Case***: "The United States' complaint *against Sally Jim* seeks to reduce federal income tax assessments to judgment for the 2001 tax year." (DE 123 at 1 (emphasis added)).

- ***Government's Second Motion for Summary Judgment***: "The Court should enter judgment in favor of the United States and *against Sally Jim*…." (DE 125 at 30-31 (emphasis added)).
- ***Government's Third Motion for Summary Judgment***: "The Court should enter judgment in favor of the United States and *against Sally Jim*…." (DE 139 at 30 (emphasis added)).
- ***Government's Fourth Motion for Summary Judgment***: "The Court should enter judgment in favor of the United States and *against Sally Jim*…." (DE 156 at 30 (emphasis added)).
- ***Government's Reply in Support of Fourth Motion for Summary Judgment***: "The Court should enter judgment in favor of the United States and *against Sally Jim* for the full amount of the tax assessments, interest, and penalties set forth in the United States' motion for summary judgment." (DE 160 at 9 (emphasis added)).

The first and only time the Government mentioned a potential judgment against the Tribe was in its proposed order of final judgment submitted after the Findings of Fact and Conclusions of Law. Implicating the Tribe – *for the first time* – in a proposed final judgment, without providing the Tribe an opportunity to contest its inclusion in such judgment, is manifestly unjust.

C. The Final Judgment is Confusing and Creates Uncertainty.

Further, the Final Judgment is unclear and is likely to create confusion. A judgment must state the relief to which the prevailing party is entitled. *See Penn West Assocs., Inc. v. Cohen*, 371 F.3d 118, 126 (3d Cir. 2004) (a final judgment "should be a self-contained document, saying who has won and what relief has been awarded"); *Reytblatt v. Denton*, 812 F.2d 1042, 1043 (7th Cir. 1987) ("The purpose of the separate judgment required by Fed. R. Civ. P. 58 is to let the parties (and the appellate court) know what has been decided and when."). The Final Judgment imposes judgment against both the Tribe and Ms. Jim: "[J]udgment is entered in favor of Plaintiff, the United States and against Defendant, Sally Jim and Intervenor-Defendant, the Miccosukee Tribe of Indians of Florida." (DE 190). The Final Judgment then states, "Sally Jim is liable to the United States in the amount of $278,758.83." (*Id.*).

The Final Judgment does not state or indicate what the judgment against the Tribe is for, and nothing in the record of the case provides an explanation regarding the basis for such judgment. The District Court's conclusion that "[t]here can be no confusion as to which defendant(s) are liable for such damages" belies the actual Final Judgment. (DE 196 at 5). Rather, these contradictory provisions are certainly likely to lead to confusion regarding who is liable for the amount due and what impact, if any, the judgment has on the Tribe.

D. The Fact that the Tribe is an Intervenor-Defendant Does Not Warrant Imposition of a Judgment Against the Tribe.

The District Court concluded that judgment against the Tribe is appropriate because the Tribe was permitted to intervene in this case under Federal Rule of Civil Procedure 24. (DE 196 at 5). Rule 24, however, does not support such a conclusion. Rule 24 addresses when and under what circumstances intervention in a lawsuit is allowed, not whether judgment will be entered against an intervenor. The Tribe did not seek to intervene because it believed it was liable for liabilities proposed against Ms. Jim.[13] Rather, the District Court allowed the Tribe to intervene in the case because it had an "interest in determining the taxability of its general welfare program" and that "the disposition of the case against Jim…has the potential for negative *stare decisis*…." (DE 114 at 4). As the District Court noted, "although the Tribe shares similar objectives with Jim, they are not identical." (DE 114 at 4).

The District Court relied solely on *Alvarado v. J.C. Penny Co. Inc.* to support its conclusion on the Tribe's motion for reconsideration that an intervenor subjects

[13] Over fifty years ago, the 1966 amendments to the Federal Rules of Civil Procedure did away with Rule 24's requirement that an intervenor must be bound by the judgment in order to intervene. *See Smuck v. Hobson*, 408 F.2d 175, 180 (D.C. Cir. 1969) ("Rule 24(a) requires not that the applicant would be 'bound' by a judgment in the action, but only that disposition of the action may as a practical matter impair or impede his ability to protect that interest."); *Spring Const. Co. v. Harris*, 614 F.2d 374, 377 (4th Cir. 1980) ("[N]ow, in order to intervene of right, a party need not prove that he would be bound in a res judicata sense by any judgment in the case.").

itself to a judgment against it, even if the opposing party never presented such a claim in any medium. (DE 190 at 5). The facts of *Alvarado*, however, are readily distinguishable from the facts here. 997 F.2d 803 (10th Cir. 1993). In *Alvarado*, the plaintiff (Alvarado) sued the defendant (J.C. Penney) after clothing she purchased at a J.C. Penney department store caught fire. *Id.* at 804. The alleged manufacturers of the clothing intervened in order to resolve future indemnification claims that might be raised by J.C. Penney and moved for summary judgment. *Id.* 804-05. After the manufacturers moved for summary judgment, thus giving all parties an opportunity to respond to their request for relief, the court entered summary judgment in favor of the manufacturers. *Id.* at 804. In seeking to amend the judgment, J.C. Penney claimed summary judgment was inappropriate because it had not directly asserted indemnification claims against the co-defendant manufacturers. *Id.* The court rejected J.C. Penney's argument, noting that the manufacturers had directly asserted that they were not liable to Alvarado or J.C. Penney and, therefore, put J.C. Penney on notice of its claims. *Id.* at 804-05.

Unlike the manufacturers in the *Alvarado* case, the Tribe did not assert any claims for relief against any other party. The Tribe did not move for summary judgment, like the intervening defendants in *Alvarado*. Nor, importantly, did the Government ever assert any claims against the Tribe. Rather, the Tribe's limited interest in this proceeding is also confirmed by the District Court's Findings of Fact

and Conclusions of Law, which state that judgment shall be entered against Ms. Jim, not the Tribe. (DE 188 at 12). There has never been any claim or assertion that the Tribe would be liable to the IRS for the amounts it seeks from Ms. Jim. Indeed, the Tribe had no pecuniary interest at stake in this proceeding whatsoever.

And the Tribe has not assumed such a role. The Tribe raised in its motion to intervene that "[t]he outcome of the present proceedings, *if unfavorable to Ms. Jim*, will set a precedent that allows the IRS to impose a reporting and withholding liability on the Tribe…." (DE 90 at 7 (emphasis added)). And in its Answer, the Tribe added generic language requesting "such other relief as the Court deems just and proper." (DE 115 at 4). These statements cannot be construed as an acknowledgement that the Tribe may be subject to a judgment. Rather, these statements are simply a request to present defenses on issues that could be used by the IRS in future proceedings against the Tribe.

Until the proposed final judgment, the Government never asserted the Tribe's Answer or Motion to Intervene was an opportunity to impose judgment against the Tribe. And the Government plainly failed to seek a judgment against the Tribe in its multiple motions for summary judgment, at trial, or in any other communications with the District Court or the Tribe. Instead, the Government remained laser focused on the liability of Ms. Jim. (DE 192 at 3-5). At trial, in its final request for relief to the District Court, the Government made clear in its summation that:

> We are asking the Court to find and hold that the distributions that Sally Jim received in substance were net revenue from gaming, that Sally Jim is responsible for all the distributions that she picked up in the envelopes that were provided to her in cash and that Sally Jim has failed to establish a reasonable cause and a lack of willful neglect for her failure to file her tax returns and pay her taxes on time.

Tr. Aug. 16, 2016 at 4:10-16.

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; (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 January, 2017.

[SIGNATURE ON FOLLOWING PAGE]

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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 12,464 words.

This 10th day of January, 2017.

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