16-17109-GG

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

SALLY JIM,

Defendant-Appellant

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA,

Intervenor-Appellant

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

BRIEF FOR THE APPELLEE

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CERTIFICATE OF INTERESTED PERSONS

AND CORPORATE DISCLOSURE STATEMENT

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

Abney, George Blay, Attorney, Miccosukee Tribe

Altonaga, Cecilia M., United States District Judge

Bahnsen, Nicholas S., Attorney, Tax Division, Dept. of Justice

Bolen, Sarah, Attorney, Internal Revenue Service

Branman, Robert J., Attorney, Tax Division, Dept. of Justice

Calli, Paul A., Attorney for nonparty Guy A. Lewis

Cline, Brandon S., Attorney, Internal Revenue Service

Davis, Daniel Ezra, Attorney, Sally Jim

Diffley, Daniel F., Attorney, Miccosukee Tribe

Farrior, William, (former) Attorney, Tax Division, Dept. of Justice

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CERTIFICATE OF INTERESTED PERSONS

AND CORPORATE DISCLOSURE STATEMENT

Furnas, James, Revenue Agent, IRS

Greenberg, Benjamin G., Acting United States Attorney

Hubbert, David A., Acting Assistant Attorney General

Kearns, Michael J., Attorney, Tax Division, Dept. of Justice

Lewis, Guy A., nonparty

Lothamer, Casey, Attorney, Internal Revenue Service

McAliley, Chris M., United States Magistrate Judge

McLaughlin, Teresa E., Attorney, Tax Division, Dept. of Justice

Miccosukee Tribe of Indians of Florida, Intervenor-Appellant

Nez, Berlinda, Revenue Agent, IRS

Roman, Bernardo, III, Attorney for Sally Jim

Rothenberg, Gilbert S., Attorney, Tax Division, Dept. of Justice

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

Saunooke, Robert O., Attorney, Sally Jim

Sewell, Pamela, Attorney, Internal Revenue Service

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CERTIFICATE OF INTERESTED PERSONS

AND CORPORATE DISCLOSURE STATEMENT

Toulou, Tracy, Director, Office of Tribal Justice, Dept. of Justice

Van Doran, Shelly, (former) Attorney, Internal Revenue Service

Welsh, Robert L., (former) Attorney, Tax Division, Dept. of Justice

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to 11th Cir. R. 28-1(c) and Fed. R. App. P. 34(a), counsel for the United States respectfully inform this Court that they believe that oral argument should be heard because this case presents an issue of first impression regarding the intersection of the Tribal General Welfare Exclusion Act of 2014 and the Indian Gaming Regulatory Act.

GLOSSARY

IGRA	Indian Gaming Regulatory Act
I.R.C.	Internal Revenue Code
IRS	Internal Revenue Service
Jim Br.	Sally Jim's opening brief
MIBG	Miccosukee Indian Bingo Gaming
NTDR	Nontaxable Distributable Revenue
Tr. Br.	Miccosukee Tribe's opening brief

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STATEMENT OF JURISDICTION

1. Jurisdiction in the District Court

The United States instituted this proceeding by filing a complaint seeking to reduce income tax assessments against Sally Jim (Jim) to judgment. (Doc. 1.)[1] The District Court had subject matter jurisdiction pursuant to Section 7402 of the Internal Revenue Code of 1986 (26 U.S.C.) (the Code or I.R.C.) and 28 U.S.C. §§ 1340 and 1345. With leave of court (Doc. 114), the Miccosukee Tribe of Indians of Florida (the Tribe) intervened as of right as a defendant (Docs. 90, 115).[2]

2. Jurisdiction in the Court of Appeals

The District Court entered judgment against Sally Jim and the Tribe and determined that Jim was indebted to the United States in the amount of $278,758.83, plus statutory interest and additions accruing

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[1] "Doc." references are to the documents contained in the record on appeal, as numbered by the Clerk of the District Court. "Ex." references are to the Government's exhibits admitted at trial. "Jim Br." and "Tr. Br." references are to the opening briefs of Sally Jim and the Miccosukee Tribe, respectively.

[2] Counsel for Guy Lewis appeared in connection with a third-party deposition subpoena issued to Mr. Lewis. (Docs. 42, 48, 51.) Although the Clerk of the District Court mistakenly entered him on the docket as a third-party defendant, Mr. Lewis is not a party to the suit.

after April 9, 2015. (Doc. 190.) The judgment was a final, appealable judgment that disposed of all claims of all parties.

3. Timeliness of the appeal

The District Court entered its judgment on August 24, 2016. (Doc. 190.) The Tribe filed a timely motion to alter or amend the judgment on September 6, 2016, which the District Court denied on September 16, 2016. (Docs. 192, 196.) On November 15, 2016, within 60 days after the order denying the motion to alter or amend the judgment, both Jim and the Tribe filed notices of appeal, which were docketed as a single appeal by this Court. (Docs. 201, 202.) The notices of appeal are timely under Fed. R. App. P. 4(a)(1)(B), 4(a)(4)(A)(iv) and 28 U.S.C. § 2107(b). This Court has jurisdiction over the appeal pursuant to 28 U.S.C. § 1291.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 16-17109-GG

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

SALLY JIM,

Defendant-Appellant

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA,

Intervenor-Appellant

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

BRIEF FOR THE APPELLEE

STATEMENT OF THE ISSUES

1. Whether the District Court correctly determined that per capita distributions of gaming income made by the Miccosukee Tribe to Sally Jim were includible in gross income under 25 U.S.C. § 2710(b)(3)(D), and were not general welfare payments excludable under I.R.C. § 139E.

2. Whether the District Court correctly found that the entire $272,000 paid to Jim was taxable to her.

3. Whether the District Court correctly held that Jim was liable for penalties for failure to timely file a return and pay tax because she did not show that the failure was due to reasonable cause.

4. Whether the District Court correctly denied the Tribe's motion to alter or amend the judgment entered against it as intervenor-defendant.

STATEMENT OF THE CASE

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

The United States brought this suit in the District Court for the Southern District of Florida against Sally Jim (Jim), seeking judgment for federal taxes owed by her for the year 2001. (Doc. 1.) The District Court granted a motion to intervene as of right filed by the Miccosukee Tribe of Indians of Florida (Tribe), after which the Tribe answered the complaint and asserted affirmative defenses. (Docs. 90, 114, 115.)

The District Court entered partial summary judgment for the United States. It held that to the extent that the distributions were derived from gaming income, they did not qualify as excludable general

welfare payments, and were therefore includible in gross income. (Doc. 173 at 11-14, 20.) The court found, however, that there were issues of fact for trial regarding (i) how much, if any, of the distributions were derived from non-gaming sources that might be excludable from gross income (*id.* at 10-11, 20); (ii) whether Jim was taxable on the entire amount distributed to her, including payments respecting members of her family (*id.* at 14-16, 20); and (iii) whether Jim had reasonable cause for late filing of her return and late payment of her tax so as to avoid delinquency penalties under I.R.C. § 6651(a)(1) and (2), respectively (*id.* at 17-20). The court scheduled trial on those issues. (*Id.* at 20.)

After a four-day bench trial (*see* Docs. 197, 198, 199, 200), the Court issued an opinion finding in favor of the Government on the remaining issues (Doc. 188). Noting that Jim and the Tribe presented no evidence identifying any part of the distributions as being derived from sources other than gaming, the court concluded that no part of the distributions was exempt from taxation. (*Id.* at 4, 8.) It further concluded that all of the distributions were taxable to Jim due to the control she exercised over them. (*Id.* at 5-6, 9.) Finally, the court found that Jim failed to establish that she had reasonable cause for filing her

return and paying the tax late. (*Id.* at 10-12.) The court later entered judgment against both Jim and intervenor Tribe. (Doc. 190.) The Court denied (Doc. 196) the Tribe's motion to alter or amend the judgment (Doc. 192).

(ii) Statement of the facts

1. The Miccosukee Tribe develops a gaming facility and distributes the net revenue equally to its members

The Tribe makes decisions through its Business Council and General Council. The General Council, which meets on a quarterly basis, consists of all members over the age of 18. (Doc. 168 at ¶ 16.) The Business Council consists of five members, including the Chairman. (Doc. 198 at 125:7-18.) Billy Cypress was the Chairman of the Tribe from 1995 to 2009. (Doc. 168 at ¶ 20.)

By ordinance enacted in 1984, the Tribe imposed a "gross receipts tax" on businesses conducted on its reservation. The tax was set at 5% of the sales price of items sold, ticket prices for the Tribal Cultural Center and airboat rides, and rentals of commercial space. (Ex. 75, Secs. 2-4; Doc. 199 at 17.)

In 1988, Congress enacted the Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2467 (IGRA). In 1989, the Tribe entered

into a development agreement for the construction and operation of a gaming facility, which began operations in 1990.[3] The facility, known as the Bingo Hall or Miccosukee Indian Bingo Gaming (MIBG), offered the types of games considered "class II" under the IGRA. (Doc. 168 at ¶ 12.)

When the gaming operation began generating income, the Tribe was able to distribute the gaming revenue to its members "in accordance with the revenue generated at MIBG." (Ex. 7 at 6; Doc. 199 at 90:23-91:2.) At the quarterly General Council meetings, the finance director or treasurer reported that funds were available for distribution and set a distribution date, usually about 30 days from the meeting. (Doc. 168 at ¶ 18.) The distributions are not based on individual needs of recipients, but are issued equally to all members. (Doc. 168 at ¶ 15.) Distributions were generally issued to the female adult in each household. (Doc. 168 at ¶¶ 5-6.)

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[3] This Court has previously chronicled the development of the Tribe's gaming facility and the Tribe's subsequent dispute with the developer over control of the operations. *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians of Florida*, 177 F.3d 1212 (11th Cir. 1999).

2. The Tribe's efforts to avoid taxation

Under the IGRA, the Tribe is permitted to make per capita distributions to members of the "net revenues" from class II gaming, provided that the payments are "subject to Federal taxation," and tribes are required to "notify members of such tax liability when payments are made." 25 U.S.C. § 2710(b)(3)(D). Beginning in 1995, tribes were also required to deduct and withhold income taxes from the payments. I.R.C. § 3402(r).

Instead of deducting, withholding, and notifying its members that the distributions were subject to Federal taxation, the Tribe engaged in extensive efforts to conceal the distributions from the IRS. The Tribe reacted to the new withholding requirement by attempting to recharacterize its "net revenues" from gaming as "gross receipts" from its gaming facility. Specifically, the Tribe took steps to impose its pre-existing "gross receipts tax" on the operations of the gaming facility. The Tribe passed a new ordinance, with retroactive effect to January 1,

1995, imposing a 6.5% fee on all amounts wagered and received by the gaming facility.[4] (Ex. 1; Doc. 199 at 33.)

Chairman Cypress directed the Tribe's finance manager to open a new checking account in which to deposit the revenue collected from the gaming facility, to be "evenly distributed to our members, periodically." (Ex. 2; Doc. 199 at 61:12-22.) The Tribe referred to the account as the "non-taxable distributable revenue" (NTDR) account. (Doc. 168, ¶¶ 14-15.)

The Tribe's concern with the tax consequences of the distributions from the NTDR account, and its efforts to conceal the distributions from the IRS, were frequent subjects of discussion at General Council meetings. For example, at a General Council meeting on February 2, 1995, one of the Tribe's attorneys, Dexter Lehtinen, reported that the Tribe would begin issuing distributions in two checks, with one check consisting of the amount of tax due, "which he urged tribal members to

[4] The amount of the "gross receipts tax" imposed on the gaming facility was raised to 7.78% in 2000 (Ex. 26 at 5) and was "something like" 8.7% in 2015. (Doc. 181-2 (Deposition of Gabriel Osceola) at 26:22-27:1.) There is no evidence in the record, however, that the tax on non-gaming sales, admissions, and rentals was ever changed from the 5% rate established in 1984.

deposit so that they may use [it] to pay the taxes when due." (Ex. 3 at 5.) Despite Lehtinen's announcement, the Tribe did not begin issuing two checks in the announced manner. (Doc. 199 at 84:8-85:1.) Instead, Cypress notified members that the Tribe would keep a reserve should the members ultimately be required to pay income tax on the distributions. (Doc. 199 at 84:8-86:4; Ex. 3 at 6.) One member testified that some members of the General Council "were asking among ourselves, why is this money not subject to taxation? If we are being told it is not taxable, then why are we setting aside moneys?" (Doc. 199, 154:17-155:3.)

Cypress reported at several meetings that other tribes were paying tax on their distributions of gaming revenue. At the meeting of February 2, 1995, Cypress reported on a trip the Business Council took to visit a casino in Connecticut operated by the Mashantucket Pequot Tribe. A member of the Business Council "stated this tribe is saying they are willing to pay the taxes being imposed on gaming revenue." (Ex. 3 at 13; Doc. 199 at 149:2-150:11.) At the meeting of November 2, 1995, Cypress reported that Seminole members were paying tax on

their gaming revenue. (Doc. 199 at 92:8-14.) According to the minutes, Cypress stated that the Seminole Chairman–

> said they are now balking at paying the gaming taxes. They have questioned how the Miccosukee Tribe with little or no formal education has managed to avoid paying these taxes and the Seminole Tribe with a highly educated staff are being made to pay the taxes.

(Ex. 7 at 6.) And at a meeting on Nov. 9, 2000, Cypress reminded members that the Tribe had been "lucky so far, while other Indian tribes gaming revenue is being taxed, it has not happened to us, the Business Council is working everyday to keep this from happening." (Ex. 26 at 5.)

The Business Council counseled members how to conceal the distributions from the IRS. Cypress repeatedly instructed members not to disclose the distributions to credit card agencies or to others because, *inter alia*, such disclosures increased the possibility that the information would come to the attention of the IRS. (Ex. 6 at 9; Doc. 199 at 88:19-25; Ex. 7 at 4; Ex. 30 at 6; Ex. 26 at 5.) According to the General Council minutes of November 2, 1995, Cypress stated that the Business Council had "repeatedly" asked members not to list the distributions on credit applications, and added that it was–

> trying very hard to protect tribal members from facing problems with IRS but if they (tribal members) continue to list this as income then all Business Council effort will be for naught. If the gaming revenue taxation should be imposed then IRS can fine tribal members for the amounts they have listed on these applications.

(Ex. 7 at 4-5.)

Over the years, Cypress counseled members on how to avoid financial transactions that could lead to unwanted attention from the IRS. At the General Council meeting of May 14, 1998, Cypress explained that if members wanted to buy a vehicle, they could do it through the Tribe and thereby avoid using large amounts of currency to complete the purchase that the car dealership would have to report to the IRS. (Ex. 20 at 35; Doc. 199 at 93:4-19.) At the same meeting, Cypress advised members who wished to save their distributions in a bank to use a shared account in the tribe's name instead because "the IRS can not tax it." (Ex. 20 at 35; Doc. 199 at 98.)

Cypress also advised members to cash their distribution checks only at the tribal administrative office, and not at a commercial bank or the Miccosukee gaming facility, to ensure that the distributions would not be disclosed to the IRS. At the General Council meeting of May 4, 2000, Cypress "stated that the only way the tribal members' money will

not be reported to the IRS is if they cash their checks at the Administration office, this is the only way they can be assured they will not be reported." (Ex. 30 at 6; Doc. 199 at 110:18-112:23.)

By 2003, the Tribe had engaged the law firm of White and Case for legal advice. (Doc. 199 at 126:15-127:6.) White and Case wrote a 42-page legal memorandum, dated February 14, 2003, concerning the matter of "Distributions of the Gaming Tax to Tribal Members." (Ex. 55.) The memorandum addresses numerous issues pertaining to the Tribe's handling of the distributions, including warnings that there was a "strong likelihood" that a reviewing court would conclude that the distributions were "per capita payments" to members and that the Tribe had violated provisions of the IGRA and the withholding requirement of I.R.C. § 3402(r). (Ex. 55 at 12, 15-34.)

In 2005, the IRS "began to investigate the Miccosukee Tribe to determine whether the Tribe had complied with its reporting and withholding requirements." *Miccosukee Tribe of Indians of Florida v. United States*, 698 F.3d 1326, 1329 (11th Cir. 2012) (upholding issuance of third-party internal revenue summonses against various challenges).

Gabriel Osceola, a member of the Business Council, testified that on May 6, 2010, Lehtinen informed that council that he had never expressed a legal opinion as to whether the members had to pay federal income tax, and if the Business Council thought otherwise, it had misunderstood him. The substance of Lehtinen's statement was conveyed to the General Council. As a result, the Tribe filed a class-action malpractice suit against Lehtinen (Ex. 63), but did not start withholding from the distributions. (Doc. 199 at 161:7-163:1.)

Jim was aware of the Tribe's efforts to conceal the distributions from the IRS. She attended "probably over 50" of the quarterly General Council meetings. (Doc. 198 at 56:7-12.) When she did not attend meetings, she would still gather with members of her clan and discuss what had transpired. (Doc. 198 at 34:23-35:4.) She acknowledged that she had attended meetings at which Chairman Cypress said that the Business Council was trying to protect members from facing problems with the IRS, and at which members were told not to report the distributions on credit card applications for that reason. (Doc. 198 at 69:1-15.) She attended meetings at which Cypress said that the only way to avoid a distribution being reported was to cash it at the

administrative office. (Doc. 198 at 70:23-71:2.) And she had also heard at General Council meetings that a member's bank account with a substantial sum would be reported to the IRS and generate an investigation. (Doc. 198 at 90:2-10.) Finally, Jim was aware that the Seminole Tribe had a gaming facility, distributed revenue to members, and paid tax on the distributions. (Doc. 198 at 71:3-18.)

3. Jim's filing history and receipt of distributions

Jim held several paying jobs before 2001, and she was generally aware of the need to file an income tax return and pay tax. She had filed returns for some years before 2001. (Doc. 198 at 47:10-49:22, 52:18-24.) In 2001, she was paid wages of $25,990 for her work in the Tribe's healthcare facility. (Doc. 168 at ¶ 9.) She also received $272,000 in distributions from the Tribe, representing shares for herself, her husband, and her two daughters. (Doc. 168 at ¶¶ 7-8, 19.)

Jim did not, however, file a federal income tax return for 2001 when due, not even to report her wage income. At her deposition, she testified that she had "everything ready," but then "just completely forgot" to file. At trial, Jim testified instead that she thought it was not necessary to file. (Doc. 198, 54:3-55:18.) Apart from the tax withheld

from her wages, she did not make any estimated payments of tax in 2001. (Doc. 168 at ¶ 10.) In January 2015, after this lawsuit was commenced, Jim filed a 2001 return reporting the $272,000 as excluded "Indian general welfare benefits." (Ex. 67, Form 8275.)

4. Jim's control over the distributions

In general, when a Miccosukee member who is a parent receives a distribution share attributable to a child, the parent has discretion to use or save the money in any fashion. On occasion, the Tribe might withhold a share attributable to the child of an irresponsible member at the request of the child's clan, but no such interventions had occurred as to Jim. (Doc. 199 at 119:13-120:4.) The Tribe also allowed members to take advances against their distributions, and Jim took such advances. (Doc. 198 at 59:10-21.)

Jim would normally pick up her distribution checks at the administration office. She would then sign the checks with both her name and her husband's name and walk away with cash in an envelope. (Doc. 198 at 58:11-25; 61:10-13.) She gave some of the cash to her husband, Alexander Osceola. He testified that the money was split three ways between himself, Jim, and their natural daughter, omitting

an adopted daughter. (Doc. 198 at 92:2-6; 107:21-108:4.) Alexander spent the money Jim gave him on gambling and on routine household expenses. (Doc. 198 at 100:11-101:10.)

Jim testified that at times she would set aside a portion of her distribution for her children. She described the method for such set-asides as simply handing cash back to the administrative office to hold in a safe. She testified that any money she aside in 2001 she later spent on routine household bills. (Doc. 198 at 62:1-63:25.)

5. Tribal benefits for members

The Tribe provides its members with numerous benefits. The Tribe has a school on its reservation, and the school receives funding from the Bureau of Indian Education. (Doc. 199 at 160:4-12.) The Tribe will also pay for post-secondary education. (Doc. 199 at 160:13-16.) Members 18 years of age or older can apply for a house, and when one becomes available, they pay the Tribe $10,000, and no property tax. (Doc. 198 at 64:22-65:18.) The Tribe provided basic medical care at no cost and covered a portion of the members' cost of seeing specialists. (Doc. 198 at 65:19-66:6.)

6. Proceedings in the District Court

The United States commenced this suit, seeking a judgment against Jim for her 2001 income tax liability. (Doc. 1.) The Tribe was involved in this case almost from the beginning. The Tribe's attorney, Bernardo Roman, represented Jim during early proceedings (Docs. 7, 12, 16), and he sometimes identified himself as the Tribe's counsel. (Doc. 35 at 3-4). The Tribe soon moved to intervene, arguing that it had an interest in the litigation because the outcome could affect the Tribe and all its members. (Doc. 90 at 5-6.) Over the Government's objection (Doc. 91), the District Court permitted the Tribe to intervene as a matter of right (Doc. 114 at 5). The Tribe thereafter participated throughout the remainder of the suit. (Docs. 138, 159, 168, and 200 at 30-38.)

The United States filed four motions for summary judgment. (Docs. 111, 125, 139, 156.) The District Court denied two of the motions to await this Court's disposition of two appeals that might have addressed an issue in the case.[5] (Doc. 120, 142.) The District Court

[5] *United States v. Billie*, 611 F. App'x 608 (11th Cir. 2015) (enforcing internal revenue summons served on Tribe's chairman);
(continued…)

denied another in order to permit Jim to amend her answer to assert new defenses and to allow the United States to respond. (Doc. 137.) The District Court ultimately granted in part the Government's fourth motion for summary judgment (Doc. 156) and scheduled trial for the disputed factual issues.

a. The District Court's order granting partial summary judgment

The court identified the disputed issues as (i) whether the Tribe's distributions were excludable from income as general welfare payments, (ii) whether the tax assessment was inflated because it included distributions made to Jim on behalf of her husband and children, and (iii) whether the distributions were excludable from income because they constituted income derived directly from the land. (Doc. 173 at 6.) The Court also addressed the Government's argument, which was not disputed by Jim or the Tribe, that Jim was liable for penalties for failing to file a return and failing to pay tax. (*Id*.)

(…continued)
Cypress v. United States, 646 F. App'x 748, 755 (11th Cir. 2016) (ruling that the Anti-Injunction Act, I.R.C. § 7421(a), barred tribal members' suit to enjoin the assessment of federal taxes).

On the principal issue, the court held that the Tribal General Welfare Exclusion Act (*see* I.R.C. § 139E) did not supplant the Indian Gaming Regulatory Act (*see* 25 U.S.C. § 2710(b)(3)(D)). It accordingly held that, to the extent the distributions were per capita distributions of gaming revenue, they were not excludable from income. (Doc. 173 at 11-14.) The court found that there was no dispute that the payments were "per capita" distributions or that gaming revenue was the primary source of the payments. The court held, however, that there was a dispute of fact as to whether the distributions were *wholly* comprised of gaming revenue or included some revenue from non-gaming sources. (*Id.* at 9.) The court accordingly scheduled trial to take evidence as to what portion of the distributions, if any, was attributable to non-gaming sources. The Court also deferred any ruling about whether such other sources were exempt from income until a source was identified. (Doc. 173 at 11.) For the same reason, the court denied summary judgment as to whether a part of the distributions was derived directly from the land. (*Id.* at 17.)

As additional analysis of the principal issue, the District Court held that the Tribe's per capita distributions did not qualify as Indian

general welfare benefits under I.R.C. § 139E(b). The court reasoned that per capita distributions normally will not be "for the promotion of general welfare" as required by I.R.C. § 139E(b)(2)(B) because they are necessarily not based on need. The court further opined that the $272,000 distributed to Jim could not be an Indian general welfare benefit because it was "lavish," a disqualifying fact under I.R.C. § 139E(b)(2)(C). After considering the amount of the payments, their per capita nature, and the clear application of the IGRA, the court held that the payment to Jim was not an Indian general welfare benefit under I.R.C. § 139E. (Doc. 173 at 12-14.)

The court also held that disputed factual issues precluded summary judgment on the issues whether Jim had control over the entire $272,000 (*Id.* at 15) and whether she had reasonable cause for her failures to file a return and pay tax on the distributions. (*Id.* at 18-20.)

A bench trial was scheduled to resolve (i) whether any portion of the distributions were from non-gaming sources, and, if so, whether such sources were exempt; (ii) whether the assessment was inflated because Jim received distributions for her husband and children, and

(iii) whether Jim had reasonable cause for her failure to file a return and pay the tax on the tribal distributions. (Doc. 188 at 3.)

b. The District Court's trial findings of fact and conclusions of law

After a four-day bench trial, the District Court issued an opinion deciding the remaining issues in favor of the Government. The court first found that Jim and the Tribe did not present any evidence identifying a specific percentage of the distributions derived from non-gaming sources. Accordingly, the court held that no portion of the distribution was exempt from tax. (Doc. 188 at 8.)

The court then found that Jim exercised sufficient dominion over the entire $272,000 distribution and that, as a result, it was properly taxable to her alone. (Doc. 188 at 9-10.) The court relied on several circumstances. First, it noted that Jim had reported the entire $272,000 on her 2001 tax return filed in 2015, and that her husband and one daughter testified that they did not file tax returns reporting any portion of the distribution. In addition, the court pointed out that although Jim testified that she saved portions of the distributions for her children in tribal trusts, she did not provide any documentary evidence of such trusts. The court also relied on the fact that Jim

admitted in her deposition that she spent all the money in one daughter's trust account on household expenses. Finally, the court found it significant that the Tribe is a matriarchal society and that its customs established Jim as head of the household. (*Id.* at 9.)

The court went on to find that Jim did not establish reasonable cause for her failure to file a return and pay tax. It first noted that her trial testimony was not entirely credible because it conflicted with her prior deposition testimony. Specifically, it noted that, at Jim's deposition, she testified that she had her 2001 return ready to file, but then "just completely forgot to file that year." (Doc. 188 at 11, quoting from Doc. 156-7 (Deposition of Sally Jim) at 58:4.) At trial, however, she testified that she relied on instructions from Cypress, Lehtinen and the Business Council that she was not required to file a return. (Doc. 198 at 55.) The court found, however, that Cypress and the Business Council were not tax experts upon whom Jim could reasonably rely. (Doc. 188 at 11.) And the court relied upon Lehtinen's testimony that he never represented Jim or any other individual member of the Tribe, and never advised Jim not to file her 2001 return or pay tax on the distributions. (*Id.* at 12.) Finally, because the Tribe instructed its

members, including Jim, to take "active measures" to conceal their distributions from the IRS, the court concluded that this was not a case where Jim could assert a "sincere, albeit erroneous" belief that the distributions were not taxable income. (Doc. 188 at 12.) The court accordingly distinguished Jim's situation from that of the taxpayer in *Jourdain v. Commissioner*, 71 T.C. 980, 991 (1979), *aff'd*, 617 F.2d 507 (8th Cir. 1980). (Doc. 188 at 12.)

c. The Tribe's motion to alter or amend the judgment

The Court entered judgment in favor of the United States "and against Defendant Sally Jim and Intervenor-Defendant, the Miccosukee Tribe of Indians of Florida." The judgment specified the amount of Jim's tax liability, but did not require the Tribe to pay any amount. (Doc. 190.)

The Tribe moved to alter or amend the judgment. It contended (i) that the United States had only brought claims against Jim, not the Tribe, and (ii) that the entry of judgment against the Tribe was not supported by the findings of fact and conclusions of law and was unjust, "unclear and likely to create confusion regarding the impact of such judgment against the Tribe." (Doc. 192 at 6.)

The District Court denied the motion. (Doc. 196.) It held that the judgment against the Tribe was warranted because the Tribe had moved to intervene and the District Court had previously agreed that the Tribe had "a protectable interest in determining the taxability of its general welfare program." (Doc. 196 at 2, *citing* Doc. 114 at 4.) The court also noted that the Tribe had answered the complaint and asserted affirmative defenses, including that the distributions were derived directly from the land and were also for general welfare purposes.

The District Court also held that the judgment was not uncertain or confusing because it was clear that only Jim was liable to pay money under the judgment and that the judgment against the Tribe "simply relates to the Court's findings in [Docs. 173 and 188], which concluded the Tribe's distributions are subject to federal income taxation." (Doc. 196 at 5.)

This appeal followed.

(iii) Statement of the standard or scope of review

The District Court's ruling that that the Tribal General Welfare Act did not apply to the Tribe's per capita distributions of gaming

revenue, and that such distributions did not qualify as Indian general welfare benefits, is reviewed *de novo*. *Wright v. Everson*, 543 F.3d 649, 654 (11th Cir. 2008).

The District Court's conclusion that Jim had sufficient control over the distributions delivered to her so that they constituted income taxable to her was primarily factual in nature and is therefore reviewed for clear error. *Kann v. Commissioner*, 210 F.2d 247, 249 (3d Cir. 1953); *Stone v. Commissioner*, 865 F.2d 342, 351 (D.C. Cir. 1989).

The District Court's conclusion that Jim did not establish the elements of "reasonable cause" sufficient to avoid delinquency penalties is reviewed for clear error. *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.")

The District Court's denial of the Tribe's motion to alter or amend the judgment is reviewed for abuse of discretion. *Am. Home Assur. Co. v. Glenn Estess & Assocs., Inc.*, 763 F.2d 1237, 1238 (11th Cir. 1985).

SUMMARY OF ARGUMENT

1. The District Court correctly held that the per capita distributions Jim received from the Tribe were taxable as gaming revenue under 25 U.S.C. § 2710(b)(3)(D), and not excludable from income as general welfare payments under I.R.C. § 139E. The Indian Gaming Regulatory Act (IGRA) specifically provides that a Tribe's per capita payment to a member of the net revenues from gaming is subject to taxation. 25 U.S.C. § 2710(b)(3)(D). The record clearly showed that the payments were per capita payments from gaming revenue. They are therefore taxable as such. Nothing in the Tribal General Welfare Exclusion Act purports to alter the taxable nature of per capita payments of gaming revenue under the IGRA. And the court correctly rejected Jim's argument that the gaming revenue had been transformed into something else through the Tribe's imposition of a "gross receipts" tax on its gaming facility.

Even without regard to the IGRA, the court correctly determined that the payment did not qualify as an "Indian general welfare benefit" within the meaning of the Tribal General Welfare Exclusion Act and I.R.C. § 139E. An "Indian general welfare benefit" is defined to include

payments that are "for the promotion of general welfare," but "are not lavish or extravagant." I.R.C. § 139E(b). The District Court correctly concluded that these requirements, considered together, required an element of need that was not satisfied by annual payments of $68,000 per capita.

2. Because Jim was married and had two children, the $272,000 in distributions she received represented four shares of the Tribe's per capita payments. Nevertheless, the District Court correctly found, after trial, that Jim exercised sufficient control over the entire amount to warrant its being taxable as income to her. Jim picked up the check herself, signed for herself and her husband, and left the tribal administrative office with cash. No other member of her family reported the payment as income, while Jim reported it all as "excluded" income on a return she filed after this suit was commenced. Even if she had a moral or cultural obligation to use the funds to support her family, the control she exercised over it rendered the money taxable to her.

3. The District Court correctly found that Jim failed to demonstrate that she had reasonable cause for her failure to file a

return and pay tax on time. Jim was present at many of the Tribe's General Council meetings where she heard the Business Council advise all members to refrain from (i) reporting the distributions to the IRS, (ii) including the distributions on credit applications, (iii) depositing the distributions at commercial banks, and (iv) using the cash to make large purchases, all to prevent the IRS from learning about the distributions. Under such circumstances, she was not justified in relying on the "advice" she received from the Business Council.

4. The District Court did not err in entering judgment against the Tribe, which had intervened as of right to protect its interests. An intervenor has the status of an original party and is fully bound by the court's orders entered after the intervention. One of the principal benefits of intervention, after all, is that it prevents a multiplicity of suits involving common questions of fact and law by enabling the court to resolve those related issues in a single proceeding. Here, the court's determination that the distributions were per capita payments of gaming revenue may have preclusive effect as to the Tribe's obligations to withhold and report the payments. It is entirely appropriate that the

Tribe be bound, as a party to this suit, by the District Court's findings of fact reached after proceedings in which the Tribe participated.

ARGUMENT

I

The District Court correctly held that the per capita distributions paid to Sally Jim were taxable gaming income, not excludable general welfare payments

A. Introduction

In general, each person's gross income includes "all income from whatever source derived." I.R.C. § 61. Income has long been defined to include any "accessions to wealth, clearly realized, and over which the taxpayers have complete dominion." *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426, 431 (1955). Indians are subject to the same requirement to pay federal income taxes as non-Indians, unless exempted by a treaty or agreement between the United States and the Indian's tribe or an Act of Congress dealing with Indian affairs. *Squire v. Capoeman*, 351 U.S. 1, 6 (1956) (recognizing an exemption for income directly derived from allotted land: there, a sale of standing timber); *Barrett v. United States*, 561 F.3d 1140, 1145 (10th Cir. 2009); *see* Rev. Rul. 67-284, 1967-2 C.B. 55. "[T]he Indian Gaming Regulatory Act

explicitly provides that per capita distributions of income from tribal casinos are subject to federal taxation." *Campbell v. Commissioner*, 164 F.3d 1140, 1142 (8th Cir. 1999), citing 25 U.S.C. § 2710(b)(3)(D).

Jim and the Tribe do not dispute that the distributions to her, whatever their source, are "gross income" as defined by I.R.C. § 61 unless an exclusion applies. They contend instead that the $272,000 was excluded from income because of a statute or agreement. Specifically, both argue that all or some of the $272,000 was excluded from income pursuant to the Tribal General Welfare Exclusion Act of 2014, codified at I.R.C. § 139E. (Tr. Br. 22-35; Jim Br. at 10, adopting Tribe's brief.) Both also argue that the distributions did not constitute "net revenue" from gaming under 25 U.S.C. § 2710(b)(3) because the Tribe imposed a "gross receipts" tax on the activities of the gaming facility and therefore took revenue from it in the form of a "gross receipts tax" rather than as "net revenue" from gaming. (Tr. Br. at 30-31; Jim Br. at 55-59.) Jim argues separately that the distributions are excluded because of various other provisions of law. (Jim Br. at 42-54.) We address these contentions in turn.

B. The Tribal General Welfare Exclusion Act did not supplant the treatment of net gaming revenue established by the Indian Gaming Regulatory Act

The Tribe's principal contention is that the Tribal General Welfare Exclusion Act renders all or an unspecified portion of the distribution exempt from tax, notwithstanding the contrary provision of the Indian Gaming Regulatory Act, specifically, 25 U.S.C. § 2710(b)(3)(D), which requires per capita distributions of net gaming revenue to be treated as taxable income to members. (Tr. Br. 22-35.) As we will show, the District Court correctly interpreted the two statutes in concluding that the Tribe's per capita distributions of its gaming revenue were taxable income. Moreover, the District Court correctly held that the Tribe's imposition of a gross receipts tax on its gaming facility did not change the character of the source of the distribution payments as "net revenue" from gaming within the meaning of 25 U.S.C. § 2710(b)(3)(D).

1. The laws pertaining to Indian gaming and welfare benefits

a. Legislation related to Indian gaming

Congress passed the Indian Gaming Regulatory Act (IGRA) to address "the rapidly expanding field of Indian gaming." *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians (Tamiami II)*, 63 F.3d

1030, 1032 (11th Cir. 1995). The IGRA provided a statutory basis for the operation and regulation of gaming by Indian tribes. 25 U.S.C. § 2702; *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 48 (1996). The IGRA represented a "comprehensive approach to the controversial subject of regulating tribal gaming." *Alabama v. PCI Gaming Auth.*, 801 F.3d 1278, 1283 (11th Cir. 2015), quoting *Florida v. Seminole Tribe of Florida*, 181 F.3d 1237, 1247 (11th Cir. 1999) (internal quotations omitted).

That "comprehensive approach" includes, *inter alia*, requirements concerning ownership of the gaming activity, allowable uses of gaming revenue, annual audits, and background investigations of management officials. 25 U.S.C. § 2710(b)(1), (b)(2). Relevant to this case, 25 U.S.C. § 2710(b)(3) contains an explicit direction that–

> Net revenues from any class II gaming activities conducted or licensed by any Indian tribe may be used to make per capita payments to members of the Indian tribe only if –
>
> * * *
>
> (D) the per capita payments are subject to Federal taxation and tribes notify members of such tax liability when payments are made.

25 U.S.C. § 2710(b)(3). A "per capita payment" is defined as–

> the distribution of money or other thing of value to all members of the tribe, or to identified groups of members, which is paid directly from the net revenues of any tribal gaming activity. This definition does not apply to payments which have been set aside by the tribe for special purposes or programs, such as payments made for social welfare, medical assistance, education, housing or other similar, specifically identified needs.

25 C.F.R. § 290.2.

In 1994, Congress amended the Internal Revenue Code to require Indian tribes paying "net revenues" from gaming to members to deduct and withhold income taxes from such payments. I.R.C. § 3402(r), added by the Uruguay Round Agreements Act, Pub. L. No. 103-465, § 701(a) 108 Stat. 4809, 4995-96. The report accompanying the amendment states that under the prior law, although tribes could make "taxable distributions" to members, they were not required to withhold on such payments, an omission which "may result in significant tax liability" to the members. S. Rep. 103-412 (1994) at 136. Congress believed that a withholding requirement would eliminate the need for some members to make quarterly estimated payments and "reduce the likelihood that they will face penalties for underpayment of tax at the time of tax filing." (*Id.*) Accordingly, Congress added a new provision, effective for payments made after December 31, 1994, requiring that–

> Every person, including an Indian tribe, making a payment to a member of an Indian tribe from the net revenues of any class II or class III gaming activity conducted or licensed by such tribe shall deduct and withhold from such payment a tax in an amount equal to such payment's proportionate share of the annualized tax.

Uruguay Round Agreements Act, *supra*, § 701(a), 108 Stat. at 4995-96. It was therefore clear in 2001 that a per capita payment of net gaming revenue was gross income to the recipient within the meaning of I.R.C. § 61, that it was confirmed as being "subject to Federal taxation" under the IGRA, specifically 25 U.S.C. § 2710(b)(3)(D), and that the Tribe was required to withhold from the payment and remit the withholding to the IRS pursuant to I.R.C. §§ 3402(r) and 6041.

b. The general welfare exclusion

Section 61 of the Code does not expressly exclude "welfare benefits" from the definition of gross income. Nevertheless, the IRS has long taken the position that government disbursements promoting the general welfare are not taxable income to the individuals receiving said benefits.[6] The Tax Court has acknowledged the existence of this

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[6] There are numerous rulings to the effect that payments of this nature are not includible in gross income. *See, e.g.,* Notice 99-3, 1999-1 C.B. 271 (payments received as Temporary Assistance to Needy Families by individuals performing work under state welfare-to-work

(continued…)

"general welfare exclusion." *Bailey v. Commissioner*, 88 T.C. 1293, 1299-1301 (1987); *Graff v. Commissioner*, 74 T.C. 743, 753-54 (1980), *aff'd per curiam*, 673 F.2d 784 (5th Cir. 1982); *Bannon v. Commissioner*, 99 T.C. 59, 63 (1992).[7]

As described more generally in administrative guidance issued by the IRS, to qualify for the general welfare exclusion, payments must "(i) be made from a governmental fund, (ii) be for the promotion of the general welfare (*i.e.*, generally based on individual or family needs), and (iii) not represent compensation for services." Rev. Rul. 2005-46, 2005-2 C.B. 120.

(…continued)
programs); Rev. Rul. 78-170, 1978-1 C.B. 24 (government payments to assist low-income persons with utility costs); Rev. Rul. 76-395, 1976-2 C.B. 16, 17 (government grants to assist low-income city inhabitants to refurbish homes); Rev. Rul. 76-144, 1976-1 C.B. 17 (government grants to persons eligible for relief under the Disaster Relief Act of 1974); Rev. Rul. 57-102, 1957-1 C.B. 26 (benefits paid to blind persons under state public assistance law).

[7] In a different context, the Supreme Court, referring to a New York State low-income housing subsidy, similarly distinguished income from welfare benefits, stating that "[i]n a real sense, it no more embodies the attributes of income or profits than do welfare benefits, food stamps, or other government subsidies." *United Housing Found., Inc. v. Forman*, 421 U.S. 837, 855 (1975).

In 2014, following several years of consultation with tribal leaders, the IRS published additional guidance to ensure that benefits provided under Indian tribal general welfare programs would qualify for the exclusion on the same basis as welfare programs of other governmental entities. Rev. Proc. 2014-35, 2014-26 I.R.B. 1110-12, Secs. 2.02, 2.03, 2.05. The guidance defined a qualifying "general welfare" payment in terms similar to previous guidance, *i.e.*, that "the payments must (1) be made pursuant to a governmental program, (2) be for the promotion of the general welfare (that is, based on need), and (3) not represent compensation for services." *Id.*, 2014-26 I.R.B. at 1110-12, Secs. 2.02, 2.03. The guidance further provided that a qualifying program could be funded with casino revenue, but could not consist of per capita distributions of gaming revenue. The guidance accordingly stated that–

> per capita payments to tribal members of tribal gaming revenues that are subject to the Indian Gaming Regulatory Act are gross income under § 61, are subject to the information reporting and withholding requirements of §§ 6041 and 3402(r), and are not excludable from gross income under the general welfare exclusion or this revenue procedure. *See* 25 U.S.C. §§ 2701-2721 and 25 C.F.R. Part 290.

Rev. Proc. 2014-35, Sec. 2.03, 2014-26 I.R.B. at 1111-12.

In recognition of the unique circumstances of Indian tribes and tribal governments, the IRS sought to identify general criteria for the tribal welfare programs which, if satisfied, would also satisfy the "individual or family needs" requirement applicable to other general welfare programs. To that end, the Revenue Procedure stated (at Sec. 2.04) that the "individual need" requirement of the general welfare exclusion would be considered satisfied if benefits provided under the program satisfied the "general criteria" of Sec. 5.02(1) and the benefit was of the type described in Sec. 5.02(2). The "general criteria" are that the benefits must be provided pursuant to a specific tribal program, the program must have written guidelines, the benefit must be available to any tribal member who satisfies the program's guidelines, the program does not discriminate in favor of members of the governing body, the benefit is not lavish or extravagant under the circumstances, and the benefit is not compensation for services. Sec. 5.02(1). The types of benefits that may be distributed cover a wide range of basic needs, including benefits for housing and education, care of elderly and disabled persons, transportation from the reservation to essential services, relocation costs for persons displaced from their homes,

expenses associated with cultural activities, and "assistance to individuals in exigent circumstances." Sec. 5.02(2).

Only a few months after the IRS published Rev. Proc. 2014-35, Congress passed the Tribal General Welfare Exclusion Act of 2014, Pub. L. No. 113-168, 128 Stat. 1883. The House passed it by suspension of the rules and the Senate passed it by unanimous consent. The bill did not go through any committee markups, and there are no committee reports or hearings for it. The only legislative history includes floor statements by members of the House and Senate. Although such statements have limited value in statutory interpretation because "they generally represent only the view of the speaker and not necessarily that of the entire body," statements of the sponsors may be accorded more weight, especially if other legislators did not offer contrary views. *Kenna v. U.S. Dist. Court for C.D. Cal.*, 435 F.3d 1011, 1015 (9th Cir. 2006). In this case, the floor statements of the sponsor (Rep. Nunes) and other legislators uniformly express the intent to codify the just-

issued guidance of Rev. Proc. 2014-35.[8] No legislators expressed a contrary view.

The Act amends the Internal Revenue Code by adding § 139E, which provides that "[g]ross income does not include the value of any Indian general welfare benefit." I.R.C. § 139E(a). An "Indian general welfare benefit" is defined as –

> any payment made or services provided to or on behalf of a member of an Indian tribe (or any spouse or dependent of such member) pursuant to an Indian tribal government program, but only 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

[8] 160 Cong. Rec. S5616 (daily ed. Sept. 16, 2014) (statement of Sen. Moran) ("The IRS recently issued a notice that establishes the tribal gender [*sic*] welfare exclusion . . . . but we want to make certain that this policy is extended and codified"); 160 Cong. Rec. S5617 (daily ed. Sept. 16, 2014) (statement of Sen. Heitkamp) ("The IRS recently issued helpful guidance . . . we also must make sure that parity provided by that guidance is in statutory language"); 160 Cong. Rec. H7601(daily ed. Sept. 16, 2014) (statement of Rep. Nunes) ("The provisions in H.R. 3043 would codify this IRS guidance"); 160 Cong. Rec. H7601(daily ed. Sept. 16, 2014) (statement of Rep. Kind) ("[T]his legislation would codify existing IRS practice . . . .").

such guidelines,

(B) are for the promotion of general welfare,

(C) are not lavish or extravagant, and

(D) are not compensation for services.

I.R.C. § 139E(b).

The Act called for creation of a Tribal Advisory Commission, and for the Secretary, in consultation with the Commission, to establish guidelines for what constitutes "lavish or extravagant benefits with respect to Indian tribal government programs." I.R.C. § 139E(c)(3); Tribal General Welfare Exclusion Act of 2014, *supra*, § 3, 128 Stat. at 1884-85.

2. The Tribal General Welfare Exclusion Act does not repeal those provisions of the Indian Gaming Regulatory Act requiring taxation of per capita distributions of net gaming revenue

The District Court correctly held that the Tribal General Welfare Exclusion Act did not alter the tax treatment of per capita distributions of net revenue from gaming established by the IGRA. The IGRA's comprehensive approach to the subject of Indian gaming includes an explicit provision that per capita distributions of net gaming revenue are "subject to Federal taxation." 25 U.S.C. § 2710(b)(3)(D). Congress

confirmed the taxable nature of the distributions when it required that tribes begin withholding from the distributions to protect individuals from the burden of either having to make quarterly payments of estimated tax or being subject to underpayment penalties.

Nothing in the Tribal General Welfare Exclusion Act evinces an intent to alter the tax treatment of such payments established by 25 U.S.C. § 2710(b)(3)(D) and confirmed by I.R.C. § 3402(r). The Tribal General Welfare Exclusion Act contains no explicit references to revenues from gaming. The only indirect reference to gaming revenue is in the legislators' endorsement of newly-issued Rev. Proc. 2014-35, which states that per capita payments of gaming revenue would continue to be treated as taxable pursuant to 25 U.S.C. § 2710(b)(3) and I.R.C. § 61, as well as subject to withholding pursuant to I.R.C. §§ 6041 and 3402(r). Rev. Proc. 2014-35, Sec. 2.03.

The Tribe points out that an ambiguity in a statute governing Indian affairs is to be construed in favor of the Indian tribe. (Tr. Br. at 23-24.) But this canon "does not permit reliance on ambiguities that do not exist; nor does it permit disregard of the clearly expressed intent of Congress." *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498,

506 (1986). And, pertinent to this case, the Supreme Court has warned that the canon's force is "offset by the canon that warns us against interpreting federal statutes as providing tax exemptions unless those exemptions are clearly expressed." *Chickasaw Nation v. United States*, 534 U.S. 84, 95 (2001). Here, the IGRA is unambiguous in subjecting per capita payments of gaming revenue to taxation, and the Tribal General Welfare Exclusion Act does not clearly express a contrary intent.

3. The per capita payments did not qualify as Indian general welfare benefits because they were lavish or extravagant and not based on need

The District Court correctly ruled that the payments to Jim did not qualify as an "Indian general welfare benefit" because they were lavish and extravagant and because they were not based on need as part of a per capita distribution program. (Doc. 173 at 12-14.) "Indian general welfare benefit" is defined to exclude a benefit that is "lavish or extravagant" under guidelines that have not yet been developed. I.R.C. § 139E(b)(2)(C), (c)(3). The court below recognized that the guidelines have not been established. But in order not to deprive the statute itself of force, the court nevertheless concluded that a welfare benefit of

$272,000 for a four-person household was lavish or extravagant, in the circumstances, especially when provided in addition to the Tribe's other benefits, including housing, education, medical care and elder care. (Doc. 173 at 12). For comparison, the median household income in Florida in 2001 was approximately $38,000. Money Income in the United States: 2001, United States Census Bureau, available at https://www.census.gov/prod/2002pubs/p60-218.pdf. The court further observed that, although Congress may have intended "promotion of the general welfare" in I.R.C. § 139E(b)(2)(B) to be construed broadly, it could not be construed so far as to permit a tribe to broadly label per capita payments of gaming revenue as "promoting general welfare" and thereby avoid the requirement of 25 U.S.C. § 2710(b)(3)(D) that such payments are subject to taxation.

The District Court correctly relied on the analogous decision in *In re Hutchinson*, 354 B.R. 523 (Bankr. D. Kan. 2006), as instructive. (Doc. 173 at 13.) In that case, a debtor who was a member of an Indian tribe and received per capita distributions of gaming revenue contended that the distributions were exempt from his bankruptcy estate under 11 U.S.C. § 522(d)(10)(A) as "a local public assistance benefit." *Id.* at 529.

In particular, the debtor relied on the IGRA for his contention that tribes could use gaming revenue "to provide for the general welfare of the Indian tribe and its members." *Id.* at 530. After considering Kansas statutes, as well as opinions of several other bankruptcy courts considering other state laws, the court concluded that a "public assistance benefit" meant government aid to the needy, blind, aged, or disabled persons and dependent children, and per capita distributions did not meet this definition because they are made in equal amounts to all enrolled tribal members regardless of need. *Id.* at 530-531. The same court reaffirmed its holding in *In re McDonald*, 519 B.R. 324, 341 (Bankr. D. Kan. 2014).

On appeal, the Tribe argues that the District Court should not have granted summary judgment to the Government on this issue because an evaluation whether a welfare benefit is "lavish or extravagant" should take into consideration all of the relevant facts and circumstances. (Tr. Br. at 34-35.) But in response to the Government's point that the amount distributed far exceeded statistical information regarding the median household income in Florida in 2001 (Doc. 156 at 22-23), Jim and the Tribe did not identify other relevant facts or

circumstances to be considered, nor did they show a material issue of disputed fact (Doc. 159 at 11-13). Consequently, the District Court did not err in entering summary judgment on this issue.

The Tribe further argues that even if the $272,000 payment was lavish or extravagant, then the Court should have first determined what portion was not and then allowed that amount as an exempt Indian general welfare benefit. (Tr. Br. 33, 35.) As authority, the Tribe relies on an example from an IRS instruction booklet. (Tr. Br. 33, citing IRS Pub. 463, "Travel, Entertainment, Gift, and Car Expenses"). Section 274 disallows a deduction for certain entertainment expenses of a taxpayer in a trade or business. Specifically, I.R.C. § 274(k)(1)(A) disallows deductions for business-related meals "unless such expense is not lavish or extravagant under the circumstances." In Publication 463, one example explains that if a taxpayer spends an amount that is lavish or extravagant on an otherwise-qualifying business meal, the portion that is not lavish or extravagant is not disallowed under the section.

The Tribe's reliance on the example in IRS instructions pertaining to an unrelated provision of the Code is inapt. The structure of I.R.C. § 139E acts to exclude from gross income only those payments made

"pursuant to an Indian tribal government program, but only if" the program meets all of the requirements of subsection (b). As a result, if payments under the program are lavish or extravagant, then the payments do not qualify as "Indian general welfare benefits." Here, I.R.C. § 139E does not provide a basis for excluding from income a portion of the $272,000 payment because the total amount of the payment to Jim is lavish or extravagant. No payments made pursuant to the program are Indian general welfare benefits under I.R.C. § 139E.

C. The Tribe's use of a "gross receipts tax" did not permit it to avoid the requirements of 25 U.S.C. § 2710(b)(3)

There is no merit to the further argument of Jim and the Tribe that imposition of a "gross receipts tax" on wagering at the casino transformed the net gaming revenue into something other than net gaming revenue. (Tr. Br. 30-31.) Jim and the Tribe assert that because the gross receipts tax applied to all businesses using the Tribe's land and resources, the net gaming revenue somehow was no longer net gaming revenue. (Jim Br. at 55-59; Tr. Br. 30.) The District Court correctly recognized, however, that the distributions might have included revenue from non-gaming sources when it denied the

Government's motion for summary judgment in this regard. (Doc. 173 at 10-11.) And it scheduled trial to permit Jim and the Tribe to show what portion, if any, was derived from such sources. At trial, however, Jim and the Tribe presented no evidence of a specific percentage of the distributions that derived from any source other than gaming revenue. (Doc. 188 at 8.) The Tribe's imposition of a 6.5% "gross receipts tax" (later increased to 7.78% and then to more than 8%) as a means of conveying the gaming facility's net revenue into the Tribe's "nontaxable distributable revenue" account is a mere formalism. In the tax context, courts typically "disregard formalisms and look to the substance of a transaction to determine its effect. 'To permit the true nature of a transaction to be disguised by mere formalisms, which exist solely to alter tax liabilities, would seriously impair the effective administration of the tax policies of Congress.'" *Commissioner v. Estate of Sanders*, 834 F.3d 1269, 1282 (11th Cir. 2016), quoting *Commissioner v. Court Holding Co.*, 324 U.S. 331, 334 (1945).

In any event, we dispute the Tribe's factual assertion that "the Tribe made no distributions from the net revenues of its gaming operations. Rather, all of the distributions the Tribe made were derived

from its gross receipts tax." (Tr. Br. at 31 n.10, citing Doc. 198 at 9:21-24.) The Tribe's use of this passage of Lehtinen's testimony is misleading. Considered in context, Lehtinen was not testifying as to a fact about the nature of the distributions. Instead, he was describing a legal position he included in an advocacy letter he wrote on behalf of the Tribe. Lehtinen had previously testified that, in 1995, the Tribe received an inquiry from the Office of Indian Gaming, asking if the Tribe made distributions of net revenue from gaming. Lehtinen wrote the Tribe's response, stating that it did not distribute net revenue from gaming, but that it did make distributions from its gross receipts tax. (Doc. 197 at 85.) Asked again about the letter (on redirect), Lehtinen described the legal position asserted in the 1995 letter. (Doc. 198 at 9:18-24.) The testimony the Tribe now cites for its assertion that distributions were from the gross receipts tax and not net gaming revenues is actually Lehtinen's testimony about the legal position he advanced in a letter he sent to the Bureau of Indian Affairs. At trial, Lehtinen added that he did not believe the position was legally correct. (Doc. 198 at 8:1-3 (testifying that the position was "probably the best

possible argument to the IRS. It was also not my personal position and I advised that the IRS was not likely to accept it.")).

D. The distribution was not excludable under Jim's other theories

Jim, but not the Tribe, contends that the Tribe's distributions to her are exempt from income tax under one or more poorly explained theories. (Jim Br. 42-54.) Jim's argument is difficult to follow because portions of it were apparently written before trial for an appeal in a different case.[9] For example, although the United States was the plaintiff in this case, Jim's brief makes several assertions about the "plaintiffs" or a "lead plaintiff" that refer to individual members of the Miccosukee Tribe. (Jim Br. at 46, 51, 55.) Jim's brief also includes an assertion that "legislation with Native American Indians must be construed as the Indian themselves would have understood it, *as alleged in the Complaint*." (Br. 51, emphasis supplied.) The United States made no such allegation in the complaint it filed in this case. (Doc. 1.) And Jim asserts, as fact, and without citation to the record,

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[9] Portions of the brief suggest it was written for the appeal in *Cypress v. United States*, 646 F. App'x 748 (11th Cir. 2016). *See* pp. 16-17 n.5, *supra*.

that the NTDR distributions included the tribe's revenue from "its fuel tax on the Tribe's fueling station," and "its income from tribal leases, licenses and enterprises on tribal trust lands." (Jim Br. at 55.) Jim makes this assertion without acknowledging that the extent to which the distributions were derived from non-gaming revenue was a trial issue, and Jim and the Tribe did not present any evidence identifying what percentage, if any, was derived from non-gaming sources. (Doc. 188 at 8.) The Court should therefore disregard Jim's arguments that are wholly irrelevant to the issues presented in the instant appeal.

In any event, as best we understand these arguments, Jim asserts that the Tribe's former Chairman, Billy Cypress, had been designated by the Secretary of Interior "as its Superintendent over the Miccosukee Tribe and charged him with interpreting and applying statutes applicable to Tribes" (Jim Br. at 53), and that the District Court should have deferred to Billy Cypress's interpretation of such statutes that the distributions were for the lease of Indian Lands (*id.* at 52-54). Jim cites regulations[10] promulgated under the Indian Self Determination and

[10] Jim Br. 53, *citing* 25 C.F.R. §§ 162.016, 162.018

Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (1975), codified at 25 U.S.C. § 5301 *et seq*. That Act created a mechanism for Indian tribes to enter into agreements with the United States providing for the tribe's assumption of responsibility for programs or services to Indian populations that otherwise would be provided by the Federal government. *Colbert v. United States*, 785 F.3d 1384, 1385 (11th Cir. 2015). But the Act does not implicate federal tax administration, nor does it authorize anyone to characterize net revenue from gaming as lease income. It is unavailing for the Tribe to invoke the canon in favor of the tribe's construction. Not only is there no ambiguity in the controlling statutes to construe, but also the clear intent of Congress to tax gaming distributions cannot be ignored. *See Catawba Indian Tribe*, 476 U.S. at 506. The Supreme Court has also warned against interpreting federal statutes as providing tax exemptions that are not clearly expressed. *Chickasaw Nation*, 534 U.S. at 95. Jim has not explained how any of the statutes to which she has referred provides an exemption from income for per capita distributions of gaming revenue. And none does.

II

The District Court correctly held that Jim had sufficient control over the entire $272,000 for it to be income to her, and not to another person

The District Court held that Jim was liable for tax on the entire $272,000, notwithstanding her contention that some of the payment belonged to members of her family. (Doc. 188 at 10.) Jim does not challenge that conclusion on appeal, and thus has waived any contentions in this regard. *Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 680 (11th Cir. 2014). The Tribe, however, challenges the District Court's conclusion in this regard. (Tr. Br. at 35-42.) But nothing in the Tribe's motion to intervene (or in its answer to the complaint) signaled the Tribe's interest in determining whether its payments to Jim were income to her alone or to her in part and to her family members in part. (Docs. 90, 113, 115.) And it is not apparent what interest the Tribe has in the District Court's resolution of this matter. In any event, the District Court's conclusion is correct and should be affirmed.

A gain constitutes taxable income "when its recipient has such control over it that, as a practical matter, he derives readily realizable economic value from it." *Rutkin v. United States*, 343 U.S. 130, 137

(1952). *Accord*, *United States v. Rochelle*, 384 F.2d 748, 751 (5th Cir. 1967) ("the economic benefit accruing to the taxpayer is the controlling factor in determining whether a gain is 'income.'"). A taxpayer receives income when "cash, as here, is delivered by its owner to the taxpayer in a manner which allows the recipient freedom to dispose of it at will, even though . . . his freedom to use it may be assailable by someone with a better title to it." *United States v. Rochelle*, 384 F.2d at 751-52.

The District Court here correctly found that Jim had sufficient control over the distribution so that it constituted income to her. The evidence established that Jim had complete dominion over the funds without restriction. Although the checks were made payable to Jim and her husband, she had no difficulty signing them without her husband being present at the tribal administrative office and walking away with cash in an envelope. (Doc. 198 at 61:10-13.) Her husband and daughter later received some of the cash, but only when she turned it over to them. The District Court correctly relied on these factors in concluding that Jim's control over the distributions warranted their inclusion in her gross income. Notably, as the court pointed out, Jim reported the entire sum on her 2001 individual tax return that she filed after

commencement of the lawsuit and when represented by counsel. By contrast, both Jim's husband and one daughter testified that they did not file tax returns for 2001. Moreover, Jim did not provide any documentary evidence of her assertion that she saved a portion of her children's shares in a trust, and she had previously admitted in her deposition she spent all of the money on household expenses. Because the Tribe is a matriarchal society, it was customary that the distribution for the husband and children would be delivered to Jim. Finally, Jim testified that if she were to divorce, she would keep the marital property, and her former husband would vacate the home. (Doc. 188 at 9-10.) This cogent evidence, considered by the court in its totality, amply supports the District Court's factual determination that Jim sufficiently controlled the total amount of distributions her family received from the Tribe to warrant their being taxable to her alone. (Doc. 188 at 10.)

The Tribe's argument that Jim lacked complete dominion over the distribution (Tr. Br. at 35-42) lacks merit. The Tribe asserts that "Tribal custom requires" that Jim use the money to support her family (Tr. Br. at 38, citing Doc. 159-3 at 10:5-8, one member's testimony that

the Tribe "helps all its people"), and that if she had not used the money to support her family the Tribe "could have intervened by denying Ms. Jim access to the distributions," citing Doc. 181-4 at 113:12-115:8.[11] (Br. 38.)

The fact that Jim was assertedly required by Tribal custom to provide for her family does not distinguish her situation from many that involve taxpayers with families. Many decisions and enactments have been shaped by the assumption that a taxpayer will share income with his or her spouse and children. *See, e.g.*, *Helvering v. Clifford*, 309 U.S. 331, 336 (1940) ("For where the head of the household has income in excess of normal needs, it may well make but little difference to him (except income-tax-wise) where portions of that income are routed – so long as it stays in the family group."); I.R.C. § 1(g) (unearned income of child under age of 18 taxed at the marginal rate of parents). Moreover, the Tribe's assertion that if Jim did not provide for her family then it

[11] The Tribe's citation to Doc. 181-4 at 113-115 is a mistake. Doc. 181-4 is the parties' designated transcript of the deposition of Colley Billie. Pages 113-115 were not designated, and are therefore not in the record.

could intervene by denying Jim access to *future* distributions is a concession that the 2001 distributions, once paid out to Jim, were not recoverable from her.

Finally, the Tribe is mistaken in its assertion that the District Court "relied on only one fact to reach its conclusion," that fact being the tax return Jim signed in 2015. (Tr. Br. at 39.) The District Court plainly cited other facts and based its conclusion on "the evidence submitted at trial in its totality." (Doc. 188 at 10.)

III

The District Court correctly found that Jim did not demonstrate that she had reasonable cause to avoid the delinquency penalties

After trial, the District Court held Jim liable for additions to tax because she did not show reasonable cause for her failure to file her return and pay her tax when due. (Doc. 188 at 10-12.) As with the previous issue, Jim has not challenged that conclusion in her appellate brief, but the Tribe has in its brief. (Tr. Br. at 43-45.) Again, nothing in the Tribe's motion to intervene or its answer (Docs. 90, 113, 115) indicates an interest in whether Jim had reasonable cause for her failure to file and pay. In any event, the District Court correctly found

that Jim lacked reasonable cause for not reporting the distributions and paying tax on them.

A. Delinquency penalties and the "reasonable cause" exception

Section 6651(a) provides penalties for a taxpayer's delinquency in in timely filing a return and paying the tax. The amount of the penalty is 5% of the amount required to be shown per month for failing to file a return, and 0.5% of the amount of such tax per month for failing to pay the tax. Both penalties are capped at 25% of the amount of tax, and an adjustment is made for any month in which both penalties apply. I.R.C. § 6651(c)(1).

Under the express terms of Section 6651(a), the additions to tax apply "unless it is shown that [the] failure [to file or pay on time, as the case may be] is due to reasonable cause and not due to willful neglect." As a result, in order to "escape the penalt[ies] the taxpayer bears the heavy burden of [establishing] both (1) that the failure did not result from willful neglect and (2) that the failure was 'due to reasonable cause.'" *United States v. Boyle*, 469 U.S. 241, 245 (1985). "Willful neglect" is not at issue in this case.

A taxpayer has had "reasonable cause" if she "exercised ordinary business care and prudence." Treas. Reg. § 301.6651-1(c)(1) (26 C.F.R.); *see Boyle*, 469 U.S. at 246 n.4. Whether a taxpayer acted with reasonable cause is determined after an evaluation of the totality of the facts and circumstances, the most important factor being the extent of the taxpayer's effort to assess her proper tax liability. *Southgate Master Fund, L.L.C. ex rel. Montgomery Capital Advisors, LLC v. United States*, 659 F.3d 466, 493 (5th Cir. 2011). Reliance on the advice of a tax professional can establish reasonable cause, but it does not necessarily do so. *Id.* Among the relevant factors is whether the advisor is sufficiently qualified to give tax advice. *Hermax Co., Inc. v. Commissioner*, 11 T.C. 442, 446 (1948), *aff'd*, 175 F.2d 776 (3d Cir. 1949) (reliance on public accountant who was not an expert in Federal tax laws was not reasonable); *In re Wyly*, 552 B.R. 338, 504 (Bankr. N.D. Tex. 2016).

B. Jim did not establish reasonable cause for her failure to file a return and pay tax

The District Court correctly found that Jim failed to demonstrate reasonable cause for her failure to timely file a tax return and failure to timely pay tax. The Tribe's sole argument is its contention that Jim

relied on the advice of Dexter Lehtinen and the Business Council. (Tr. Br. 43.) The Tribe asserts that "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. Br. 43, citing Doc. 198 at 81:16-82:4.) The cited testimony, however, does not support the Tribe's assertion. The Tribe cites Jim's testimony that:

> Q: And these meetings that you attended regarding the tax issues and distributions, who did you rely on to advise you?
>
> A: Where – when we had the meetings at the – for the community, when legals came up with Mr. Lehtinen, so I would think that it would be him to rely on.
>
> Q: And did – did you understand what he was saying or were you relying on the interpretation?
>
> A: The interpretation.
>
> Q: And why would you rely on him; why would you decide to rely on him?
>
> A: Because he was the one that the Tribe had selected to hire him to represent the Miccosukees, so I thought maybe he knew – he knows what he was talking about and what's best for the community.

(Doc. 198 at 81:16-82:4.) No advice is described above. Thus, the Tribe has failed to cite record evidence for its assertion that Lehtinen and the Business Council advised Jim that she was not required by law to report the distributions on a tax return.

It is clear, moreover, that Jim did not personally retain Lehtinen for professional advice. Lehtinen testified that he did not know Jim, could not recall ever having a conversation with her, did not correspond with her, and had not advised her that she did not need to file a tax return for 2001 or report the distributions on her return. (Doc. 197 at 103:10-104:20.) Lehtinen attended General Council meetings and sometimes spoke at them. But Lehtinen spoke in English, and testified that "the tribal chairman or another officer would generally, as I understand it, summarize in Miccosukee what" he had said. (Doc. 197, 62:15-63:6.) Of course, since Lehtinen did not speak the Miccosukee language, he could not confirm the accuracy of the summary or translation. (*Id.*)

Business Council member Gabriel Osceola testified that Chairman Cypress was not a tax expert and the members had no reason believe otherwise. (Doc. 199 at 159:19-160:1.) Moreover, Jim's knowledge that Cypress and the Business Council had tried to coordinate efforts to conceal the NTDR distributions from the IRS put her on notice that their advice not to report the distributions might have been a continuation of the coordinated effort to protect other members from

IRS attention, rather than particularized advice for her about her legal obligations. At best, Jim relied on an interpretation of Lehtinen's statements, rendered by tribal leaders engaged in a concerted effort to discourage members from disclosing to the IRS the distributions of gaming revenue. Against this background, the District Court's conclusion that Jim had not shown reasonable cause for her failure to file a return reporting the distributions is well supported.

IV

The District Court properly named the Tribe as a defendant in the judgment

The District Court's inclusion of the Tribe as a judgment defendant is fully consistent with its status as an intervenor, the subsequent course of proceedings, and the policies behind intervention. The benefits of intervention include efficiency and consistency in resolving related issues in a single proceeding and preventing a multiplicity of suits that involve common questions of law or fact. *Sec. Ins. Co. of Hartford v. Schipporeit, Inc.*, 69 F.3d 1377, 1381 (7th Cir. 1995); 6 *Moore's Federal Practice*, § 24.03[5][b][i] (Matthew Bender 3d Ed.). Consequently, it is well established that an intervenor enters the suit with the status of an original party and is fully bound by all future

court orders. *United States v. State of Oregon*, 657 F.2d 1009, 1014 (9th Cir. 1981) ("By successfully intervening, a party makes himself vulnerable to complete adjudication by the federal court of the issues in litigation between the intervener and the adverse party," (internal citations and quotations omitted). *Accord*, *Marcaida v. Rascoe*, 569 F.2d 828, 831 (5th Cir. 1978); *Matter of First Colonial Corp. of Am.*, 544 F.2d 1291, 1298 (5th Cir. 1977); *Alvarado v. J.C. Penney Co.*, 997 F.2d 803, 805 (10th Cir. 1993); *D.C. v. Merit Sys. Prot. Bd.*, 762 F.2d 129, 132 (D.C. Cir. 1985) ("The 'price' of such intervention, we believe, is the possibility that the plaintiff will be able to obtain relief against the intervenor-defendant even if the original defendant is eliminated from the lawsuit."). Having successfully intervened in the United States' suit against Sally Jim, it is wholly unremarkable that the Tribe is named in the judgment and bound by the District Court's orders entered after the intervention.

Although the Tribe interposes several vague objections (Tr. Br. at 46-53), it seems unwilling to acknowledge that it may have an interest in limiting the judgment's preclusive effect on its own liability. This Court has already recognized the Commissioner has been investigating

the Tribe "to determine whether the Tribe had complied with its reporting and withholding requirements." *Miccosukee Tribe of Indians of Florida v. United States*, 698 F.3d 1326, 1329 (11th Cir. 2012). The issue decided by the court below – that the distributions were gross income to Jim because they were per capita payments of net gaming revenue – are the same factual and legal issues necessary to determine whether the Tribe has complied with its reporting and withholding requirements. Specifically, a Tribe "making a payment to a member of an Indian tribe from the net revenues of any class II or class III gaming activity conducted or licensed by such tribe" is required to withhold from the distributions, which are "treated as if they were wages paid by an employer to an employee." I.R.C. § 3402(r)(1), (7). The Tribe was also required to file information returns with the IRS reporting the payments and furnish copies of such returns to the payees. I.R.C. § 6041(a), (d). The Tribe is subject to penalties for failure to file such returns and furnish copies. I.R.C. §§ 6721, 6722. The District Court's finding that the payments were per capita distributions of gaming revenue is potentially preclusive in future disputes over whether the Tribe fulfilled its legal obligations regarding such payments.

The Tribe necessarily anticipated such possibilities when it sought to intervene. To do so, it was required to show that it had both (1) an interest in the property or transaction that was the subject matter of the action, and (2) that the disposition of the matter may, as a practical matter, impede or impair its ability to protect its interest. Fed. R. Civ. P. 24(a)(2); *Fed. Sav. & Loan Ins. Corp. v. Falls Chase Special Taxing Dist.*, 983 F.2d 211, 215 (11th Cir. 1993). To make this showing, the Tribe asserted that the court would need to determine the taxability of the Tribe's distribution payments and that it had a "direct, substantial, and strong relationship to the legally protectable interest of the Tribe." (Doc. 90 at 1; Doc. 196 at 2.)

Naming the Tribe in the judgment, after it fully participated in the action, is consistent with the purposes of intervention. The Tribe's intervention permitted it to participate in the briefing and trial of the issue whether the payments were per capita payments of gaming revenue. The court and the parties expended significant resources in creating a judicial record sufficient for the District Court to enter findings of fact regarding the relationship between the distribution payments and the Tribe's gaming revenue. It is entirely appropriate

that the Tribe be bound by the court's findings in any subsequent litigation presenting similar questions of fact and law. The Tribe's interest in amending the judgment to remove itself as a defendant is preparation for a dispute over its withholding and reporting requirements, which turns on common questions of law and fact.

Finally, the Tribe's contention that judgment is "unclear and is likely to create confusion" is refuted by review of the judgment and the District Court's order denying the Tribe's motion to alter or amend it. The judgment is clear in stating that "Specifically, Sally Jim is liable to the United States in the amount of $278,758.83," plus statutory additions and interest for her 2001 income tax liability. (Doc. 190.) And, as the District Court stated, "the judgment against the Tribe simply relates to the Court's findings, which concluded the Tribe's distributions are subject to federal income taxation." (Doc. 196 at 5.) The District Court's inclusion of the Tribe in the judgment, and its denial of the Tribe's motion to alter or amend the judgment, are therefore correct.

CONCLUSION

The judgment of the District Court should be affirmed.

Respectfully submitted,

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Dated: March 13, 2017

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