Nos. 14-36055, 16-35607

In the United States Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

KING MOUNTAIN TOBACCO COMPANY, INC.,
Defendant-Appellant,

On Appeal from the United States District Court for the Eastern District of Washington, Spokane

BRIEF FOR DEFENDANT-APPELLANT

RANDOLPH H. BARNHOUSE
JUSTIN J. SOLIMON
Johnson Barnhouse & Keegan LLP
7424 4th Street NW
Los Ranchos de Albuquerque, NM 87107
(505) 842-6123

Attorneys for Defendant-Appellant

CORPORATE DISCLOSURE STATEMENT

Defendant-Appellant King Mountain Tobacco Company, Inc. has no parent company, and no public company has any ownership interest in it.

REQUEST FOR ORAL ARGUMENT

King Mountain Tobacco Company, Inc. respectfully requests oral argument. In *Squire v. Capoeman*, 351 U.S. 1 (1956), the United States Supreme Court held that the General Allotment Act prohibits any tax that imposes an encumbrance on Indian allotted lands.[1] The District Court for the Eastern District of Washington ("district court") confirmed that the tax at issue here imposes such an encumbrance, but refused to follow *Capoeman* because, according to the district court, "[t]he prospect of forfeiture of the allotment land is too speculative . . . ." ECF No. 92 at 11, ER 23. This appeal also involves treaty promises made by the United States to the Yakama people.[2] These treaty commitments also prohibit imposition of the excise tax at issue on appeal.

Oral argument will allow the parties to address in greater detail the district court's failure to follow controlling precedent, the district court's failure to apply the appropriate canons of treaty and statutory construction, and the district court's error in holding that the language of the Yakama Treaty is not express enough to require application of those canons in this federal tax case. Oral argument will

[1] (General Allotment Act, Act of Feb. 8, 1887), Add. 1.

[2] Although the Treaty is entitled "Treaty with the Yakimas," 12 Stat. 951 (1855), Add. 32, the official spelling is "Yakama." *See Ramsey v. United States*, 302 F.3d 1074, 1076 n.1 (9th Cir. 2002).

significantly aid the Court's decisional process on these and other issues in this appeal. Fed. R. App. P. 34(a)(2)(C).

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STATEMENT OF JURISDICTION

I. Federal District Court Jurisdiction.

The United States Government brought this tax collection case against King Mountain Tobacco Company. The District Court for the Eastern District of Washington had jurisdiction over Plaintiff's claims under the Internal Revenue Code of 1986, 26 U.S.C. § 7402(a), Add. 80; 28 U.S.C. § 1340, Add. 87; and 28 U.S.C. § 1345, Add. 89. The district court also had jurisdiction under 28 U.S.C. § 1331, Add. 85, because the claims present a federal question that arises under the laws and a treaty of the United States.

II. Jurisdiction on Appeal.

The district court amended its original final judgment to add a dollar amount awarded to the Plaintiff, but did not identify a specific amount of that award attributable to taxes, penalties or interest. If this Court nevertheless treats the amended judgment as sufficiently specific to serve as a final judgment, then the Ninth Circuit Court of Appeals has appellate jurisdiction over this appeal pursuant to 28 U.S.C. § 1291, Add. 82, because the district court's grant of Plaintiff/Appellees' motion for summary judgment, as amended, would constitute a final decision of a district court of the United States. *See* Order Granting United States' Motion for Summary Judgment (January 24, 2014) ECF No. 62, ER 42; Order Granting United States' Renewed Motion for Summary Judgment (August

28, 2014) ECF No. 87, ER 24; Judgment in a Civil Action (December 11, 2014) ECF No. 95, ER 11; Defendant's Notice of Appeal (December 10, 2014) ECF No. 93, ER 66; Amended Notice of Appeal (December 11, 2014) ECF. No. 96, ER 63; Order Amending Final Judgment *sua sponte* (December 11, 2014) ECF No. 113, ER 1; Defendant's Notice of Appeal (July 28, 2016) ECF No. 114, ER 45.

ISSUES PRESENTED FOR REVIEW

1. Whether the district court erred when it failed to follow Supreme Court precedent confirming that the General Allotment Act prohibits imposition of a federal tax if that tax subjects Indian allotted lands to liens and forfeiture.

2. Whether the tax at issue, imposed on the travel of Yakama goods into commerce, is barred by Articles II, III and VI of the Yakama Treaty.

3. Whether the district court erred when it:

   a) failed to include a specific monetary amount of judgment against King Mountain in its final order;

   b) attempted to remedy that error by amending the judgment while this appeal was pending; and

   c) refused to specify how much of the monetary judgment awarded against King Mountain is attributable to tax, how much is attributable to penalties, and how much is for interest.

CONSTITUTIONAL AND STATUTORY PROVISIONS

An addendum containing pertinent constitutional provisions, statutes, rules, and legislative history is bound with this brief.

STATEMENT OF THE CASE

I. Procedural History and Rulings Presented for Review.

A. The Related Case.

Imposition of the federal excise tax at issue in this action violates protections guaranteed: 1) by Congress in the General Allotment Act; and 2) by the United States in its Treaty with the Yakama Nation. To challenge these violations, the Confederated Tribes and Bands of the Yakama Nation, Delbert Wheeler (a Yakama tribal member) and Mr. Wheeler's Yakama Nation corporation (King Mountain Tobacco Company, Inc.) filed suit seeking to enjoin the United States from imposing this tax on tobacco products as they travel into commerce after being manufactured on Yakama allotted lands. That case was dismissed for lack of subject matter jurisdiction.[3]

B. The District Court's First Final Judgment in the Instant Action.

While the related case was pending, the United States filed the instant action against King Mountain Tobacco Company seeking payment of the taxes challenged by the plaintiffs in the related case. The district court granted the United States' motion for summary judgment in the instant action, holding that the General Allotment Act's protections do not apply in the instant case both because

[3] *Confederated Tribes & Bands of Yakama Indian Nation v. Alcohol & Tobacco Tax & Trade Bureau*, 843 F.3d 810 (9th Cir. 2016).

"[t]he prospect of forfeiture of the allotment land is too speculative", ECF No. 92 at 11, ER 23, and because the allotment owner was conducting his business through his wholly owned tribal corporation, ECF No. 149 at 11, Add. 25.[4] The district court also held that the Yakama Treaty does not "contain[] express exemptive language *applicable to the manufacture of tobacco products*." Case No. 11-308 Order 149 at 20, Add. 5 (emphasis added).

Based on these erroneous holdings, the district court granted summary judgment against King Mountain. Judgment in a Civil Action (January 24, 2014) ECF No. 62, ER 42. The district court later granted the United States' Renewed Motion for Summary Judgment (August 28, 2014) ECF No. 87, ER 24. Unfortunately, neither ruling included a judgment amount despite King Mountain's repeated requests that the final judgment separately specify the amount of taxes, the amount of penalties, and the amount of interest that the court was awarding against King Mountain. ECF Nos. 88, 104, ER 68, 47.

King Mountain appealed. ECF No. 114, ER 45.

[4] The District Court, in its January 24, 2014 Order Granting United States' Motion for Summary Judgment in this case (ECF No. 62) explicitly incorporated by reference its Order Granting Summary Judgment in the companion case of *King Mountain Tobacco Co. v. Alcohol and Tobacco Tax and Trade Bureau*, Case No. 11-3038 (ECF No. 149 in the companion case). The Order in the companion case is included in the Addendum at 5, and will be cited in this brief as "Case No. 11-308 Order, ECF No. 149."

C. The District Court's Amended Final Judgment.

After King Mountain appealed the district court's original final judgment (in part for its failure to include a monetary judgment amount), the United States moved in the district court to amend the final judgment to add a specific monetary judgment amount. ECF No. 102, ER 53. King Mountain filed a cross motion to amend seeking to have any final judgment specify how much of the judgment was attributable to taxes, how much was attributable to penalties, and how much was for interest. ECF No. 104, ER 47. The district court denied both motions for lack of jurisdiction. ECF No. 110, ER 5.

Approximately one year later, the district court *sua sponte* reconsidered its jurisdictional ruling, and entered an order amending the earlier, final judgment by adding a lump sum final judgment amount, declining once again to identify specific amounts of the total final judgment attributable to taxes, penalties and interest. ECF No. 113, ER 1.

Once again, King Mountain appealed. ECF No. 114, ER 45.

This Court has consolidated the two appeals. Nov. 14, 2016, Order Granting Unopposed Motion to Consolidate, Dkt Entry 9 (Case Nos. 14-36055, 16-35607).

II. Statement of the Facts

A. The 1855 Yakama Treaty.

In 1855, Isaac Ingalls Stevens, Governor of the Washington Territory, and General Joel Palmer, Superintendent of Indian Affairs in the Oregon Territory, acting on behalf of the United States Government, initiated treaty negotiations near present day Walla Walla Washington with Kamaiakin, Sklom, Owhi, Te-cole-kun,La-hoom, Koo-lat-toose, Sch-noo-a, Me-ni-nock, Shee-ah-cotte, Sla-kish, Elit Palmer, Tuck-quille, Wish-och-knipits, Ka-loo-as and other leaders of fourteen tribes and bands of Plateau Indians. Those fourteen tribes and bands ultimately were confederated into the Yakama Nation. *See Yakama History*, Yakama Nation Museum & Cultural Center (available at: http://www.yakamamuseum.com/home-history.php, last visited April 10, 2017). It was critically important to the United States that these negotiations be successful for a number of historic reasons, including the need to secure land for the American settlers moving into the Washington territory. *See Understanding Tribal Treaty Rights In Western Washington* (available athttp://nwifc.org/w/wp-content/uploads/downloads/2014/10/understanding-treaty-rights-final.pdf, last visited April 11, 2017).

As members of an oral culture, the Yakama leaders focused on the federal commissioners' spoken words during the negotiations, not the written text

ultimately included in the Treaty itself, which none of the Yakama signatories could read.[5] SOF at ¶ 16, ECF No. 55 at 5, ER 77; Decl. of Fisher, ECF No. 55-2 at ¶ 6, ER 166. Therefore, the Yakama's original understanding of their agreement with the United States came from verbal descriptions of the Treaty's articles passed through a chain of interpreters and Indian criers. *Id.* However, the translation provided to benefit the Yakama negotiators was limited as the "language" used by the interpreters was a commercial jargon that used only a few hundred words. *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n* ("*Fishing Vessel*"), 443 U.S. 658, 667 n.10 (1979).

The verbal descriptions of the promises made by the United States treaty negotiators were captured in part in minutes taken by the representatives of the United States who negotiated with the Yakama people. Treaty Minutes, ECF No. 6-2, ER 326-399. These minutes, testimony of Yakama elders and similar sources are part of the Treaty and must be relied upon by federal courts when called upon to determine the meaning of the Treaty's text. *Tulee v. Washington*, 315 U.S. 681, 684-85 (1942) ("It is our responsibility to see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives at the council"); *United States v. Winans*, 198

[5] King Mountain Tobacco Co., Inc.'s Response to the United States' Statement of Facts and Additional Statement of Facts, ECF No. 55, ER 73, is abbreviated as "SOF" in this opening brief.

U.S. 371, 381 (1905) ("How the treaty in question was understood may be gathered from the circumstances.").

The negotiations at Walla Walla culminated in the Yakama Treaty of 1855, which was subsequently ratified by the Senate and signed by the President. Article II of the Yakama Treaty set aside the land the Yakama people retained as a reservation for "the exclusive use and benefit" of the Yakama people. Yakama Treaty; Add. 32; Treaty Minutes, ECF No. 6-2 at 75, ER 348. The allotments and improvements made on the reservation were likewise to be for the exclusive use and benefit of the Yakama Indians, as promised by Governor Stevens. Treaty Minutes, ECF No. 6-2 at 76, ER 349; SOF ¶ 19, ECF No. 55 at 5, ER 77; Decl. of Fisher, ECF No. 55-2 at ¶ 10, ER 168. There is no evidence in either the Treaty or the council proceedings to suggest that tribal leaders anticipated benefits from the use of reservation land to accrue to the government through taxation. SOF ¶ 25, ECF No. 55 at 8-9, ER 80-81; Decl. of Fisher, ECF No. 55-2 at ¶ 10, ER 168.

Article III of the Treaty extended and protected Yakama economic activities beyond reservation boundaries. Specifically, it secured to the Indians "free access" to the nearest public highway . . . as also the right, in common with the citizens of the United States, to travel upon all public highways." Yakama Treaty; Add. 33. Governor Stevens made the economic purpose of such travel explicit when he stated, during negotiations:

> You will be allowed to go on the roads to take your things to market, your horses and cattle. You will be allowed to go to the usual fishing places and fish in common with the whites, and to get roots and berries and to kill game on land not occupied by the whites. All that outside the reservation.

Treaty Minutes, ECF No. 6-2 at 99, ER 372; *see Yakama Indian Nation v. Flores*, 955 F. Supp. 1229, 1248, 1251, 1253 (E.D. Wash. 1997) (finding that the Yakama people understood the Treaty to reserve their "right to travel the public highways without restriction for purposes of hauling goods to market" and to "retain their right to travel outside reservation boundaries, with no conditions attached" even as they "engage in *future* trading endeavors") (emphasis in original).

The Yakama people understood that the land on which they would settle would truly and unequivocally be their own land, and they would be able to use that land to raise their families, cultivate crops, and engage in trade and travel. SOF at ¶ 28, ECF No. 55 at 9, ER 81; Decl. of Manson, ECF No. 55-1 at ¶ 7 (l), ER 86. The Yakama people also understood that the right to travel and trade included all goods, not just those derived from on-reservation resources. *United States v. Smiskin*, 487 F.3d 1260, 1268 (9th Cir. 2007) ("Here, there is evidence from the time of treaty suggesting that the Yakamas then understood the right to travel to extend beyond tribal goods.").

The Yakama people's understanding of these sacred treaty terms is consistent with the unequivocal promises made by the federal treaty negotiators.

Federal treaty negotiators explained to the Yakama people that "entering into the Treaty would not infringe upon or hinder their tribal practice" and "was presented as a means to preserve Yakama customs and prevent further encroachments by white settlers, while at the same time providing tribes with modern accoutrements to enhance their standard of living and fortify their resources." *Yakama Indian Nation*, 955 F. Supp. at 1244.

The Yakama Treaty resulted in the Yakama people's surrender to the United States of nearly ten million acres, or 90% of their land. *Smiskin*, 487 F.3d at 1265; Yakama Treaty, ECF No. 6-2 at 60-66, ER 333-339; Add. 32. In return, the Yakama people were promised by federal negotiators that "*you can rely on all its provisions being carried out strictly*." *Yakama Indian Nation*, 955 F. Supp. at 1243 (discussing the representations of General Palmer at the treaty negotiations) (emphasis in original).

The Yakama Treaty, like all treaties, is the supreme law of the land. It guarantees the Yakama People the right to travel and trade without government restrictions, and promises them the exclusive benefit of their lands – exclusive of benefit to the United States through taxation. The government made these promises to end war, and to secure title to millions of acres of Yakama land. All federal agencies must honor these promises both because the United States is a

party to this solemn Treaty, and because, as federal trustee, it has fiduciary obligations to the Yakama Nation and its people.

B. The Yakama Treaty Protects the Yakama People's Historic Cultivation and Trade of Tobacco.

Since long before the Treaty between the Yakama Nation and the United States, people of the Yakama Nation used their lands for farming and agricultural purposes, including the cultivation of tobacco. SOF ¶ 11, ECF No. 55 at 4, ER 76; Decl. of Manson, ECF No. 55-1 at ¶ 7(b) ER 90; Decl. of Fisher, ECF No. 55-2 at ¶ 8, ER 166. The Yakama people have long been recognized as "inveterate traders" with extensive trading practices and territory. *Yakama Indian Nation v. Flores*, 955 F. Supp. 1229, 1238 (E.D. Wash. 1997), *aff'd sub nom. Cree v. Flores*, 157 F.3d 762 (9th Cir. 1998) ("*Cree II*"); SOF ¶ 15, ECF No. 55 at 5, ER 77; Decl. of Manson, ECF No. 55-1 at ¶ 7(f), ER 90; Decl. of Fisher, ECF No. 55-2 at ¶ 8, ER 166. Their trading practices included trade with travelers entering Yakama territory, as well as trade that occurred well beyond their lands. *Yakama Indian Nation*, 955 F. Supp. at 1238; SOF ¶ 15, ECF No. 55 at 5, ER 77; Decl. of Manson, ECF No. 55-1 at ¶ 7(f), ER 90; Decl. of Fisher, ECF No. 55-2 at ¶ 8, ER 167-68. The Yakama people's "way of life depended on goods that were not available in the immediate area." *Yakama Indian Nation*, 955 F. Supp. at 1238; *see United States v. Smiskin*, 487 F.3d at 1268 ("it is likely that the Yakamas

transported not only their own goods but also goods produced by other tribes in the network").

Tobacco has a longstanding presence in everyday Yakama life and, at the time of the Treaty, the Yakama people gathered, grew, traded, and used tobacco. SOF ¶ 11, ECF No. 55 at 4, ER 76; Decl. of Manson, ECF No. 55-1 at ¶ 7(b), ER 90; Decl. of Fisher, ECF No. 55-2 at ¶ 8, ER 167-68. The Yakama people regularly blended the indigenous forms of tobacco available to them with other tobacco and similar plants to modulate burn, aroma and taste. SOF ¶ 12, ECF No. 55 at 4, ER 76; Decl. of Manson 55-1 at ¶ 7(b), ER 90; Decl. of Fisher 55-2 at ¶ 9, ER 168. They further used and continue to use tobacco in ceremonial and official contexts as a powerful religious and spiritual symbol, as well as a form of trade currency. SOF ¶ 13, ECF No. 55 at 4, ER 76; Decl. of Manson, ECF No. 55-1 at ¶ 7 (d), ER 90. The Yakama historically have engaged in extensive tobacco trade, including trade of tobacco grown and harvested on their land as well as tobacco obtained in trade from non-Yakama people. SOF ¶ 15, ECF No. 55 at 4, ER 76; Decl. of Manson ECF No. 55-1 at ¶ 7(f), ER 90; Decl. of Fisher, ECF No. 55-2 at ¶ 8, ER 167-68.

Based upon their historic trading practices and the promises made to the Yakama people by the federal government during treaty negotiations and in the Treaty, the Yakama people always understood that they would be allowed to

harvest the resources of their land and trade those resources with others – for the exclusive benefit of the Yakama people. *Cree II*, 157 F.3d at 769 (affirming the district court's finding that the Yakama people "understood the Treaty to grant them valuable rights that would permit them to continue in their ways"); SOF ¶ 27, ECF No. 55 at 9, ER 81; Decl. of Manson, ECF No. 55-1 at ¶ 8, ER 90.

C. King Mountain Tobacco Company Manufactures and Trades Tobacco Products that Are Grown on Indian Allotted Lands Within the Yakama Nation.

Pursuant to their historic practices and treaty rights, the Yakama people and their tribal corporations continue to harvest the resources of the land and trade them and other goods to this very day. King Mountain Tobacco Company is just such a tribal corporation, organized and existing under the laws of the Yakama Nation. SOF at ¶ 5, EFC No. 55 at 5, ER 75. King Mountain is owned and operated by Delbert Wheeler, Sr., a life-long enrolled member of the Yakama Nation. SOF at ¶ 6, ECF No. 55 at 6, ER 75.[6] Fifty-four of King Mountain's employees are Yakama Indians. SOF at ¶ 10, ECF No. 55 at 4, ER 76; Decl. of Thompson, EFC No. 55-1 at ¶ 8, ER 86. King Mountain's manufacturing facilities are located on a Yakama trust allotment belonging to King Mountain's owner, Delbert Wheeler. SOF at ¶ 7, ECF No. 55 at ¶7, ER 75.

[6] Mr. Wheeler passed away in June 2016. His estate is in probate, including his allotted lands, which must pass to enrolled members of the Yakama Nation under federal probate procedures, and all shares of King Mountain, which also will pass to his Yakama enrolled family members.

All products manufactured by King Mountain contain trust-land grown tobacco although some of that product is blended with other tobacco. Case No. 11-308 Order, ECF No. 149 at 2, Add. 6; SOF 8(a), ECF No. 55 at ¶8, ER 75. Certain products manufactured by King Mountain consist entirely of tobacco grown exclusively on allotted land held in trust by the United States. Case No. 11-308 Order, ECF. No. 149 at 3, Add. 7; SOF 8(b), ECF No. 55 at 8(c) ER 86; Decl. of Thompson, ECF No. 55-1 at ¶ 7 ER 86. In 2012 and since that time, King Mountain has continued to increase the percentage of Yakama allotment grown tobacco used in its products. Case No. 11-308 Order, ECF No. 149 at 2-3, Add. 7; SOF 8(c), ECF No. 55 at 3, ER 76; Decl. of Thompson, ECF No. 55-1 at ¶ 6, ER 86. Specifically, for the Fourth Quarter of 2013, King Mountain's products were comprised of at least 55 percent tobacco grown exclusively on allotted land held in trust by the United States for the beneficial use of Mr. Wheeler. Case No. 11-308 Order, ECF No. 149 at 3, Add. 7; SOF 5(d), ECF No. 141 at 3; Decl. of Thompson, ECF No. 149-1 at ¶ 6, ER 86. Product sold without extensive processing for religious use consists of 100% allotment grown tobacco. Case No. 11-308 Order, ECF No. 149 at 3, Add. 7; SOF 8(b) ECF No. 55, ER 74; Decl. of Thompson, ECF No. 55-1 at ¶ 7, ER 86.

SUMMARY OF THE ARGUMENT

A. The General Allotment Act Prohibits Imposition of The Federal Excise Tax at Issue on King Mountain.

The General Allotment Act prohibits taxation that can result in an encumbrance on, or forfeiture of, an Indian allotment. That prohibition focuses on the title to the allotted Indian lands, and does not focus on the nature of the taxable event. Because the excise tax at issue here contains specific land forfeiture provisions, it is not enforceable on Yakama allotted lands. *Squire v. Capoeman*, 351 U.S. 1 (1956). Because allotment encumbrance and forfeiture can result even when an allotment holder conducts his business through a wholly owned tribal corporation, the General Allotment Act prohibition still applies.

B. The Yakama Treaty Prohibits Imposition of the Tax at Issue on King Mountain.

The Yakama Treaty is express federal law that exempts Yakama people from a tax when, as here, the incidence of the tax is on travel of product out of bond on the Yakama Nation. The Treaty's language is at least sufficiently express to require the district court to consider evidence showing how the Indians understood the Treaty and their rights and guarantees under the Treaty. Here, the district court erred when it granted summary judgment against King Mountain on its Treaty claims, and erred when it did so without conducting the Treaty analysis required by controlling Supreme Court and Ninth Circuit Court of Appeals

precedent, and without applying the Indian canons of treaty and statutory construction.

C. A Final Judgment Must Contain a Specific Judgment Amount and, if Applicable, a Specific Amount for Penalties and Interest.

The district court's first judgment did not include a specific amount owed by King Mountain. While this appeal was pending, the district court *sua sponte* amended its final judgment to include a specific amount, but still failed to state facts necessary to determine the amount of penalties and interest, if any, awarded by the court. A final judgment in favor of the plaintiff must include with specificity the amount of money owed by the Defendant. *United States v. F. & M. Schaefer Brewing Co.*, 78 S. Ct. 674 (1958) (district court order was not a final judgment because, although it stated amount of money illegally collected from plaintiff, it did not state dates of payment, and did not state facts necessary to compute amount of interest to be included in the judgment).

STANDARD OF REVIEW AND BURDEN OF PROOF

This case involves application of a federal statute intended to benefit Indians, and interpretation of a treaty between the United States and an Indian Tribe. This Court reviews *de novo* the interpretation and application of statutory language, such as that contained in the General Allotment Act. *United States v. Idaho*, 210 F.3d 1067, 1072 (9th Cir. 2000). The Court also reviews *de novo* the interpretation and application of treaty language. *Cree II*, 157 F.3d at 768. The Supreme Court repeatedly has held that the interpretation of statutes intended to benefit Indians, and interpretation of all Indian treaties, are both subject to canons of construction favorable to the Indian party. *See, e.g.*, *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985). Under those canons, the text of a treaty must be construed as the Indian Tribe would naturally have understood it at the time of the treaty, with doubtful or ambiguous expressions resolved in the Indians Tribe's favor. *Tulee*, 315 U.S. at 684-85 ("It is our responsibility to see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives at the council"). As the United States Supreme Court has held:

> [I]t is the intention of the parties, and not solely that of the superior side, that must control any attempt to interpret the treaties. When Indians are involved, this Court has long given special meaning to this rule. It has held that the United States, as the party with the presumptively superior negotiating skills and superior knowledge of the language in which the treaty is recorded, has a responsibility to

> avoid taking advantage of the other side. "*[T]he treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.*" This rule, in fact, has thrice been explicitly relied on by the Court in broadly interpreting these very [Yakama] treaties in the Indians' favor.

Fishing Vessel, 443 U.S. at 675-76 (emphasis added). Sources beyond the treaty necessarily aid treaty interpretation. *United States v. Winans*, 198 U.S. 371, 381 (1905) ("How the treaty in question was understood may be gathered from the circumstances.").

A district court's grant of summary judgment is also reviewed *de novo*. *Nolan v. Heald College*, 551 F.3d 1148, 1153 (9th Cir. 2009). This Court is guided by the traditional rules of summary judgment and will affirm a grant of summary judgment only if it appears from the record that "there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a), Add. 90; *Lopez v. Smith*, 203 F.3d 1122, 1131 (9th Cir. 2000) (*en banc*). The Court must view the evidence in the light most favorable to King Mountain, which was the non-moving party, to determine whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Ramsey v. United States*, 302 F.3d 1074, 1077 (9th Cir. 2002).

When the district court failed to include a specific dollar amount awarded to the Plaintiff, and then decided that it need not include a specific amount of the

award attributable to taxes, penalties and interest, or the facts necessary to determine those amounts, it committed an error of law which is reviewed *de novo*. *See Husain v. Olympic Airways*, 316 F.3d 829, 835 (9th Cir. 2002). A district court's interpretation of the Federal Rules of Civil Procedure is also reviewed *de novo*. *See United States v. 2,164 Watches*, 366 F.3d 767, 770 (9th Cir. 2004).

ARGUMENT

I. The General Allotment Act Prohibits Imposition of the Federal Excise Tax at Issue on King Mountain.[7]

A. The General Allotment Act Prohibits Imposition of Any Tax that Could Result in a "Charge or Incumbrance" on an Indian Allotment.

The General Allotment Act was designed to protect Indian allotment holders from any financial charge that could become an "incumbrance" on the allotment, because any such "incumbrance" would prevent the United States from giving the allottee free and clear title to the allotment. 25 U.S.C. §§ 348-349, Add. 62-64. The United States Supreme Court directly addressed this specific protection in the context of federal taxes in the seminal case *Squire v. Capoeman*, 351 U.S. at 6 (1956). Where a federal tax creates an "incumbrance" on an allotment, *Capoeman* controls. The district court's failure to adhere to *Capoeman* requires reversal.

In *Capoeman*, the Supreme Court held that taxing the proceeds of timber sales would violate the General Allotment Act because allowing such taxation would mean that "the land no longer serves the purpose for which it was by treaty set aside to his ancestors, and for which it was allotted to him." *Id.* at 10. The Court explained that if the federal tax at issue there were allowed then:

[7] Reference to the Yakama Treaty is included in this section of the argument because Article VI of the Yakama Treaty provides the same protections to Yakama Indian allotment holders as those contained in the General Allotment Act. *See* Section II(E), *infra*.

> [The allotment] can no longer be adequate to his needs and serve the purpose of bringing him finally to a state of competency and independence. Unless the proceeds of the timber sale are preserved for respondent, he cannot go forward when declared competent with the necessary chance of economic survival in competition with others. This chance is guaranteed by the tax exemption afforded by the General Allotment Act, and the solemn undertaking in the patent. It is unreasonable to infer that, in enacting the income tax law, Congress intended to limit or undermine the Government's undertaking. To tax respondent under these circumstances would, in the words of the court below, be "at the least, a sorry breach of faith with these Indians."

Id. at 10.[8] The Supreme Court went on to hold that the General Allotment Act prohibits any tax that could result in a "charge or incumbrance" on an Indian allotment. *Id.* at 7. Critically, the Court's analysis was not as to the nature of the tax.[9] Instead, the Court focused on whether the tax impacted the Government's ability to transfer the allotment to the allottee free of encumbrance. *Accord Stevens v. Comm'r of Internal Revenue*, 452 F.2d 741, 744 (9th Cir. 1971) ("*Capoeman* is not a technical or narrow decision; nor is its holding limited to capital gains taxes.").

In *Capoeman*, the district court, the Ninth Circuit Court of Appeals and the United States Supreme Court all relied on three sources supporting an exemption

[8] In this context, a '"noncompetent Indian' is one who holds allotted land under a trust patent and who may not alienate or encumber that land without the consent of the United States." *Kirschling v. United States*, 746 F.2d 512, 513 n.1 (9th Cir. 1984).

[9] *Capoeman* involved application of long term capital gain tax to income derived from the sale of allotment grown timber.

to the tax: (1) the text of the 1855 Quinaielt Treaty (Add. 39);[10] (2) exemptive language in the General Allotment Act;[11] and (3) the terms of the allotment trust patent. *Id.* at 6 ("we cannot agree that taxability of respondents in these circumstances is unaffected by the treaty, the trust patent or the Allotment Act"); *Capoeman v. United States*, 110 F. Supp. 924, 925 (W.D. Wash. 1952) (same); *Squire v. Capoeman*, 220 F.2d 349 (9th Cir. 1955) (same), *aff'd*, 351 U.S. 1 (1956).

In *Capoeman*, the district court, this Court, and the United States Supreme Court all found the General Allotment Act's language sufficiently express to require application of the Indian canons of Treaty and statutory construction. As the Supreme Court noted:

> Although this statutory provision is not expressly couched in terms of nontaxability, this Court has said that "Doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith. Hence, in the words of Chief Justice Marshall:" "The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of, which are susceptible of a more extended

[10] "[T]he Quinaielts were to have exclusive use of their reservation 'and no white man shall be permitted to reside thereon without permission of the tribe[.]" *Capoeman*, 351 U.S. at 3.

[11] Allottees are to receive their allotted lands "discharged of the trust under which the United States had theretofore held them, and to obtain a patent 'in fee, discharged of said trust and free of all charge or incumbrance whatsoever'[.]" *Capoeman*, 351 U.S. at 3.

> meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense."

Capoeman, 351 U.S. at 6-7 (citations omitted).

The Supreme Court's decision in *Capoeman* requires application of the Indian canons of construction in this pending action. Indeed, that requirement in *Capoeman* is consistent with the Supreme Court's long standing position that "the standard principles of statutory interpretation do not have their usual force in cases involving Indian law." *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985). As a matter of well-rooted federal common law, treaties and statutes are to be liberally construed in favor of Indian tribes and people and all ambiguities contained therein are to be resolved in favor of the Indian party. *Choate v. Trapp*, 224 U.S. 665, 675 (1912) ("in the Government's dealings with the Indians. . . [the] construction [of treaties] is liberal; [d]oubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor" of the Indians); *Winters v. United States*, 207 U.S. 564, 576-77 (1908) ("By a rule of interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians.").

Yet instead of following the Supreme Court's unambiguous holding in *Capoeman*, the district court in this case refused to apply Indian treaty and statutory canons of construction to King Mountain's General Allotment Act

claims, or to King Mountain's Treaty claims.[12] The district court compounded its failure to follow the Supreme Court's controlling *Capoeman* decision when it instead interpreted the General Allotment Act by relying on two cases in which the General Allotment Act was never at issue. Case No. 11-308 Order, ECF No. 149 at 15- 19, Add. 19-23 (citing *Ramsey v. United States*, 302 F.3d 1074, 1078 (9th Cir. 2002), and *Hoptowit v. CIR*, 709 F.2d 564 (9th Cir. 1983)). But in *Ramsey*, the challenged federal tax targeted exclusively off-reservation activities – heavy vehicle and diesel fuel taxes – so the General Allotment Act was not and could not have been an issue. As a result, there is not a single reference to allotments in this Court's *Ramsey* decision, although the Court did confirm its adherence to *Capoeman* when it held that "language such as 'free from incumbrance,'" is an example of express exemptive language sufficient "to find Indians exempt from federal tax." *Id*. at 1078-79. Mr. Ramsey did not urge application of the General Allotment Act because the tax at issue in his case had nothing to do with allotted lands and instead was imposed exclusively on the instruments he used to transport goods outside the Yakama Nation – goods that also had no ties to allotted Yakama lands. Similarly, *Hoptowit v. C.I.R.*, involved only claims under Article II of the Yakama Treaty. There was no General Allotment Act claim, and as a result no

[12] *E.g.*, Case No. 11-308 Order, ECF No. 149 at 19, Add. 23 ("Within the context of federal taxation, express exemptive language must exist in the Treaty before the Court may examine extrinsic evidence, such as how the Yakama tribe members would have understood the Treaty at the time that it was ratified.").

analysis of the protections provided by the General Allotment Act to Yakama allotments. *Hoptowit*, 709 F.2d at 566 ("Hoptowit bases his claim on a treaty"). The district court was bound to follow *Capoeman*, and erred when it instead relied on two cases that had nothing to do with allotments to interpret the General Allotment Act.

B. The Excise Tax at Issue in This Case Improperly Results in a "Charge or Incumbrance" on Allotted Lands.

Imposition of the tobacco excise tax by its terms directly imposes the threat of forfeiture or lien against the allotment upon which King Mountain manufactures its product, in direct violation of the General Allotment Act and *Capoeman*.[13] Indeed, the tax code provides that nonpayment of the excise tax *automatically* results in forfeiture:

> Real and personal property of illicit operators.--All tobacco products, cigarette papers and tubes, machinery, fixtures, equipment, and other materials and personal property on the premises of any person engaged in business as a manufacturer or importer of tobacco products or cigarette papers and tubes, or export warehouse proprietor, without filing the bond or obtaining the permit, as required by this chapter, together with all his right, title, and interest in the building in which such business is conducted, and *the lot or tract of ground on which the building is located, shall be forfeited to the United States*.

26 U.S.C. § 5763(c) (emphasis added), Add. 78.

[13] Case No. 11-308 Order, ECF No. 149 at 2, Add. 6 (King Mountain's manufacturing facilities are located within the boundaries of the Yakama Nation Reservation on property held in trust by the United States for the beneficial use of Mr. Wheeler.").

Specifically, the Internal Revenue Code ("IRC") provides for the Cigarette Excise Tax in Subtitle E, chapter 52, 26 U.S.C. § 5701, Add. 65. Subchapter G provides for Fines, Penalties, and Forfeitures for those who willfully omit, neglect, or refuse to comply with any duty imposed upon that person, including payment of the tax. 26 U.S.C. § 5701(b), Add. 65. The statute later clarifies that Section 5763 provides that the "lot or tract of ground on which the building is located, *shall be forfeited* to the United States." *Id.* § 5763(c) (emphasis added), Add. 74.

Finally, the statutory provision of most significance here is the requirement that all property "intended for use in violating the provisions of this chapter, *or which has been so used*, *shall be forfeited* to the United States as provided in section 7302." *Id.* § 5763(d) (emphasis added), Add. 78; *see* 26 U.S.C. § 7302, Add. 79 ("It shall be unlawful to have or possess any property intended for use in violating the provisions of the internal revenue laws, or regulations prescribed under such laws, or which has been so used, and no property rights shall exist in any such property."). This forfeiture language creates the very lien, levy or forfeiture against the allotment that is prohibited in the General Allotment Act.[14]

[14] When the district court first ruled on this argument, it failed to address subsection 5763 (d). ECF No. 92 at 3. On reconsideration, the court included a ruling on subsection (d), but avoided ruling directly on the forfeiture language instead opining that the risk of forfeiture was "too speculative." *Id.* at 11. But neither *Capoeman* nor any other case has ever adopted a judicial exception to General Allotment Act protections based on a judicial determination of the likelihood the executive branch will take action under a tax statute containing forfeiture provisions, some of which are automatic.

As the cigarette excise tax provides that nonpayment can result in civil penalties, criminal penalties and forfeitures, 26 U.S.C. §§ 5761-63, Add. 74, *Capoeman* is once again instructive. The government in *Capoeman* argued that once the timber was processed – severed from the land – imposing a capital gains tax on income from the sale of the severed timber was permissible because it was a tax on income and not the source of the income – the land. *Id*. at 6. The Supreme Court disagreed, explaining that taxing the proceeds of selling timber would violate the General Allotment Act because allowing such taxation would mean that "the land no longer serves the purpose for which it was by treaty set aside to his ancestors, and for which it was allotted to him." *Id.* at 10.

If by manufacturing his product on allotted lands this Yakama tribal member risks losing his allotment for non-payment of excise tax, then the land "can no longer be adequate to his needs and serve the purpose of bringing him finally to a state of competency and independence." *Capoeman*, 351 U.S. at 10. If his allotment is forfeited, this Yakama tribal member "cannot go forward when declared competent with the necessary chance of economic survival in competition with others. This chance is guaranteed by the tax exemption afforded by the General Allotment Act, and the solemn undertaking in the patent." *Id.*

In its simplest terms, the inclusion of forfeiture as a direct and automatic remedy for failure to pay the excise tax offends the very purpose of the General Allotment Act.

C. Mr. Wheeler's Use of a Wholly Owned Yakama Corporation Does Not Change the Analysis as the Excise Tax Statute Still Impermissibly Subjects His Indian Allotted Land to Forfeiture.

In its order granting Appellees' motion for summary judgment, the district court held that "the *Capoeman* exemption would not apply to taxes owed by King Mountain" because, the Court reasoned, "the trust property is held for the benefit of Mr. Wheeler, it is not King Mountain's asset, and presumably the property would not be subject to a tax lien." Case No. 11-308 Order, ECF No. 149 at 12, Add. 16 (citing *Squire v. Capoeman*, 351 U.S. 1, 6 (1956)). But that is not correct: notwithstanding Mr. Wheeler's use of a wholly owned corporation to conduct the manufacturing activities, the property still is directly subject to lien, seizure and forfeiture by the plain terms of the statute.

26 U.S.C. Sections 5761-63, Add. 74, allows forfeiture of property belonging to third parties, and allows forfeiture to be accomplished without notice or due process protections. *See In re Certain Chevrolet Automobile Bearing New Jersey Registration #IV-42*, 47 F. Supp. 843, 844 (D.N.J. 1942) (holding that the lack of personal notice of intended forfeiture to claimant did not require cancellation of forfeiture proceedings); *United States v. One 1951 Chevrolet 3/4-*

Ton Pickup Truck, 130 F. Supp. 777, 778-79 (W.D. Ky. 1955) (holding that the forfeiture of property could be had without claimant having been convicted).

D. Tobacco Products Need Not Be "Directly Derived" From Allotted Lands in Order for those Allotted Lands to Benefit from General Allotment Act Protections.

The district court improperly imposed a "directly derived" requirement in this case, in the process misinterpreting the Supreme Court's holding in *Capoeman* on this issue. Specifically, the district court stated that the Court in *Capoeman* "noted, however, that the restriction on taxation *was limited to* 'the trust and income derived directly therefrom.'" Case No. 11-308 Order, ECF No. 149 at 8, Add. 12 (emphasis added). That is not what the Supreme Court said in *Capoeman*. Instead, the Supreme Court stated at the page cited by the district court:

> [I]t was said by Felix S. Cohen, an acknowledged expert in Indian law, that "It is clear that the exemption accorded tribal and restricted Indian lands *extends to* the income derived directly therefrom."

Capoeman, 351 U.S. at 8-9 (emphasis added). The difference is obvious and significant. The Supreme Court merely referenced Cohen for the proposition that the exemption *extends to* income derived from the land. It in no way limited the exemption as held by the district court.

Capoeman involved application of long term capital gains tax to income derived from the sale of allotment grown timber. To determine whether this tax on *income* impacted the ability of the government to transfer title to the allotment free

of encumbrance, the Court in *Capoeman* logically looked to whether the *income* that was subject to the tax was income that was "derived directly" from the allotted lands. *Id.* at 8-9. The reason that determination was necessary is because the income the government proposed to tax, having derived directly from the allotted lands, was necessary to give the Indian in that case the chance to:

> go forward when declared competent with the necessary chance of economic survival in competition with others. This chance is guaranteed by the tax exemption afforded by the General Allotment Act, and the solemn undertaking in the patent.

Id. at 10. Although *Capoeman* requires courts addressing a tax *on income* to look to where the income is derived, it does so only because if the income to be taxed is directly derived from the allotted lands, taxing that income is antithetical to the purpose for which Congress adopted the General Allotment Act. In other words, it is the encumbrance of the allotment, and not the source of income, that was dispositive in *Capoeman.* As the Supreme Court noted in *Capoeman;* "imposition of the tax here in question is inconsistent with the Government's promise to transfer the fee 'free of all charge or incumbrance whatsoever.'" *Id.* at 6. This Court also has confirmed that it is the encumbrance that is the critical issue:

> *Capoeman*'s point was that if an Indian's allotted land (or the income directly derived from it) was taxed, and the tax was not paid, *the resulting tax lien on the land* would make it impossible for him to receive the land free of "incumbrance" at the end of the trust period.

United States v. Anderson, 625 F.2d 910, 914 (9th Cir. 1980) (emphasis added).

The case now before this Court does not involve a tax on income. It is an excise tax on a product manufactured on Yakama allotted lands.[15] The excise tax is assessed on travel – becoming due at the moment the product travels out of King Mountain's bonded warehouse. 26 U.S.C. § 5703(b)(1) (imposing tax "at the time of removal of the tobacco products and papers and tubes"). Add. 71. If the tax is not paid, the allotted land is subject to encumbrance and forfeiture. Because the critical issue is not whether the challenged tax is on *income* from an item "directly derived" from the allotment, a "directly derived" analysis is of no use to the Court. Instead, the issue the Court must address is whether the challenged tax encumbers the land in a manner prohibited by the General Allotment Act.

But even if a connection between the allotted land and the tobacco product were required to afford General Allotment Act protections, the Act would prohibit taxation here because the product is derived directly from the allotted lands. *Stevens v. Comm'r of Internal Revenue*, 452 F.2d 741, 747 (9th Cir. 1971) (income from ranching and farming operations by an allottee on his allotted land was not taxable); *United States v. Daney*, 370 F.2d 791, 795 (10th Cir. 1996) (bonuses paid

[15] An excise tax is "[An] obligation . . . based upon the voluntary action of the person taxed in performing the act, enjoying the privilege or engaging in the occupation which is the subject of the excise, and the element of absolute and unavoidable demand, as in the case of a property tax, is lacking." *Washington Pub. Ports Ass'n v. State, Dep't of Revenue*, 148 Wash. 2d 637, 651–52, 62 P.3d 462, 469 (2003) (citation omitted).

to an allottee for oil and gas leases on his allotment were not taxable); *Kirschling v. United States*, 746 F.2d 512 (9th Cir. 1984) (gift to a non-Indian of the proceeds from sale of timber on allotted lands not subject to federal gift tax). The record confirms that King Mountain's product line contains up to 100% allotment grown tobacco. For example, tobacco used for religious purposes and which is sold without extensive processing is completely derived from Yakama allotted lands. Yet the district court ignored this issue in its rulings below.[16] The majority of the tobacco in King Mountain's other tobacco products also is grown on Mr. Wheeler's allotted lands. SOF 5(d), ECF No. 55 at 3 ER 75; Decl. of Thompson, ECF No. 55-1 at ¶ 6, ER 85. And in any event, the government is not taxing income from this product (which might require a "directly derived" analysis), but

[16] Traditional use tobacco sold by King Mountain is entirely derived from an Indian allotment, yet still is taxed by the Plaintiff/Appellee. The only arguable treatment of the traditional use tobacco issue in this case by the district court is that court's incorporation of its order in the related case. In that incorporated order, the district court made an off-hand statement to the effect that King Mountain did not "state a claim relating to its 'traditional use tobacco'" and "the parties presented little argument related to the 'traditional use tobacco' in the course of litigating this case." Case No. 11-308 Order, ECF No. 149 at 3, Add. 7. In the case now on appeal, traditional use tobacco is a major component of the defenses raised in King Mountain's answer and counterclaims and traditional use tobacco was the topic of significant argument in briefing and at oral argument. *E.g.*, ECF No. 6 at 15-18, Add. 290-93; ECF No. 55 at 6-8, 20-21, Add. 78-80.

instead seeks to tax the privilege of moving this product by way of travel out of bond.[17]

The activity taxed here does not involve income at all, much less income only incidental to trust land such as rental of physical improvements like condominiums or hotel rooms. *See Critzer v. United States*, 597 F.2d 708, 713-14 (Ct. Cl. 1979). Nor does it concern income from an allotment retail store selling goods or services unrelated to the trust lands. *Dillon v. United States*, 792 F.2d 849, 856 (9th Cir. 1986). Instead, it involves an excise tax on consumer-ready tobacco products at the point they leave the factory - products made on an allotment, by Indian people, and that are either entirely made from allotment grown tobacco, or incorporate large quantities of allotment grown tobacco. The product comes directly out of the soil of an allotment and is processed, if at all, entirely on an allotment. *See Stevens*, 452 F.2d at 747; *Daney*, 370 F.2d at 795.

To address the undisputed facts offered by King Mountain showing that the unprocessed tobacco contained in King Mountain's products is generated principally and directly from the trust lands, the district court created an additional constraint on the *Capoeman* exemption – one that prohibits application of the exemption if the final product of the reservation derived goods was "manufactured" or "processed." Case No. 11-308 Order, ECF No. 149 at 9, Add.

[17] See note 18, *infra*.

13 ("The unprocessed tobacco grown on trust land is analogous to the timber grown on trust land in *Capoeman*, and any income from the unprocessed tobacco could be deemed as derived directly from the land."). The district court held that the manufacturing process in itself removed any General Allotment Act protections that otherwise existed. The district court viewed the manufacturing process as analogous to a motel or restaurant, ignoring the distinction between services offered on trust land and product produced on trust land. If that legal holding is allowed to stand, then manufacturing on an allotment would never give rise to General Allotment Act protections, a result Congress never intended under the General Allotment Act, and neither the federal nor Yakama negotiators intended under the Yakama Treaty.

The district court cited no cases that endorse its holding that a product which in an unprocessed state is directly derived from trust lands and exempt from taxation losses its "directly derived" character if it is processed. Nor did the district court issue any findings of fact regarding what characteristics of the tobacco manufacturing process – growing, harvesting, drying, curing, blending, and/or packaging – destroys the otherwise valid exemption from taxation. And the district court never addressed how its new rule of law applies at all to tobacco harvested and sold for religious use without going through the manufacturing process – tobacco that is nevertheless taxed by the Plaintiff/Appellee.

Finally, the district court offered no policy justification for denying an exemption to Indian people who process products derived from their lands. Indeed, policy considerations support the opposite result, because under the district court's reasoning Indian people are left only to deliver raw products to the market and are thus relegated to nothing more than common laborers if they are to benefit from the protections promised in the General Allotment Act. That result – taxing the Yakama people for their efforts to compete in the market place through processing of goods derived from their allotted lands – would "be 'at the least, a sorry breach of faith with these Indians.'" *Capoeman*, 351 U.S. at 10. It also contravenes the Treaty's promise to allow Yakama people the opportunity to exploit advances and developments in technology and trade that would occur and have occurred in the intervening centuries. *Smiskin*, 487 F.3d at 1266 ("the Treaty was clearly intended to reserve the Yakamas' right to travel on the public highways to engage *in future trading endeavors*") (internal quotation marks and citation omitted).

II. The Yakama Treaty Prohibits Imposition of the Federal Excise Tax at Issue on King Mountain.

A. Treaty Tax Exemptions Need Not Be Explicit.

Native Americans, in ordinary affairs of life not governed by treaties or remedial legislation, are subject to federal taxes. However, statutes and treaties may exempt Native Americans from federal taxation. *Capoeman*, 351 U.S. at 6.

When a federal tax is involved, the existence of a statutory or treaty exemption "depends on whether express exemptive language exists within the text of the statute or treaty." *Ramsey*, 302 F.3d at 1078. This exemptive language "need not explicitly state that Indians are exempt from the specific tax at issue; it must only provide evidence of the federal government's intent to exempt Indians from taxation." *Id.* "Treaty language such as 'free from incumbrance,' 'free from taxation,' and 'free from fees,' are but some examples of express exemptive language required to find Indians exempt from federal tax." *Id.* at 1078-79. The Yakama Treaty contains such language.

The Yakama Treaty affirmed certain rights for the Yakama people beyond those rights they would have had without the Treaty and beyond rights that other citizens may have. *See Puyallup Tribe v. Dep't of Game*, 391 U.S. 392, 397 (1968) ("[T]o construe the treaty as giving the Indians 'no rights but such as they would have without the treaty' would be 'an impotent outcome to negotiations and a convention which seemed to promise more, and give the word of the Nation for more.'") (internal citation omitted); *Tulee v. Washington*, 315 U.S. at 684 (holding that "despite the phrase 'in common with citizens of the Territory,' Article III conferred upon the Yakamas continuing rights, *beyond those which other citizens may enjoy*, to fish at their 'usual and accustomed places'") (emphasis added). Among the rights confirmed by the Treaty are: (1) the exclusive benefit of their

lands, explicitly reserved in Article II of the Treaty; (2) the right to travel to engage in trade, both within and beyond the boundaries of the reservation, free from economic restrictions, explicitly reserved in Article III of the Treaty; and (3) the right to hold their allotted lands "exempt from levy, sale, or forfeiture" guaranteed in Article VI of the Treaty.

In granting Appellees' motion for summary judgment, the district court improperly imposed a requirement that the Yakama Treaty contain "express exemptive language *applicable to the manufacture of tobacco products*." Case No. 11-308 Order, ECF No. 149 at 20, Add. 24 (emphasis added). Under this constrained legal standard, the district court predictably found no exemption under the Treaty. *Id.* In so holding, the district court ignored this Court's guidance that the Treaty "need not explicitly state that Indians are exempt from the specific tax at issue; it must only provide evidence of the federal government's intent to exempt Indians from taxation." *Ramsey*, 302 F.3d at 1078.

B. The District Court Erred When it Failed to Apply the Indian Canons of Treaty Construction.

In *Capoeman*, the Supreme Court applied Indian canons of treaty construction to the Quinaielt Treaty, in part because of the Court's finding that the General Allotment Act and Treaty Act claims together required that it do so. *Capoeman*, 351 U.S. at 2 ("The question presented is whether the proceeds of the sale by the United States Government of standing timber on allotted lands on the

Quinaielt Indian Reservation may be made subject to capital gains tax, consistently with *applicable treaty and statutory provisions* and the Government's role as respondents' trustee and guardian" (emphasis added)). That exact same analysis must apply in this case. Additionally, under the controlling law in this Circuit, "[t]he applicability of a federal tax to Indians depends on whether express exemptive language exists within the text of the statute or treaty." *Ramsey*, 302 F.3d at 1078. This general rule is subject to the following clarification: "[t]he language *need not explicitly state that Indians are exempt from the specific tax at issue*; it must only provide *evidence of the federal government's intent to exempt Indians from taxation*." *Id.* (emphasis added). As clarified, the general rule provides that when the treaty contains any express exemptive language, then "any ambiguities as to whether the exemptive language applies to the tax at issue should be construed in favor of the Indians." *Id.* at 1079.[18]

This rule required the district court to apply a two-step process when it construed the Yakama Treaty: (1) determine whether the articles of the Treaty

[18] The Third and Eighth Circuit Courts of Appeal recognize the potential conflict between the Indian canon and federal tax canons in the context of Indian treaties and have appropriately harmonized the two. *See Holt v. Comm'r of Internal Revenue*, 364 F.2d 38, 40 (8th Cir. 1966) (holding that courts must look to the Indian canons if there is a basis in a treaty's text "which can reasonably be construed to confer income exemptions"); *Lazore v. Comm'r of Internal Revenue*, 11 F.3d 1180, 1184-85 (3d Cir. 1993) ("This formulation gives appropriate weight to the notion that a treaty-based tax exemption must have a textual basis and accounts for the interpretive rules applicable to Indian treaties"); *see also Cook v. United States*, 32 Fed. Cl. 170, 174-75 (1994).

contain any exemptive language (either alone or when read together with the General Allotment Act); and (2) if so, apply treaty canons of construction favoring the Yakama Nation's understanding of the Treaty language to determine whether the exemption applies to the federal tax at issue. Those treaty canons of construction require terms in treaties to be construed as the Indian tribe or person would have understood them. *United States v. Shoshone Tribe*, 304 U.S. 111, 116 (1938) (treaties "are not to be interpreted narrowly, as sometimes may be writings expressed in words of art employed by conveyancers, but are to be construed in the sense in which naturally the Indians would understand them"); *United States v. Winans*, 198 U.S. 371, 380-81 (1905) ("we have said we will construe a treaty with the Indians as [the Indians] understood it"); *Tulee*, 315 U.S. at 684-85 ("It is our responsibility to see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives at the council"). Sources beyond the treaty necessarily aid that interpretation. *Winans*, 198 U.S. at 381 ("How the treaty in question was understood may be gathered from the circumstances.").

But instead of applying this required analysis, the district court viewed only whether, within its four corners, the Treaty contained explicit language exempting the Yakama people from the federal tax, and held that it does not. Specifically, the district court applied the following legal standard: whether the Yakama Treaty

"contains express exemptive language applicable to the manufacture of tobacco products." Case No. 11-308 Order, ECF No. 149 at 20; Add. 24. Such a restriction on treaty interpretation renders the canons of construction meaningless. If the Treaty is required to have explicit language exempting the Yakama people from the specific tobacco excise tax at issue here (which did not exist at the time of the Treaty negotiations), then there would be no need to employ the canons of construction, because the Treaty would be dispositive. Neither this Court nor the Supreme Court has ever endorsed such a constrained standard of treaty construction.

C. Article II of the Yakama Treaty Contains Express Exemptive Language.

Article II of the Yakama Treaty provides:

> There is, however, reserved, from the lands above ceded for the use and occupation of the aforesaid confederated tribes and bands of Indians, the tract of land [described in the Treaty text].
>
> All which tract shall be set apart and, so far as necessary, surveyed and marked out, *for the exclusive use and benefit* of said confederated tribes and bands of Indians, as an Indian reservation, nor shall any white man, excepting those in the employment of the Indian Department, be permitted to reside upon the said reservation without permission of the tribe and the superintendent and agent.

Treaty, Add. 33 (emphasis added). Article II confirms that the Yakama people were to be the sole residents of the reserved lands ("use and occupation") and were

to be the sole beneficiaries of the resources cultivated on their reserved lands ("exclusive use and benefit"). *Id.*

The term "exclusive use" alone was used in the Quinaielt Treaty that was at issue in *Capoeman*. And in *Capoeman* the district court, this Court and the Supreme Court held that the term "exclusive use" alone was sufficiently express to require application of the Indian canons of construction.[19] The Yakama Treaty guarantees are even greater than those promised the Quinaielt. The Yakama in Article II of their Treaty reserved the right to both exclusive use and exclusive benefit – a much broader confirmation of the intent of the parties to protect the Yakama from federal taxation than the language in the Quinaielt Treaty held by this Court and the Supreme Court in *Capoeman* to be sufficiently express to prohibit federal taxation in that case.

"Exclusive" is not an ambiguous term, and is sufficiently express to confirm that the Yakama reserved their right to be free from federal taxation when exercising their right to "exclusive use and benefit" of their reserved lands. At the time of the treaty negotiations, the Yakama were fighting to keep others from exploiting Yakama land. In negotiating peace, they secured the right to be the only people who would benefit from the fraction of land they were able to keep. *See Swim v. Bergland*, 696 F.2d 712, 716 (9th Cir. 1983) ("Land cession agreements

[19] *Capoeman*, 351 U.S. at 6.

between the United States and Indian tribes are to be interpreted as grants *by* the Indians *to* the United States. The Indians reserve any rights not explicitly granted.") (emphasis in original); *Skeem v. United States*, 273 F. 93, 95 (9th Cir. 1921) ("The grant was not a grant to the Indians, but was a grant from the Indians to the United States, and such being the case all rights not specifically granted were reserved to the Indians.").

The word "exclusive" is at least sufficiently express to confirm a genuine issue of material fact that must be resolved at trial, through testimony of Yakama elders as to the Yakama people's understanding of that term. *Cree II*, 157 F.3d at 773-74 ("[t]estimony of this sort by Yakama elders has been sanctioned for over twenty years"); SOF at ¶ 24, ECF No. 55 at 27, ER 81.

That the phrase "exclusive use and benefit" is an express exemption is further confirmed by viewing the Treaty as a whole. "Exclusive" is used in the Treaty only in Article II (guaranteeing the "exclusive use and benefit of" the reservation to the Yakama) and Article III (providing for the "exclusive right of taking fish"). The phrase "use and benefit" alone (without inclusion of the word "exclusive") is used in the Treaty in Articles IV and X. The addition of "exclusive" in Article II is critical, especially given its omission in other provisions in the Treaty. Reading Article II as part of the larger Treaty confirms that the promise of "exclusive benefit" was and is sufficiently express, and requires the

judiciary to look beyond the face of the Treaty when it is tasked with determining whether the Treaty bars a given tax, including the tax at issue here.

To deny the exemptive intention of the term "exclusive use and benefit" in Article II of the Treaty, the district court relied heavily on *Hoptowit*, 709 F.2d at 566. Case No. 11-308 Order, ECF No. 149 at 15-16; Add. 19-20. *Hoptowit*, however, does not weaken King Mountain's claims in this case. First, unlike the case now before this Court, *Hoptowit* did not involve General Allotment Act claims. In *Capoeman*, the United States Supreme Court held that when both Treaty and General Allotment Act claims are at issue, the courts apply the Indian canons of treaty construction. *Capoeman*, 351 U.S. at 6. Second, *Hoptowit* only addressed per diem payments received by a Tribal Council member that were not related to an allotment or manufacture of a product on an allotment. *Hoptowit*, 709 F.2d at 565-566. Specifically, the Ninth Circuit drew a line as to the express exemptive language contained in Article II of the Treaty between "income derived directly from the land" – which is exempt – and "use of that income to compensate Hoptowit for his service as a Tribal Council Member" – which is not exempt. *Id.* at 566. *Hoptowit*, therefore, has no precedential value to a court called upon to preserve Article II's guarantee of exclusive use and benefit of reservation lands in the face of federal taxation of reservation based manufacturing operations using reservation derived resources. At a minimum, it does not foreclose application of

the Indian treaty canons of construction to the required analysis of Article II's guarantee of exclusive use and benefit.

When negotiating the Yakama Treaty, the United States, and its agents Governor Stevens and General Palmer, certainly knew about taxes. Yet the word "tax" was not included in the Treaty or discussed in the negotiations as confirmed by the Minutes. And it is inconceivable that Yakama people had any concept of taxation in 1855. *See Yakama Indian Nation*, 955 F. Supp. at 1244. Governor Stevens and General Palmer could not have imagined that the Yakama people would ever be subject to federal taxes on products they produced on their reservation.

The Yakama negotiators could not see into the future and demand more than the "exclusive benefit" of their reserved lands – exempting themselves and their people from unimaginable charges and assessments that might be imposed at some future date by the very government that was promising the Yakama people that they would be the exclusive beneficiaries of that fraction of their lands they were allowed to retain. *Capoeman*, 351 U.S. at 8 ("the allotment shall be free from all taxes, both those in being and those which might in the future be enacted"). Indeed, Governor Stevens and General Palmer did not demand that the Yakama negotiators grant federal taxation as a treaty concession, something which had it been important, the federal government certainly could, and would, have done.

Accord Capoeman, 351 U.S. at 8 ("it is not lightly to be assumed that Congress intended to tax the ward for the benefit of the guardian" (citation omitted)).

Because the Yakama people reserved the right to the exclusive use and benefit of their land, the only way that exclusivity could be denied is for Congress to express a clear intent to do so. *Smiskin*, 487 F.3d at 1264 ("'federal statute of general applicability that is silent on the issue of applicability to Indian tribes will not apply to them if . . . the application of the law to the tribe would abrogate rights guaranteed by Indian treaties'" (citations omitted)). There is no evidence that in passing the tobacco excise tax, Congress intended to abrogate rights guaranteed to the Yakama Nation and its people in the Yakama Treaty. At a minimum, the district court was required to take evidence from Yakama elders and experts as to whether the Yakama understood "exclusive use and benefit" in Article II to allow taxation similar to that imposed by the excise tax at issue in this case. *Smiskin*, 487 F.3d at 1264.

D. Article III of the Yakama Treaty Contains Express Exemptive Language.

Although Article II's promise of "exclusive use and benefit" is sufficiently express to prohibit imposition of the excise tax at issue here, summary judgment was also improper based on the express language of Article III of the Yakama Treaty. Article III states, in pertinent part:

> if necessary for the public convenience, roads may be run through the said reservation; and on the other hand, the right of way, with free access from the same to the nearest public highway, is secured to them; as also the right, in common with citizens of the United States, to travel upon all public highways.

Treaty With the Yakama, 12 Stat. 951 (1855), Add. 32. This Court has interpreted Article III as unequivocally prohibiting imposition of economic restrictions or pre-conditions on the Yakama people's treaty right to engage in the trade of tobacco products:

> Thus, whether the goods at issue are timber or tobacco products, the right to travel overlaps with the right to trade under the Yakama Treaty such that excluding commercial exchanges from its purview would effectively abrogate our decision in *Cree II* and render the Right to Travel provision truly impotent.

Smiskin, 487 F.3d at 1266-67; *see also Yakama Indian Nation*, 955 F. Supp. at 1248 (holding that "the language of the Treaty, when viewed in the historical context as the Yakamas would have understood it, unambiguously reserves to the Yakamas the right to travel the public highways without restriction for purposes of hauling goods to market").

The Washington Supreme Court just last month reached the same conclusion when called upon to interpret Article III of the Yakama Treaty. *Cougar Den, Inc. v. Washington State Dep't of Licensing*, No. 92289-6, 2017 WL 1192119, at *6 (Wash. Mar. 16, 2017) ("Based on the historical interpretation of the Tribe's

essential need to travel extensively for trade purposes, this right is protected by [Article III of] the treaty.").

Instead of applying this controlling precedent, the district court relied on a decision of this Court that declined to apply Article III's provisions to exempt an individual tribal member from federal heavy vehicle and diesel fuel taxes. Case No. 11-308 Order, ECF No. 149 at 17-18, Add. 21-22 (citing *Ramsey*, 302 F.3d at 1080). *Ramsey*, however, is not dispositive of King Mountain's Article III claims in this case. Moreover, and contrary to the district court's holding below, *Ramsey* does not stand for the proposition that Article III can never be read to contain exemptive language sufficient to require application of the Indian canons of treaty construction when reviewing application of federal taxes. Instead, Ramsey is limited to the facts before the Court in that case.

Ramsey did not involve reservation-based manufacturing activities – rather, it concerned the tools of trade used off reservation to haul off reservation goods to market. In *Ramsey*, the challenged federal tax targeted exclusively off-reservation activities – heavy vehicle and diesel fuel taxes. The tax at issue in *Ramsey* had nothing to do with allotted lands and instead was imposed exclusively on the

instruments used to transport the goods, rather than the goods themselves.[20] In contrast, this case involves an excise tax on the right to travel with goods out of bond on the Yakama Nation. The goods at issue are manufactured on the Yakama Nation, and incorporate agricultural material grown on Yakama trust lands.

As a result, this Court's decision in *Smiskin* is applicable in this case, and not its decision in *Ramsey*. In *Smiskin*, the Court held that Article III's Treaty protections prohibited prosecution under federal law of a Yakama tribal member in a case involving restrictions on the transport of tobacco products. *Smiskin*, 487 F.3d at 1266 ("the Yakamas understood the Treaty at the time of signing to "unambiguously reserve [ ] to [them] the right to travel the public highways *without restriction* for purposes of hauling goods to market") (emphasis in original and citations omitted).

Here, as in *Smiskin*, the Article III travel guarantee exempts the Yakama people from an excise tax imposed when goods travel out of bond. *Accord Cougar Den,* No. 92289-6, 2017 WL 1192119 (Wash. Mar. 16, 2017) (applying Indian canons of construction to hold that Article III of the Yakama Treaty prohibits state taxation of fuel when the incidence of the tax is on movement (importation) of the article of trade).

[20] *Ramsey*'s precedential value is limited to the finding that Article III's guarantee to the Yakama's of their right to travel "does not provide express language from which we can discern an intent to exempt the Yakama from federal heavy vehicle and diesel fuel taxation." *Id.* at 1080.

E. Article VI of the Yakama Treaty Contains Express Exemptive Language Nearly Identical to Language in the General Allotment Act.

In this case, as in *Capoeman*, the "Government urges us to view this case as an ordinary tax case without regard to the treaty, relevant statutes, congressional policy concerning Indians, or the guardian-ward relationship between the United States and these particular Indians." *Capoeman*, 351 U.S. at 5-6. But here, as in *Capoeman*, and because of *Capoeman*'s controlling precedential authority, the Court must again reject that argument.

In *Capoeman*, the Supreme Court confirmed that the phrase in the text of the General Allotment Act prohibiting any "charge or incumbrance" on allotted lands was sufficient to include taxation, particularly in light of subsequent amendments to the Act. *Capoeman*, 351 U.S. at 7. That same approach is required under the similar language contained in Article VI of the Yakama Treaty.

Article VI of the Yakama Treaty provides for allotment lands to be directed "by the President." The Treaty goes on to provide that these lands will be administered "on the same terms and subject to the same regulations as provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable". The Omaha Treaty includes the following language:

> "…And the President may, at any time, in his discretion, after such person or family has made a location on the land assigned for a permanent home, issue a patent to such person or family for such assigned land, conditioned that the tract shall not be aliened or leased

> for a longer term than two years; **and shall be exempt from levy, sale, or forfeiture**, which conditions shall continue in force,…

Treaty With The Omaha of March 16, 1854, ratified April 17, 1854, 10 Stat. 1043, Article 6, Disposition of Lands Reserved, at 612 (emphasis added), Add. 25. Thus, the allotment system contained within the Yakama Treaty includes a prohibition against liens, levies or forfeitures similar to that contained in the General Allotment Act. Because this Court and the Supreme Court have confirmed that such language is sufficiently express to require application of the Indian canons of construction, those canons must be applied in this case. And, as noted above in the context of the General Allotment Act, because the excise tax at issue here directly imposes a forfeiture and lien against allotted property as part of its tax provisions, it cannot be imposed on King Mountain consistent with Article VI of the Yakama Treaty.

III. The District Court Erred When It Failed to Include a Specific Monetary Award, and When It Failed to Include Specific Amounts for Each Element of the Specific Award In Its Final Judgment.

The district court's original final judgment did not include a specific amount owed by King Mountain. After King Mountain appealed the original final judgment (in part for its failure to include a monetary judgment amount), the United States asked the district court to amend the final judgment to add a specific monetary judgment amount. ECF No. 102, ER 53. King Mountain filed a cross motion to amend seeking to have any final judgment amount specify how much of

the judgment was attributable to taxes, how much was attributable to penalties, and how much was for interest. ECF No. 104, ER 47.

In its order denying the motions to amend, the district court acknowledged that "the amount owing was mistakenly omitted from the judgment[,]" ECF No. 112 at 2, Add. 3, but held that it could not correct this omission as Federal Rule of Civil Procedure 60(a) requires that "[a]fter an appeal has been docketed, a court may only correct a clerical mistake with the appellate court's leave[,]" ECF No. 112 at 3, Add. 3. Over a year later, the district court revisited this matter *sua sponte*, and entered an order holding that Rule 60(a) allows it to correct a "clerical error" after a notice of appeal has been filed if "the correction does not represent a change of position, but rather simply clarifies the court's intended action." ECF No. 112 at 2, Add. 3 (quoting *Morris v. Morgan Stanley & Co.*, 942 F.2d 648, 654 (9th Cir. 1991). Thus, the district court asserted that Rule 60(a) provided it with sufficient room to fix the deficiencies in its original judgment. Yet although the district court amended its final judgment to include a total amount, it still failed to state facts necessary to determine the amount of penalties and interest, if any, awarded by the court.

A final judgment in favor of the plaintiff must include with specificity the amount of money owed by the Defendant. *United States v. Cooke*, 215 F.2d 528, 530 (9th Cir. 1954) ("We think that the bare statements of the names of the

successful litigants without stating the amounts of their respective recoveries do not constitute a showing of the 'substance' of the judgments"). This requirement applies equally in tax cases brought by the federal government. *Cf. McDermitt v. United States*, 954 F.2d 1245, 1249 (6th Cir. 1992) ("money judgments in favor of a plaintiff should contain a sum certain in order to be considered final").

This is not an academic issue. Specifically, although the total final judgment amount, if it stands, would force King Mountain to declare bankruptcy, as part of its Master Settlement Agreement obligations in states where it sells cigarettes, King Mountain has deposited funds into escrow accounts that should be sufficient to pay off the amount of taxes it appears were included in the district court's final judgment.[21] But King Mountain would not have enough in escrow to pay the entire judgment, so could only remain in business if some or all of the tax, penalty and interest is discharged.[22] The lack of specificity as to these separate amounts in the amended final judgement will only make the determination of the discharge issue more complicated, if not impossible.

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[21] These types of escrow funds have been accessed by the U.S. in forfeiture proceedings. *United States v. Oregon*, 671 F.3d 484 (4th Cir. 2012) (state failed to prove that tobacco company's interest was superior to its own, which allowed the interest to be subject to U.S. seizure). In addition, the manufacturer's interest in these types of escrow accounts has been applied to claims in bankruptcy proceedings. *In re Carolina Tobacco Co.*, 375 B.R. 602 (Bankr. D. Or. 2007) (allowing tobacco company to sell and convey assigned escrow releases).

[22] 11 U.S.C. §727, Add. 57; 11 U.S.C. § 523, Add. 44.

Because the district erred in its application of the General Allotment Act and the Yakama Treaty to the facts in this case, this Court should not need to address the district court's failure to provide sufficient specificity in its original final judgment, as amended. However, if this Court rules in King Mountain's favor on the General Allotment Act and Treaty issues in a manner that requires additional fact finding by the district court and that court's application of the Indian canons of construction, then the Court also will need to remand the case to the district court with instructions that any judgment against King Mountain contain specific amounts of taxes, penalties and interest awarded to the plaintiff, or facts necessary to compute those amounts. *United States v. F. & M. Schaefer Brewing Co.*, 78 S. Ct. 674 (1958) (district court order was not a final judgment because, although it stated amount of money illegally collected from plaintiff, it did not state date or dates of payment, and did not state facts necessary to compute amount of interest to be included in the judgment).

CONCLUSION

The Court should reverse the district court for its failure to follow *Capoeman*'s holding that the General Allotment Act's protections prohibit the application of any tax that can result in an encumbrance on and forfeiture of allotted Indian lands, because the Yakama Treaty contains express language confirming an intent to exempt the Yakama people from this type of federal tax, or at least language sufficiently express to require application of Indian canons of treaty and statutory construction, or for its failure to provide a specific amount of the judgment in its final order including specific amounts for each element of the judgment.

April 14, 2017

Respectfully submitted,

Johnson Barnhouse & Keegan LLP

By: /s/ Randolph H. Barnhouse
Randolph H. Barnhouse
Justin J. Solimon
7424 4th Street NW
Los Ranchos de Albuquerque, NM 87107
Telephone: (505) 842-6123
Facsimile: (505) 842-6124
dbarnhouse@indiancountrylaw.com
jsolimon@indiancountrylaw.com

Attorneys for Defendant-Appellant

STATEMENT OF RELATED CASES

The Ninth Circuit Court of Appeals reversed the district court in a related case and instructed the district court to dismiss that case for lack of subject matter jurisdiction. *Confederated Tribes & Bands of Yakama Indian Nation v. Alcohol & Tobacco Tax & Trade Bureau*, 843 F.3d 810 (9th Cir. 2016).

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Respectfully submitted,

Johnson Barnhouse & Keegan LLP

By: /s/ Randolph H. Barnhouse
Randolph H. Barnhouse
Justin J. Solimon
7424 4th Street NW
Los Ranchos de Albuquerque, NM 87107
Telephone: (505) 842-6123
Facsimile: (505) 842-6124
dbarnhouse@indiancountrylaw.com
jsolimon@indiancountrylaw.com

Attorneys for Defendant-Appellant

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

I certify that pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening brief is proportionately spaced, has a typeface of 14 points or more and contains 13,364 words.

April 14, 2017

Respectfully submitted,

Johnson Barnhouse & Keegan LLP

By: /s/ Randolph H. Barnhouse
Randolph H. Barnhouse
Justin J. Solimon
7424 4th Street NW
Los Ranchos de Albuquerque, NM 87107
Telephone: (505) 842-6123
Facsimile: (505) 842-6124
dbarnhouse@indiancountrylaw.com
jsolimon@indiancountrylaw.com

Attorneys for Defendant-Appellant

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 17, 2017. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Johnson Barnhouse & Keegan LLP

By: /s/ Randolph H. Barnhouse
Randolph H. Barnhouse
Justin J. Solimon
7424 4th Street NW
Los Ranchos de Albuquerque, NM 87107
Telephone: (505) 842-6123
Facsimile: (505) 842-6124
dbarnhouse@indiancountrylaw.com
jsolimon@indiancountrylaw.com

Attorneys for Defendant-Appellant

ADDENDUM

INDEX

Remedy by existing law not impaired.

SEC. 2. That nothing in this act contained shall prevent, lessen, impeach, or avoid any remedy at law or in equity which any owner of letters patent for a design, aggrieved by the infringement of the same, might have had if this act had not been passed; but such owner shall not twice recover the profit made from the infringement.

Approved, February 4, 1887.

Feb. 8, 1887.

CHAP. 119.—An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes.

President authorized to allot land in severalty to Indians on reservations.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use, either by treaty stipulation or by virtue of an act of Congress or executive order setting apart the same for their use, the President of the United States be, and he hereby is, authorized, whenever in his opinion any reservation or any part thereof of such Indians is advantageous for agricultural and grazing purposes, to cause said reservation, or any part thereof, to be surveyed, or resurveyed if necessary, and to allot the lands in said reservation in severalty to any Indian located thereon in quantities as follows:

Distribution.

To each head of a family, one-quarter of a section;

To each single person over eighteen years of age, one-eighth of a section;

To each orphan child under eighteen years of age, one-eighth of a section; and

To each other single person under eighteen years now living, or who may be born prior to the date of the order of the President directing an allotment of the lands embraced in any reservation, one-sixteenth of a section: *Provided*, That in case there is not sufficient land in any of said reservations to allot lands to each individual of the classes above named in quantities as above provided, the lands embraced in such reservation or reservations shall be allotted to each individual of each of said classes pro rata in accordance with the provisions of this act: *And provided further*, That where the treaty or act of Congress setting apart such reservation provides for the allotment of lands in severalty in quantities in excess of those herein provided, the President, in making allotments upon such reservation, shall allot the lands to each individual Indian belonging thereon in quantity as specified in such treaty or act: *And provided further*, That when the lands allotted are only valuable for grazing purposes, an additional allotment of such grazing lands, in quantities as above provided, shall be made to each individual.

Provisos.

Allotment pro rata if lands insufficient.

Allotment by treaty or act not reduced.

Additional allotment of lands fit for grazing only.

Selection of allotments.

SEC. 2. That all allotments set apart under the provisions of this act shall be selected by the Indians, heads of families selecting for their minor children, and the agents shall select for each orphan child, and in such manner as to embrace the improvements of the Indians making the selection. Where the improvements of two or more Indians have been made on the same legal subdivision of land, unless they shall otherwise agree, a provisional line may be run dividing said lands between them, and the amount to which each is entitled shall be equalized in the assignment of the remainder of the land to which they are entitled under this act: *Provided*, That if any one entitled to an allotment shall fail to make a selection within four years after the President shall direct that allotments may be made on a particular reservation, the Secretary of the Interior may direct the agent of such tribe or band, if such there be, and if there be no agent, then a special agent appointed for that purpose, to make a selection for such Indian, which election shall be allotted as in cases where selections are made by the Indians, and patents shall issue in like manner.

Improvements.

Proviso.

On failure to select in four years, Secretary of the Interior may direct selection.

Allotments to be made by special agents and Indian agents.

SEC. 3. That the allotments provided for in this act shall be made by special agents appointed by the President for such purpose, and the agents in charge of the respective reservations on which the allotments are directed to be made, under such rules and regulations as the Secretary of the Interior may from time to time prescribe, and shall be certified by such agents to the Commissioner of Indian Affairs, in duplicate, one copy to be retained in the Indian Office and the other to be transmitted to the Secretary of the Interior for his action, and to be deposited in the General Land Office.

Certificates.

Indians not on reservations, etc., may make selection of public lands.

SEC. 4. That where any Indian not residing upon a reservation, or for whose tribe no reservation has been provided by treaty, act of Congress, or executive order, shall make settlement upon any surveyed or unsurveyed lands of the United States not otherwise appropriated, he or she shall be entitled, upon application to the local land-office for the district in which the lands are located, to have the same allotted to him or her, and to his or her children, in quantities and manner as provided in this act for Indians residing upon reservations; and when such settlement is made upon unsurveyed lands, the grant to such Indians shall be adjusted upon the survey of the lands so as to conform thereto; and patents shall be issued to them for such lands in the manner and with the restrictions as herein provided. And the fees to which the officers of such local land-office would have been entitled had such lands been entered under the general laws for the disposition of the public lands shall be paid to them, from any moneys in the Treasury of the United States not otherwise appropriated, upon a statement of an account in their behalf for such fees by the Commissioner of the General Land Office, and a certification of such account to the Secretary of the Treasury by the Secretary of the Interior.

Fees to be paid from the Treasury.

Patent to issue.

SEC. 5. That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided*, That the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: *Provided*, That the law of descent and partition in force in the State or Territory where such lands are situate shall apply thereto after patents therefor have been executed and delivered, except as herein otherwise provided; and the laws of the State of Kansas regulating the descent and partition of real estate shall, so far as practicable, apply to all lands in the Indian Territory which may be allotted in severalty under the provisions of this act: *And provided further*, That at any time after lands have been allotted to all the Indians of any tribe as herein provided, or sooner if in the opinion of the President it shall be for the best interests of said tribe, it shall be lawful for the Secretary of the Interior to negotiate with such Indian tribe for the purchase and release by said tribe, in conformity with the treaty or statute under which such reservation is held, of such portions of its reservation not allotted as such tribe shall, from time to time, consent to sell, on such terms and conditions as shall be considered just and equitable between the United States and said tribe of Indians, which purchase shall not be complete until ratified by Congress, and the form and manner of executing such release shall also be

To be held in trust.

Conveyance in fee after 25 years.

Provisos.

Period may be extended.

Laws of descent and partition.

Negotiations for purchase of lands not alloted.

Lands so bought to be held for actual settlers if arable.

prescribed by Congress: *Provided however*, That all lands adapted to agriculture, with or without irrigation so sold or released to the United States by any Indian tribe shall be held by the United States for the sole purpose of securing homes to actual settlers and shall be disposed of by the United States to actual and bona fide settlers only in tracts not exceeding one hundred and sixty acres to any one person, on such terms as Congress shall prescribe, subject to grants which Congress may make in aid of education: *And provided further*, That no patents shall issue therefor except to the person so taking the same as and for a homestead, or his heirs, and after the expiration of five years occupancy thereof as such homestead; and any conveyance of said lands so taken as a homestead, or any contract touching the same, or lien thereon, created prior to the date of such patent, shall be null and void.

Patent to issue only to person taking as homestead.

Purchase money to be held in trust for Indians.

And the sums agreed to be paid by the United States as purchase money for any portion of any such reservation shall be held in the Treasury of the United States for the sole use of the tribe or tribes of Indians; to whom such reservations belonged; and the same, with interest thereon at three per cent per annum, shall be at all times subject to appropriation by Congress for the education and civilization of such tribe or tribes of Indians or the members thereof. The patents aforesaid shall be recorded in the General Land Office, and afterward delivered, free of charge, to the allottee entitled thereto. And if any religious society or other organization is now occupying any of the public lands to which this act is applicable, for religious or educational work among the Indians, the Secretary of the Interior is hereby authorized to confirm such occupation to such society or organization, in quantity not exceeding one hundred and sixty acres in any one tract, so long as the same shall be so occupied, on such terms as he shall deem just; but nothing herein contained shall change or alter any claim of such society for religious or educational purposes heretofore granted by law.

Religious organizations.

Indians selecting lands to be preferred for police, etc.

And hereafter in the employment of Indian police, or any other employes in the public service among any of the Indian tribes or bands affected by this act, and where Indians can perform the duties required, those Indians who have availed themselves of the provisions of this act and become citizens of the United States shall be preferred.

Citizenship to be accorded to allottees and Indians adopting civilized life.

SEC. 6. That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property.

Secretary of the Interior to prescribe rules for use of waters for irrigation.

SEC. 7. That in cases where the use of water for irrigation is necessary to render the lands within any Indian reservation available for agricultural purposes, the Secretary of the Interior be, and he is hereby, authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservations; and no other appropriation or grant of water by any riparian proprietor shall be authorized or permitted to the damage of any other riparian proprietor.

Lands excepted.

SEC. 8. That the provision of this act shall not extend to the territory occupied by the Cherokees, Creeks, Choctaws, Chickasaws, Seminoles, and Osage, Miamies and Peorias, and Sacs and Foxes, in the Indian Territory, nor to any of the reservations of the Seneca Nation of New York Indians in the State of New York, nor to that strip of territory in the State of Nebraska adjoining the Sioux Nation on the south added by executive order.

Appropriation for surveys.

SEC 9. That for the purpose of making the surveys and resurveys mentioned in section two of this act, there be, and hereby is, appropriated, out of any moneys in the Treasury not otherwise appropriated, the sum of one hundred thousand dollars, to be repaid proportionately out of the proceeds of the sales of such land as may be acquired from the Indians under the provisions of this act.

Rights of way not affected.

SEC. 10. That nothing in this act contained shall be so construed as to affect the right and power of Congress to grant the right of way through any lands granted to an Indian, or a tribe of Indians, for railroads or other highways, or telegraph lines, for the public use, or to condemn such lands to public uses, upon making just compensation.

Southern Utes may be removed to new reservation.

SEC. 11. That nothing in this act shall be so construed as to prevent the removal of the Southern Ute Indians from their present reservation in Southwestern Colorado to a new reservation by and with the consent of a majority of the adult male members of said tribe.

Approved, February 8, 1887.

CHAP. 120.—An act to declare a forfeiture of lands granted to the New Orleans, Baton Rouge and Vicksburg Railroad Company, to confirm title to certain lands, and for other purposes.

Feb. 8, 1887.

Certain lands granted to New Orleans, Baton Rouge and Vicksburg R. R. Co. forfeited.
Vol. 16, p. 579.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the lands granted to the New Orleans, Baton Rouge and Vicksburg Railroad Company by the act entitled "An act to incorporate the Texas Pacific Railroad Company and to aid in the construction of its road, and for other purposes," approved March third, eighteen hundred and seventy-one, are hereby declared to be forfeited to the United States of America in all that part of said grant which is situate on the east side of the Mississippi River, and also in all that part of said grant on the west of the Mississippi River which is opposite to and coterminous with the part of the New Orleans Pacific Railroad Company which was completed on the fifth day of January, eighteen hundred and eighty-one; and said lands are restored to the public domain of the United States.

Certain lands confirmed to New Orleans Pacific R. R. Co., assignee of New Orleans, Baton Rouge and Vicksburg R. R. Co.

SEC. 2. That the title of the United States and of the original grantee to the lands granted by said act of Congress of March third, eighteen hundred and seventy-one, to said grantee, the New Orleans, Baton Rouge and Vicksburg Railroad Company, not herein declared forfeited, is relinquished, granted, conveyed, and confirmed to the New Orleans Pacific Railroad Company, as the assignee of the New Orleans, Baton Rouge and Vicksburg Railroad Company, said lands to be located in accordance with the map filed by said New Orleans Pacific Railway Company in the Department of the Interior October twenty-seventh, eighteen hundred and eighty-one and November seventeenth, eighteen hundred and eighty-two, which indicate the definite location of said road: *Provided*, That all said lands occupied by actual settlers at the date of the definite location of said road and still remaining in their possession or in possession of their heirs or assigns shall be held and deemed excepted from said grant and shall be subject to entry under the public land laws of the United States.

Proviso. Lands of actual settlers at the time excepted.

When grant to be in effect.

SEC. 3. That the relinquishment of the lands and the confirmation of the grant provided for in the second sections of this act are made and shall take effect whenever the Secretary of the Interior is notified that

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

KING MOUNTAIN TOBACCO COMPANY, INC., et al; Plaintiffs, v. ALCOHOL AND TOBACCO TAX AND TRADE BUREAU, et al; Defendants.	NO: CV-11-3038-RMP ORDER GRANTING UNITED STATES' MOTION FOR SUMMARY JUDGMENT

Before the Court is a motion for summary judgment filed by the United States, ECF No. 134. A similar motion was filed in the related case *United States v. King Mountain Tobacco Co.*, Case No. 12-3089 at ECF No. 48. The Court heard oral argument on the motions in both cases. John Adams Moore, Jr., and Randolph Barnhouse represented the plaintiff, the Confederated Tribes and Bands of the Yakama Indian Nation. W. Carl Hankla, Trial Attorney for the Tax Division of the United States Department of Justice, represented the United States. The

Court has reviewed the briefing and all supporting documents presented in this case and in Case No. 12-3089 and is fully informed.

BACKGROUND

The following facts are not in dispute. Plaintiff Confederated Tribes and Bands of the Yakama Nation ("Yakama Nation") is a federally recognized Indian tribe. ECF No. 141 at 2. King Mountain Tobacco, Inc. ("King Mountain") is a corporation organized, existing, and operating under the laws of the Yakama Nation. *Id.* Delbert Wheeler, Sr., is an enrolled member of the Yakama Nation and is the owner and operator of King Mountain. *Id.*

King Mountain's manufacturing facilities are located within the boundaries of the Yakama Nation Reservation on property held in trust by the United States for the beneficial use of Mr. Wheeler. ECF No. 141 at 2. King Mountain manufactures cigarettes and roll-your-own tobacco. ECF No. 103 at 2. The parties agree that the tobacco products at issue in this case are manufactured from a blend of tobacco grown on Yakama Nation trust land and tobacco grown elsewhere on non-trust land. ECF No. 141 at 2.

The amount of tobacco used in King Mountain's products is subject to some dispute. At the time that the Court previously entered its Order Denying Plaintiff's Motion for Partial Summary Judgment, uncontroverted evidence established that approximately twenty percent of the tobacco used by King Mountain in its

manufactured products was grown on trust land. ECF No. 103 at 9. In responding to the instant motion for summary judgment, Yakama Nation asserts that King Mountain has increased the percentage of tobacco grown on trust land since 2012. ECF No. 141-1 at 3-4. Yakama Nation further asserts that as of the fourth quarter of 2013, fifty-five percent of the tobacco used in King Mountain's manufactured products is grown exclusively on trust land. *Id.*

Yakama Nation additionally asserts that King Mountain now produces "traditional use tobacco" that is "intended for Indian traditional and ceremonial use and [] consists entirely of (100 percent) tobacco grown exclusively on [trust land]." ECF No. 141-1 at 4. According to Yakama Nation, six shipments of King Mountain's "traditional use tobacco" have been subject to federal excise taxes since 2012. *Id.* However, Yakama Nation's First Amended Complaint raised only the issue of cigarettes and roll-your-own tobacco products, ECF No. 16 at 26, and did not state a claim relating to its "traditional use tobacco." In addition, the parties presented little argument related to the "traditional use tobacco" in the course of litigating this case.

King Mountain, Mr. Wheeler, and the Yakama Nation brought this action seeking a declaration that King Mountain is not subject to payment of federal excise taxes on tobacco products; a declaration that the Yakama Nation is entitled to meaningful consultation and resolution of disputes with the executive branch;

and an injunction against Defendant Alcohol and Tobacco Tax and Trade Bureau ("TTB") prohibiting TTB from preventing the sale of King Mountain's products. ECF No. 16 at 53-54. In addition, Plaintiff seeks a refund or abatement of all monies paid under the excise tax requirements. *Id.*

Upon a motion from the United States, the Court dismissed King Mountain and Mr. Wheeler from this action for lack of jurisdiction. ECF No. 83. However, the Court held that it has jurisdiction to hear claims brought by the Yakama Nation. ECF No. 83. The Court further ruled that Yakama Nation may press claims on behalf of King Mountain and Delbert Wheeler, because the Yakama Nation's interests as a sovereign are implicated by the imposition of taxes upon its enrolled members. ECF No. 83 at 9-10.

Yakama Nation previously filed a motion for partial summary judgment, ECF No. 52. In ruling on that motion, the Court held that: 1) King Mountain was not exempt from taxation under the General Allotment Act for manufacturing cigarettes and roll-your-own tobacco; and 2) Article II of the 1855 Yakama Treaty did not contain express language exempting the manufacture of tobacco products from federal taxation. ECF No. 103.[1]

[1] The United States' current motion touches upon some issues already ruled upon by the Court in denying Yakama Nation's previous motion for partial summary judgment. ECF No. 103. However, the Court recognizes that in the instant

The United States now seeks summary judgment, contending that as a matter of law that it is entitled to dismissal of all claims pressed by the remaining plaintiff, Yakama Nation.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A key purpose of summary judgment "is to isolate and dispose of factually unsupported claims." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). Summary judgment is "not a disfavored procedural shortcut," but is instead the "principal tool[ ] by which factually insufficient claims or defenses [can] be isolated and prevented from going to trial with the attendant unwarranted consumption of public and private resources." *Celotex*, 477 U.S. at 327.

The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. *See Celotex*, 477 U.S. at 323. The burden then shifts to the non-moving party to "set out 'specific facts showing a genuine issue for trial.'" *Id.* at 324 (quoting Fed. R. Civ. P. 56(e)).

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motion, the United States bears the burden of establishing that it is entitled to summary judgment under Federal Rule of Civil Procedure 56.

A genuine issue of material fact exists if sufficient evidence supports the claimed factual dispute, requiring "a jury or judge to resolve the parties' differing versions of the truth at trial." *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir.1987). At summary judgment, the court draws all reasonable inferences in favor of the nonmoving party. *In re Oracle Corp. Secs. Litig.*, 627 F.3d 376, 387 (9th Cir. 2010) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986)). The evidence presented by both the moving and non-moving parties must be admissible. Fed. R. Civ. P. 56(e). The court will not presume missing facts, and non-specific facts in affidavits are not sufficient to support or undermine a claim. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888-89 (1990).

DISCUSSION

As citizens of the United States, enrolled members of federally recognized Indian tribes are generally liable to pay federal taxes. *See Squire v. Capoeman*, 351 U.S. 1, 6 (1956). Federal law imposes an excise tax on the manufacturing of tobacco products to be calculated against the manufacturer at the time of the removal of the tobacco products from the manufacturer's facilities. 26 U.S.C. §§ 5701-5703. Yakama Nation contends that their tobacco products are exempt from excise taxes under the General Allotment Act, Articles II and III of the 1855

Yakama Treaty, and Section 4225 of the Internal Revenue Code pertaining to Indian handicrafts.[2] Each of these issues is examined in turn.

General Allotment Act

Under the General Allotment Act, individual Indians were allotted lands to be held in trust by the United States for the benefit of that individual Indian. *Capoeman*, 351 U.S. at 3. After twenty five years, absent extension of the trust period by the President, the land would be conveyed in fee simple to the allottee. *Id.* Part of the Act states:

> [T]he Secretary of the Interior may, in his discretion, and he is authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter *all restrictions as to sale, incumbrance, or taxation of said land shall be removed* and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent . . . .

25 U.S.C. § 349 (emphasis added).

In *Capoeman*, the Supreme Court held that the language "all restrictions as to . . . taxation of said land shall be removed," implied that trust land that was not

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[2] Yakama Nation also claimed in its First Amended Complaint that it is entitled to a face-to-face meeting with the President of the United States to resolve any disputes under the 1855 Yakama Treaty. ECF No. 16 at 52-53. However, Yakama Nation represented at oral argument that a meeting has since occurred between the president and a member of the Yakama Nation's leadership. This claim is therefore moot.

yet patented in fee was not subject to taxation. 351 U.S. at 8-10. The Supreme Court noted, however, that the restriction on taxation was limited to "the trust and income derived directly therefrom." *Id.* at 9. Income that was not derived directly from trust land but was derived from earlier income from the land, also known as "reinvestment income," was not exempt from taxation. *Id.* (discussing F. Cohen, Handbook of Federal Indian Law 265-66 (1942)). In *Capoeman*, the taxes at issue were capital gains assessed as income tax on the sale of timber. *Id.* at 4. The Court held that the income resulting from the sale of the timber was derived directly from the trust land and, therefore, not subject to federal income tax. *Id.* at 9-10.

Cases decided after *Capoeman* have identified sources of income beyond timber that are derived directly from the land and are not subject to income tax. *E.g.*, *Stevens v. Commissioner*, 452 F.2d 741, 747 (9th Cir. 1971) (holding that income derived from ranching and farming operations by an allottee on his allotted land are not taxable); *United States v. Daney*, 370 F.2d 791 (10th Cir. 1996) (holding that bonuses paid to allottee for oil and gas leases to his allotment were not taxable). However, other cases have found that some income-producing activities, despite being sited on allotted or tribal trust land, are subject to federal income taxes. *E.g.*, *Dillon v. United States*, 792 F.2d 849, 856 (9th Cir. 1986) (holding that income from a smoke shop operated on trust land was not "generated

principally from the use of reservation land and resources"); *Critzer v. United States*, 597 F.2d 708, 713-14 (Ct. Cl. 1979) (holding that income generated from a motel, a restaurant, a gift shop, and from building rentals, is not derived directly from the land).

This case concerns tobacco products that King Mountain manufactures from a blend of tobacco, some of which was grown on trust land and some of which was grown elsewhere on non-trust land. The unprocessed tobacco grown on trust land is analogous to the timber grown on trust land in *Capoeman*, and any income from the unprocessed tobacco could be deemed as derived directly from the land. *See* 351 U.S. at 8-10.

In this case the United States is not seeking to impose a tax on the income from unprocessed tobacco grown on trust land. The excise tax at issue is assessed on manufactured tobacco products, including cigarettes and roll-your-own tobacco. The manufacturing process is a combination of labor and capital investment, rather than a product derived directly from the land. *See id.*; *Critzer*, 597 F.2d at 713. Manufacturing tobacco products from unprocessed tobacco grown on trust land is analogous to "income derived from investment of surplus income from the land." *See Capoeman*, 351 U.S. at 9. The excise tax at issue is triggered by the manufacturing process, which is more akin to reinvestment income that is not exempt from taxation. *See Dillon*, 792 F.2d at 855-56.

The Court's decision is consistent with the purposes of the allotment system as expressed in *Capoeman*. In *Capoeman*, the Court recognized that the purpose of the allotment system "was to protect the Indians' interest and to prepare the Indians to take their place as independent qualified members of the modern body politic." *Id.* As such, the Court recognized that it is necessary to preserve from taxation all income derived directly from the allotment land, but it is not necessary to preserve reinvestment income. *Id.*

Yakama Nation's right to grow tobacco on its land free from taxation is not at issue in this case. The purposes underlying the allotment system are not undermined when an excise tax is imposed on manufactured tobacco products created by reinvesting unprocessed tobacco into manufactured tobacco products.

In its previous order, the Court referred to the portion of trust land tobacco used to manufacture King Mountain's finished tobacco products to illustrate the limited connection between the unprocessed tobacco that is derived directly from the land and the finished tobacco products. The proportion of trust land grown tobacco used in the finished tobacco products is not determinative. Whether the tobacco used to manufacture the tobacco products is constituted of fifty-five percent trust land grown tobacco or twenty percent trust land grown tobacco does not change the Court's analysis or conclusions. The excise tax at issue is on the manufactured product, not on the tobacco grown on trust land.

Yakama Nation also contends that King Mountain should be entitled to an allocated tax exemption for that portion of its finished tobacco products that were made using tobacco grown on Yakama trust land. The Court rejects Yakama Nation's theory of allocation for the same reasons that it rejects Yakama Nation's argument under *Capoeman*.[3] The United States is imposing an excise tax on the manufactured tobacco products. The excise tax is not imposed on the unprocessed tobacco, some portion of which may be derived directly from the land. Applying a theory of allocation in this case tied to a proportion of the materials that are derived directly from the land would result in an impermissible broadening of the *Capoeman* rule. *See Dillon*, 792 F.2d at 857.

Additionally, the Court notes an alternative basis for granting summary judgment on the Yakama Nation's claim under the General Allotment Act. The Ninth Circuit consistently has held that the tax exemption under *Capoeman* for income derived directly from trust land applies only to income derived from the allottee's own allotment. *United States v. Anderson*, 625 F.2d 910, 914 (9th Cir. 1980). For example, if an allottee earns income from cattle that graze on different allottees' trust land, such income would not be excludable from income tax. *Id.* at 912. The *Anderson* court noted that "*Capoeman*'s point was that if an Indian's

[3] The Court notes that Yakama Nation did not cite to a single case where a court applied an allocation theory to the *Capoeman* line of cases.

allotted land (or the income directly derived from it) was taxed, and the tax was not paid, the resulting tax lien on the land would make it impossible for him to receive the land free of 'incumbrance' at the end of the trust period." *Id.* at 914. In contrast, an allottee's failure to pay taxes would not give rise to a tax lien on a different beneficiary's land. *Id.* (quoting *Holt v. Commissioner*, 364 F.2d 38, 41 (8th Cir. 1966)).

In this case, Mr. Wheeler is the allottee, but King Mountain is the tax payer. The tax lien statute applies to the property of the "person liable to pay" the unpaid tax. 26 U.S.C. § 6321. Although the Court is aware that Mr. Wheeler's assets could be subject to a tax lien if King Mountain was found to be Mr. Wheeler's alter ego, *see G. M. Leasing Corp. v. United States*, 429 U.S. 338, 350-51 (1977), the record is devoid of any evidence that King Mountain is Mr. Wheeler's alter ego. Accordingly, any failure by King Mountain to pay tax would presumably result in a tax lien on any assets owned by King Mountain. As the trust property is held for the benefit of Mr. Wheeler, it is not King Mountain's asset, and presumably the property would not be subject to a tax lien. Therefore, under the reasoning of *Anderson*, the *Capoeman* exemption would not apply to taxes owed by King Mountain.

Therefore, the Court finds that there is no tax exemption under the General Allotment Act for the manufactured tobacco products.

Article II of the 1855 Yakama Treaty

The United States contends that King Mountain is not exempt from taxation for cigarettes and roll-your-own tobacco under Article II of the 1855 Yakama Treaty. Article II of the Treaty describes the land that was reserved to the Yakama Nation and states that the "tract shall be set apart and, so far as necessary, surveyed and marked out, *for the exclusive use and benefit* of said confederated tribes and bands of Indians . . . ." *Id.* (emphasis added). The Yakama Nation argues that the language "for exclusive use and benefit" evidences an intent by the United States to exclude certain activities, such as the manufacturing of tobacco products, from federal taxation.

As an initial matter, the parties dispute whether the Court is limited to the four corners of the Treaty when determining whether the treaty creates a tax exemption, or if the Court may also consider extrinsic information such as information about the parties' intent during treaty negotiations.

The Ninth Circuit addressed the scope of this inquiry in *Ramsey v. United States*, 302 F.3d 1074 (2002). Kip Ramsey was an enrolled member of the Yakama Nation. *Id.* at 1076. Mr. Ramsey owned a logging company and used diesel trucks exceeding 55,000 pounds of gross weight to haul his lumber. *Id.* Federal law imposed a tax on trucks that exceeded 55,000 pounds. *Id.* (citing 26

U.S.C. § 4481). Mr. Ramsey argued that the truck taxes were preempted by Article III of the Treaty. *Id.* Article III of the Treaty reads in pertinent part:

> [I]f necessary for the public convenience, roads may be run through the said reservation; and on the other hand, the right of way, with free access from the same to the nearest public highway, is secured to them; as also the right, in common with citizens of the United States, to travel upon all public highways.

Ramsey, 302 F.3d at 1076-77 (quoting 12 Stat. at 951-53).

Mr. Ramsey asserted that this language precluded the taxation of enrolled members of the Yakama Nation for using public highways. *Id.* at 1077. As part of his argument, Mr. Ramsey relied on the fact that the Ninth Circuit had held that the Treaty preempted Washington law that taxed heavy vehicles. *Cree v. Flores*, 157 F.3d 762, 771 (9th Cir. 1998). Mr. Ramsey asserted that the holding regarding Washington law applied equally to federal law. *Ramsey*, 302 F.3d at 1077.

The Ninth Circuit declined to extend its holding in *Cree* to preempt federal taxation. The Court drew a distinction between the appropriate canons of construction that applied to preemption of state law with those that applied to federal law. *Id.* at 1078. When state tax law is at issue, "a court determines if there is an express federal law prohibiting the tax." *Id.* at 1079. Any federal law arguably prohibiting the state tax "must be interpreted in the light most favorable to the Indians, and extrinsic evidence may be used to show the federal government's and Indians' intent." *Id.* However, where federal tax law is at issue,

a court must first determine whether the treaty or statute contains "express exemptive language." *Id.* at 1078. Only if the treaty or statute contains express exemptive language does the court proceed to determine whether that language could be reasonably construed to support exemption from taxation. *Id.* at 1079.

Because this case concerns federal tax law, the question before this Court is whether Article II contains express exemptive language.[4] In making this inquiry, the Court will not consider evidence extrinsic to the Treaty itself. *See id.* at 1078-79.

The Ninth Circuit construed Article II's "exclusive use and benefit" language in *Hoptowit v. Commissioner*, 709 F.2d 564 (9th Cir. 1983). In *Hoptowit*, an enrolled member of the Yakama Nation sought exemptions from federal income tax for income derived from a smoke shop operated on land within the Yakama Nation reservation and for per diem payments received for his work on the

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[4] Yakama Nation takes issue with the "express exemptive language" test and notes that the Third and Eighth Circuits apply a more permissive standard in examining exemptions from federal taxes flowing from Indian treaties. In those circuits, a treaty may be liberally construed to favor the Indians where it "contains language which can *reasonably be construed* to confer [tax] exemptions." *Lazore v. Commissioner*, 11 F.3d 1180, 1185 (3d Cir. 1993); *Holt v. Commissioner*, 364 F.2d 38, 40 (8th Cir. 1966) (emphasis added). However, this Court is bound to follow Ninth Circuit precedent on the matter.

Yakama Nation Tribal Council. *Id.* at 565. He asserted that Article II's "exclusive use and benefit" language was the source of the exemption. *Id.* at 565-66.

With regard to the per diem payments, the court noted that it previously had ruled that such payments were not exempt from income tax under the reasoning of *Capoeman*. *Id.* at 566 (citing *Comm'r v. Walker*, 326 F.2d 261 (9th Cir. 1964)). In reviewing the language of Article II, the court noted that language "gives to the Tribe the exclusive use and benefit *of the land* on which the reservation is located." *Id.* The court concluded that "any tax exemption created by this language is limited to the income derived directly from the land." *Id.* In short, because the per diem payments were not exempt under the reasoning of *Capoeman*, they were similarly not exempt under any exception contained in Article II. If the income at issue is not derived directly from the land for the purposes of *Capoeman*, then it does not arise from the "use and benefit of the land" for the purposes of Article II. *See id.*

This Court has found that there is no exemption from the federal excise tax on manufactured tobacco products under *Capoeman* because the manufactured tobacco products are not derived directly from the land. Under the reasoning of *Hoptowit*, the manufactured tobacco products are not exempt from taxation under Article II of the Yakama Treaty because the excise tax is on the manufacturing of the tobacco products and not on the "use and benefit of the land." *See id.*

Article III of the 1855 Yakama Treaty

Yakama Nation argues that, in addition to Article II of the 1855 Yakama Treaty, Article III of the Treaty prohibits application of the excise tax on King Mountain's tobacco products. The United States contends that Yakama Nation's reliance on Article III is precluded by the Ninth Circuit's decision in *Ramsey*, 302 F.3d 1074.

In *Ramsey*, the Ninth Circuit examined the following language in Article III of the Treaty:

> [I]f necessary for the public convenience, roads may be run throughout the said reservation; and on the other hand, the right of way, with free access from the same to the nearest public highway, is secured to them; as also the right in common with citizens of the United States, to travel upon all public highways.

Ramsey, 302 F.3d at 1076-77 (quoting 12 Stat. at 951-53). The plaintiff in *Ramsey*, a member of the Yakama Indian Tribe, contended that this language exempted him from a heavy vehicle tax and diesel fuel tax assessed by the Internal Revenue Service when Ramsey hauled lumber to off-reservation markets. *Id.* at 1076.

The Ninth Circuit rejected Ramsey's argument, finding that Article III contained no express exemptive language under the standard for exemption from federal taxation. *Id.* at 1080. The court noted that the only exemptive language in the Treaty "is the 'free access' language," which did not modify the Yakama's

right under the Treaty to travel upon the "public highways" any differently from other "citizens of the United States." *Id.* Therefore, Ramsey was subject to taxation on public highways to the same extent as non-Yakama peoples. *Id.*

In this case, the Court similarly holds that the "free access" language is not express exemptive language applicable to King Mountain's manufactured tobacco products. Article III provides "free access" on roads running throughout the reservation to the public highways. King Mountain is not being taxed for using on-reservation roads. It is being taxed for manufacturing tobacco products. Therefore, the only exemptive language in Article III, the "free access" language as recognized in *Ramsey*, does not apply to this case.

Yakama Nation's arguments to the contrary are not persuasive. Yakama Nation argues that *Ramsey* is distinguishable because it involved only a tax on off-reservation activities and not a tax on reservation-produced goods or activities. In support of this argument, Yakama Nation cites to *United States v. Smiskin*, 487 F.3d 1260, 1266-68 (9th Cir. 2007), where the Ninth Circuit relied on the tribe's understanding of the Treaty at the time that the treaty was drafted to hold that application of a state pre-notification requirement to Yakama tribe members violated Article III of the Yakama Treaty. However, *Smiksin* involved a state tax provision rather than a federal tax.

Within the context of federal taxation, express exemptive language must exist in the Treaty before the Court may examine extrinsic evidence, such as how the Yakama tribe members would have understood the Treaty at the time that it was ratified. *See Ramsey*, 302 F.3d at 1078-79. Because no express exemptive language can be found in Article III applying to the manufacture of tobacco products, the United States is entitled to summary judgment on this claim.

Section 4225 of the Internal Revenue Code

Yakama Nation claims that King Mountain's tobacco products are exempt from taxation under Section 4225 of the Internal Revenue Code, entitled "Exemption of articles manufactured or produced by Indians." Section 4225 provides that "[n]o tax shall be imposed *under this chapter* on any article of native Indian handicraft manufactured or produced by Indians on Indian reservations." (Emphasis added.)

Section 4225 is located within Chapter 32 of the Internal Revenue Code. Chapter 32 of the Code contains certain manufacturer excise taxes, including taxes on fishing rods, fishing poles, and bows and arrows. *See, e.g.*, 26 U.S.C. § 4161. Notably, the tobacco excise tax at issue in this case, 26 U.S.C. §5701, is not located within Chapter 32 but rather is found in Chapter 52 of the Code. Thus, Section 4225, on its face, does not apply to the tobacco excise tax.

CONCLUSION

The Court finds no exemption from federal excise taxes on manufactured tobacco products under the General Allotment Act because the finished tobacco products are not derived directly from the land. The Court finds no exemption under either Article II or III of the Yakama Treaty of 1855 because neither Article contains express exemptive language applicable to the manufacture of tobacco products. Finally, the Court finds no exemption under Section 4225 of the Internal Revenue Code because the exemption for Indian handicrafts on its face does not apply to excise taxes for the manufacture of tobacco products. Therefore, the United States is entitled to summary judgment on all claims.

Accordingly, **IT IS HEREBY ORDERED** that the United States' Motion for Summary Judgment, **ECF No. 134**, is **GRANTED**.

The District Court Executive is hereby directed to enter this Order, enter Judgment accordingly, provide copies to counsel, and to close this case.

DATED this 24th day of January 2014.

s/ Rosanna Malouf Peterson
ROSANNA MALOUF PETERSON
Chief United States District Court Judge

The Office of the President of the United States

(TREATY)

TREATY WITH THE OMAHA, 1854.

March 16, 1854.

Articles of agreement and convention made and concluded at the city of Washington this sixteenth day of March, one thousand eight hundred and fifty-four, by George W. Manypenny, as commissioner on the part of the United States, and the following-named chiefs of the Omaha tribe of Indians, viz: Shon-ga-ska, or Logan Fontenelle; E-sta-mah-za, or Joseph Le Flesche; Gra-tah-nah-je, or Standing Hawk; Gah-he-ga-gin-gah, or Little Chief; Ta-wah-gah-ha, or Village Maker; Wah-no-ke-ga, or Noise; So-da-nah-ze, or Yellow Smoke; they being thereto duly authorized by said tribe. [FNA][FNB]

ARTICLE 1

The Omaha Indians cede to the United States all their lands west of the Missouri River, and south of a line drawn due west from a point in the centre of the main channel of said Missouri River due east of where the Ayoway River disembogues out of the bluffs, to the western boundary of the Omaha country, and forever relinquish all right and title to the country south of said line: Provided, however, That if the country north of said due west line, which is reserved by the Omahas for their future home, should not on exploration prove to be a satisfactory and suitable location for said Indians, the President may, with the consent of said Indians, set apart and assign to them, within or outside of the ceded country, a residence suited for and acceptable to them. And for the purpose of determining at once and definitely, it is agreed that a delegation of said Indians, in company with their agent, shall, immediately after the ratification of this instrument, proceed to examine the country hereby reserved, and if it please the delegation, and the Indians in counsel express themselves satisfied, then it shall be deemed and taken for their future home; but if otherwise, on the fact being reported to the President, he is authorized to cause a new location, of suitable extent, to be made for the future home of said Indians, and which shall not be more in extent than three hundred thousand acres, and then and in that case, all of the country belonging to the said Indians north of said due west line, shall be and is hereby ceded to the United States by the said Indians, they to receive the same rate per acre for it, less the number of acres assigned in lieu of it for a home, as now paid for the land south of said line.[FNC][FND]

ARTICLE 2

The Omahas agree, that so soon after the United States shall make the necessary provision for fulfilling the stipulations of this instrument, as they can conveniently arrange their affairs, and not to exceed one year from its ratification, they will vacate the ceded country, and remove to the lands reserved herein by them, or to the other lands provided for in

lieu thereof, in the preceding article, as the case may be. [FNE]

ARTICLE 3

The Omahas relinquish to the United States all claims, for money or other thing, under former treaties, and likewise all claim[FNF] which they may have heretofore, at any land on the east side of the Missouri River: Provided, The Omahas shall still be entitled to and receive from the Government, the unpaid balance of the twenty-five thousand dollars appropriated for their use, by the act of thirtieth of August, 1851.

ARTICLE 4

In consideration of and payment for the country herein ceded, and the relinquishments herein made, the United States agree to pay to the Omaha Indians the several sums of money following, to wit;[FNG]

1st. Forty thousand dollars, per annum, for the term of three years, commencing on the first day of January, eighteen hundred and fifty-five.

2d. Thirty thousand dollars per annum, for the term of ten years, next succeeding the three years.

3d. Twenty thousand dollars per annum, for the term of fifteen years, next succeeding the ten years.

4th. Ten thousand dollars per annum, for the term of twelve years, next succeeding the fifteen years.

All which several sums of money shall be paid to the Omahas, or expended for their use and benefit, under the direction of the President of the United States, who may from time to time determine at his discretion, what proportion of the annual payments, in this article provided for, if any, shall be paid to them in money, and what proportion shall be applied to and expended, for their moral improvement and education; for such beneficial objects as in his judgment will be calculated to advance them in civilization; for buildings, opening farms, fencing, breaking land, providing stock, agricultural implements, seeds, &c.; for clothing, provisions, and merchandise; for iron, steel, arms, and ammunition; for mechanics, and tools; and for medical purposes. [FNH]

ARTICLE 5

In order to enable the said Indians to settle their affairs and to remove and subsist themselves for one year at their new home, and which they agree to do without further expense to the United States, and also to pay the expenses of the delegation who may be appointed to make the exploration provided for in article first, and to fence and break up two hundred acres of land at their new home, they shall receive from the United States, the further sum of forty-one thousand dollars, to be paid out and expended under the direction of the President, and in such manner as he shall approve. [FNI]

ARTICLE 6

The President may, from time to time, at his discretion, cause the whole or such portion of the land hereby reserved, as he may think proper, or of such other land as may be selected in lieu thereof, as provided for in article first, to be surveyed into lots, and to assign to such Indian or Indians of said tribe as are willing to avail of the privilege, and who will locate on the same as a permanent home, if a single person over twenty-one years of age, one-eighth of a section; to each family of two, one quarter section; to each family of three and not exceeding five, one half section; to each family of six and not exceeding ten, one section; and to each family over ten in number, one quarter section for every additional five members. And he may prescribe such rules and regulations as will insure to the family, in case of the death of the head thereof, the possession and enjoyment of such permanent home and the improvements thereon. And the President may, at any time, in his discretion, after such person or family has made a location on the land assigned for a permanent home, issue a patent to such person or family for such assigned land, conditioned that the tract shall not be aliened or leased for a longer term than two years; and shall be exempt from levy, sale, or forfeiture, which conditions shall continue in force, until a State constitution, embracing such lands within its boundaries, shall have been formed,[FNJ] and the legislature of the State shall remove the restrictions. And if any such person or family shall at any time neglect or refuse to occupy and till a portion of the lands assigned and on which they have located, or shall rove from place to place, the President may, if the patent shall have been issued, cancel the assignment, and may also withhold from such person or family, their proportion of the annuities or other moneys due them, until they shall have returned to such permanent home, and resumed the pursuits of industry; and in default of their return the tract may be declared abandoned, and thereafter assigned to some other person or family of such tribe, or disposed of as is provided for the disposition of the excess of said land. And the residue of the land hereby reserved, or of that which may be selected in lieu thereof, after all of the Indian persons or families shall have had assigned to them permanent homes, may be sold for their benefit, under such laws, rules or regulations, as may hereafter be prescribed by the Congress or President of the United States. No State legislature shall remove the restrictions herein provided for, without the consent of Congress.

ARTICLE 7

Should the Omahas determine to make their permanent home north of the due west line named in the first article, the United States agree to protect them from the Sioux and all other hostile tribes, as long as the President may deem such protection necessary; and if other lands be assigned them, the same protection is guaranteed.

ARTICLE 8

The United States agree to erect for the Omahas, at their new home, a grist and saw mill, and keep the same in repair, and provide a miller for ten years; also to erect a good blacksmith shop, supply the same with tools, and keep it in repair for ten years; and provide a good blacksmith for a like period; and to employ an experienced farmer for the term of ten years, to instruct the Indians in agriculture. [FNK][FNL][FNM]

ARTICLE 9

The annuities of the Indians shall not be taken to pay the debts of individuals. [FNN]

ARTICLE 10

The Omahas acknowledge their dependence on the Government of the United States, and promise to be friendly with all the citizens thereof, and pledge themselves to commit no depredations on the property of such citizens. And should any one or more of them violate this pledge, and the fact be satisfactorily proven before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the Government out of their annuities. Nor will they make war on any other tribe, except in self-defence, but will submit all matters of difference between them and other Indians to the Government of the United States, or its agent, for decision, and abide thereby. And if any of the said Omahas commit any depredations on any other Indians, the same rule shall prevail as that prescribed in this article in cases of depredations against citizens.[FNO][FNP]

ARTICLE 11

The Omahas acknowledge themselves indebted to Lewis Sounsosee, (a half-breed,) for services, the sum of one thousand dollars, which debt they have not been able to pay, and the United States agree to pay the same. [FNQ]

ARTICLE 12

The Omahas are desirous to exclude from their country the use of ardent spirits, and to prevent their people from drinking the same, and therefore it is provided that any Omaha who is guilty of bringing liquor into their country, or who drinks liquor, may have his or her proportion of the annuities withheld from him or her for such time as the President may determine. [FNR]

ARTICLE 13

The board of foreign missions of the Presbyterian Church have on the lands of the Omahas a manual-labor boarding-school, for the education of the Omaha, Ottoe, and other Indian youth, which is now in successful operation, and as it will be some time before[FNS] the necessary buildings can be erected on the reservation, and (it is) desirable that the school should not be suspended, it is agreed that the said board shall have four adjoining quarter sections of land, so as to include as near as may be all the improvements heretofore made by them; and the President is authorized to issue to the proper authority of said board, a patent in fee-simple for such quarter sections.

ARTICLE 14

The Omahas agree that all the necessary roads, highways, and railroads, which may be constructed as the country improves, and the lines of which may run through such tract as may be reserved for their permanent home, shall have a right of way through the reservation, a just compensation being paid therefor in money.

ARTICLE 15

This treaty shall be obligatory on the contracting parties as soon as the same shall be ratified by the President and

Senate of the United States. [FNT]

In testimony whereof, the said George W. Manypenny, commissioner as aforesaid, and the undersigned chiefs, of the Omaha tribe of Indians, have hereunto set their hands and seals, at the place and on the day and year herein before written.

George W. Manypenny, Comissioner. (L.S.)

Shon-ga-ska, or Logan Fontenelle, his x mark. (L.S.)

E-sta-mah-za, or Joseph Le Flesche, his x mark. (L.S.)

Gra-tah-mah-je, or Standing Hawk, his x mark. (L.S.)

Gah-he-ga-gin-gah, or Little Chief, his x mark. (L.S.)

Tah-wah-gah-ha, or Village Maker, his x mark. (L.S.)

Wah-no-ke-ga, or Noise, his x mark. (L.S.)

So-da-nah-ze, or Yellow Smoke, his x mark. (L.S.)

Executed in the presence of us:

James M. Gatewood, Indian agent.

James Goszler.

Charles Calvert.

James D. Kerr.

Henry Beard.

Alfred Chapman.

Lewis saunsoci, interpreter.

FNA Ratified Apr. 17, 1854.

FNB Proclaimed June 21, 1854.

FNC Cession of lands to the United States.

FND Reserve for the Indians.

FNE Removal of the Indians.

FNF Relinquishment of former claims.

FNG Payment to the Indians.

FNH How made.

FNI Further payment.

FNJ Disposition of the lands reserved.

FNK Protection from hostile tribes.

FNL Grist and sawmill.

FNM Blacksmith.

FNN Annuities not to be taken for debts.

FNO Conduct of the Indians.

FNP Depredations.

FNQ Payment to Lewis Sounsosee.

FNR Provision against introduction of ardent spirits.

FNS Grant to the missions of the Presbyterian Church.

FNT Construction of roads.

1854 WL 9493 (Trty.)
END OF DOCUMENT

The Office of the President of the United States

(TREATY)

TREATY WITH THE YAKIMA, 1855.

June 9, 1855.

Articles of agreement and convention made and concluded at the treaty-ground, Camp Stevens, Walla-Walla Valley, this ninth day of June, in the year one thousand eight hundred and fifty-five, by and between Isaac I. Stevens, governor and superintendent of Indian affairs for the Territory of Washington, on the part of the United States, and the undersigned head chiefs, chiefs, head-men, and delegates of the Yakama, Palouse, Pisquouse, Wenatshapam, Klikatat, Klinquit, Kow-was-say-ee, Li-ay-was, Skin-pah, Wish-ham, Shyiks, Oche-chotes, Kah-milt-pah, and Se-ap-cat, confederated tribes and bands of Indians, occupying lands hereinafter bounded and described and lying in Washington Territory, who for the purposes of this treaty are to be considered as one nation, under the name of "Yakama," with Kamaiakun as its head chief, on behalf of and acting for said tribes and bands, and being duly authorized thereto by them. [FNA][FNB]

ARTICLE 1

The aforesaid confederated tribes and bands of Indians hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the lands and country occupied and claimed by them, and bounded and described as follows, to wit: [FNC]

Commencing at Mount Ranier, thence northerly along the main ridge of the Cascade Mountains to the point where the northern tributaries of Lake Che-lan and the southern tributaries of the Methow River have their rise; thence southeasterly on the divide between the waters of Lake Che-lan and the Methow River to the Columbia River; thence, crossing the Columbia on a true east course, to a point whose longitude is one hundred and nineteen degrees and ten minutes, (119 degrees 10',) which two latter lines separate the above confederated tribes and bands from the Oakinakane tribe of Indians; thence in a true south course to the forty-seventh (47 degrees) parallel of latitude; thence east on said parallel to the main Palouse River, which two latter lines of boundary separate the above confederated tribes and bands from the Spokanes; thence down the Palouse River to its junction with the Moh-hah-ne-she, or southern tributary of the same; thence in a southesterly direction, to the Snake River, at the mouth of the Tucannon River, separating the above confederated tribes from the Nez Perce tribe of Indians; thence down the Snake River to its junction with the Columbia River; thence up the Columbia River to the "White Banks" below the Priest's Rapids; thence westerly to a lake called "LaLac;" thence southerly to a point on the Yakama River called Toh-mah-luke; thence, in a southwesterly direction, to the Columbia River, at the western extremity of the "Big Island," between the mouths of the Umatilla River and Butler Creek; all which latter boundaries[FND] separate the above confederated tribes and bands from the Walla-Walla, Cayuse, and Umatilla tribes and bands of Indians; thence down the Columbia River to midway between the mouths of White Salmon and Wind Rivers; thence along the divide between said rivers to the main ridge of the Cascade Mountains; and thence along said ridge to the place of beginning.

ARTICLE 2

There is, however, reserved, from the lands above ceded for the use and occupation of the aforesaid confederated tribes and bands of Indians, the tract of land included within the following boundaries, to wit: Commencing on the Yakama River, at the mouth of the Attah-nam River; thence westerly along said Attah-nam River to the forks; thence along the southern tributary to the Cascade Mountains; thence southerly along the main ridge of said mountains, passing south and east of Mount Adams, to the spur whence flows the waters of the Klickatat and Pisco Rivers; thence down said spur to the divide between the waters of said rivers; thence along said divide to the divide separating the waters of the Satass River from those flowing into the Columbia River; thence along said divide to the main Yakama, eight miles below the mouth of the Satass River; and thence up the Yakama River to the place of beginning. [FNE][FNF]

All which tract shall be set apart and, so far as necessary, surveyed and marked out, for the exclusive use and benefit of said confederated tribes and bands of Indians, as an Indian reservation; nor shall any white man, excepting those in the employment of the Indian Department, be permitted to reside upon the said reservation without permission of the tribe and the superintendent and agent. And the said confederated tribes and bands agree to remove to, and settle upon, the same, within one year after the ratification of this treaty. In the mean time it shall be lawful for them to reside upon any ground not in the actual claim and occupation of citizens of the United States; and upon any ground claimed or occupied, if with the permission of the owner or claimant. [FNG] [FNH]

Guaranteeing, however, the right to all citizens of the United States to enter upon and occupy as settlers any lands not actually occupied and cultivated by said Indians at this time, and not included in the reservation above named.

And provided, That any substantial improvements heretofore made by any Indian, such as fields enclosed and cultivated, and houses erected upon the lands hereby ceded, and which he may be compelled to abandon in consequence of this treaty, shall be valued, under the direction of the President of the United States, and payment made therefor in money; or improvements of an equal value made for said Indian upon the reservation. And no Indian will be required to abandon the improvements aforesaid, now occupied by him, until their value in money, or improvements of an equal value shall be furnished him as aforesaid. [FNI]

ARTICLE 3

And provided, That, if necessary for the public convenience, roads may be run through the said reservation; and on the other hand, the right of way, with free access from the same to the nearest public highway, is secured to them; as also the right, in common with citizens of the United States, to travel upon all public highways. [FNJ]

The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with the citizens of the Territory, and of erecting temporary buildings for curing them; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land. [FNK]

ARTICLE 4

In consideration of the above cession, the United States agree to pay to the said confederated tribes and bands of Indians, in addition to the goods and provisions distributed to them at the time of signing this treaty, the sum of two hundred thousand dollars, in the following manner, that is to say: Sixty thousand dollars, to be expended under the direction of the President of the United States, the first year after the ratification of this treaty, in provid-

ing for their removal to the reservation, breaking up and fencing farms, building houses for them, supplying them with provisions and a suitable outfit, and for such other objects as he may deem necessary, and the remainder in annuities, as follows: For the first five years after the ratification of the treaty, ten thousand dollars each year, commencing September first, 1856; for the next five years, eight thousand dollars each year; for the next five years, six thousand dollars per year; and for the next five years, four thousand dollars per year. [FNL]

All which sums of money shall be applied to the use and benefit of said Indians, under the direction of the President of the United States, who may from time to time determine, at his discretion, upon what beneficial objects to expend the same for them. And the superintendent of Indian affairs, or other proper officer, shall each year inform the President of the wishes of the Indians in relation thereto. [FNM]

ARTICLE 5

The United States further agree to establish at suitable points within said reservation, within one year after the ratification hereof, two schools, erecting the necessary buildings, keeping them in repair, and providing them with furniture, books, and stationery, one of which shall be an agricultural and industrial school, to be located at the agency, and to be free to the children of the said confederated tribes and bands of Indians, and to employ one superintendent of teaching and two teachers; to build two blacksmith's shops, to one of which shall be attached a tin-shop, and to the other a gunsmith's shop; one carpenter's shop, one wagon and plough maker's shop, and to keep the same in repair and furnished with the necessary tools; to employ one superintendent of farming and two farmers, two blacksmiths, one tinner, one gunsmith, one carpenter, one wagon and plough maker, for the instruction of the Indians in trades and to assist them in the same; to erect one saw-mill and one flouring-mill, keeping the same in repair and furnished with the necessary tools and fixtures; to erect a hospital, keeping the same in repair and provided with the necessary medicines and furniture, and to employ a physician; and to erect, keep in repair, and provided with the necessary furniture, the building required for the accommodation of the said employees. The said buildings and establishments to be maintained and kept in repair as aforesaid, and the employees to be kept in service for the period of twenty years. [FNN][FNO][FNP][FNQ]

And in view of the fact that the head chief of the said confederated tribes and bands of Indians is expected, and will be called upon to perform many services of a public character, occupying much of his time, the United States further agree to pay to the said confederated tribes and bands of Indians five hundred dollars per year, for the term of twenty years after the ratification hereof, as a salary for such person as the said confederated tribes and bands of Indians may select to be their head chief, to build for him at a suitable point on the reservation a comfortable house, and properly furnish the same, and to plough and fence ten acres of land. The said salary to be paid to, and the said house to be occupied by, such head chief so long as he may continue to hold that office. [FNR]

And it is distinctly understood and agreed that at the time of the conclusion of this treaty Kamaiakun is the duly elected and authorized[FNS] head chief of the confederated tribes and bands aforesaid, styled the Yakama Nation, and is recognized as such by them and by the commissioners on the part of the United States holding this treaty; and all the expenditures and expenses contemplated in this article of this treaty shall be defrayed by the United States, and shall not be deducted from the annuities agreed to be paid to said confederated tribes and band of Indians. Nor shall the cost of transporting the goods for the annuity payments be a charge upon the annuities, but shall be defrayed by the United States.

ARTICLE 6

The President may, from time to time, at his discretion, cause the whole or such portions of such reservation as he may think proper, to be surveyed into lots, and assign the same to such individuals or families of the said confederated tribes and bands of Indians as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable. [FNT]

ARTICLE 7

The annuities of the aforesaid confederated tribes and bands of Indians shall not be taken to pay the debts of individuals.[FNU]

ARTICLE 8

The aforesaid confederated tribes and bands of Indians acknowledge their dependence upon the Government of the United States, and promise to be friendly with all citizens thereof, and pledge themselves to commit no depredations upon the property of such citizens.[FNV]

And should any one or more of them violate this pledge, and the fact be satisfactorily proved before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the Government out of the annuities. [FNW]

Nor will they make war upon any other tribe, except in self-defence, but will submit all matters of difference between them and other Indians to the Government of the United States or its agent for decision, and abide thereby. And if any of the said Indians commit depredations on any other Indians within the Territory of Washington or Oregon, the same rule shall prevail as that provided in this article in case of depredations against citizens. And the said confederated tribes and bands of Indians agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial. [FNX][FNY]

ARTICLE 9

The said confederated tribes and bands of Indians desire to exclude from their reservation the use of ardent spirits, and to prevent their people from drinking the same, and, therefore, it is provided that any Indian belonging to said confederated tribes and bands of Indians, who is guilty of bringing liquor into said reservation, or who drinks liquor, may have his or her annuities withheld from him or her for such time as the President may determine. [FNZ]

ARTICLE 10

And provided, That there is also reserved and set apart from the lands ceded by this treaty, for the use and benefit of the aforesaid confederated tribes and bands, a tract of land not exceeding in quantity one township of six miles square, situated at the forks of the Pisquouse or Wenatshapam River, and known as the “Wenatshapam Fishery,” which said reservation shall be surveyed and marked out whenever the President may direct, and be subject to the same provisions and restrictions as other Indian reservations. [FNAA]

ARTICLE 11

This treaty shall be obligatory upon the contracting parties as soon as the same shall be ratified by the President and Senate of the United States. [FNBB]

In testimony whereof, the said Isaac I. Stevens, governor and superintendent of Indian affairs for the Territory of Washington, and the undersigned head chief, chiefs, headmen, and delegates of the aforesaid confederated tribes and bands of Indians, have hereunto set their hands and seals, at the place and on the day and year hereinbefore written.

ISAAC I. STEVENS,

Governor and Superintendent. (L.S.)

Kamaiakun, his x mark. (L.S.)

Skloom, his x mark. (L.S.)

Owhi, his x mark. (L.S.)

Te-cole-kun, his x mark. (L.S.)

La-hoom, his x mark. (L.S.)

Me-ni-nock, his x mark. (L.S.)

Elit Palmer, his x mark. (L.S.)

Wish-och-kmpits, his x mark. (L.S.)

Koo-lat-toose, his x mark. (L.S.)

Shee-ah-cotte, his x mark. (L.S.)

Tuck-quille, his x mark. (L.S.)

Ka-loo-as, his x mark. (L.S.)

Scha-noo-a, his x mark. (L.S.)

Sla-kish, his x mark. (L.S.)

Signed and sealed in the presence of - -

James Doty, secretary of treaties,

Mie. Cles. Pandosy, O. M. T.,

Wm. C. McKay,

W. H. Tappan, sub Indian agent, W. T.,

C. Chirouse, O. M. T.,

Patrick McKenzie, interpreter,

A. D. Pamburn, interpreter,

Joel Palmer, superintendent Indian affairs, O. T.,

W. D. Biglow,

A. D. Pamburn, interpreter.

FNA Ratified Mar. 8, 1859.

FNB Proclaimed Apr. 18, 1859.

FNC Cession of lands to the United States.

FND Boundaries.

FNE Reservation.

FNF Boundaries.

FNG Reservations to be set apart, etc., and Indians to settle thereon.

FNH Whites not to reside thereon.

FNI Improvements on ceded lands.

FNJ Roads may be made.

FNK Privileges secured to Indians.

FNL Payments by the United States.

FNM How to be applied.

FNN United States to establish schools.

FNO Mechanics' shops.

FNP Sawmill and flouring mill.

FNQ Hospital.

FNR Salary to head chief; house, etc.

FNS Kamaiakun is the head chief.

FNT Reservation may be surveyed into lots and assigned to individuals or families.

FNU Annuities not to pay for debts of individuals.

FNV Tribes to preserve friendly relations.

FNW To pay for depredations.

FNX Not to make war but in self-defense.

FNY Tosurrender offenders.

FNZ Annuities may be withheld from those who drink ardent spirits.

FNAA Wenatshapam fishery reserved.

FNBB When treaty to take effect.

1855 WL 10420 (Trty.)
END OF DOCUMENT

1855 WL 10417(Trty.)
(TREATY)

TREATY WITH THE QUINAIELT, ETC., 1855.

July 1, 1855.

Articles of agreement and convention made and concluded by and between Isaac I. Stevens, governor and superintendent of Indian affairs of the Territory of Washington, on the part of the United States, and the undersigned chiefs, headmen, and delegates of the different tribes and bands of the Qui-nai-elt and Quil-leh-ute Indians, on the part of said tribes and bands, and duly authorized thereto by them. [FNA][FNB][FNC]

ARTICLE 1

The said tribes and bands hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the lands and country occupied by them, bounded and described as follows: Commencing at a point on the Pacific coast, which is the southwest corner of the lands lately ceded by the Makah tribe of Indians to the United States, and running easterly with and along the southern boundary of the said Makah tribe to the middle of the coast range of mountains; thence southerly with said range of mountains to their intersection with the dividing ridge between the chehalis and Quiniatl Rivers; thence westerly with said ridge to the Pacific coast; thence northerly along said coast to the place of beginning. [FND][FNE]

ARTICLE 2

There shall, however, be reserved, for the use and occupation of the tribes and bands aforesaid, a tract or tracts of land sufficient for their wants within the Territory of Washington, to be selected by the President of the United States, and hereafter surveyed or located and set apart for their exclusive use, and no white man shall be permitted to reside thereon without permission of the tribe and of the superintendent of Indian affairs or Indian agent. And the said tribes and bands agree to remove to and settle upon the same within one year after the ratification of this treaty, or sooner if the means are furnished them. In the meantime it shall be lawful for them to reside upon any lands not in the actual claim and occupation of citizens of the United States, and upon any lands claimed or occupied, if with the permission of the owner or claimant. If necessary for the public convenience, roads may be run through said reservation, on compensation being made for any damage sustained thereby. [FNF][FNG][FNH][FNI]

ARTICLE 3

The right of taking fish at all usual and accustomed grounds and stations is secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing the same; together with the privilege of hunting, gathering roots and berries, and pasturing their horses on all open and unclaimed lands. Provided, however, That they shall not take[FNJ] shell-fish from any beds staked or cultivated by citizens; and provided, also, that they shall alter all stallions not intended for breeding, and keep up and confine the stallions themselves.

ARTICLE 4

In consideration of the above cession, the United States agree to pay to the said tribes and bands the sum of twenty-five thousand dollars, in the following manner, that is to say: For the first year after the ratification hereof, two thousand five hundred dollars; for the next two years, two thousand dollars each year; for the next three years, one thousand six hundred dollars each year; for the next four years, one thousand three hundred dollars each year; for the next five years, one thousand dollars each year; and for the next five years, seven hundred dollars each year. All of which sums

of money shall be applied to the use and benefit of the said Indians under the directions of the President of the United States, who may from time to time, determine at his discretion upon what beneficial objects to expend the same; and the superintendent of Indian affairs, or other proper officer, shall each year inform the President of the wishes of said Indians in respect thereto. [FNK][FNL]

ARTICLE 5

To enable the said Indians to remove to and settle upon such reservation as may be selected for them by the President, and to clear, fence, and break up a sufficient quantity of land for cultivation, the United States further agree to pay the sum of two thousand five hundred dollars, to be laid out and expended under the direction of the President, and in such manner as he shall approve. [FNM]

ARTICLE 6

The President may hereafter, when in his opinion the interests of the Territory shall require, and the welfare of the said Indians be promoted by it, remove them from said reservation or reservations to such other suitable place or places within said Territory as he may deem fit, on renumerating them for their improvements and the expenses of their removal, or may consolidate them with other friendly tribes or bands, in which latter case the annuities, payable to the consolidated tribes respectively, shall also be consolidated; and he may further, at his discretion, cause the whole or any portion of the lands to be reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable. Any substantial improvements heretofore made by any Indians, and which they shall be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President, and payment made accordingly therefor. [FNN][FNO]

ARTICLE 7

The annuities of the aforesaid tribes and bands shall not be taken to pay the debts of individuals. [FNP]

ARTICLE 8

The said tribes and bands acknowledge their dependence on the Government of the United States, and promise to be friendly with all citizens thereof, and pledge themselves to commit no depredations on the property of such citizens; and should any one or more of them violate this pledge, and the fact be satisfactorily proven before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the Government out of their annuities. Nor will they make war on any other tribe except in self-defence, but will submit all matters of difference between them and other Indians to the Government of the United States, or its agent, for decision and abide thereby; and if any of the said Indians commit any depredations on any other Indians within the Territory, the same rule shall prevail as is prescribed in this article in case of depredations against citizens. And the said tribes and bands agree not to shelter or conceal offenders against the laws of the United States, but to deliver them to the authorities for trial. [FNQ][FNR][FNS][FNT]

ARTICLE 9

The above tribes and bands are desirous to exclude from their reservations the use of ardent spirits, and to prevent their people from drinking the same, and therefore it is provided that any Indian belonging to said tribes who is guilty of bringing liquor into said reservations, or who drinks liquor, may have his or her proportion of the annuities withheld from him or her, for such time as the President may determine. [FNU]

ARTICLE 10

The United States further agree to establish at the general agency for the district of Puget Sound, within one year from the ratification hereof, and to support for a period of twenty years, an agricultural and industrial school, to be free to the children of the said tribes and bands in common with those of the other tribes of said district, and to provide the said school with a suitable instructor or instructors, and also to provide a smithy and carpenter's shop, and furnish them with the necessary tools, and to employ a blacksmith, carpenter, and farmer for a term of twenty years, to instruct the Indians in their respective occupations. And the United States further agree to employ a physician to reside at the said central agency, who shall furnish medicine and advice to their sick, and shall vaccinate them; the expenses of the said school, shops, employees, and medical attendance to be defrayed by the United States, and not deducted from their annuities. [FNV][FNW]

ARTICLE 11

The said tribes and bands agree to free all slaves now held by them, and not to purchase or acquire others hereafter. [FNX]

ARTICLE 12

The said tribes and bands finally agree not to trade at Vancouver's Island or elsewhere out of the dominions of the United States, nor shall foreign Indians be permitted to reside on their reservations without consent of the superintendent or agent. [FNY][FNZ]

ARTICLE 13

This treaty shall be obligatory on the contracting parties as soon as the same shall be ratified by the President and Senate of the United States. [FNAA]

In testimony whereof, the said Isaac I. Stevens, governor and superintendent of Indian affairs, and the undersigned chiefs, headmen, and delegates of the aforesaid tribes and bands of Indians, have hereunto set their hands and seals, at Olympia, January 25, 1856, and on the Qui-nai-elt River, July 1, 1855.

Isaac I. Stevens, Governor and Sup't of Indian Affairs.

Tah-ho-lah, Head Chief Qui-nite-'l tribe, his x mark. (L.S.)

How-yat'l, Head Chief Quil-ley-yute tribe, his x mark. (L.S.)

Kal-lape, Sub-chief Quil-ley-hutes, his x mark. (L.S.)

Tah-ah-ha-wht'l, Sub-chief Quil-ley-hutes, his x mark. (L.S.)

Lay-le-whash-er, his x mark. (L.S.)

E-mah-lah-cup, his x mark. (L.S.)

Ash-chak-a-wick, his x mark. (L.S.)

Ay-a-quan, his x mark. (L.S.)

Yats-see-o-kop, his x mark. (L.S.)

Karts-so-pe-ah, his x mark. (L.S.)

Quat-a-de-tot'l, his x mark. (L.S.)

Now-ah-ism, his x mark. (L.S.)

Cla-kish-ka, his x mark. (L.S.)

Kler-way-sr-hun, his x mark. (L.S.)

Quar-ter-heit'l, his x mark. (L.S.)

Hay-nee-si-oos, his x mark. (L.S.)

Hoo-e-yas'lsee, his x mark. (L.S.)

Quilt-le-se-mah, his x mark. (L.S.)

Qua-lats-kaim, his x mark. (L.S.)

Yah-le-hum, his x mark. (L.S.)

Je-tah-let-shin, his x mark. (L.S.)

Ma-ta-a-ha, his x mark. (L.S.)

Wah-kee-nah, Sub-chief Qui-nite'l tribe, his x mark. (L.S.)

Yer-ay-let'l, Sub-chief, his x mark. (L.S.)

Silley-mark'l, his x mark. (L.S.)

Cher-lark-tin, his x mark. (L.S.)

How-yat-'l, his x mark. (L.S.)

Kne-she-guartsh, Sub-chief, his x mark. (L.S.)

Klay-sumetz, his x mark. (L.S.)

Kape, his x mark. (L.S.)

Hay-et-lite-'l, or John, his x mark. (L.S.)

Executed in the presence of us; the words "or tracts," in the II. article, and "next," in the IV. article, being interlined prior to execution.

M. T. Simmons, special Indian agent.

H. A. Goldsborough, commissary, &c.

B. F. Shaw, interpreter.

James Tilton, surveyor-general Washington Territory.

F. Kennedy.

J. Y. Miller.

H. D. Cock.

A

Jan. 25, 1856.
FNB Ratified Mar. 8, 1859.
FNC Proclaimed, Apr. 11, 1859.
FND Surrender of lands to the United States.
FNE Boundaries.
FNF Reservation within the Territory of Washington.
FNG Whites not to reside thereon, unless, etc.
FNH Indians agree to move and settle there.
FNI Roads may be made.
FNJ Rights and privileges secured to the Indians.
FNK Payment by the United States.
FNL How to be applied.
FNM Appropriation for removal, for clearing and fencing lands, etc.
FNN Indians may be removed from the reservation, etc.
FNO Tribe annuities may be consolidated.
FNP Annuities of tribes not to pay debts of individuals.
FNQ Tribes to preserve friendly relations, etc.
FNR To pay for depredations.
FNS Not to make war, except, etc.
FNT To surrender offenders.
FNU Annuities to be withheld from those drinking, etc., ardent spirits.
FNV United States to establish agricultural schools, etc.
FNW To employ mechanics, etc., a physician, etc.
FNX The tribes are to free all slaves and not to acquire others.
FNY Not to trade out of the United States.
FNZ Foreign Indians not to reside on reservation.
FNAA When treaty to take effect.

End of Document

TITLE 11 - BANKRUPTCY
CHAPTER 5 - CREDITORS, THE DEBTOR, AND THE ESTATE
SUBCHAPTER II - DEBTORS DUTIES AND BENEFITS

§ 523. Exceptions to discharge

(a) A discharge under section 727, 1141, 1228 (a), 1228 (b), or 1328 (b) of this title does not discharge an individual debtor from any debt—

(1) for a tax or a customs duty—

(A) of the kind and for the periods specified in section 507 (a)(3) or 507 (a)(8) of this title, whether or not a claim for such tax was filed or allowed;

(B) with respect to which a return, or equivalent report or notice, if required—

(i) was not filed or given; or

(ii) was filed or given after the date on which such return, report, or notice was last due, under applicable law or under any extension, and after two years before the date of the filing of the petition; or

(C) with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax;

(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—

(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;

(B) use of a statement in writing—

(i) that is materially false;

(ii) respecting the debtor's or an insider's financial condition;

(iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and

(iv) that the debtor caused to be made or published with intent to deceive; or

(C) **(i)** for purposes of subparagraph (A)—

(I) consumer debts owed to a single creditor and aggregating more than $500 for luxury goods or services incurred by an individual debtor on or within 90 days before the order for relief under this title are presumed to be nondischargeable; and

(II) cash advances aggregating more than $750 that are extensions of consumer credit under an open end credit plan obtained by an individual debtor on or within 70 days before the order for relief under this title, are presumed to be nondischargeable; and

(ii) for purposes of this subparagraph—

(I) the terms "consumer", "credit", and "open end credit plan" have the same meanings as in section 103 of the Truth in Lending Act; and

(II) the term "luxury goods or services" does not include goods or services reasonably necessary for the support or maintenance of the debtor or a dependent of the debtor;

(3) neither listed nor scheduled under section 521 (a)(1) of this title, with the name, if known to the debtor, of the creditor to whom such debt is owed, in time to permit—

(A) if such debt is not of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim, unless such creditor had notice or actual knowledge of the case in time for such timely filing; or

(B) if such debt is of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim and timely request for a determination of dischargeability of such debt under one of such paragraphs, unless such creditor had notice or actual knowledge of the case in time for such timely filing and request;

(4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny;

(5) for a domestic support obligation;

(6) for willful and malicious injury by the debtor to another entity or to the property of another entity;

(7) to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss, other than a tax penalty—

(A) relating to a tax of a kind not specified in paragraph (1) of this subsection; or

(B) imposed with respect to a transaction or event that occurred before three years before the date of the filing of the petition;

(8) unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor's dependents, for—

(A) **(i)** an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution; or

(ii) an obligation to repay funds received as an educational benefit, scholarship, or stipend; or

(B) any other educational loan that is a qualified education loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986, incurred by a debtor who is an individual;

(9) for death or personal injury caused by the debtor's operation of a motor vehicle, vessel, or aircraft if such operation was unlawful because the debtor was intoxicated from using alcohol, a drug, or another substance;

(10) that was or could have been listed or scheduled by the debtor in a prior case concerning the debtor under this title or under the Bankruptcy Act in which the debtor waived discharge, or was denied a discharge under section 727 (a)(2), (3), (4), (5), (6), or (7) of this title, or under section 14c(1), (2), (3), (4), (6), or (7) of such Act;

(11) provided in any final judgment, unreviewable order, or consent order or decree entered in any court of the United States or of any State, issued by a Federal depository institutions regulatory agency, or contained in any settlement agreement entered into by the debtor, arising from any act of fraud or defalcation while acting in a fiduciary capacity committed with respect to any depository institution or insured credit union;

(12) for malicious or reckless failure to fulfill any commitment by the debtor to a Federal depository institutions regulatory agency to maintain the capital of an insured depository institution, except that this paragraph shall not extend any such commitment which would otherwise be terminated due to any act of such agency;

(13) for any payment of an order of restitution issued under title 18, United States Code;

(14) incurred to pay a tax to the United States that would be nondischargeable pursuant to paragraph (1);

(14A) incurred to pay a tax to a governmental unit, other than the United States, that would be nondischargeable under paragraph (1);

(14B) incurred to pay fines or penalties imposed under Federal election law;

(15) to a spouse, former spouse, or child of the debtor and not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, or a determination made in accordance with State or territorial law by a governmental unit;

(16) for a fee or assessment that becomes due and payable after the order for relief to a membership association with respect to the debtor's interest in a unit that has condominium ownership, in a share of a cooperative corporation, or a lot in a homeowners association, for as long as the debtor or the trustee has a legal, equitable, or possessory ownership interest in such unit, such corporation, or such lot, but nothing in this paragraph shall except from discharge the debt of a debtor for a membership association fee or assessment for a period arising before entry of the order for relief in a pending or subsequent bankruptcy case;

(17) for a fee imposed on a prisoner by any court for the filing of a case, motion, complaint, or appeal, or for other costs and expenses assessed with respect to such filing, regardless of an assertion of poverty by the debtor under subsection (b) or (f)(2) of section 1915 of title 28 (or a similar non-Federal law), or the debtor's status as a prisoner, as defined in section 1915 (h) of title 28 (or a similar non-Federal law);

(18) owed to a pension, profit-sharing, stock bonus, or other plan established under section 401, 403, 408, 408A, 414, 457, or 501(c) of the Internal Revenue Code of 1986, under—

(A) a loan permitted under section 408(b)(1) of the Employee Retirement Income Security Act of 1974, or subject to section 72(p) of the Internal Revenue Code of 1986; or

(B) a loan from a thrift savings plan permitted under subchapter III of chapter 84 of title 5, that satisfies the requirements of section 8433(g) of such title;

but nothing in this paragraph may be construed to provide that any loan made under a governmental plan under section 414 (d), or a contract or account under section 403(b), of the Internal Revenue Code of 1986 constitutes a claim or a debt under this title; or

(19) that—

(A) is for—

(i) the violation of any of the Federal securities laws (as that term is defined in section 3(a)(47) of the Securities Exchange Act of 1934), any of the State securities laws, or any regulation or order issued under such Federal or State securities laws; or

(ii) common law fraud, deceit, or manipulation in connection with the purchase or sale of any security; and

(B) results, before, on, or after the date on which the petition was filed, from—

(i) any judgment, order, consent order, or decree entered in any Federal or State judicial or administrative proceeding;

(ii) any settlement agreement entered into by the debtor; or

(iii) any court or administrative order for any damages, fine, penalty, citation, restitutionary payment, disgorgement payment, attorney fee, cost, or other payment owed by the debtor.

For purposes of this subsection, the term "return" means a return that satisfies the requirements of applicable nonbankruptcy law (including applicable filing requirements). Such term includes a return prepared pursuant to section 6020(a) of the Internal Revenue Code of 1986, or similar State or local law, or a written stipulation to a judgment or a final order entered by a nonbankruptcy tribunal, but does not include a return made pursuant to section 6020(b) of the Internal Revenue Code of 1986, or a similar State or local law.

(b) Notwithstanding subsection (a) of this section, a debt that was excepted from discharge under subsection (a)(1), (a)(3), or (a)(8) of this section, under section 17a(1), 17a(3), or 17a(5) of the Bankruptcy Act, under section 439A [1] of the Higher Education Act of 1965, or under section 733(g) [1] of the Public Health Service Act in a prior case concerning the debtor under this title, or under the Bankruptcy Act, is dischargeable in a case under this title unless, by the terms of subsection (a) of this section, such debt is not dischargeable in the case under this title.

(c)

(1) Except as provided in subsection (a)(3)(B) of this section, the debtor shall be discharged from a debt of a kind specified in paragraph (2), (4), or (6) of subsection (a) of this section, unless, on request of the creditor to whom such debt is owed, and after notice and a hearing, the court determines such debt to be excepted from discharge under paragraph (2), (4), or (6), as the case may be, of subsection (a) of this section.

(2) Paragraph (1) shall not apply in the case of a Federal depository institutions regulatory agency seeking, in its capacity as conservator, receiver, or liquidating agent for an insured depository institution, to recover a debt described in subsection (a)(2), (a)(4), (a)(6), or (a)(11) owed to such institution by an institution-affiliated party unless the receiver, conservator, or liquidating agent was appointed in time to reasonably comply, or for a Federal depository institutions regulatory agency acting in its corporate capacity as a successor to such receiver, conservator, or liquidating agent to reasonably comply, with subsection (a)(3)(B) as a creditor of such institution-affiliated party with respect to such debt.

(d) If a creditor requests a determination of dischargeability of a consumer debt under subsection (a)(2) of this section, and such debt is discharged, the court shall grant judgment in favor of the debtor for the costs of, and a reasonable attorney's fee for, the proceeding if the court finds that the position of the creditor was not substantially justified, except that the court shall not award such costs and fees if special circumstances would make the award unjust.

(e) Any institution-affiliated party of an insured depository institution shall be considered to be acting in a fiduciary capacity with respect to the purposes of subsection (a)(4) or (11).

Footnotes

[1] See References in Text note below.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2590; Pub. L. 96–56, § 3, Aug. 14, 1979, 93 Stat. 387; Pub. L. 97–35, title XXIII, § 2334(b), Aug. 13, 1981, 95 Stat. 863; Pub. L. 98–353, title III, §§ 307, 371, 454, July 10, 1984, 98 Stat. 353, 364, 375; Pub. L. 99–554, title II, §§ 257(n), 281, 283 (j), Oct. 27, 1986, 100 Stat. 3115–3117; Pub. L. 101–581, § 2(a), Nov. 15, 1990, 104 Stat. 2865; Pub. L. 101–647, title XXV, § 2522(a), title XXXI, § 3102(a), title XXXVI, § 3621, Nov. 29, 1990, 104 Stat. 4865, 4916, 4964; Pub. L. 103–322, title XXXII, § 320934, Sept. 13, 1994, 108 Stat. 2135; Pub. L. 103–394, title II, § 221, title III, §§ 304(e), (h)(3), 306, 309, title V, § 501(d)(13), Oct. 22, 1994, 108 Stat. 4129, 4133–4135, 4137, 4145; Pub. L. 104–134, title I, § 101[(a)] [title VIII, § 804(b)], Apr. 26, 1996, 110 Stat. 1321, 1321–74; renumbered title I, Pub. L. 104–140, § 1(a), May 2, 1996, 110 Stat. 1327; Pub. L. 104–193, title III, § 374(a), Aug. 22, 1996, 110 Stat. 2255; Pub. L. 105–244, title IX, § 971(a), Oct. 7, 1998, 112 Stat. 1837; Pub. L. 107–204, title VIII, § 803, July 30, 2002, 116 Stat. 801; Pub. L. 109–8, title II, §§ 215, 220, 224 (c), title III, §§ 301, 310, 314 (a), title IV, § 412, title VII, § 714, title XII, §§ 1209, 1235, title XIV, § 1404(a), title XV, § 1502(a)(2), Apr. 20, 2005, 119 Stat. 54, 59, 64, 75, 84, 88, 107, 128, 194, 204, 215, 216; Pub. L. 111–327, § 2(a)(18), Dec. 22, 2010, 124 Stat. 3559.)

Adjustment of Dollar Amounts

For adjustment of certain dollar amounts specified in this section, that is not reflected in text, see Adjustment of Dollar Amounts note below.

Historical and Revision Notes

legislative statements

Section 523 (a)(1) represents a compromise between the position taken in the House bill and the Senate amendment. Section 523 (a)(2) likewise represents a compromise between the position taken in the House bill and the Senate amendment with respect to the false financial statement exception to discharge. In order to clarify that a "renewal of credit" includes a "refinancing of credit", explicit reference to a refinancing of credit is made in the preamble to section 523 (a)(2). A renewal of credit or refinancing of credit that was obtained by a false financial statement within the terms of section 523 (a)(2) is nondischargeable. However, each of the provisions of section 523 (a)(2) must

be proved. Thus, under section 523 (a)(2)(A) a creditor must prove that the debt was obtained by false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition. Subparagraph (A) is intended to codify current case law e.g., Neal v. Clark, 95 U.S. 704 (1887) [24 L. Ed. 586], which interprets "fraud" to mean actual or positive fraud rather than fraud implied in law. Subparagraph (A) is mutually exclusive from subparagraph (B). Subparagraph (B) pertains to the so-called false financial statement. In order for the debt to be nondischargeable, the creditor must prove that the debt was obtained by the use of a statement in writing (i) that is materially false; (ii) respecting the debtor's or an insider's financial condition; (iii) on which the creditor to whom the debtor is liable for obtaining money, property, services, or credit reasonably relied; (iv) that the debtor caused to be made or published with intent to deceive. Section 523 (a)(2)(B)(iv) is not intended to change from present law since the statement that the debtor causes to be made or published with the intent to deceive automatically includes a statement that the debtor actually makes or publishes with an intent to deceive. Section 523 (a)(2)(B) is explained in the House report. Under section 523 (a)(2)(B)(i) a discharge is barred only as to that portion of a loan with respect to which a false financial statement is materially false.

In many cases, a creditor is required by state law to refinance existing credit on which there has been no default. If the creditor does not forfeit remedies or otherwise rely to his detriment on a false financial statement with respect to existing credit, then an extension, renewal, or refinancing of such credit is nondischargeable only to the extent of the new money advanced; on the other hand, if an existing loan is in default or the creditor otherwise reasonably relies to his detriment on a false financial statement with regard to an existing loan, then the entire debt is nondischargeable under section 523 (a)(2)(B). This codifies the reasoning expressed by the second circuit in In re Danns, 558 F.2d 114 (2d Cir. 1977).

Section 523(a)(3) of the House amendment is derived from the Senate amendment. The provision is intended to overrule Birkett v. Columbia Bank, 195 U.S. 345 (1904) [25 S.Ct. 38, 49 L.Ed. 231, 12 Am.Bankr.Rep. 691].

Section 523(a)(4) of the House amendment represents a compromise between the House bill and the Senate amendment.

Section 523 (a)(5) is a compromise between the House bill and the Senate amendment. The provision excepts from discharge a debt owed to a spouse, former spouse or child of the debtor, in connection with a separation agreement, divorce decree, or property settlement agreement, for alimony to, maintenance for, or support of such spouse or child but not to the extent that the debt is assigned to another entity. If the debtor has assumed an obligation of the debtor's spouse to a third party in connection with a separation agreement, property settlement agreement, or divorce proceeding, such debt is dischargeable to the extent that payment of the debt by the debtor is not actually in the nature of alimony, maintenance, or support of debtor's spouse, former spouse, or child.

Section 523 (a)(6) adopts the position taken in the House bill and rejects the alternative suggested in the Senate amendment. The phrase "willful and malicious injury" covers a willful and malicious conversion.

Section 523(a)(7) of the House amendment adopts the position taken in the Senate amendment and rejects the position taken in the House bill. A penalty relating to a tax cannot be nondischargeable unless the tax itself is nondischargeable.

Section 523 (a)(8) represents a compromise between the House bill and the Senate amendment regarding educational loans. This provision is broader than current law which is limited to federally insured loans. Only educational loans owing to a governmental unit or a nonprofit institution of higher education are made nondischargeable under this paragraph.

Section 523 (b) is new. The section represents a modification of similar provisions contained in the House bill and the Senate amendment.

Section 523(c) of the House amendment adopts the position taken in the Senate amendment.

Section 523 (d) represents a compromise between the position taken in the House bill and the Senate amendment on the issue of attorneys' fees in false financial statement complaints to determine dischargeability. The provision contained in the House bill permitting the court to award damages is eliminated. The court must grant the debtor judgment or a reasonable attorneys' fee unless the granting of judgment would be clearly inequitable.

Nondischargeable debts: The House amendment retains the basic categories of nondischargeable tax liabilities contained in both bills, but restricts the time limits on certain nondischargeable taxes. Under the amendment, nondischargeable taxes cover taxes entitled to priority under section 507 (a)(6) of title 11 and, in the case of individual debtors under chapters 7, 11, or 13, tax liabilities with respect to which no required return had been filed or as to which a late return had been filed if the return became last due, including extensions, within 2 years before the date of the petition or became due after the petition or as to which the debtor made a fraudulent return, entry or invoice or fraudulently attempted to evade or defeat the tax.

In the case of individuals in liquidation under chapter 7 or in reorganization under chapter 11 of title 11, section 1141 (d)(2) incorporates by reference the exceptions to discharge continued in section 523. Different rules concerning the discharge of taxes where a partnership or corporation reorganizes under chapter 11, apply under section 1141.

The House amendment also deletes the reduction rule contained in section 523(e) of the Senate amendment. Under that rule, the amount of an otherwise nondischargeable tax liability would be reduced by the amount which a governmental tax authority could have collected from the debtor's estate if it had filed a timely claim against the estate but which it did not collect because no such claim was filed. This provision is deleted in order not to effectively compel a tax authority to file claim against the estate in "no asset" cases, along with a dischargeability petition. In no-asset cases, therefore, if the tax authority is not potentially penalized by failing to file a claim, the debtor in such cases will have a better opportunity to choose the prepayment forum, bankruptcy court or the Tax Court, in which to litigate his personal liability for a nondischargeable tax.

The House amendment also adopts the Senate amendment provision limiting the nondischargeability of punitive tax penalties, that is, penalties other than those which represent collection of a principal amount of tax liability through the form of a "penalty." Under the House amendment, tax penalties which are basically punitive in nature are to be nondischargeable only if the penalty is computed by reference to a related tax liability which is nondischargeable or, if the amount of the penalty is not computed by reference to a tax liability, the transaction or event giving rise to the penalty occurred during the 3-year period ending on the date of the petition.

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This section specifies which of the debtor's debts are not discharged in a bankruptcy case, and certain procedures for effectuating the section. The provision in Bankruptcy Act § 17c [section 35(c) of former title 11] granting the bankruptcy courts jurisdiction to determine dischargeability is deleted as unnecessary, in view of the comprehensive grant of jurisdiction prescribed in proposed 28 U.S.C. 1334 (b), which is adequate to cover the full jurisdiction that the bankruptcy courts have today over dischargeability and related issues under Bankruptcy Act § 17c. The Rules of Bankruptcy Procedure will specify, as they do today, who may request determinations of dischargeability, subject, of course, to proposed 11 U.S.C. 523 (c), and when such a request may be made. Proposed 11 U.S.C. 350, providing for reopening of cases, provides one possible procedure for a determination of dischargeability and related issues after a case is closed.

Subsection (a) lists nine kinds of debts excepted from discharge. Taxes that are excepted from discharge are set forth in paragraph (1). These include claims against the debtor which receive priority in the second, third and sixth categories (§ 507(a)(3)(B) and (c) and (6)). These categories include taxes for which the tax authority failed to file a claim against the estate or filed its claim late. Whether or not the taxing authority's claim is secured will also not affect the claim's nondischargeability if the tax liability in question is otherwise entitled to priority.

Also included in the nondischargeable debts are taxes for which the debtor had not filed a required return as of the petition date, or for which a return had been filed beyond its last permitted due date (§ 523(a)(1)(B)). For this purpose, the date of the tax year to which the return relates is immaterial. The late return rule applies, however, only to the late returns filed within three years before the petition was filed, and to late returns filed after the petition in title 11 was filed. For this purpose, the taxable year in question need not be one or more of the three years immediately preceding the filing of the petition.

Tax claims with respect to which the debtor filed a fraudulent return, entry or invoice, or fraudulently attempted to evade or defeat any tax (§ 523(a)(1)(C)) are included. The date of the taxable year with regard to which the fraud occurred is immaterial.

Also included are tax payments due under an agreement for deferred payment of taxes, which a debtor had entered into with the Internal Revenue Service (or State or local tax authority) before the filing of the petition and which relate to a prepetition tax liability (§ 523(a)(1)(D)) are also nondischargeable. This classification applies only to tax claims which would have received priority under section 507 (a) if the taxpayer had filed a title 11 petition on the date on which the deferred payment agreement was entered into. This rule also applies only to installment payments which become due during and after the commencement of the title 11 case. Payments which had become due within one year before the filing of the petition receive sixth priority, and will be nondischargeable under the general rule of section 523 (a)(1)(A).

The above categories of nondischargeability apply to customs duties as well as to taxes.

Paragraph (2) provides that as under Bankruptcy Act § 17a(2) [section 35(a)(2) of former title 11], a debt for obtaining money, property, services, or a refinancing extension or renewal of credit by false pretenses, a false representation, or actual fraud, or by use of a statement in writing respecting the debtor's financial condition that is materially false, on which the creditor reasonably relied, and which the debtor made or published with intent to deceive, is excepted from discharge. This provision is modified only slightly from current section 17a (2). First, "actual fraud" is added as a ground for exception from discharge. Second, the creditor must not only have relied on a false statement in writing, but the reliance must have been reasonable. This codifies case law construing present section 17a (2). Third, the phrase "in any manner whatsoever" that appears in current law after "made or published" is deleted as unnecessary, the word "published" is used in the same sense that it is used in defamation cases.

Unscheduled debts are excepted from discharge under paragraph (3). The provision, derived from section 17a (3) [section 35(a)(3) of former title 11], follows current law, but clarifies some uncertainties generated by the case law

construing 17a(3). The debt is excepted from discharge if it was not scheduled in time to permit timely action by the creditor to protect his rights, unless the creditor had notice or actual knowledge of the case.

Paragraph (4) excepts debts for fraud incurred by the debtor while acting in a fiduciary capacity or for defalcation, embezzlement, or misappropriation.

Paragraph (5) provides that debts for willful and malicious conversion or injury by the debtor to another entity or the property of another entity are nondischargeable. Under this paragraph "willful" means deliberate or intentional. To the extent that Tinker v. Colwell, 139 U.S. 473 (1902), held that a less strict standard is intended, and to the extent that other cases have relied on Tinker to apply a "reckless disregard" standard, they are overruled.

Paragraph (6) excepts from discharge debts to a spouse, former spouse, or child of the debtor for alimony to, maintenance for, or support of the spouse or child. This language, in combination with the repeal of section 456(b) of the Social Security Act (42 U.S.C. 656 (b)) by section 326 of the bill, will apply to make nondischargeable only alimony, maintenance, or support owed directly to a spouse or dependent. What constitutes alimony, maintenance, or support, will be determined under the bankruptcy law, not State law. Thus, cases such as In re Waller, 494 F.2d 447 (6th Cir. 1974), are overruled, and the result in cases such as Fife v. Fife, 1 Utah 2d 281, 265 P.2d 642 (1952) is followed. The proviso, however, makes nondischargeable any debts resulting from an agreement by the debtor to hold the debtor's spouse harmless on joint debts, to the extent that the agreement is in payment of alimony, maintenance, or support of the spouse, as determined under bankruptcy law considerations as to whether a particular agreement to pay money to a spouse is actually alimony or a property settlement.

Paragraph (7) makes nondischargeable certain liabilities for penalties including tax penalties if the underlying tax with respect to which the penalty was imposed is also nondischargeable (sec. 523 (a)(7)). These latter liabilities cover those which, but are penal in nature, as distinct from so-called "pecuniary loss" penalties which, in the case of taxes, involve basically the collection of a tax under the label of a "penalty." This provision differs from the bill as introduced, which did not link the nondischarge of a tax penalty with the treatment of the underlying tax. The amended provision reflects the existing position of the Internal Revenue Service as to tax penalties imposed by the Internal Revenue Code (Rev.Rul. 68–574, 1968–2 C.B. 595).

Paragraph (8) follows generally current law and excerpts from discharge student loans until such loans have been due and owing for five years. Such loans include direct student loans as well as insured and guaranteed loans. This provision is intended to be self-executing and the lender or institution is not required to file a complaint to determine the nondischargeability of any student loan.

Paragraph (9) excepts from discharge debts that the debtor owed before a previous bankruptcy case concerning the debtor in which the debtor was denied a discharge other than on the basis of the six-year bar.

Subsection (b) of this section permits discharge in a bankruptcy case of an unscheduled debt from a prior case. This provision is carried over from Bankruptcy Act § 17b [section 35(b) of former title 11]. The result dictated by the subsection would probably not be different if the subsection were not included. It is included nevertheless for clarity.

Subsection (c) requires a creditor who is owed a debt that may be excepted from discharge under paragraph (2), (4), or (5), (false statements, defalcation or larceny misappropriation, or willful and malicious injury) to initiate proceedings in the bankruptcy court for an exception to discharge. If the creditor does not act, the debt is discharged. This provision does not change current law.

Subsection (d) is new. It provides protection to a consumer debtor that dealt honestly with a creditor who sought to have a debt excepted from discharge on the ground of falsity in the incurring of the debt. The debtor may be awarded costs and a reasonable attorney's fee for the proceeding to determine the dischargeability of a debt under subsection (a)(2), if the court finds that the proceeding was frivolous or not brought by its creditor in good faith.

The purpose of the provision is to discourage creditors from initiating proceedings to obtaining a false financial statement exception to discharge in the hope of obtaining a settlement from an honest debtor anxious to save attorney's fees. Such practices impair the debtor's fresh start and are contrary to the spirit of the bankruptcy laws.

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Subsection (a) lists eight kinds of debts excepted from discharge. Taxes that are entitled to priority are excepted from discharge under paragraph (1). In addition, taxes with respect to which the debtor made a fraudulent return or willfully attempted to evade or defeat, or with respect to which a return (if required) was not filed or was not filed after the due date and after one year before the bankruptcy case are excepted from discharge. If the taxing authority's claim has been disallowed, then it would be barred by the more modern rules of collateral estoppel from reasserting that claim against the debtor after the case was closed. See Plumb, The Tax Recommendations of the Commission on the Bankruptcy Laws: Tax Procedures, 88 Harv.L.Rev. 1360, 1388 (1975).

As under Bankruptcy Act § 17a(2) [section 35(a)(2) of former title 11], debt for obtaining money, property, services, or an extension or renewal of credit by false pretenses, a false representation, or actual fraud, or by use of a statement in writing respecting the debtor's financial condition that is materially false, on which the creditor reasonably relied,

and that the debtor made or published with intent to deceive, is excepted from discharge. This provision is modified only slightly from current section 17a (2). First, "actual fraud" is added as a grounds for exception from discharge. Second, the creditor must not only have relied on a false statement in writing, the reliance must have been reasonable. This codifies case law construing this provision. Third, the phrase "in any manner whatsoever" that appears in current law after "made or published" is deleted as unnecessary. The word "published" is used in the same sense that it is used in slander actions.

Unscheduled debts are excepted from discharge under paragraph (3). The provision, derived from section 17a (3) [section 35(a)(3) of former title 11], follows current law, but clarifies some uncertainties generated by the case law construing 17a(3). The debt is excepted from discharge if it was not scheduled in time to permit timely action by the creditor to protect his rights, unless the creditor had notice or actual knowledge of the case.

Paragraph (4) excepts debts for embezzlement or larceny. The deletion of willful and malicious conversion from § 17a(2) of the Bankruptcy Act [section 35(a)(2) of former title 11] is not intended to effect a substantive change. The intent is to include in the category of non-dischargeable debts a conversion under which the debtor willfully and maliciously intends to borrow property for a short period of time with no intent to inflict injury but on which injury is in fact inflicted.

Paragraph (5) excepts from discharge debts to a spouse, former spouse, or child of the debtor for alimony to, maintenance for, or support of, the spouse or child. This language, in combination with the repeal of section 456(b) of the Social Security Act (42 U.S.C. 656 (b)) by section 327 of the bill, will apply to make nondischargeable only alimony, maintenance, or support owed directly to a spouse or dependent. See Hearings, pt. 2, at 942. What constitutes alimony, maintenance, or support, will be determined under the bankruptcy laws, not State law. Thus, cases such as In re Waller, 494 F.2d 447 (6th Cir. 1974); Hearings, pt. 3, at 1308–10, are overruled, and the result in cases such as Fife v. Fife, 1 Utah 2d 281, 265 P.2d 642 (1952) is followed. This provision will, however, make nondischargeable any debts resulting from an agreement by the debtor to hold the debtor's spouse harmless on joint debts, to the extent that the agreement is in payment of alimony, maintenance, or support of the spouse, as determined under bankruptcy law considerations that are similar to considerations of whether a particular agreement to pay money to a spouse is actually alimony or a property settlement. See Hearings, pt. 3, at 1287–1290.

Paragraph (6) excepts debts for willful and malicious injury by the debtor to another person or to the property of another person. Under this paragraph, "willful" means deliberate or intentional. To the extent that Tinker v. Colwell, 193 U.S. 473 (1902) [24 S.Ct. 505, 48 L.Ed. 754, 11 Am.Bankr.Rep. 568], held that a looser standard is intended, and to the extent that other cases have relied on Tinker to apply a "reckless disregard" standard, they are overruled.

Paragraph (7) excepts from discharge a debt for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, that is not compensation for actual pecuniary loss.

Paragraph (8) [enacted as (9)] excepts from discharge debts that the debtor owed before a previous bankruptcy case concerning the debtor in which the debtor was denied a discharge other than on the basis of the six-year bar.

Subsection (d) is new. It provides protection to a consumer debtor that dealt honestly with a creditor who sought to have a debt excepted from discharge on grounds of falsity in the incurring of the debt. The debtor is entitled to costs of and a reasonable attorney's fee for the proceeding to determine the dischargeability of a debt under subsection (a)(2), if the creditor initiated the proceeding and the debt was determined to be dischargeable. The court is permitted to award any actual pecuniary loss that the debtor may have suffered as a result of the proceeding (such as loss of a day's pay). The purpose of the provision is to discourage creditors from initiating false financial statement exception to discharge actions in the hopes of obtaining a settlement from an honest debtor anxious to save attorney's fees. Such practices impair the debtor's fresh start.

References in Text

The Internal Revenue Code of 1986, referred to in subsec. (a), is classified generally to Title 26, Internal Revenue Code.

Section 103 of the Truth in Lending Act, referred to in subsec. (a)(2)(C)(ii)(I), is classified to section 1602 of Title 15, Commerce and Trade.

The Bankruptcy Act, referred to in subsecs. (a)(10) and (b), is act July 1, 1898, ch. 541, 30 Stat. 544, as amended, which was classified generally to former Title 11. Sections 14c and 17a of the Bankruptcy Act were classified to sections 32(c) and 35(a) of former Title 11.

Section 408(b)(1) of the Employee Retirement Income Security Act of 1974, referred to in subsec. (a)(18)(A), is classified to section 1108 (b)(1) of Title 29, Labor.

Section 3(a)(47) of the Securities Exchange Act of 1934, referred to in subsec. (a)(19)(A)(i), is classified to section 78c (a)(47) of Title 15, Commerce and Trade.

Section 439A of the Higher Education Act of 1965, referred to in subsec. (b), was classified to section 1087–3 of Title 20, Education, and was repealed by Pub. L. 95–598, title III, § 317, Nov. 6, 1978, 92 Stat. 2678.

Section 733(g) of the Public Health Service Act, referred to in subsec. (b), was repealed by Pub. L. 95–598, title III, § 327, Nov. 6, 1978, 92 Stat. 2679. A subsec. (g), containing similar provisions, was added to section 733 by Pub. L. 97–35, title XXVII, § 2730, Aug. 13, 1981, 95 Stat. 919. Section 733 was subsequently omitted in the general revision of subchapter V of chapter 6A of Title 42, The Public Health and Welfare, by Pub. L. 102–408, title I, § 102, Oct. 13, 1992, 106 Stat. 1994. See section 292f (g) of Title 42.

Amendments

2010—Subsec. (a)(2)(C)(ii)(II). Pub. L. 111–327, § 2(a)(18)(A), substituted semicolon for period at end.

Subsec. (a)(3). Pub. L. 111–327, § 2(a)(18)(B), substituted "521(a)(1)" for "521(1)" in introductory provisions.

2005—Pub. L. 109–8, § 1209(1), transferred par. (15) and inserted it after subsec. (a)(14A). See 1994 Amendments note below.

Pub. L. 109–8, § 215(3), in par. (15), inserted "to a spouse, former spouse, or child of the debtor and" before "not of the kind" and "or" after "court of record," and substituted a semicolon for "unless—

"(A) the debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor and, if the debtor is engaged in a business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business; or

"(B) discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor;".

Subsec. (a). Pub. L. 109–8, § 714(2), inserted at end "For purposes of this subsection, the term 'return' means a return that satisfies the requirements of applicable nonbankruptcy law (including applicable filing requirements). Such term includes a return prepared pursuant to section 6020(a) of the Internal Revenue Code of 1986, or similar State or local law, or a written stipulation to a judgment or a final order entered by a nonbankruptcy tribunal, but does not include a return made pursuant to section 6020(b) of the Internal Revenue Code of 1986, or a similar State or local law."

Subsec. (a)(1)(A). Pub. L. 109–8, § 1502(a)(2), substituted "507(a)(3)" for "507(a)(2)".

Subsec. (a)(1)(B). Pub. L. 109–8, § 714(1)(A), inserted "or equivalent report or notice," after "a return," in introductory provisions.

Subsec. (a)(1)(B)(i). Pub. L. 109–8, § 714(1)(B), inserted "or given" after "filed".

Subsec. (a)(1)(B)(ii). Pub. L. 109–8, § 714(1)(C), inserted "or given" after "filed" and ", report, or notice" after "return".

Subsec. (a)(2)(C). Pub. L. 109–8, § 310, amended subpar. (C) generally. Prior to amendment, subpar. (C) read as follows: "for purposes of subparagraph (A) of this paragraph, consumer debts owed to a single creditor and aggregating more than $1,000 for 'luxury goods or services' incurred by an individual debtor on or within 60 days before the order for relief under this title, or cash advances aggregating more than $1,000 that are extensions of consumer credit under an open end credit plan obtained by an individual debtor on or within 60 days before the order for relief under this title, are presumed to be nondischargeable; 'luxury goods or services' do not include goods or services reasonably acquired for the support or maintenance of the debtor or a dependent of the debtor; an extension of consumer credit under an open end credit plan is to be defined for purposes of this subparagraph as it is defined in the Consumer Credit Protection Act;".

Subsec. (a)(5). Pub. L. 109–8, § 215(1)(A), added par. (5) and struck out former par. (5) which read as follows: "to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not to the extent that—

"(A) such debt is assigned to another entity, voluntarily, by operation of law, or otherwise (other than debts assigned pursuant to section 408(a)(3) of the Social Security Act, or any such debt which has been assigned to the Federal Government or to a State or any political subdivision of such State); or

"(B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support;"

Subsec. (a)(8). Pub. L. 109–8, § 220, added par. (8) and struck out former par. (8) which read as follows: "for an educational benefit overpayment or loan made, insured or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution, or for an obligation to repay funds received as an educational benefit, scholarship or stipend, unless excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents;".

Subsec. (a)(9). Pub. L. 109–8, § 1209(2), substituted “motor vehicle, vessel, or aircraft” for “motor vehicle”.

Subsec. (a)(14A). Pub. L. 109–8, § 314(a), added par. (14A).

Subsec. (a)(14B). Pub. L. 109–8, § 1235, added par. (14B).

Subsec. (a)(16). Pub. L. 109–8, § 412, struck out “dwelling” after “debtor’s interest in a” and “housing” after “share of a cooperative” and substituted “ownership,” for “ownership or” and “or a lot in a homeowners association, for as long as the debtor or the trustee has a legal, equitable, or possessory ownership interest in such unit, such corporation, or such lot,” for “but only if such fee or assessment is payable for a period during which—

“(A) the debtor physically occupied a dwelling unit in the condominium or cooperative project; or

“(B) the debtor rented the dwelling unit to a tenant and received payments from the tenant for such period,”.

Subsec. (a)(17). Pub. L. 109–8, § 301, substituted “on a prisoner by any court” for “by a court” and “subsection (b) or (f)(2) of section 1915” for “section 1915 (b) or (f)” and inserted “(or a similar non-Federal law)” after “title 28” in two places.

Subsec. (a)(18). Pub. L. 109–8, § 224(c), added par. (18).

Pub. L. 109–8, § 215(1)(B), struck out par. (18) which read as follows: “owed under State law to a State or municipality that is—

“(A) in the nature of support, and

“(B) enforceable under part D of title IV of the Social Security Act (42 U.S.C. 601 et seq.); or”.

Subsec. (a)(19)(B). Pub. L. 109–8, § 1404(a), inserted “, before, on, or after the date on which the petition was filed,” after “results” in introductory provisions.

Subsec. (c)(1). Pub. L. 109–8, § 215(2), substituted “or (6)” for “(6), or (15)” in two places.

Subsec. (e). Pub. L. 109–8, § 1209(3), substituted “an insured” for “a insured”.

2002—Subsec. (a)(19). Pub. L. 107–204 added par. (19).

1998—Subsec. (a)(8). Pub. L. 105–244 substituted “stipend, unless” for “stipend, unless—” and struck out “(B)” before “excepting such debt” and subpar. (A) which read as follows: “such loan, benefit, scholarship, or stipend overpayment first became due more than 7 years (exclusive of any applicable suspension of the repayment period) before the date of the filing of the petition; or”.

1996—Subsec. (a)(5)(A). Pub. L. 104–193, § 374(a)(4), substituted “section 408 (a)(3)” for “section 402 (a)(26)”.

Subsec. (a)(17). Pub. L. 104–134 added par. (17).

Subsec. (a)(18). Pub. L. 104–193, § 374(a)(1)–(3), added par. (18).

1994—Par. (15). Pub. L. 103–394, § 304(e)[(1)], amended this section by adding par. (15) at the end. See 2005 Amendment note above.

Subsec. (a). Pub. L. 103–394, § 501(d)(13)(A)(i), substituted “1141,” for “1141,,” in introductory provisions.

Subsec. (a)(1)(A). Pub. L. 103–394, § 304(h)(3), substituted “507(a)(8)” for “507(a)(7)”.

Subsec. (a)(2)(C). Pub. L. 103–394, §§ 306, 501 (d)(13)(A)(ii), substituted “$1,000 for” for “$500 for”, “60” for “forty” after “incurred by an individual debtor on or within”, and “60” for “twenty” after “obtained by an individual debtor on or within”, and struck out “(15 U.S.C. 1601 et seq.)” after “Protection Act”.

Subsec. (a)(11). Pub. L. 103–322, § 320934(1), struck out “or” after semicolon at end.

Subsec. (a)(12). Pub. L. 103–322, § 320934(2), which directed the substitution of “; or” for a period at end of par. (12), could not be executed because a period did not appear at end.

Subsec. (a)(13). Pub. L. 103–394, § 221(1), substituted semicolon for period at end.

Pub. L. 103–322, § 320934(3), added par. (13).

Subsec. (a)(14). Pub. L. 103–394, § 221(2), added par. (14).

Subsec. (a)(16). Pub. L. 103–394, § 309, added par. (16).

Subsec. (b). Pub. L. 103–394, § 501(d)(13)(B), struck out “(20 U.S.C. 1087–3)” after “Act of 1965” and “(42 U.S.C. 294f)” after “Service Act”.

Subsec. (c)(1). Pub. L. 103–394, § 304(e)(2), substituted “(6), or (15)” for “or (6)” in two places.

Subsec. (e). Pub. L. 103–394, § 501(d)(13)(C), substituted “insured depository institution” for “depository institution or insured credit union”.

1990—Subsec. (a)(8). Pub. L. 101–647, § 3621, substituted “for an educational benefit overpayment or loan made, insured or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution, or for an obligation to repay funds received as an educational benefit, scholarship or stipend, unless” for “for an educational loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or a nonprofit institution, unless” in introductory provisions and amended subpar. (A) generally. Prior to amendment, subpar. (A) read as follows: “such loan first became due before five years (exclusive of any applicable suspension of the repayment period) before the date of the filing of the petition; or”.

Subsec. (a)(9). Pub. L. 101–581 and Pub. L. 101–647, § 3102(a), identically amended par. (9) generally. Prior to amendment, par. (9) read as follows: “to any entity, to the extent that such debt arises from a judgment or consent decree entered in a court of record against the debtor wherein liability was incurred by such debtor as a result of the debtor’s operation of a motor vehicle while legally intoxicated under the laws or regulations of any jurisdiction within the United States or its territories wherein such motor vehicle was operated and within which such liability was incurred; or”.

Subsec. (a)(11), (12). Pub. L. 101–647, § 2522(a)(1), added pars. (11) and (12).

Subsec. (c). Pub. L. 101–647, § 2522(a)(3), designated existing provisions as par. (1) and added par. (2).

Subsec. (e). Pub. L. 101–647, § 2522(a)(2), added subsec. (e).

1986—Subsec. (a). Pub. L. 99–554, § 257(n), inserted reference to sections 1228 (a) and 1228 (b) of this title.

Subsec. (a)(1)(A). Pub. L. 99–554, § 283(j)(1)(A), substituted “507(a)(7)” for “507(a)(6)”.

Subsec. (a)(5). Pub. L. 99–554, § 281, struck out the comma after “decree” and inserted “, determination made in accordance with State or territorial law by a governmental unit,” after “record”.

Subsec. (a)(9), (10). Pub. L. 99–554, § 283(j)(1)(B), redesignated par. (9) relating to debts incurred by persons driving while intoxicated, added by Pub. L. 98–353, as (10).

Subsec. (b). Pub. L. 99–554, § 283(j)(2), substituted “Service” for “Services”.

1984—Subsec. (a)(2). Pub. L. 98–353, § 454(a)(1), in provisions preceding subpar. (A), struck out “obtaining” after “for”, and substituted “refinancing of credit, to the extent obtained” for “refinance of credit,”.

Subsec. (a)(2)(A). Pub. L. 98–353, § 307(a)(1), struck out “or” at end.

Subsec. (a)(2)(B). Pub. L. 98–353, § 307(a)(2), inserted “or” at end.

Subsec. (a)(2)(B)(iii). Pub. L. 98–353, § 454(a)(1)(A), struck out “obtaining” before “such”.

Subsec. (a)(2)(C). Pub. L. 98–353, § 307(a)(3), added subpar. (C).

Subsec. (a)(5). Pub. L. 98–353, § 454(b)(1), inserted “or other order of a court of record” after “divorce decree,” in provisions preceding subpar. (A).

Subsec. (a)(5)(A). Pub. L. 98–353, § 454(b)(2), inserted “, or any such debt which has been assigned to the Federal Government or to a State or any political subdivision of such State”.

Subsec. (a)(8). Pub. L. 98–353, §§ 371(1), 454 (a)(2), struck out “of higher education” after “a nonprofit institution of” and struck out “or” at end.

Subsec. (a)(9). Pub. L. 98–353, § 371(2), added the par. (9) relating to debts incurred by persons driving while intoxicated.

Subsec. (c). Pub. L. 98–353, § 454(c), inserted “of a kind” after “debt”.

Subsec. (d). Pub. L. 98–353, § 307(b), substituted “the court shall grant judgment in favor of the debtor for the costs of, and a reasonable attorney’s fee for, the proceeding if the court finds that the position of the creditor was not substantially justified, except that the court shall not award such costs and fees if special circumstances would make the award unjust” for “the court shall grant judgment against such creditor and in favor of the debtor for the costs of, and a reasonable attorney’s fee for, the proceeding to determine dischargeability, unless such granting of judgment would be clearly inequitable”.

1981—Subsec. (a)(5)(A). Pub. L. 97–35 substituted “law, or otherwise (other than debts assigned pursuant to section 402(a)(26) of the Social Security Act);” for “law, or otherwise;”.

1979—Subsec. (a)(8). Pub. L. 96–56 substituted “for an educational loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or a nonprofit

institution of higher education" for "to a governmental unit, or a nonprofit institution of higher education, for an educational loan" in the provisions preceding subpar. (A) and inserted "(exclusive of any applicable suspension of the repayment period)" after "before five years" in subpar. (A).

Effective Date of 2005 Amendment

Pub. L. 109–8, title XIV, § 1404(b), Apr. 20, 2005, 119 Stat. 215, provided that: "The amendment made by subsection (a) [amending this section] is effective beginning July 30, 2002."

Amendment by sections 215, 220, 224(c), 301, 310, 314(a), 412, 714, 1209, 1235, and 1502(a)(2) of Pub. L. 109–8 effective 180 days after Apr. 20, 2005, and not applicable with respect to cases commenced under this title before such effective date, except as otherwise provided, see section 1501 of Pub. L. 109–8, set out as a note under section 101 of this title.

Effective Date of 1998 Amendment

Pub. L. 105–244, title IX, § 971(b), Oct. 7, 1998, 112 Stat. 1837, provided that: "The amendment made by subsection (a) [amending this section] shall apply only with respect to cases commenced under title 11, United States Code, after the date of enactment of this Act [Oct. 7, 1998]."

Effective Date of 1996 Amendment

Section 374(c) of Pub. L. 104–193 provided that: "The amendments made by this section [amending this section and section 656 of Title 42, The Public Health and Welfare] shall apply only with respect to cases commenced under title 11 of the United States Code after the date of the enactment of this Act [Aug. 22, 1996]."

For provisions relating to effective date of title III of Pub. L. 104–193, see section 395 (a)–(c) of Pub. L. 104–193, set out as a note under section 654 of Title 42, The Public Health and Welfare.

Effective Date of 1994 Amendment

Amendment by Pub. L. 103–394 effective Oct. 22, 1994, and not applicable with respect to cases commenced under this title before Oct. 22, 1994, see section 702 of Pub. L. 103–394, set out as a note under section 101 of this title.

Effective Date of 1990 Amendments

Section 3104 of title XXXI of Pub. L. 101–647 provided that:

"(a) Effective Date.—This title and the amendments made by this title [amending this section and section 1328 of this title and enacting provisions set out as a note under section 101 of this title] shall take effect on the date of the enactment of this Act [Nov. 29, 1990].

"(b) Application of Amendments.—The amendments made by this title [amending this section and section 1328 of this title] shall not apply with respect to cases commenced under title 11 of the United States Code before the date of the enactment of this Act."

Amendment by section 3621 of Pub. L. 101–647 effective 180 days after Nov. 29, 1990, see section 3631 of Pub. L. 101–647, set out as an Effective Date note under section 3001 of Title 28, Judiciary and Judicial Procedure.

Section 4 of Pub. L. 101–581 provided that:

"(a) Effective Date.—This Act and the amendments made by this Act [amending this section and section 1328 of this title and enacting provisions set out as a note under section 101 of this title] shall take effect on the date of the enactment of this Act [Nov. 15, 1990].

"(b) Application of Amendments.—The amendments made by this Act [amending this section and section 1328 of this title] shall not apply with respect to cases commenced under title 11 of the United States Code before the date of the enactment of this Act."

Effective Date of 1986 Amendment

Amendment by section 257 of Pub. L. 99–554 effective 30 days after Oct. 27, 1986, but not applicable to cases commenced under this title before that date, see section 302(a), (c)(1) of Pub. L. 99–554, set out as a note under section 581 of Title 28, Judiciary and Judicial Procedure.

Amendment by sections 281 and 283 of Pub. L. 99–554 effective 30 days after Oct. 27, 1986, see section 302(a) of Pub. L. 99–554.

Effective Date of 1984 Amendment

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

Effective Date of 1981 Amendment

Amendment by Pub. L. 97–35 effective Aug. 13, 1981, see section 2334(c) of Pub. L. 97–35, set out as a note under section 656 of Title 42, The Public Health and Welfare.

Adjustment of Dollar Amounts

The dollar amounts specified in this section were adjusted by notices of the Judicial Conference of the United States pursuant to section 104 of this title as follows:

By notice dated Feb. 19, 2010, 75 F.R. 8747, effective Apr. 1, 2010, in subsec. (a)(2)(C)(i)(I), dollar amount “550” was adjusted to “600” and, in subsec. (a)(2)(C)(i)(II), dollar amount “825” was adjusted to “875”. See notice of the Judicial Conference of the United States set out as a note under section 104 of this title.

By notice dated Feb. 7, 2007, 72 F.R. 7082, effective Apr. 1, 2007, in subsec. (a)(2)(C)(i)(I), dollar amount “500” was adjusted to “550” and, in subsec. (a)(2)(C)(i)(II), dollar amount “750” was adjusted to “825”.

By notice dated Feb. 18, 2004, 69 F.R. 8482, effective Apr. 1, 2004, in subsec. (a)(2)(C), dollar amount “1,150” was adjusted to “1,225” each time it appeared.

By notice dated Feb. 13, 2001, 66 F.R. 10910, effective Apr. 1, 2001, in subsec. (a)(2)(C), dollar amount “1,075” was adjusted to “1,150” each time it appeared.

By notice dated Feb. 3, 1998, 63 F.R. 7179, effective Apr. 1, 1998, in subsec. (a)(2)(C), dollar amount “1,000” was adjusted to “1,075” each time it appeared.

TITLE 11 - BANKRUPTCY
CHAPTER 7 - LIQUIDATION
SUBCHAPTER II - COLLECTION, LIQUIDATION, AND DISTRIBUTION OF THE ESTATE

§ 727. Discharge

(a) The court shall grant the debtor a discharge, unless—

(1) the debtor is not an individual;

(2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed—

(A) property of the debtor, within one year before the date of the filing of the petition; or

(B) property of the estate, after the date of the filing of the petition;

(3) the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case;

(4) the debtor knowingly and fraudulently, in or in connection with the case—

(A) made a false oath or account;

(B) presented or used a false claim;

(C) gave, offered, received, or attempted to obtain money, property, or advantage, or a promise of money, property, or advantage, for acting or forbearing to act; or

(D) withheld from an officer of the estate entitled to possession under this title, any recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs;

(5) the debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities;

(6) the debtor has refused, in the case—

(A) to obey any lawful order of the court, other than an order to respond to a material question or to testify;

(B) on the ground of privilege against self-incrimination, to respond to a material question approved by the court or to testify, after the debtor has been granted immunity with respect to the matter concerning which such privilege was invoked; or

(C) on a ground other than the properly invoked privilege against self-incrimination, to respond to a material question approved by the court or to testify;

(7) the debtor has committed any act specified in paragraph (2), (3), (4), (5), or (6) of this subsection, on or within one year before the date of the filing of the petition, or during the case, in connection with another case, under this title or under the Bankruptcy Act, concerning an insider;

(8) the debtor has been granted a discharge under this section, under section 1141 of this title, or under section 14, 371, or 476 of the Bankruptcy Act, in a case commenced within 8 years before the date of the filing of the petition;

(9) the debtor has been granted a discharge under section 1228 or 1328 of this title, or under section 660 or 661 of the Bankruptcy Act, in a case commenced within six years before the date of the filing of the petition, unless payments under the plan in such case totaled at least—

(A) 100 percent of the allowed unsecured claims in such case; or

(B) **(i)** 70 percent of such claims; and

(ii) the plan was proposed by the debtor in good faith, and was the debtor's best effort;

(10) the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter;

(11) after filing the petition, the debtor failed to complete an instructional course concerning personal financial management described in section 111, except that this paragraph shall not apply with respect to a debtor who is a person described in section 109 (h)(4) or who resides in a district for which the United States trustee (or the bankruptcy administrator, if any) determines that the approved instructional courses are not adequate to service the additional individuals who would otherwise be required to complete such instructional courses under this section (The United States trustee (or the bankruptcy administrator, if any) who makes a determination described in this paragraph shall review such determination not later than 1 year after the date of such determination, and not less frequently than annually thereafter.); or

(12) the court after notice and a hearing held not more than 10 days before the date of the entry of the order granting the discharge finds that there is reasonable cause to believe that—

(A) section 522 (q)(1) may be applicable to the debtor; and

(B) there is pending any proceeding in which the debtor may be found guilty of a felony of the kind described in section 522 (q)(1)(A) or liable for a debt of the kind described in section 522 (q)(1)(B).

(b) Except as provided in section 523 of this title, a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order for relief under this chapter, and any liability on a claim that is determined under section 502 of this title as if such claim had arisen before the commencement of the case, whether or not a proof of claim based on any such debt or liability is filed under section 501 of this title, and whether or not a claim based on any such debt or liability is allowed under section 502 of this title.

(c) **(1)** The trustee, a creditor, or the United States trustee may object to the granting of a discharge under subsection (a) of this section.

(2) On request of a party in interest, the court may order the trustee to examine the acts and conduct of the debtor to determine whether a ground exists for denial of discharge.

(d) On request of the trustee, a creditor, or the United States trustee, and after notice and a hearing, the court shall revoke a discharge granted under subsection (a) of this section if—

(1) such discharge was obtained through the fraud of the debtor, and the requesting party did not know of such fraud until after the granting of such discharge;

(2) the debtor acquired property that is property of the estate, or became entitled to acquire property that would be property of the estate, and knowingly and fraudulently failed to report the acquisition of or entitlement to such property, or to deliver or surrender such property to the trustee;

(3) the debtor committed an act specified in subsection (a)(6) of this section; or

(4) the debtor has failed to explain satisfactorily—

(A) a material misstatement in an audit referred to in section 586 (f) of title 28; or

(B) a failure to make available for inspection all necessary accounts, papers, documents, financial records, files, and all other papers, things, or property belonging to the debtor that are requested for an audit referred to in section 586 (f) of title 28.

(e) The trustee, a creditor, or the United States trustee may request a revocation of a discharge—

(1) under subsection (d)(1) of this section within one year after such discharge is granted; or

(2) under subsection (d)(2) or (d)(3) of this section before the later of—

(A) one year after the granting of such discharge; and

(B) the date the case is closed.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2609; Pub. L. 98–353, title III, § 480, July 10, 1984, 98 Stat. 382; Pub. L. 99–554, title II, §§ 220, 257 (s), Oct. 27, 1986, 100 Stat. 3101, 3116; Pub. L. 109–8, title I, § 106(b), title III, §§ 312(1), 330 (a), title VI, § 603(d), Apr. 20, 2005, 119 Stat. 38, 86, 101, 123.)

Historical and Revision Notes

legislative statements

Sections 727(a) (8) and (9) of the House amendment represent a compromise between provisions contained in section 727(a)(8) of the House bill and Senate amendment. Section 727(a)(8) of the House amendment adopts section 727(a)(8) of the House bill. However, section 727(a)(9) of the House amendment contains a compromise based on section 727(a)(8) of the Senate amendment with respect to the circumstances under which a plan by way of composition under Chapter XIII of the Bankruptcy Act [chapter 13 of former title 11] should be a bar to discharge in a subsequent proceeding under title 11. The paragraph provides that a discharge under section 660 or 661 of the Bankruptcy Act [section 1060 or 1061 of former title 11] or section 1328 of title 11 in a case commenced within 6 years before the date of the filing of the petition in a subsequent case, operates as a bar to discharge unless, first, payments under the plan totaled at least 100 percent of the allowed unsecured claims in the case; or second, payments under the plan totaled at least 70 percent of the allowed unsecured claims in the case and the plan was proposed by the debtor in good faith and was the debtor's best effort.

It is expected that the Rules of Bankruptcy Procedure will contain a provision permitting the debtor to request a determination of whether a plan is the debtor's "best effort" prior to confirmation of a plan in a case under chapter 13 of title 11. In determining whether a plan is the debtor's "best effort" the court will evaluate several factors. Different facts and circumstances in cases under chapter 13 operate to make any rule of thumb of limited usefulness. The court should balance the debtor's assets, including family income, health insurance, retirement benefits, and other wealth, a sum which is generally determinable, against the foreseeable necessary living expenses of the debtor and the debtor's dependents, which unfortunately is rarely quantifiable. In determining the expenses of the debtor and the debtor's dependents, the court should consider the stability of the debtor's employment, if any, the age of the debtor, the number of the debtor's dependents and their ages, the condition of equipment and tools necessary to the debtor's employment or to the operation of his business, and other foreseeable expenses that the debtor will be required to pay during the period of the plan, other than payments to be made to creditors under the plan.

Section 727(a)(10) of the House amendment clarifies a provision contained in section 727(a)(9) of the House bill and Senate amendment indicating that a discharge may be barred if the court approves a waiver of discharge executed in writing by the debtor after the order for relief under chapter 7.

Section 727(b) of the House amendment adopts a similar provision contained in the Senate amendment modifying the effect of discharge. The provision makes clear that the debtor is discharged from all debts that arose before the date of the order for relief under chapter 7 in addition to any debt which is determined under section 502 as if it were a prepetition claim. Thus, if a case is converted from chapter 11 or chapter 13 to a case under chapter 7, all debts prior to the time of conversion are discharged, in addition to debts determined after the date of conversion of a kind specified in section 502, that are to be determined as prepetition claims. This modification is particularly important with respect to an individual debtor who files a petition under chapter 11 or chapter 13 of title 11 if the case is converted to chapter 7. The logical result of the House amendment is to equate the result that obtains whether the case is converted from another chapter to chapter 7, or whether the other chapter proceeding is dismissed and a new case is commenced by filing a petition under chapter 7.

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This section is the heart of the fresh start provisions of the bankruptcy law. Subsection (a) requires the court to grant a debtor a discharge unless one of nine conditions is met. The first condition is that the debtor is not an individual. This is a change from present law, under which corporations and partnerships may be discharged in liquidation cases, though they rarely are. The change in policy will avoid trafficking in corporate shells and in bankrupt partnerships. "Individual" includes a deceased individual, so that if the debtor dies during the bankruptcy case, he will nevertheless be released from his debts, and his estate will not be liable for them. Creditors will be entitled to only one satisfaction—from the bankruptcy estate and not from the probate estate.

The next three grounds for denial of discharge center on the debtor's wrongdoing in or in connection with the bankruptcy case. They are derived from Bankruptcy Act § 14c [section 32(c) of former title 11]. If the debtor, with intent to hinder, delay, or defraud his creditors or an officer of the estate, has transferred, removed, destroyed, mutilated, or concealed, or has permitted any such action with respect to, property of the debtor within the year preceding the case, or property of the estate after the commencement of the case, then the debtor is denied discharge. The debtor is also denied discharge if he has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any books and records from which his financial condition might be ascertained, unless the act or failure to act was justified under

all the circumstances of the case. The fourth ground for denial of discharge is the commission of a bankruptcy crime, although the standard of proof is preponderance of the evidence rather than proof beyond a reasonable doubt. These crimes include the making of a false oath or account, the use or presentation of a false claim, the giving or receiving of money for acting or forbearing to act, and the withholding from an officer of the estate entitled to possession of books and records relating to the debtor's financial affairs.

The fifth ground for denial of discharge is the failure of the debtor to explain satisfactorily any loss of assets or deficiency of assets to meet the debtor's liabilities. The sixth ground concerns refusal to testify. It is a change from present law, under which the debtor may be denied discharge for legitimately exercising his right against self-incrimination. Under this provision, the debtor may be denied discharge if he refuses to obey any lawful order of the court, or if he refuses to testify after having been granted immunity or after improperly invoking the constitutional privilege against self-incrimination.

The seventh ground for denial of discharge is the commission of an act specified in grounds two through six during the year before the debtor's case in connection with another bankruptcy case concerning an insider.

The eighth ground for denial of discharge is derived from § 14c(5) of the Bankruptcy Act [section 32(c)(5) of former title 11]. If the debtor has been granted a discharge in a case commenced within 6 years preceding the present bankruptcy case, he is denied discharge. This provision, which is no change from current law with respect to straight bankruptcy, is the 6-year bar to discharge. Discharge under chapter 11 will bar a discharge for 6 years. As under current law, confirmation of a composition wage earner plan under chapter 13 is a basis for invoking the 6-year bar.

The ninth ground is approval by the court of a waiver of discharge.

Subsection (b) specifies that the discharge granted under this section discharges the debtor from all debts that arose before the date of the order for relief. It is irrelevant whether or not a proof of claim was filed with respect to the debt, and whether or not the claim based on the debt was allowed.

Subsection (c) permits the trustee, or a creditor, to object to discharge. It also permits the court, on request of a party in interest, to order the trustee to examine the acts and conduct of the debtor to determine whether a ground for denial of discharge exists.

Subsection (d) requires the court to revoke a discharge already granted in certain circumstances. If the debtor obtained the discharge through fraud, if he acquired and concealed property of the estate, or if he refused to obey a court order or to testify, the discharge is to be revoked.

Subsection (e) permits the trustee or a creditor to request revocation of a discharge within 1 year after the discharge is granted, on the grounds of fraud, and within one year of discharge or the date of the closing of the case, whichever is later, on other grounds.

References in Text

The Bankruptcy Act, referred to in subsec. (a)(7), is act July 1, 1898, ch. 541, 30 Stat. 544, as amended, which was classified generally to former Title 11.

Sections 14, 371, and 476 of the Bankruptcy Act, referred to in subsec. (a)(8), are section 14 of act July 1, 1898, ch. 541, 30 Stat. 550, section 371 of act July 1, 1898, ch. 541, as added June 22, 1938, ch. 575, § 1, 52 Stat. 912, and section 476 of act July 1, 1898, ch. 541, as added June 22, 1938, ch. 575, § 1, 52 Stat. 924, which were classified to sections 32, 771, and 876 of former Title 11.

Sections 660 and 661 of the Bankruptcy Act, referred to in subsec. (a)(9), are sections 660 and 661 of act July 1, 1898, ch. 541, as added June 22, 1938, ch. 575, § 1, 52 Stat. 935, 936, which were classified to sections 1060 and 1061 of former Title 11.

Amendments

2005—Subsec. (a)(8). Pub. L. 109–8, § 312(1), substituted "8 years" for "six years".

Subsec. (a)(11). Pub. L. 109–8, § 106(b), added par. (11).

Subsec. (a)(12). Pub. L. 109–8, § 330(a), added par. (12).

Subsec. (d)(4). Pub. L. 109–8, § 603(d), added par. (4).

1986—Subsec. (a)(9). Pub. L. 99–554, § 257(s), inserted reference to section 1228 of this title.

Subsec. (c). Pub. L. 99–554, § 220, amended subsec. (c) generally, substituting "The trustee, a creditor, or the United States trustee may object" for "The trustee or a creditor may object" in par. (1).

Subsec. (d). Pub. L. 99–554, § 220, amended subsec. (d) generally, substituting ", a creditor, or the United States trustee," for "or a creditor," in provisions preceding par. (1) and "acquisition of or entitlement to such property" for "acquisition of, or entitlement to, such property" in par. (2).

Subsec. (e). Pub. L. 99–554, § 220, amended subsec. (e) generally, substituting "The trustee, a creditor, or the United States trustee may" for "The trustee or a creditor may" in provisions preceding par. (1), "section within" for "section, within" and "discharge is granted" for "discharge was granted" in par. (1), "section before" for "section, before" in provisions of par. (2) preceding subpar. (A), and "discharge; and" for "discharge; or" in par. (2)(A).

1984—Subsec. (a)(6)(C). Pub. L. 98–353, § 480(a)(1), substituted "properly" for "property".

Subsec. (a)(7). Pub. L. 98–353, § 480(a)(2), inserted ", under this title or under the Bankruptcy Act," after "another case".

Subsec. (a)(8). Pub. L. 98–353, § 480(a)(3), substituted "371," for "371".

Subsec. (c)(1). Pub. L. 98–353, § 480(b), substituted "to the granting of a discharge" for "to discharge".

Subsec. (e)(2)(A). Pub. L. 98–353, § 480(c), substituted "or" for "and".

Effective Date of 2005 Amendment

Amendment by section 603(d) of Pub. L. 109–8 effective 18 months after Apr. 20, 2005, see section 603(e) of Pub. L. 109–8, set out as a note under section 521 of this title.

Amendments by sections 106(b), 312(1), and 330(a) of Pub. L. 109–8 effective 180 days after Apr. 20, 2005, with amendments by sections 106(b) and 312(1) of Pub. L. 109–8 not applicable with respect to cases commenced under this title before such effective date, except as otherwise provided, and amendment by section 330(a) of Pub. L. 109–8 applicable with respect to cases commenced under this title on or after Apr. 20, 2005, see section 1501 of Pub. L. 109–8, set out as a note under section 101 of this title.

Effective Date of 1986 Amendment

Amendment by section 257 of Pub. L. 99–554 effective 30 days after Oct. 27, 1986, but not applicable to cases commenced under this title before that date, see section 302(a), (c)(1) of Pub. L. 99–554, set out as a note under section 581 of Title 28, Judiciary and Judicial Procedure.

Effective date and applicability of amendment by section 220 of Pub. L. 99–554 dependent upon the judicial district involved, see section 302(d), (e) of Pub. L. 99–554.

Effective Date of 1984 Amendment

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

25 U.S. Code § 348 - Patents to be held in trust; descent and partition

Current through Pub. L. 114-38. (See Public Laws for the current Congress.)

§ 348.
Patents to be held in trust; descent and partition

Upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided*, That the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: *Provided*, That, subject to section 8(b) of the American Indian Probate Reform Act of 2004 (Public Law 108–374; 118 Stat. 1810), the rules of intestate succession under the Indian Land Consolidation Act (25 U.S.C. 2201 et seq.) (including a tribal probate code approved under that Act or regulations promulgated under that Act) shall apply to that land for which patents have been executed and delivered: *And provided further*, That at any time after lands have been allotted to all the Indians of any tribe as herein provided, or sooner if in the opinion of the President it shall be for the best interests of said tribe, it shall be lawful for the Secretary of the Interior to negotiate with such Indian tribe for the purchase and release by said tribe, in conformity with the treaty or statute under which such reservation is held, of such portions of its reservation not allotted as such tribe shall, from time to time, consent to sell, on such terms and conditions as shall be considered just and equitable between the United States and said tribe of Indians, which purchase shall not be complete until ratified by Congress, and the form and manner of executing such release shall also be prescribed by Congress: *Provided, however*, That all lands adapted to agriculture, with or without irrigation so sold or released to the United States by any Indian tribe shall be held by the United States for the sole purpose of securing homes to actual settlers and shall be disposed of by the United States to actual and bona fide settlers only in tracts not exceeding one hundred and sixty acres to any one person, on such terms as Congress shall prescribe, subject to grants which Congress may make in aid of education: *And provided further*, That no patents shall issue therefor except to the person so taking the same as and for a homestead, or his heirs, and after the expiration of five years' occupancy thereof as such homestead; and any conveyance of said lands so taken as a homestead, or any contract touching the same, or lien thereon, created prior to the date of such patent, shall be null and void. And the sums agreed to be paid by the United States as purchase money for any portion of any such reservation shall be held in the Treasury of the United States for the sole use of the tribe or tribes of Indians; to whom such reservations belonged; and the same, with interest thereon at 3 per centum per annum, shall be at all times subject to appropriation by Congress for the education and civilization of such tribe or tribes of Indians or the members thereof. The patents aforesaid shall be recorded in the Bureau of Land Management, and afterwards delivered, free of charge, to the allottee entitled thereto. And if any religious society or other organization was occupying on February 8, 1887, any of the public lands to which this act is applicable, for religious or educational work among the Indians, the Secretary of the Interior is authorized to confirm such occupation to such society or organization, in quantity not exceeding one hundred and sixty acres in any one tract, so long as the same shall be so occupied, on such terms as he shall deem just; but nothing herein contained shall change or alter any claim of such society for religious or educational purposes heretofore granted by law. And in the employment of Indian police, or any other employees in the public service among any of the Indian tribes or bands affected by this act, and where Indians can perform the

duties required, those Indians who have availed themselves of the provisions of this act and become citizens of the United States shall be preferred.

Provided further, That whenever the Secretary of the Interior shall be satisfied that any of the Indians of the Siletz Indian Reservation, in the State of Oregon, fully capable of managing their own business affairs, and being of the age of twenty-one years or upward, shall, through inheritance or otherwise, become the owner of more than eighty acres of land upon said reservation, he shall cause patents to be issued to such Indian or Indians for all of such lands over and above the eighty acres thereof. Said patent or patents shall be issued for the least valuable portions of said lands, and the same shall be discharged of any trust and free of all charge, incumbrance, or restriction whatsoever; and the Secretary of the Interior is authorized and directed to ascertain, as soon as shall be practicable, whether any of said Indians of the Siletz Reservation should receive patents conveying in fee lands to them under the provisions of this Act.

(Feb. 8, 1887, ch. 119, § 5, 24 Stat. 389; Mar. 3, 1901, ch. 832, § 9, 31 Stat. 1085; 1946 Reorg. Plan No. 3, § 403, eff. July 16, 1946, 11 F.R. 7876,60 Stat. 1100; Pub. L. 106–462, title I, § 106(a)(2), Nov. 7, 2000, 114 Stat. 2007; Pub. L. 108–374, § 6(c), Oct. 27, 2004, 118 Stat. 1805; Pub. L. 109–221, title V, § 501(b)(2), May 12, 2006, 120 Stat. 344.)

25 U.S. Code § 349 - Patents in fee to allottees

Current through Pub. L. 114-38. (See Public Laws for the current Congress.)

§ 349.
Patents in fee to allottees

At the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section 348 of this title, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law: *Provided*, That the Secretary of the Interior may, in his discretion, and he is authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent: *Provided further*, That until the issuance of fee-simple patents all allottees to whom trust patents shall be issued shall be subject to the exclusive jurisdiction of the United States: *And provided further*, That the provisions of this Act shall not extend to any Indians in the former Indian Territory.

(Feb. 8, 1887, ch. 119, § 6, 24 Stat. 390; May 8, 1906, ch. 2348, 34 Stat. 182.)

1988—Pub. L. 100–647, title V, § 5061(c)(3), Nov. 10, 1988, 102 Stat. 3680, inserted "PIPE TOBACCO," after "SMOKELESS TOBACCO," in chapter heading.

1987—Pub. L. 100–203, title X, § 10512(f)(2), Dec. 22, 1987, 101 Stat. 1330–449, added item for subchapter D and redesignated items for former subchapters D, E, and F as E, F, and G, respectively.

1986—Pub. L. 99–272, title XIII, § 13202(b)(1), Apr. 7, 1986, 100 Stat. 311, inserted "SMOKELESS TOBACCO," after "CIGARETTES," in chapter heading.

1976—Pub. L. 94–455, title XXI, § 2128(d)(2), Oct. 4, 1976, 90 Stat. 1921, substituted "manufacturers and importers" for "manufacturers" in item for subchapter D.

1965—Pub. L. 89–44, title V, § 502(b)(1), (2), June 21, 1965, 79 Stat. 150, struck out "TOBACCO," from chapter heading, reference to dealers in tobacco materials from heading of subchapter B, heading of subchapter D and redesignated subchapters E, F and G as D, E and F respectively, and struck out in heading of subchapter D (as redesignated) a reference to dealers in tobacco materials.

1958—Pub. L. 85–859, title II, § 202, Sept. 2, 1958, 72 Stat. 1414, substituted "manufacturers of tobacco products and cigarette papers and tubes, export warehouse proprietors, and" for "manufacturers of articles and" in heading of subchapters B and E, "manufacturers and importers of tobacco products and cigarette papers and tubes and export warehouse proprietors" for "manufacturers of articles" in heading of subchapter C, and "Penalties and forfeitures" for "Fines, penalties and forfeitures" in heading of subchapter G.

Subchapter A—Definitions; Rate and Payment of Tax; Exemption From Tax; and Refund and Drawback of Tax

AMENDMENTS

1965—Pub. L. 89–44, title V, § 501(g), title VIII, § 808(c)(2), June 21, 1965, 79 Stat. 150, 165, struck out item 5707 "Floor stocks refund on cigarettes" and inserted "Credit" before "refund" in item 5705.

1958—Pub. L. 85–859, title II, § 202, Sept. 2, 1958, 72 Stat. 1414, added item 5708.

§ 5701. Rate of tax

(a) Cigars

On cigars, manufactured in or imported into the United States, there shall be imposed the following taxes:

(1) Small cigars

On cigars, weighing not more than 3 pounds per thousand, $50.33 per thousand;

(2) Large cigars

On cigars weighing more than 3 pounds per thousand, a tax equal to 52.75 percent of the price for which sold but not more than 40.26 cents per cigar.

Cigars not exempt from tax under this chapter which are removed but not intended for sale shall be taxed at the same rate as similar cigars removed for sale.

(b) Cigarettes

On cigarettes, manufactured in or imported into the United States, there shall be imposed the following taxes:

(1) Small cigarettes

On cigarettes, weighing not more than 3 pounds per thousand, $50.33 per thousand;

(2) Large cigarettes

On cigarettes, weighing more than 3 pounds per thousand, $105.69 per thousand; except that, if more than 6½ inches in length, they shall be taxable at the rate prescribed for cigarettes weighing not more than 3 pounds per thousand, counting each 2¾ inches, or fraction thereof, of the length of each as one cigarette.

(c) Cigarette papers

On cigarette papers, manufactured in or imported into the United States, there shall be imposed a tax of 3.15 cents for each 50 papers or fractional part thereof; except that, if cigarette papers measure more than 6½ inches in length, they shall be taxable at the rate prescribed, counting each 2¾ inches, or fraction thereof, of the length of each as one cigarette paper.

(d) Cigarette tubes

On cigarette tubes, manufactured in or imported into the United States, there shall be imposed a tax of 6.30 cents for each 50 tubes or fractional part thereof, except that if cigarette tubes measure more than 6½ inches in length, they shall be taxable at the rate prescribed, counting each 2¾ inches, or fraction thereof, of the length of each as one cigarette tube.

(e) Smokeless tobacco

On smokeless tobacco, manufacturered[1] in or imported into the United States, there shall be imposed the following taxes:

(1) Snuff

On snuff, $1.51 per pound and a proportionate tax at the like rate on all fractional parts of a pound.

(2) Chewing tobacco

On chewing tobacco, 50.33 cents per pound and a proportionate tax at the like rate on all fractional parts of a pound.

(f) Pipe tobacco

On pipe tobacco, manufactured in or imported into the United States, there shall be imposed a tax of $2.8311 cents per pound (and a proportionate tax at the like rate on all fractional parts of a pound).

(g) Roll-your-own tobacco

On roll-your-own tobacco, manufactured in or imported into the United States, there shall be imposed a tax of $24.78 per pound (and a proportionate tax at the like rate on all fractional parts of a pound).

(h) Imported tobacco products and cigarette papers and tubes

The taxes imposed by this section on tobacco products and cigarette papers and tubes imported into the United States shall be in addition to any import duties imposed on such articles, unless such import duties are imposed in lieu of internal revenue tax.

(Aug. 16, 1954, ch. 736, 68A Stat. 705; Mar. 30, 1955, ch. 18, § 3(a)(9), 69 Stat. 14; Mar. 29, 1956, ch. 115,

[1] So in original. Probably should be "manufactured".

§ 3(a)(9), 70 Stat. 66; Pub. L. 85–12, § 3(a)(7), Mar. 29, 1957, 71 Stat. 9; Pub. L. 85–475, § 3(a)(7), June 30, 1958, 72 Stat. 259; Pub. L. 85–859, title II, § 202, Sept. 2, 1958, 72 Stat. 1414; Pub. L. 86–75, § 3(a)(7), June 30, 1959, 73 Stat. 157; Pub. L. 86–564, title II, § 202(a)(9), June 30, 1960, 74 Stat. 290; Pub. L. 86–779, § 1, Sept. 14, 1960, 74 Stat. 998; Pub. L. 87–72, § 3(a)(9), June 30, 1961, 75 Stat. 193; Pub. L. 87–508, § 3(a)(8), June 28, 1962, 76 Stat. 114; Pub. L. 88–52, § 3(a)(9), June 29, 1963, 77 Stat. 72; Pub. L. 88–348, § 2(a)(9), June 30, 1964, 78 Stat. 237; Pub. L. 89–44, title V, §§ 501(f), 502(a), June 21, 1965, 79 Stat. 150; Pub. L. 90–240, § 4(a), Jan. 2, 1968, 81 Stat. 776; Pub. L. 94–455, title XIX, § 1905(a)(24), title XXI, § 2128(a), Oct. 4, 1976, 90 Stat. 1821, 1921; Pub. L. 97–248, title II, § 283(a), Sept. 3, 1982, 96 Stat. 568; Pub. L. 99–272, title XIII, § 13202(a), Apr. 7, 1986, 100 Stat. 311; Pub. L. 100–647, title V, § 5061(a), Nov. 10, 1988, 102 Stat. 3679; Pub. L. 101–508, title XI, § 11202(a)–(f), Nov. 5, 1990, 104 Stat. 1388–419; Pub. L. 105–33, title IX, § 9302(a)–(g)(1), (h)(3), Aug. 5, 1997, 111 Stat. 671, 672, 674; Pub. L. 111–3, title VII, § 701(a)–(g), Feb. 4, 2009, 123 Stat. 106, 107.)

AMENDMENTS

2009—Subsec. (a)(1). Pub. L. 111–3, § 701(a)(1), substituted "$50.33 per thousand" for "$1.828 cents per thousand ($1.594 cents per thousand on cigars removed during 2000 or 2001)".

Subsec. (a)(2). Pub. L. 111–3, § 701(a)(2), (3), substituted "52.75 percent" for "20.719 percent (18.063 percent on cigars removed during 2000 or 2001)" and "40.26 cents per cigar" for "$48.75 per thousand ($42.50 per thousand on cigars removed during 2000 or 2001)".

Subsec. (b)(1). Pub. L. 111–3, § 701(b)(1), substituted "$50.33 per thousand" for "$19.50 per thousand ($17 per thousand on cigarettes removed during 2000 or 2001)".

Subsec. (b)(2). Pub. L. 111–3, § 701(b)(2), substituted "$105.69 per thousand" for "$40.95 per thousand ($35.70 per thousand on cigarettes removed during 2000 or 2001)".

Subsec. (c). Pub. L. 111–3, § 701(c), substituted "3.15 cents" for "1.22 cents (1.06 cents on cigarette papers removed during 2000 or 2001)".

Subsec. (d). Pub. L. 111–3, § 701(d), substituted "6.30 cents" for "2.44 cents (2.13 cents on cigarette tubes removed during 2000 or 2001)".

Subsec. (e)(1). Pub. L. 111–3, § 701(e)(1), substituted "$1.51" for "58.5 cents (51 cents on snuff removed during 2000 or 2001)".

Subsec. (e)(2). Pub. L. 111–3, § 701(e)(2), substituted "50.33 cents" for "19.5 cents (17 cents on chewing tobacco removed during 2000 or 2001)".

Subsec. (f). Pub. L. 111–3, § 701(f), substituted "$2.8311 cents" for "$1.0969 cents (95.67 cents on pipe tobacco removed during 2000 or 2001)".

Subsec. (g). Pub. L. 111–3, § 701(g), substituted "$24.78" for "$1.0969 cents (95.67 cents on roll-your-own tobacco removed during 2000 or 2001)".

1997—Subsec. (a)(1). Pub. L. 105–33, § 9302(b)(1), substituted "$1.828 cents per thousand ($1.594 cents per thousand on cigars removed during 2000 or 2001)" for "$1.125 cents per thousand (93.75 cents per thousand on cigars removed during 1991 or 1992)".

Subsec. (a)(2). Pub. L. 105–33, § 9302(b)(2), substituted "equal to 20.719 percent (18.063 percent on cigars removed during 2000 or 2001) of the price for which sold but not more than $48.75 per thousand ($42.50 per thousand on cigars removed during 2000 or 2001)." for "equal to—

"(A) 10.625 percent of the price for which sold but not more than $25 per thousand on cigars removed during 1991 or 1992, and

"(B) 12.75 percent of the price for which sold but not more than $30 per thousand on cigars removed after 1992."

Subsec. (b)(1). Pub. L. 105–33, § 9302(a)(1), substituted "$19.50 per thousand ($17 per thousand on cigarettes removed during 2000 or 2001)" for "$12 per thousand ($10 per thousand on cigarettes removed during 1991 or 1992)".

Subsec. (b)(2). Pub. L. 105–33, § 9302(a)(2), substituted "$40.95 per thousand ($35.70 per thousand on cigarettes removed during 2000 or 2001)" for "$25.20 per thousand ($21 per thousand on cigarettes removed during 1991 or 1992)".

Subsec. (c). Pub. L. 105–33, § 9302(h)(3), substituted "On cigarette papers," for "On each book or set of cigarette papers containing more than 25 papers,".

Pub. L. 105–33, § 9302(c), substituted "1.22 cents (1.06 cents on cigarette papers removed during 2000 or 2001)" for "0.75 cent (0.625 cent on cigarette papers removed during 1991 or 1992)".

Subsec. (d). Pub. L. 105–33, § 9302(d), substituted "2.44 cents (2.13 cents on cigarette tubes removed during 2000 or 2001)" for "1.5 cents (1.25 cents on cigarette tubes removed during 1991 or 1992)".

Subsec. (e)(1). Pub. L. 105–33, § 9302(e)(1), substituted "58.5 cents (51 cents on snuff removed during 2000 or 2001)" for "36 cents (30 cents on snuff removed during 1991 or 1992)".

Subsec. (e)(2). Pub. L. 105–33, § 9302(e)(2), substituted "19.5 cents (17 cents on chewing tobacco removed during 2000 or 2001)" for "12 cents (10 cents on chewing tobacco removed during 1991 or 1992)".

Subsec. (f). Pub. L. 105–33, § 9302(f), substituted "$1.0969 cents (95.67 cents on pipe tobacco removed during 2000 or 2001)" for "67.5 cents (56.25 cents on pipe tobacco removed during 1991 or 1992)".

Subsecs. (g), (h). Pub. L. 105–33, § 9302(g)(1), added subsec. (g) and redesignated former subsec. (g) as (h).

1990—Subsec. (a)(1). Pub. L. 101–508, § 11202(a)(1), substituted "$1.125 cents per thousand (93.75 cents per thousand on cigars removed during 1991 or 1992)" for "75 cents per thousand".

Subsec. (a)(2). Pub. L. 101–508, § 11202(a)(2), substituted "equal to—" and subpars. (A) and (B) for "equal to 8½ percent of the wholesale price, but not more than $20 per thousand."

Subsec. (b)(1). Pub. L. 101–508, § 11202(b)(1), substituted "$12 per thousand ($10 per thousand on cigarettes removed during 1991 or 1992)" for "$8 per thousand".

Subsec. (b)(2). Pub. L. 101–508, § 11202(b)(2), substituted "$25.20 per thousand ($21 per thousand on cigarettes removed during 1991 or 1992)" for "$16.80 per thousand".

Subsec. (c). Pub. L. 101–508, § 11202(c), substituted "0.75 cent (0.625 cent on cigarette papers removed during 1991 or 1992)" for "½ cent".

Subsec. (d). Pub. L. 101–508, § 11202(d), substituted "1.5 cents (1.25 cents on cigarette tubes removed during 1991 or 1992)" for "1 cent".

Subsec. (e)(1). Pub. L. 101–508, § 11202(e)(1), substituted "36 cents (30 cents on snuff removed during 1991 or 1992)" for "24 cents".

Subsec. (e)(2). Pub. L. 101–508, § 11202(e)(2), substituted "12 cents (10 cents on chewing tobacco removed during 1991 or 1992)" for "8 cents".

Subsec. (f). Pub. L. 101–508, § 11202(f), substituted "67.5 cents (56.25 cents on pipe tobacco removed during 1991 or 1992)" for "45 cents".

1988—Subsecs. (f), (g). Pub. L. 100–647 added subsec. (f) and redesignated former subsec. (f) as (g).

1986—Subsecs. (e), (f). Pub. L. 99–272 added subsec. (e) and redesignated former subsec. (e) as (f).

1982—Subsec. (b)(1). Pub. L. 97–248, § 283(a)(1), substituted "$8" for "$4".

Subsec. (b)(2). Pub. L. 97–248, § 283(a)(2), substituted "$16.80" for "$8.40".

1976—Subsec. (a). Pub. L. 94–455, § 2128(a), substituted provisions setting a tax of 8½ percent of the wholesale price, but not more than $20 per thousand, on cigars weighing more than 3 pounds per thousand for provisions setting the tax according to a graduated table running from $2.50 per thousand for large cigars if removed to retail at not more than 2½ cents each to $20 per thousand if removed to retail at more than 20 cents

each, and struck out provisions that, in determining the retail price, for tax purposes, regard be had to the ordinary retail price of a single cigar in its principal market, exclusive of any State or local taxes imposed on cigars as a commodity, and that, for purposes of that determination, the amount of State or local tax excluded from the retail price be the actual tax imposed, except that, if the combined taxes resulted in a numerical figure ending in a fraction of a cent, the amount so excluded would be rounded to the next highest full cent unless such rounding would result in a tax lower than the tax which would be imposed in the absence of State or local tax.

Subsec. (e). Pub. L. 94–455, § 1905(a)(24), inserted ", unless such import duties are imposed in lieu of internal revenue tax" after "such articles".

1968—Subsec. (a). Pub. L. 90–240 provided that the amount of State and local tax excluded from the retail price be the actual tax imposed, except that, if the combined taxes result in a numerical figure ending in a fraction of a cent, the amount so excluded be rounded to the next highest full cent unless such rounding would result in a tax lower than the tax which would be imposed in the absence of State and local taxes.

1965—Pub. L. 89–44, § 502(a), struck out subsec. (a) relating to tobacco and redesignated subsecs. (b) to (f) as subsecs. (a) to (e), respectively.

Subsec. (b)(1). Pub. L. 89–44, § 501(f), removed the July 1, 1965, time limit for the $4 per thousand rate as well as the provision for imposition of a $3.50 rate on and after July 1, 1965.

1964—Subsec. (c)(1). Pub. L. 88–348 substituted "July 1, 1965" for "July 1, 1964" in two places.

1963—Subsec. (c)(1). Pub. L. 88–52 substituted "July 1, 1964" for "July 1, 1963" in two places.

1962—Subsec. (c)(1). Pub. L. 87–508 substituted "July 1, 1963" for "July 1, 1962" in two places.

1961—Subsec. (c)(1). Pub. L. 87–72 substituted "July 1, 1962" for "July 1, 1961" in two places.

1960—Subsec. (b). Pub. L. 86–779 substituted "imposed on cigars as a commodity" for "imposed on the retail sales of cigars".

Subsec. (c)(1). Pub. L. 86–564 substituted "July 1, 1961" for "July 1, 1960" in two places.

1959—Subsec. (c)(1). Pub. L. 86–75 substituted "July 1, 1960" for "July 1, 1959" in two places.

1958—Subsec. (b). Pub. L. 85–859 provided that in determining the retail price, for tax purposes, regard shall be had to the ordinary retail price of a single cigar in its principal market, exclusive of any State or local taxes imposed on the retail sale of cigars, and required cigars not exempt from tax under this chapter which are removed but not intended for sale to be taxed at the same rate as similar cigars removed for sale.

Subsec. (c)(1). Pub. L. 85–475 substituted "July 1, 1959" for "July 1, 1958" in two places.

Subsec. (d). Pub. L. 85–859 substituted "On each book or set of cigarette papers containing more than 25 papers, manufactured in or imported into the United States, there shall be imposed" for "On cigarette papers, manufactured in or imported into the United States, there shall be imposed, on each package, book, or set containing more than 25 papers".

Subsec. (f). Pub. L. 85–859 substituted "imposed by this section on tobacco products and cigarette papers and tubes imported into the United States" for "imposed on articles by this section".

1957—Subsec. (c)(1). Pub. L. 85–12 substituted "July 1, 1958" for "April 1, 1957" in two places.

1956—Subsec. (c)(1). Act Mar. 29, 1956, substituted "April 1, 1957" for "April 1, 1956" in two places.

1955—Subsec. (c)(1). Act Mar. 30, 1955, substituted "April 1, 1956" for "April 1, 1955" in two places.

EFFECTIVE DATE OF 2009 AMENDMENT

Except as otherwise provided, amendment by Pub. L. 111–3 effective Apr. 1, 2009, see section 3 of Pub. L. 111–3, set out as an Effective Date note under section 1396 of Title 42, The Public Health and Welfare.

Pub. L. 111–3, title VII, § 701(i), Feb. 4, 2009, 123 Stat. 108, provided that: "The amendments made by this section [amending this section] shall apply to articles removed (as defined in section 5702(j) of the Internal Revenue Code of 1986) after March 31, 2009."

EFFECTIVE DATE OF 1997 AMENDMENT

Section 9302(i) of Pub. L. 105–33 provided that:

"(1) IN GENERAL.—The amendments made by this section [enacting section 5754 of this title and amending this section and sections 5702, 5704, 5712, 5713, 5721, 5722, and 5761 to 5763 of this title] shall apply to articles removed (as defined in section 5702(k) [now section 5702(j)] of the Internal Revenue Code of 1986, as amended by this section) after December 31, 1999.

"(2) TRANSITIONAL RULE.—Any person who—

"(A) on the date of the enactment of this Act [Aug. 5, 1997] is engaged in business as a manufacturer of roll-your-own tobacco or as an importer of tobacco products or cigarette papers and tubes, and

"(B) before January 1, 2000, submits an application under subchapter B of chapter 52 of such Code to engage in such business,

may, notwithstanding such subchapter B, continue to engage in such business pending final action on such application. Pending such final action, all provisions of such chapter 52 shall apply to such applicant in the same manner and to the same extent as if such applicant were a holder of a permit under such chapter 52 to engage in such business."

EFFECTIVE DATE OF 1990 AMENDMENT

Section 11202(h) of Pub. L. 101–508 provided that: "The amendments made by this section [amending this section and section 5702 of this title] shall apply with respect to articles removed after December 31, 1990."

EFFECTIVE DATE OF 1988 AMENDMENT

Section 5061(d) of Pub. L. 100–647 provided that:

"(1) IN GENERAL.—The amendments made by this section [amending this section and section 5702 of this title] shall apply to pipe tobacco removed (within the meaning of section 5702(k) [now section 5702(j)] of the 1986 Code) after December 31, 1988.

"(2) TRANSITIONAL RULE.—Any person who—

"(A) on the date of the enactment of this Act [Nov. 10, 1988], is engaged in business as a manufacturer of pipe tobacco, and

"(B) before January 1, 1989, submits an application under subchapter B of chapter 52 of the 1986 Code to engage in such business,

may, notwithstanding such subchapter B, continue to engage in such business pending final action on such application. Pending such final action, all provisions of chapter 52 of the 1986 Code shall apply to such applicant in the same manner and to the same extent as if such applicant were a holder of a permit to manufacture pipe tobacco under such chapter 52."

EFFECTIVE DATE OF 1986 AMENDMENT

Section 13202(c) of Pub. L. 99–272, as amended by Pub. L. 99–514, § 2, Oct. 22, 1986, 100 Stat. 2095, provided that:

"(1) IN GENERAL.—The amendments made by this section [amending this section and section 5702 of this title] shall apply to smokeless tobacco removed after June 30, 1986.

"(2) TRANSITIONAL RULE.—Any person who—

"(A) on the date of the enactment of this Act [Apr. 7, 1986], is engaged in business as a manufacturer of smokeless tobacco, and

"(B) before July 1, 1986, submits an application under subchapter B of chapter 52 of the Internal Revenue Code of 1986 [formerly I.R.C. 1954] to engage in such business,

may, notwithstanding such subchapter B, continue to engage in such business pending final action on such application. Pending such final action, all provisions of chapter 52 of such Code shall apply to such applicant in the same manner and to the same extent as if such applicant were a holder of a permit to manufacture smokless [sic] tobacco under such chapter 52."

EFFECTIVE DATE OF 1982 AMENDMENT

Section 283(c) of Pub. L. 97–248, as amended by Pub. L. 99–107, § 2, Sept. 30, 1985, 99 Stat. 479; Pub. L. 99–155, § 2(a), Nov. 14, 1985, 99 Stat. 814; Pub. L. 99–181, § 1, Dec. 13, 1985, 99 Stat. 1172; Pub. L. 99–189, § 1, Dec. 18, 1985, 99 Stat. 1184; Pub. L. 99–201, § 1, Dec. 23, 1985, 99 Stat. 1665; Pub. L. 99–272, title XIII, § 13201(a), Apr. 7, 1986, 100 Stat. 311, provided that: "The amendment made by subsection (a) [amending this section] shall apply with respect to cigarettes removed after December 31, 1982."

[Pub. L. 99–272, title XIII, § 13201(b), Apr. 7, 1986, 100 Stat. 311, provided that: "For purposes of all Federal and State laws, the amendment made by subsection (a) [amending section 283(c) of Pub. L. 97–248, set out above] shall be treated as having taken effect on March 14, 1986."]

EFFECTIVE DATE OF 1976 AMENDMENT

Amendment by section 1905(a)(24) of Pub. L. 94–455 effective on first day of first month which begins more than 90 days after Oct. 4, 1976, see section 1905(d) of Pub. L. 94–455, set out as a note under section 5005 of this title.

Section 2128(e) of Pub. L. 94–455 provided that: "The amendments made by this section [amending this section and sections 5702 and 5741 of this title] shall take effect on the first month which begins more than 90 days after the date of the enactment of this Act [Oct. 4, 1976]."

EFFECTIVE DATE OF 1968 AMENDMENT

Section 4(b) of Pub. L. 90–240 provided that: "The amendment made by subsection (a) [amending this section] shall apply to the removal of cigars on or after the first day of the first calendar quarter which begins more than 30 days after the date of the enactment of this Act [Jan. 2, 1968]."

EFFECTIVE DATE OF 1965 AMENDMENT

Section 701(d) of Pub. L. 89–44 provided that: "The amendments made by section 501 [repealing sections 5063 and 5707 of this title and provisions formerly set out below and amending this section and sections 5001, 5022, 5041, and 5051 of this title] shall apply on and after July 1, 1965. The amendments made by section 502 [striking out subchapter D of chapter 52 of this title and redesignating subchapters E, F, and G as subchapters D, E, and F respectively, and amending this section and sections 5702, 5704, 5711, 5741, 5753, 5762, and 5763 of this title] shall apply on and after January 1, 1966."

EFFECTIVE DATE OF 1960 AMENDMENT

Section 2 of Pub. L. 86–779 provided that: "The amendment made by the first section of this Act [amending this section] shall apply with respect to cigars removed on or after the ninth day of the first month which begins after the date of the enactment of this Act [Sept. 14, 1960]."

EFFECTIVE DATE OF 1958 AMENDMENT

Amendment by Pub. L. 85–859 effective Sept. 3, 1958, see section 210(a)(1) of Pub. L. 85–859, set out as a note under section 5001 of this title.

COORDINATION WITH TOBACCO INDUSTRY SETTLEMENT AGREEMENT

Section 9302(k) of Pub. L. 105–33, as added by Pub. L. 105–34, title XVI, § 1604(f)(3), Aug. 5, 1997, 111 Stat. 1099, which provided that the increase in excise taxes collected as a result of the amendments made by subsections (a), (e), and (g) of section 9302 of Pub. L. 105–33 (amending this section and section 5702 of this title) were to be credited against the total payments made by parties pursuant to Federal legislation implementing the tobacco industry settlement agreement of June 20, 1997, was repealed by Pub. L. 105–78, title V, § 519, Nov. 13, 1997, 111 Stat. 1519.

FLOOR STOCKS TAXES

Pub. L. 111–3, title VII, § 701(h), Feb. 4, 2009, 123 Stat. 107, provided that:

"(1) IMPOSITION OF TAX.—On tobacco products (other than cigars described in section 5701(a)(2) of the Internal Revenue Code of 1986) and cigarette papers and tubes manufactured in or imported into the United States which are removed before April 1, 2009, and held on such date for sale by any person, there is hereby imposed a tax in an amount equal to the excess of—

"(A) the tax which would be imposed under section 5701 of such Code on the article if the article had been removed on such date, over

"(B) the prior tax (if any) imposed under section 5701 of such Code on such article.

"(2) CREDIT AGAINST TAX.—Each person shall be allowed as a credit against the taxes imposed by paragraph (1) an amount equal to $500. Such credit shall not exceed the amount of taxes imposed by paragraph (1) on April 1, 2009, for which such person is liable.

"(3) LIABILITY FOR TAX AND METHOD OF PAYMENT.—

"(A) LIABILITY FOR TAX.—A person holding tobacco products, cigarette papers, or cigarette tubes on April 1, 2009, to which any tax imposed by paragraph (1) applies shall be liable for such tax.

"(B) METHOD OF PAYMENT.—The tax imposed by paragraph (1) shall be paid in such manner as the Secretary shall prescribe by regulations.

"(C) TIME FOR PAYMENT.—The tax imposed by paragraph (1) shall be paid on or before August 1, 2009.

"(4) ARTICLES IN FOREIGN TRADE ZONES.—Notwithstanding the Act of June 18, 1934 (commonly known as the Foreign Trade Zone Act, 48 Stat. 998, 19 U.S.C. 81a et seq.) or any other provision of law, any article which is located in a foreign trade zone on April 1, 2009, shall be subject to the tax imposed by paragraph (1) if—

"(A) internal revenue taxes have been determined, or customs duties liquidated, with respect to such article before such date pursuant to a request made under the 1st proviso of section 3(a) of such Act [19 U.S.C. 81c(a)], or

"(B) such article is held on such date under the supervision of an officer of the United States Customs and Border Protection of the Department of Homeland Security pursuant to the 2d proviso of such section 3(a).

"(5) DEFINITIONS.—For purposes of this subsection—

"(A) IN GENERAL.—Any term used in this subsection which is also used in section 5702 of the Internal Revenue Code of 1986 shall have the same meaning as such term has in such section.

"(B) SECRETARY.—The term 'Secretary' means the Secretary of the Treasury or the Secretary's delegate.

"(6) CONTROLLED GROUPS.—Rules similar to the rules of section 5061(e)(3) of such Code shall apply for purposes of this subsection.

"(7) OTHER LAWS APPLICABLE.—All provisions of law, including penalties, applicable with respect to the taxes imposed by section 5701 of such Code shall, insofar as applicable and not inconsistent with the provisions of this subsection, apply to the floor stocks taxes imposed by paragraph (1), to the same extent as if such taxes were imposed by such section 5701. The Secretary may treat any person who bore the ultimate burden of the tax imposed by paragraph (1) as the person to whom a credit or refund under such provisions may be allowed or made."

Section 9302(j) of Pub. L. 105–33, as amended by Pub. L. 106–554, § 1(a)(7) [title III, § 315(a)(1)], Dec. 21, 2000, 114 Stat. 2763, 2763A–643, provided that:

"(1) IMPOSITION OF TAX.—On cigarettes manufactured in or imported into the United States which are removed before any tax increase date, and held on such date for sale by any person, there is hereby imposed a tax in an amount equal to the excess of—

"(A) the tax which would be imposed under section 5701 of the Internal Revenue Code of 1986 on the article if the article had been removed on such date, over

"(B) the prior tax (if any) imposed under section 5701 of such Code on such article.

"(2) AUTHORITY TO EXEMPT CIGARETTES HELD IN VENDING MACHINES.—To the extent provided in regulations prescribed by the Secretary, no tax shall be imposed by paragraph (1) on cigarettes held for retail sale on any tax increase date, by any person in any vending machine. If the Secretary provides such a benefit with respect to any person, the Secretary may reduce the $500 amount in paragraph (3) with respect to such person.

"(3) CREDIT AGAINST TAX.—Each person shall be allowed as a credit against the taxes imposed by paragraph (1) an amount equal to $500. Such credit shall not exceed the amount of taxes imposed by paragraph (1) on any tax increase date, for which such person is liable.

"(4) LIABILITY FOR TAX AND METHOD OF PAYMENT.—

"(A) LIABILITY FOR TAX.—A person holding cigarettes on any tax increase date, to which any tax imposed by paragraph (1) applies shall be liable for such tax.

"(B) METHOD OF PAYMENT.—The tax imposed by paragraph (1) shall be paid in such manner as the Secretary shall prescribe by regulations.

"(C) TIME FOR PAYMENT.—The tax imposed by paragraph (1) shall be paid on or before April 1 following any tax increase date.

"(5) ARTICLES IN FOREIGN TRADE ZONES.—Notwithstanding the Act of June 18, 1934 (48 Stat. 998, 19 U.S.C. 81a) and any other provision of law, any article which is located in a foreign trade zone on any tax increase date, shall be subject to the tax imposed by paragraph (1) if—

"(A) internal revenue taxes have been determined, or customs duties liquidated, with respect to such article before such date pursuant to a request made under the 1st proviso of section 3(a) of such Act [19 U.S.C. 81c(a)], or

"(B) such article is held on such date under the supervision of a customs officer pursuant to the 2d proviso of such section 3(a).

"(6) DEFINITIONS.—For purposes of this subsection—

"(A) IN GENERAL.—Terms used in this subsection which are also used in section 5702 of the Internal Revenue Code of 1986 shall have the respective meanings such terms have in such section, as amended by this Act.

"(B) TAX INCREASE DATE.—The term 'tax increase date' means January 1, 2000, and January 1, 2002.

"(C) SECRETARY.—The term 'Secretary' means the Secretary of the Treasury or the Secretary's delegate.

"(7) CONTROLLED GROUPS.—Rules similar to the rules of section 5061(e)(3) of such Code shall apply for purposes of this subsection.

"(8) OTHER LAWS APPLICABLE.—All provisions of law, including penalties, applicable with respect to the taxes imposed by section 5701 of such Code shall, insofar as applicable and not inconsistent with the provisions of this subsection, apply to the floor stocks taxes imposed by paragraph (1), to the same extent as if such taxes were imposed by such section 5701. The Secretary may treat any person who bore the ultimate burden of the tax imposed by paragraph (1) as the person to whom a credit or refund under such provisions may be allowed or made."

Section 11202(i) of Pub. L. 101–508 provided that:

"(1) IMPOSITION OF TAX.—On cigarettes manufactured in or imported into the United States which are removed before any tax-increase date and held on such date for sale by any person, there shall be imposed the following taxes:

"(A) SMALL CIGARETTES.—On cigarettes, weighing not more than 3 pounds per thousand, $2 per thousand.

"(B) LARGE CIGARETTES.—On cigarettes weighing more than 3 pounds per thousand, $4.20 per thousand; except that, if more than 6½ inches in length, they shall be taxable at the rate prescribed for cigarettes weighing not more than 3 pounds per thousand, counting each 2¾ inches, or fraction thereof, of the length of each as one cigarette.

"(2) EXCEPTION FOR CERTAIN AMOUNTS OF CIGARETTES.—

"(A) IN GENERAL.—No tax shall be imposed by paragraph (1) on cigarettes held on any tax-increase date by any person if—

"(i) the aggregate number of cigarettes held by such person on such date does not exceed 30,000, and

"(ii) such person submits to the Secretary (at the time and in the manner required by the Secretary) such information as the Secretary shall require for purposes of this subparagraph.

For purposes of this subparagraph, in the case of cigarettes measuring more than 6½ inches in length, each 2¾ inches (or fraction thereof) of the length of each shall be counted as one cigarette.

"(B) AUTHORITY TO EXEMPT CIGARETTES HELD IN VENDING MACHINES.—To the extent provided in regulations prescribed by the Secretary, no tax shall be imposed by paragraph (1) on cigarettes held for retail sale on any tax-increase date by any person in any vending machine. If the Secretary provides such a benefit with respect to any person, the Secretary may reduce the 30,000 amount in subparagraph (A) and the $60 amount in paragraph (3) with respect to such person.

"(3) CREDIT AGAINST TAX.—Each person shall be allowed as a credit against the taxes imposed by paragraph (1) an amount equal to $60. Such credit shall not exceed the amount of taxes imposed by paragraph (1) for which such person is liable.

"(4) LIABILITY FOR TAX AND METHOD OF PAYMENT.—

"(A) LIABILITY FOR TAX.—A person holding cigarettes on any tax-increase date to which any tax imposed by paragraph (1) applies shall be liable for such tax.

"(B) METHOD OF PAYMENT.—The tax imposed by paragraph (1) shall be paid in such manner as the Secretary shall prescribe by regulations.

"(C) TIME FOR PAYMENT.—The tax imposed by paragraph (1) shall be paid on or before the 1st June 30 following the tax-increase date.

"(5) DEFINITIONS.—For purposes of this subsection—

"(A) TAX-INCREASE DATE.—The term 'tax-increase date' means January 1, 1991, and January 1, 1993.

"(B) OTHER DEFINITIONS.—Terms used in this subsection which are also used in section 5702 of the Internal Revenue Code of 1986 shall have the respective meanings such terms have in such section.

"(C) SECRETARY.—The term 'Secretary' means the Secretary of the Treasury or his delegate.

"(6) CONTROLLED GROUPS.—Rules similar to the rules of section 11201(e)(6) [Pub. L. 101–508, set out in a note under section 5001 of this title] shall apply for purposes of this subsection.

"(7) OTHER LAWS APPLICABLE.—All provisions of law, including penalties, applicable with respect to the taxes imposed by section 5701 of such Code shall, insofar as applicable and not inconsistent with the provisions of this subsection, apply to the floor stocks taxes imposed by paragraph (1), to the same extent as if such taxes were imposed by such section 5701."

Section 5061(e) of Pub. L. 100–647 provided that:

"(1) IMPOSITION OF TAX.—On pipe tobacco manufactured in or imported into the United States which is removed before January 1, 1989, and held on such date for sale by any person, there is hereby imposed a tax of 45 cents per pound (and a proportionate tax at the like rate on all fractional parts of a pound).

"(2) LIABILITY FOR TAX AND METHOD OF PAYMENT.—

"(A) LIABILITY FOR TAX.—A person holding pipe tobacco on January 1, 1989, to which the tax imposed by paragraph (1) applies shall be liable for such tax.

"(B) METHOD OF PAYMENT.—The tax imposed by paragraph (1) shall be treated as a tax imposed by section 5701 of the 1986 Code and shall be due and payable on February 14, 1989, in the same manner as the tax imposed by such section is payable with respect to pipe tobacco removed on or after January 1, 1989.

"(C) TREATMENT OF PIPE TOBACCO IN FOREIGN TRADE ZONES.—Notwithstanding the Act of June 18, 1934 (48

Stat. 998, 19 U.S.C. 81a) or any other provision of law, pipe tobacco which is located in a foreign trade zone on January 1, 1989, shall be subject to the tax imposed by paragraph (1) and shall be treated for purposes of this subsection as held on such date for sale if—

"(i) internal revenue taxes have been determined, or customs duties liquidated, with respect to such pipe tobacco before such date pursuant to a request made under the first proviso of section 3(a) of such Act [19 U.S.C. 81c(a)], or

"(ii) such pipe tobacco is held on such date under the supervision of a customs officer pursuant to the second proviso of such section 3(a).

"Under regulations prescribed by the Secretary of the Treasury or his delegate, provisions similar to sections 5706 and 5708 of the 1986 Code shall apply to pipe tobacco with respect to which tax is imposed by paragraph (1) by reason of this subparagraph.

"(3) PIPE TOBACCO.—For purposes of this subsection, the term 'pipe tobacco' shall have the meaning given to such term by subsection (*o*) [now subsection (n)] of section 5702 of the 1986 Code.

"(4) EXCEPTION WHERE LIABILITY DOES NOT EXCEED $1,000.—No tax shall be imposed by paragraph (1) on any person if the tax which would but for this paragraph be imposed on such person does not exceed $1,000. For purposes of the preceding sentence, all persons who are treated as a single taxpayer under section 5061(e)(3) of the 1986 Code shall be treated as 1 person."

Section 283(b) of Pub. L. 97–248, as amended by Pub. L. 97–448, title III, § 306(a)(14), Jan. 12, 1983, 96 Stat. 2405; Pub. L. 99–514, § 2, Oct. 22, 1986, 100 Stat. 2095, provided that:

"(1) IMPOSITION OF TAX.—On cigarettes manufactured in or imported into the United States which are removed before January 1, 1983, and held on such date for sale by any person, there shall be imposed the following taxes:

"(A) SMALL CIGARETTES.—On cigarettes, weighing not more than 3 pounds per thousand, $4 per thousand;

"(B) LARGE CIGARETTES.—On cigarettes, weighing more than 3 pounds per thousand, $8.40 per thousand; except that, if more than 6½ inches in length, they shall be taxable at the rate prescribed for cigarettes weighing not more than 3 pounds per thousand, counting each 2¾ inches, or fraction thereof, of the length of each as one cigarette.

"(2) LIABILITY FOR TAX AND METHOD OF PAYMENT.—

"(A) LIABILITY FOR TAX.—A person holding cigarettes on January 1, 1983, to which any tax imposed by paragraph (1) applies shall be liable for such tax.

"(B) METHOD OF PAYMENT.—The tax imposed by paragraph (1) shall be treated as a tax imposed under section 5701 and shall be due and payable on February 17, 1983 in the same manner as the tax imposed under such section is payable with respect to cigarettes removed on January 1, 1983.

"(3) CIGARETTE.—For purposes of this subsection, the term 'cigarette' shall have the meaning given to such term by subsection (b) of section 5702 of the Internal Revenue Code of 1986 [formerly I.R.C. 1954].

"(4) EXCEPTION FOR RETAILERS.—The taxes imposed by paragraph (1) shall not apply to cigarettes in retail stocks held on January 1, 1983, at the place where intended to be sold at retail."

§ 5702. Definitions

When used in this chapter—

(a) Cigar

"Cigar" means any roll of tobacco wrapped in leaf tobacco or in any substance containing tobacco (other than any roll of tobacco which is a cigarette within the meaning of subsection (b)(2)).

(b) Cigarette

"Cigarette" means—

(1) any roll of tobacco wrapped in paper or in any substance not containing tobacco, and

(2) any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette described in paragraph (1).

(c) Tobacco products

"Tobacco products" means cigars, cigarettes, smokeless tobacco, pipe tobacco, and roll-your-own tobacco.

(d) Manufacturer of tobacco products

"Manufacturer of tobacco products" means any person who manufactures cigars, cigarettes, smokeless tobacco, pipe tobacco, or roll-your-own tobacco, except that such term shall not include—

(1) a person who produces cigars, cigarettes, smokeless tobacco, pipe tobacco, or roll-your-own tobacco solely for the person's own personal consumption or use, and

(2) a proprietor of a customs bonded manufacturing warehouse with respect to the operation of such warehouse.

(e) Cigarette paper

"Cigarette paper" means paper, or any other material except tobacco, prepared for use as a cigarette wrapper.

(f) Cigarette tube

"Cigarette tube" means cigarette paper made into a hollow cylinder for use in making cigarettes.

(g) Manufacturer of cigarette papers and tubes

"Manufacturer of cigarette papers and tubes" means any person who manufactures cigarette paper, or makes up cigarette paper into tubes, except for his own personal use or consumption.

(h) Export warehouse

"Export warehouse" means a bonded internal revenue warehouse for the storage of tobacco products or cigarette papers or tubes or any processed tobacco, upon which the internal revenue tax has not been paid, for subsequent shipment to a foreign country, Puerto Rico, the Virgin Islands, or a possession of the United States, or for consumption beyond the jurisdiction of the internal revenue laws of the United States.

(i) Export warehouse proprietor

"Export warehouse proprietor" means any person who operates an export warehouse.

(j) Removal or remove

"Removal" or "remove" means the removal of tobacco products or cigarette papers or tubes, or any processed tobacco, from the factory or from internal revenue bond under section 5704, as the Secretary shall by regulation prescribe, or release from customs custody, and shall also include the smuggling or other unlawful importation of such articles into the United States.

(k) Importer

"Importer" means any person in the United States to whom nontaxpaid tobacco products or cigarette papers or tubes, or any processed tobacco, manufactured in a foreign country, Puer-

this section, after Dec. 31, 1988, with transition rule, see section 5061(d) of Pub. L. 100–647, set out as a note under section 5701 of this title.

EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by Pub. L. 99–272 applicable to smokeless tobacco removed after June 30, 1986, see section 13202(c) of Pub. L. 99–272, set out as a note under section 5701 of this title.

EFFECTIVE DATE OF 1976 AMENDMENT

Amendment by section 2128(b) of Pub. L. 94–455 effective on first month which begins more than 90 days after Oct. 4, 1976, see section 2128(e) of Pub. L. 94–455, set out as a note under section 5701 of this title.

EFFECTIVE DATE OF 1965 AMENDMENT

Amendment by section 502(b)(3) of Pub. L. 89–44 applicable on and after Jan. 1, 1966, see section 701(d) of Pub. L. 89–44, set out as a note under section 5701 of this title.

Section 808(d)(1) of Pub. L. 89–44 provided that: "The amendments made by subsections (a) and (b)(3) [amending this section and section 7652 of this title] shall take effect on July 1, 1965."

EFFECTIVE DATE OF 1958 AMENDMENT

Amendment by Pub. L. 85–859 effective Sept. 3, 1958, see section 210(a)(1) of Pub. L. 85–859, set out as an Effective Date note under section 5001 of this title.

§ 5703. Liability for tax and method of payment

(a) Liability for tax

(1) Original liability

The manufacturer or importer of tobacco products and cigarette papers and tubes shall be liable for the taxes imposed thereon by section 5701.

(2) Transfer of liability

When tobacco products and cigarette papers and tubes are transferred, without payment of tax, pursuant to section 5704, the liability for tax shall be transferred in accordance with the provisions of this paragraph. When tobacco products and cigarette papers and tubes are transferred between the bonded premises of manufacturers and export warehouse proprietors, the transferee shall become liable for the tax upon receipt by him of such articles, and the transferor shall thereupon be relieved of his liability for such tax. When tobacco products and cigarette papers and tubes are released in bond from customs custody for transfer to the bonded premises of a manufacturer of tobacco products or cigarette papers and tubes, the transferee shall become liable for the tax on such articles upon release from customs custody, and the importer shall thereupon be relieved of his liability for such tax. All provisions of this chapter applicable to tobacco products and cigarette papers and tubes in bond shall be applicable to such articles returned to bond upon withdrawal from the market or returned to bond after previous removal for a tax-exempt purpose.

(b) Method of payment of tax

(1) In general

The taxes imposed by section 5701 shall be determined at the time of removal of the tobacco products and cigarette papers and tubes. Such taxes shall be paid on the basis of return. The Secretary shall, by regulations, prescribe the period or the event for which such return shall be made and the information to be furnished on such return. Any postponement under this subsection of the payment of taxes determined at the time of removal shall be conditioned upon the filing of such additional bonds, and upon compliance with such requirements, as the Secretary may prescribe for the protection of the revenue. The Secretary may, by regulations, require payment of tax on the basis of a return prior to removal of the tobacco products and cigarette papers and tubes where a person defaults in the postponed payment of tax on the basis of a return under this subsection or regulations prescribed thereunder. All administrative and penalty provisions of this title, insofar as applicable, shall apply to any tax imposed by section 5701.

(2) Time for payment of taxes

(A) In general

Except as otherwise provided in this paragraph, in the case of taxes on tobacco products and cigarette papers and tubes removed during any semimonthly period under bond for deferred payment of tax, the last day for payment of such taxes shall be the 14th day after the last day of such semimonthly period.

(B) Imported articles

In the case of tobacco products and cigarette papers and tubes which are imported into the United States—

(i) In general

The last day for payment of tax shall be the 14th day after the last day of the semimonthly period during which the article is entered into the customs territory of the United States.

(ii) Special rule for entry for warehousing

Except as provided in clause (iv), in the case of an entry for warehousing, the last day for payment of tax shall not be later than the 14th day after the last day of the semimonthly period during which the article is removed from the 1st such warehouse.

(iii) Foreign trade zones

Except as provided in clause (iv) and in regulations prescribed by the Secretary, articles brought into a foreign trade zone shall, notwithstanding any other provision of law, be treated for purposes of this subsection as if such zone were a single customs warehouse.

(iv) Exception for articles destined for export

Clauses (ii) and (iii) shall not apply to any article which is shown to the satisfaction of the Secretary to be destined for export.

(C) Tobacco products and cigarette papers and tubes brought into the United States from Puerto Rico

In the case of tobacco products and cigarette papers and tubes which are brought

into the United States from Puerto Rico, the last day for payment of tax shall be the 14th day after the last day of the semimonthly period during which the article is brought into the United States.

(D) Special rule for tax due in September

(i) In general

Notwithstanding the preceding provisions of this paragraph, the taxes on tobacco products and cigarette papers and tubes for the period beginning on September 16 and ending on September 26 shall be paid not later than September 29.

(ii) Safe harbor

The requirement of clause (i) shall be treated as met if the amount paid not later than September 29 is not less than 11/15 of the taxes on tobacco products and cigarette papers and tubes for the period beginning on September 1 and ending on September 15.

(iii) Taxpayers not required to use electronic funds transfer

In the case of payments not required to be made by electronic funds transfer, clauses (i) and (ii) shall be applied by substituting "September 25" for "September 26", "September 28" for "September 29", and "2/3" for "11/15".

(E) Special rule where due date falls on Saturday, Sunday, or holiday

Notwithstanding section 7503, if, but for this subparagraph, the due date under this paragraph would fall on a Saturday, Sunday, or a legal holiday (as defined in section 7503), such due date shall be the immediately preceding day which is not a Saturday, Sunday, or such a holiday (or the immediately following day where the due date described in subparagraph (D) falls on a Sunday).

(F) Special rule for unlawfully manufactured tobacco products

In the case of any tobacco products, cigarette paper, or cigarette tubes manufactured in the United States at any place other than the premises of a manufacturer of tobacco products, cigarette paper, or cigarette tubes that has filed the bond and obtained the permit required under this chapter, tax shall be due and payable immediately upon manufacture.

(3) Payment by electronic fund transfer

Any person who in any 12-month period, ending December 31, was liable for a gross amount equal to or exceeding $5,000,000 in taxes imposed on tobacco products and cigarette papers and tubes by section 5701 (or 7652) shall pay such taxes during the succeeding calendar year by electronic fund transfer (as defined in section 5061(e)(2)) to a Federal Reserve Bank. Rules similar to the rules of section 5061(e)(3) shall apply to the $5,000,000 amount specified in the preceding sentence.

(c) Use of government depositaries

The Secretary may authorize Federal Reserve banks, and incorporated banks or trust companies which are depositaries or financial agents of the United States, to receive any tax imposed by this chapter, in such manner, at such times, and under such conditions as he may prescribe; and he shall prescribe the manner, time, and condition under which the receipt of such tax by such banks and trust companies is to be treated as payment for tax purposes.

(d) Assessment

Whenever any tax required to be paid by this chapter is not paid in full at the time required for such payment, it shall be the duty of the Secretary, subject to the limitations prescribed in section 6501, on proof satisfactory to him, to determine the amount of tax which has been omitted to be paid, and to make an assessment therefor against the person liable for the tax. The tax so assessed shall be in addition to the penalties imposed by law for failure to pay such tax when required. Except in cases where delay may jeopardize collection of the tax, or where the amount is nominal or the result of an evident mathematical error, no such assessment shall be made until and after the person liable for the tax has been afforded reasonable notice and opportunity to show cause, in writing, against such assessment.

(Aug. 16, 1954, ch. 736, 68A Stat. 707; Pub. L. 85–859, title II, § 202, Sept. 2, 1958, 72 Stat. 1417; Pub. L. 94–455, title XIX, §§ 1905(a)(25), 1906(b)(13)(A), Oct. 4, 1976, 90 Stat. 1821, 1834; Pub. L. 97–448, title III, § 308(a), Jan. 12, 1983, 96 Stat. 2407; Pub. L. 98–369, div. A, title I, § 27(c)(2), July 18, 1984, 98 Stat. 509; Pub. L. 99–509, title VIII, § 8011(a)(1), Oct. 21, 1986, 100 Stat. 1951; Pub. L. 99–514, title XVIII, § 1801(c)(2), Oct. 22, 1986, 100 Stat. 2786; Pub. L. 100–647, title II, § 2003(b)(1)(C), (D), Nov. 10, 1988, 102 Stat. 3598; Pub. L. 103–465, title VII, § 712(c), Dec. 8, 1994, 108 Stat. 5000; Pub. L. 111–3, title VII, § 702(e)(1), Feb. 4, 2009, 123 Stat. 110.)

AMENDMENTS

2009—Subsec. (b)(2)(F). Pub. L. 111–3 added subpar. (F).

1994—Subsec. (b)(2)(D). Pub. L. 103–465, § 712(c)(1), added subpar. (D). Former subpar. (D) redesignated (E).

Subsec. (b)(2)(E). Pub. L. 103–465, § 712(c), redesignated subpar. (D) as (E), substituted "due date" for "14th day" in heading, and inserted "(or the immediately following day where the due date described in subparagraph (D) falls on a Sunday)" before period at end.

1988—Subsec. (b)(2)(B)(i), (ii), (C). Pub. L. 100–647 substituted "the 14th day after the last day of the semimonthly period during which" for "the 14th day after the date on which".

1986—Subsec. (b)(2). Pub. L. 99–509 amended par. (2) generally. Prior to amendment par. (2), time for making of return and payment of taxes, read as follows: "In the case of tobacco products and cigarette papers and tubes removed after December 31, 1982, under bond for deferred payment of tax, the last day for filing a return and paying any tax due for each return period shall be the last day of the first succeeding return period plus 10 days."

Subsec. (b)(3). Pub. L. 99–514 inserted last sentence.

1984—Subsec. (b)(3). Pub. L. 98–369 added par. (3).

1983—Subsec. (b). Pub. L. 97–448 designated existing provisions as par. (1), struck out provisions that the Secretary prescribe the time for making a return and the time for the payment of taxes and that the Secretary prescribe by regulations the conditions for the filing of additional bonds, and added par. (2).

1976—Subsec. (a). Pub. L. 94–455, §1905(a)(25)(A), directed that all provisions of chapter 52 applicable to tobacco products and cigarette papers and tubes in bond be applicable to such articles returned to bond upon withdrawal from the market or returned to bond after previous removal for a tax-exempt purpose.

Subsec. (b). Pub. L. 94–455, §§1905(a)(25)(B), 1906(b)(13)(A), struck out provisions which had authorized payment of taxes by stamp until regulations could be promulgated to provide for payment by return and struck out "or his delegate" after "Secretary" in three places.

Subsec. (c). Pub. L. 94–455, §§1905(a)(25)(C), 1906(b)(13)(A), redesignated subsec. (d) as (c) and struck out "or his delegate" after "Secretary". Former subsec. (c), relating to the use of stamps as evidence of the payment of taxes, was struck out.

Subsecs. (d), (e). Pub. L. 94–455, §§1905(a)(25)(C), 1906(b)(13)(A), redesignated subsec. (e) as (d) and struck out "or his delegate" after "Secretary". Former subsec. (d) redesignated (c).

1958—Subsec. (a)(1). Pub. L. 85–859 designated part of first sentence of subsec. (a) as par. (1) thereof and redesignated the remainder of subsec. (a) as (b).

Subsec. (a)(2). Pub. L. 85–859 added par. (2).

Subsec. (b). Pub. L. 85–859 designated former subsec. (a), with exception of part of the first sentence, as subsec. (b) and substituted "tobacco products and cigarette papers and tubes" for "articles", and inserted provisions relating to postponements, and to payment of the tax on the basis of a return prior to removal of the tobacco products and cigarette papers and tubes where a person defaults in the postponed payment of the tax. Former subsec. (b) redesignated (c).

Subsec. (c). Pub. L. 85–859 designated former subsec. (b) as (c) and substituted "If the Secretary or his delegate shall by regulation provide for the payment of tax by return and require the use of" for "If the Secretary or his delegate shall, by regulation, require the use", and "tobacco products" for "articles". Former subsec. (c) redesignated (d).

Subsec. (d). Pub. L. 85–859 redesignated former subsec. (c) as (d). Former subsec. (d) redesignated (e).

Subsec. (e). Pub. L. 85–859 designated former subsec. (d) as (e) and permitted assessments in cases where delay may jeopardize collection of the tax, or where the amount is nominal or the result of an evident mathematical error.

EFFECTIVE DATE OF 2009 AMENDMENT

Pub. L. 111–3, title VII, §702(e)(2), Feb. 4, 2009, 123 Stat. 110, provided that: "The amendment made by this subsection [amending this section] shall take effect on the date of the enactment of this Act [Feb. 4, 2009]."

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103–465 effective Jan. 1, 1995, see section 712(e) of Pub. L. 103–465, set out as a note under section 5061 of this title.

EFFECTIVE DATE OF 1988 AMENDMENT

Amendment by Pub. L. 100–647 effective as if included in the amendments made by section 8011 of the Omnibus Budget Reconciliation Act of 1986, Pub. L. 99–509, see section 2003(b)(2) of Pub. L. 100–647, set out as a note under section 5061 of this title.

EFFECTIVE DATE OF 1986 AMENDMENTS

Amendment by Pub. L. 99–514 effective, except as otherwise provided, as if included in the provisions of the Tax Reform Act of 1984, Pub. L. 98–369, div. A, to which such amendment relates, see section 1881 of Pub. L. 99–514, set out as a note under section 48 of this title.

Amendment by Pub. L. 99–509 applicable to removals during semimonthly periods ending on or after Dec. 31, 1986, except as otherwise provided, see section 8011(c) of Pub. L. 99–509, set out as a note under section 5061 of this title.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–369 applicable to taxes required to be paid on or after Sept. 30, 1984, see section 27(d)(2) of Pub. L. 98–369, set out as a note under section 5001 of this title.

EFFECTIVE DATE OF 1983 AMENDMENT

Section 308(b) of Pub. L. 97–448 provided that: "The amendments made by subsection (a) [amending this section] shall apply with respect to tobacco products and cigarette papers and tubes removed after December 31, 1982."

EFFECTIVE DATE OF 1976 AMENDMENT

Amendment by section 1905(a)(25) of Pub. L. 94–455 effective on first day of first month which begins more than 90 days after Oct. 4, 1976, see section 1905(d) of Pub. L. 94–455, set out as a note under section 5005 of this title.

EFFECTIVE DATE OF 1958 AMENDMENT

Amendment by Pub. L. 85–859 effective Sept. 3, 1958, see section 210(a)(1) of Pub. L. 85–859, set out as an Effective Date note under section 5001 of this title.

PLAN AMENDMENTS NOT REQUIRED UNTIL JANUARY 1, 1989

For provisions directing that if any amendments made by subtitle A or subtitle C of title XI [§§1101–1147 and 1171–1177] or title XVIII [§§1800–1899A] of Pub. L. 99–514 require an amendment to any plan, such plan amendment shall not be required to be made before the first plan year beginning on or after Jan. 1, 1989, see section 1140 of Pub. L. 99–514, as amended, set out as a note under section 401 of this title.

§ 5704. Exemption from tax

(a) Tobacco products furnished for employee use or experimental purposes

Tobacco products may be furnished by a manufacturer of such products, without payment of tax, for use or consumption by employees or for experimental purposes, in such quantities, and in such manner as the Secretary shall by regulation prescribed.

(b) Tobacco products and cigarette papers and tubes transferred or removed in bond from domestic factories and export warehouses

A manufacturer or export warehouse proprietor may transfer tobacco products and cigarette papers and tubes, without payment of tax, to the bonded premises of another manufacturer or export warehouse proprietor, or remove such articles, without payment of tax, for shipment to a foreign country, Puerto Rico, the Virgin Islands, or a possession of the United States, or for consumption beyond the jurisdiction of the internal revenue laws of the United States; and manufacturers may similarly remove such articles for use of the United States; in accordance with such regulations and under such bonds as the Secretary shall prescribe. Tobacco products and cigarette papers and tubes may not be transferred or removed under this subsection unless such products or papers and tubes bear such marks, labels, or notices as the Secretary shall by regulations prescribe.

(c) Tobacco products and cigarette papers and tubes released in bond from customs custody

Tobacco products and cigarette papers and tubes, imported or brought into the United States, may be released from customs custody, without payment of tax, for delivery to the proprietor of an export warehouse, or to a manufacturer of tobacco products or cigarette papers

AMENDMENTS

1987—Pub. L. 100–203, title X, § 10512(f)(1), Dec. 22, 1987, 101 Stat. 1330–449, redesignated subchapter F as G.

1965—Pub. L. 89–44, title V, § 502(b)(7), June 21, 1965, 79 Stat. 151, redesignated subchapter G as F. Former subchapter F redesignated E.

1958—Pub. L. 85–859, title II, § 202, Sept. 2, 1958, 72 Stat. 1425, substituted "Penalties and Forfeitures" for "Fines, Penalties, and Forfeitures" in subchapter heading.

§ 5761. Civil penalties

(a) Omitting things required or doing things forbidden

Whoever willfully omits, neglects, or refuses to comply with any duty imposed upon him by this chapter, or to do, or cause to be done, any of the things required by this chapter, or does anything prohibited by this chapter, shall in addition to any other penalty provided in this title, be liable to a penalty of $1,000, to be recovered, with costs of suit, in a civil action, except where a penalty under subsection (b) or (c) or under section 6651 or 6653 or part II of subchapter A of chapter 68 may be collected from such person by assessment.

(b) Failure to pay tax

Whoever fails to pay any tax imposed by this chapter at the time prescribed by law or regulations, shall, in addition to any other penalty provided in this title, be liable to a penalty of 5 percent of the tax due but unpaid.

(c) Sale of tobacco products and cigarette papers and tubes for export

Except as provided in subsections (b) and (d) of section 5704—

(1) every person who sells, relands, or receives within the jurisdiction of the United States any tobacco products or cigarette papers or tubes which have been labeled or shipped for exportation under this chapter,

(2) every person who sells or receives such relanded tobacco products or cigarette papers or tubes, and

(3) every person who aids or abets in such selling, relanding, or receiving,

shall, in addition to the tax and any other penalty provided in this title, be liable for a penalty equal to the greater of $1,000 or 5 times the amount of the tax imposed by this chapter. All tobacco products and cigarette papers and tubes relanded within the jurisdiction of the United States shall be forfeited to the United States and destroyed. All vessels, vehicles, and aircraft used in such relanding or in removing such products, papers, and tubes from the place where relanded, shall be forfeited to the United States. This subsection and section 5754 shall not apply to any person who relands or receives tobacco products in the quantity allowed entry free of tax and duty under subchapter IV of chapter 98 of the Harmonized Tariff Schedule of the United States. No quantity of tobacco products other than the quantity referred to in the preceding sentence may be relanded or received as a personal use quantity.

(d) Personal use quantities

(1) In general

No quantity of tobacco products other than the quantity referred to in paragraph (2) may be relanded or received as a personal use quantity.

(2) Exception for personal use quantity

Subsection (c) and section 5754 shall not apply to any person who relands or receives tobacco products in the quantity allowed entry free of tax and duty under chapter 98 of the Harmonized Tariff Schedule of the United States, and such person may voluntarily relinquish to the Secretary at the time of entry any excess of such quantity without incurring the penalty under subsection (c).

(3) Special rule for delivery sales

(A) In general

Paragraph (2) shall not apply to any tobacco product sold in connection with a delivery sale.

(B) Delivery sale

For purposes of subparagraph (A), the term "delivery sale" means any sale of a tobacco product to a consumer if—

(i) the consumer submits the order for such sale by means of a telephone or other method of voice transmission, the mail, or the Internet or other online service, or the seller is otherwise not in the physical presence of the buyer when the request for purchase or order is made, or

(ii) the tobacco product is delivered by use of a common carrier, private delivery service, or the mail, or the seller is not in the physical presence of the buyer when the buyer obtains personal possession of the tobacco product.

(e) Applicability of section 6665

The penalties imposed by subsections (b) and (c) shall be assessed, collected, and paid in the same manner as taxes, as provided in section 6665(a).

(f) Cross references

For penalty for failure to make deposits or for overstatement of deposits, see section 6656.

(Aug. 16, 1954, ch. 736, 68A Stat. 717; Pub. L. 85–859, title II, § 202, Sept. 2, 1958, 72 Stat. 1425; Pub. L. 97–34, title VII, §§ 722(a)(3), 724(b)(5), Aug. 13, 1981, 95 Stat. 342, 345; Pub. L. 97–448, title I, § 107(b), Jan. 12, 1983, 96 Stat. 2391; Pub. L. 98–369, div. A, title VII, § 714(h)(2), July 18, 1984, 98 Stat. 962; Pub. L. 101–239, title VII, § 7721(c)(4), (5), Dec. 19, 1989, 103 Stat. 2399; Pub. L. 105–33, title IX, § 9302(h)(1)(B)–(D), Aug. 5, 1997, 111 Stat. 673; Pub. L. 106–476, title IV, §§ 4002(c), 4003(a), Nov. 9, 2000, 114 Stat. 2177; Pub. L. 106–554, § 1(a)(7) [title III, § 315(a)(3)], Dec. 21, 2000, 114 Stat. 2763, 2763A–644; Pub. L. 109–432, div. C, title IV, § 401(f)(1), (2)(A), Dec. 20, 2006, 120 Stat. 3049, 3050.)

REFERENCES IN TEXT

The Harmonized Tariff Schedule of the United States, referred to in subsecs. (c) and (d)(2), is not set out in the Code. See Publication of Harmonized Tariff Schedule note set out under section 1202 of Title 19, Customs Duties.

AMENDMENTS

2006—Subsec. (c). Pub. L. 109–432, §401(f)(2)(A), struck out at end "This subsection and section 5754 shall not apply to any person who relands or receives tobacco products in the quantity allowed entry free of tax and duty under chapter 98 of the Harmonized Tariff Schedule of the United States, and such person may voluntarily relinquish to the Secretary at the time of entry any excess of such quantity without incurring the penalty under this subsection. No quantity of tobacco products other than the quantity referred to in the preceding sentence may be relanded or received as a personal use quantity."

Subsecs. (d) to (f). Pub. L. 109–432, §401(f)(1), added subsec. (d) and redesignated former subsecs. (d) and (e) as (e) and (f), respectively.

2000—Subsec. (c). Pub. L. 106–554 inserted at end "This subsection and section 5754 shall not apply to any person who relands or receives tobacco products in the quantity allowed entry free of tax and duty under chapter 98 of the Harmonized Tariff Schedule of the United States, and such person may voluntarily relinquish to the Secretary at the time of entry any excess of such quantity without incurring the penalty under this subsection. No quantity of tobacco products other than the quantity referred to in the preceding sentence may be relanded or received as a personal use quantity."

Pub. L. 106–476, §4003(a), inserted at end "This subsection and section 5754 shall not apply to any person who relands or receives tobacco products in the quantity allowed entry free of tax and duty under subchapter IV of chapter 98 of the Harmonized Tariff Schedule of the United States. No quantity of tobacco products other than the quantity referred to in the preceding sentence may be relanded or received as a personal use quantity."

Pub. L. 106–476, §4002(c), which directed amendment of the last sentence of subsec. (c) by substituting "the jurisdiction of the United States shall be forfeited to the United States and destroyed. All vessels, vehicles, and aircraft used in such relanding or in removing such products, papers, and tubes from the place where relanded, shall be forfeited to the United States." for "the jurisdiction of the United States" and all that followed through the end period, was executed by making the substitution for "the jurisdiction of the United States, and all vessels, vehicles, and aircraft used in such relanding or in removing such products, papers, and tubes from the place where relanded, shall be forfeited to the United States." in the second sentence of subsec. (c) to reflect the probable intent of Congress and the intervening retroactive amendments by Pub. L. 106–476, §4003(a), and Pub. L. 106–554. See above.

1997—Subsec. (a). Pub. L. 105–33, §9302(h)(1)(C), substituted "subsection (b) or (c)" for "subsection (b)".

Subsec. (c). Pub. L. 105–33, §9302(h)(1)(B), added subsec. (c). Former subsec. (c) redesignated (d).

Subsec. (d). Pub. L. 105–33, §9302(h)(1)(D), substituted "The penalties imposed by subsections (b) and (c)" for "The penalty imposed by subsection (b)".

Pub. L. 105–33, §9302(h)(1)(B), redesignated subsec. (c) as (d). Former subsec. (d) redesignated (e).

Subsec. (e). Pub. L. 105–33, §9302(h)(1)(B), redesignated subsec. (d) as (e).

1989—Subsec. (a). Pub. L. 101–239, §7721(c)(4), inserted "or part II of subchapter A of chapter 68" after "or 6653".

Subsec. (c). Pub. L. 101–239, §7721(c)(5), substituted "6665" for "6662" in heading and "6665(a)" for "6662(a)" in text.

1984—Subsec. (c). Pub. L. 98–369 substituted "section 6662" for "section 6660" in heading and "section 6662(a)" for "section 6660(a)" in text.

1983—Subsec. (c). Pub. L. 97–448 substituted "section 6660" for "section 6659" in heading, and substituted "section 6660(a)" for "section 6659(a)" in text.

1981—Subsec. (c). Pub. L. 97–34, §724(b)(5), added subsec. (c). Former subsec. (c), which related to applicability of section 6656 to failure to make deposit of taxes imposed under subchapter A on the prescribed date and imposition of penalty, was struck out.

Subsec. (d). Pub. L. 97–34, §§722(a)(3), 724(b)(5), added subsec. (d). Former subsec. (d), which related to applicability of section 6660 and penalties imposed by subsections (b) and (c) to be assessed, collected, and paid in the manner as taxes provided in section 6660(a), was struck out. See subsec. (c).

1958—Subsec. (a). Pub. L. 85–859 struck out reference to section 6652 of this title.

Subsec. (b). Pub. L. 85–859 substituted provisions relating to failure to pay tax for provisions which made persons willfully failing to pay a tax liable, in addition to any other penalty provided in this title, to a penalty of the amount of the tax evaded, or not paid.

Subsec. (c). Pub. L. 85–859 substituted provisions relating to failure to make deposit of taxes for provisions which authorized a penalty of 5 percent of the tax due but unpaid where a person failed to pay tax at the time prescribed, and required the penalties to be added to the tax and assessed and collected at the same time, in the same manner, and as a part of the tax.

Subsec. (d). Pub. L. 85–859 added subsec. (d). Similar provisions were formerly contained in subsec. (c) of this section.

EFFECTIVE DATE OF 2006 AMENDMENT

Amendment by Pub. L. 109–432 applicable with respect to goods entered, or withdrawn from warehouse for consumption, on or after the 15th day after Dec. 20, 2006, see section 401(g) of Pub. L. 109–432, set out as a note under section 1681 of Title 19, Customs Duties.

EFFECTIVE DATE OF 2000 AMENDMENTS

Amendment by Pub. L. 106–554 effective as if included in section 9302 of the Balanced Budget Act of 1997, Pub. L. 105–33, see section 1(a)(7) [title III, §315(b)] of Pub. L. 106–554, set out as a note under section 5702 of this title.

Amendment by section 4002 of Pub. L. 106–476 effective 90 days after Nov. 9, 2000, see section 4002(d) of Pub. L. 106–476, set out as a note under section 5704 of this title.

Pub. L. 106–476, title IV, §4003(b), Nov. 9, 2000, 114 Stat. 2178, provided that: "The amendment made by this section [amending this section] shall take effect as if included in section 9302 of the Balanced Budget Act of 1997 [Pub. L. 105–33]."

EFFECTIVE DATE OF 1997 AMENDMENT

Amendment by Pub. L. 105–33 applicable to articles removed, as defined in section 5702(j) of this title, after Dec. 31, 1999, with transition rule, see section 9302(i) of Pub. L. 105–33, set out as a note under section 5701 of this title.

EFFECTIVE DATE OF 1989 AMENDMENT

Amendment by Pub. L. 101–239 applicable to returns the due date for which (determined without regard to extensions) is after Dec. 31, 1989, see section 7721(d) of Pub. L. 101–239, set out as a note under section 461 of this title.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–369 effective as if included in the provision of the Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. 97–248, to which such amendment relates, see section 715 of Pub. L. 98–369, set out as a note under section 31 of this title.

EFFECTIVE DATE OF 1983 AMENDMENT

Amendment by Pub. L. 97–448 effective, except as otherwise provided, as if it had been included in the provision of the Economic Recovery Tax Act of 1981, Pub. L. 97–34, to which such amendment relates, see section 109 of Pub. L. 97–448, set out as a note under section 1 of this title.

EFFECTIVE DATE OF 1981 AMENDMENT

Amendment by section 722(a)(3) of Pub. L. 97–34 applicable to returns filed after Dec. 31, 1981, see section

722(a)(4) of Pub. L. 97–34, set out as a note under section 5684 of this title.

Amendment by section 724(b)(5) of Pub. L. 97–34 applicable to returns filed after Aug. 13, 1981, see section 724(c) of Pub. L. 97–34, set out as a note under section 6656 of this title.

EFFECTIVE DATE OF 1958 AMENDMENT

Amendment by Pub. L. 85–859 effective Sept. 3, 1958, see section 210(a)(1) of Pub. L. 85–859, set out as an Effective Date note under section 5001 of this title.

§ 5762. Criminal penalties

(a) Fraudulent offenses

Whoever, with intent to defraud the United States—

(1) Engaging in business unlawfully

Engages in business as a manufacturer or importer of tobacco products or cigarette papers and tubes, or as an export warehouse proprietor, without filing the bond and obtaining the permit where required by this chapter or regulations thereunder; or

(2) Failing to furnish information or furnishing false information

Fails to keep or make any record, return, report, or inventory, or keeps or makes any false or fraudulent record, return, report, or inventory, required by this chapter or regulations thereunder; or

(3) Refusing to pay or evading tax

Refuses to pay any tax imposed by this chapter, or attempts in any manner to evade or defeat the tax or the payment thereof; or

(4) Removing tobacco products or cigarette papers or tubes unlawfully

Removes, contrary to this chapter or regulations thereunder, any tobacco products or cigarette papers or tubes subject to tax under this chapter; or

(5) Purchasing, receiving, possessing, or selling tobacco products or cigarette papers or tubes unlawfully

Violates any provision of section 5751(a)(1) or (a)(2); or

(6) Destroying, obliterating, or detaching marks, labels, or notices before packages are emptied

Violates any provision of section 5752;

shall, for each such offense, be fined not more than $10,000, or imprisoned not more than 5 years, or both.

(b) Other offenses

Whoever, otherwise than as provided in subsection (a), violates any provision of this chapter, or of regulations prescribed thereunder, shall, for each such offense, be fined not more than $1,000, or imprisoned not more than 1 year, or both.

(Aug. 16, 1954, ch. 736, 68A Stat. 717; Pub. L. 85–859, title II, § 202, Sept. 2, 1958, 72 Stat. 1425; Pub. L. 89–44, title V, § 502(b)(12), June 21, 1965, 79 Stat. 152; Pub. L. 94–455, title XIX, § 1905(b)(7)(B)(ii), Oct. 4, 1976, 90 Stat. 1823; Pub. L. 105–33, title IX, § 9302(h)(2)(A), Aug. 5, 1997, 111 Stat. 674.)

AMENDMENTS

1997—Subsec. (a)(1). Pub. L. 105–33 inserted "or importer" after "manufacturer".

1976—Subsec. (a)(6). Pub. L. 94–455 redesignated par. (7) as (6), and in par. (6) as so redesignated substituted "or notices" for "notices, or stamps" and "section 5752;" for "section 5752(a); or". Former par. (6), relating to the affixing of improper stamps, was struck out.

Subsec. (a)(7). Pub. L. 94–455 redesignated par. (7) as (6).

Subsec. (a)(8) to (11). Pub. L. 94–455 struck out pars. (8) to (11) which related to emptying packages without destroying stamps, possessing emptied packages bearing stamps, refilling packages bearing stamps, and detaching stamps or possessing used stamps.

1965—Subsec. (a)(1). Pub. L. 89–44, § 502(b)(12)(A), struck out reference to a dealer in tobacco materials.

Subsec. (a)(2). Pub. L. 89–44, § 502(b)(12)(B), struck out reference to statements.

1958—Subsec. (a). Pub. L. 85–859 included export warehouse proprietors in par. (1), struck out provisions in pars. (6) and (9) to (11) which related to labels and notices, and added pars. (7) and (8).

EFFECTIVE DATE OF 1997 AMENDMENT

Amendment by Pub. L. 105–33 applicable to articles removed, as defined in section 5702(j) of this title, after Dec. 31, 1999, with transition rule, see section 9302(i) of Pub. L. 105–33, set out as a note under section 5701 of this title.

EFFECTIVE DATE OF 1976 AMENDMENT

Amendment by Pub. L. 94–455 effective on first day of first month which begins more than 90 days after Oct. 4, 1976, see section 1905(d) of Pub. L. 94–455, set out as a note under section 5005 of this title.

EFFECTIVE DATE OF 1965 AMENDMENT

Amendment by Pub. L. 89–44 applicable on and after January 1, 1966, see section 701(d) of Pub. L. 89–44, set out as a note under section 5701 of this title.

EFFECTIVE DATE OF 1958 AMENDMENT

Amendment by Pub. L. 85–859 effective Sept. 3, 1958, see section 210(a)(1) of Pub. L. 85–859, set out as an Effective Date note under section 5001 of this title.

§ 5763. Forfeitures

(a) Tobacco products and cigarette papers and tubes unlawfully possessed

(1) Tobacco products and cigarette papers and tubes possessed with intent to defraud

All tobacco products and cigarette papers and tubes which, after removal, are possessed with intent to defraud the United States shall be forfeited to the United States.

(2) Tobacco products and cigarette papers and tubes not property packaged

All tobacco products and cigarette papers and tubes not in packages as required under section 5723 or which are in packages not bearing the marks, labels, and notices, as required under such section, which, after removal, are possessed otherwise than with intent to defraud the United States, shall be forfeited to the United States. This paragraph shall not apply to tobacco products or cigarette papers or tubes sold or delivered directly to consumers from proper packages.

(b) Personal property of qualified manufacturers, qualified importers, and export warehouse proprietors, acting with intent to defraud

All tobacco products and cigarette papers and tubes, packages, machinery, fixtures, equip-

L. 106–476, set out as a note under section 5704 of this title.

Pub. L. 106–476, title IV, §4003(b), Nov. 9, 2000, 114 Stat. 2178, provided that: "The amendment made by this section [amending this section] shall take effect as if included in section 9302 of the Balanced Budget Act of 1997 [Pub. L. 105–33]."

EFFECTIVE DATE OF 1997 AMENDMENT

Amendment by Pub. L. 105–33 applicable to articles removed, as defined in section 5702(j) of this title, after Dec. 31, 1999, with transition rule, see section 9302(i) of Pub. L. 105–33, set out as a note under section 5701 of this title.

EFFECTIVE DATE OF 1989 AMENDMENT

Amendment by Pub. L. 101–239 applicable to returns the due date for which (determined without regard to extensions) is after Dec. 31, 1989, see section 7721(d) of Pub. L. 101–239, set out as a note under section 461 of this title.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–369 effective as if included in the provision of the Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. 97–248, to which such amendment relates, see section 715 of Pub. L. 98–369, set out as a note under section 31 of this title.

EFFECTIVE DATE OF 1983 AMENDMENT

Amendment by Pub. L. 97–448 effective, except as otherwise provided, as if it had been included in the provision of the Economic Recovery Tax Act of 1981, Pub. L. 97–34, to which such amendment relates, see section 109 of Pub. L. 97–448, set out as a note under section 1 of this title.

EFFECTIVE DATE OF 1981 AMENDMENT

Amendment by section 722(a)(3) of Pub. L. 97–34 applicable to returns filed after Dec. 31, 1981, see section 722(a)(4) of Pub. L. 97–34, set out as a note under section 5684 of this title.

Amendment by section 724(b)(5) of Pub. L. 97–34 applicable to returns filed after Aug. 13, 1981, see section 724(c) of Pub. L. 97–34, set out as a note under section 6656 of this title.

EFFECTIVE DATE OF 1958 AMENDMENT

Amendment by Pub. L. 85–859 effective Sept. 3, 1958, see section 210(a)(1) of Pub. L. 85–859, set out as an Effective Date note under section 5001 of this title.

§ 5762. Criminal penalties

(a) Fraudulent offenses

Whoever, with intent to defraud the United States—

(1) Engaging in business unlawfully

Engages in business as a manufacturer or importer of tobacco products or cigarette papers and tubes, or as an export warehouse proprietor, without filing the bond and obtaining the permit where required by this chapter or regulations thereunder; or

(2) Failing to furnish information or furnishing false information

Fails to keep or make any record, return, report, or inventory, or keeps or makes any false or fraudulent record, return, report, or inventory, required by this chapter or regulations thereunder; or

(3) Refusing to pay or evading tax

Refuses to pay any tax imposed by this chapter, or attempts in any manner to evade or defeat the tax or the payment thereof; or

(4) Removing tobacco products or cigarette papers or tubes unlawfully

Removes, contrary to this chapter or regulations thereunder, any tobacco products or cigarette papers or tubes subject to tax under this chapter; or

(5) Purchasing, receiving, possessing, or selling tobacco products or cigarette papers or tubes unlawfully

Violates any provision of section 5751(a)(1) or (a)(2); or

(6) Destroying, obliterating, or detaching marks, labels, or notices before packages are emptied

Violates any provision of section 5752;

shall, for each such offense, be fined not more than $10,000, or imprisoned not more than 5 years, or both.

(b) Other offenses

Whoever, otherwise than as provided in subsection (a), violates any provision of this chapter, or of regulations prescribed thereunder, shall, for each such offense, be fined not more than $1,000, or imprisoned not more than 1 year, or both.

(Aug. 16, 1954, ch. 736, 68A Stat. 717; Pub. L. 85–859, title II, §202, Sept. 2, 1958, 72 Stat. 1425; Pub. L. 89–44, title V, §502(b)(12), June 21, 1965, 79 Stat. 152; Pub. L. 94–455, title XIX, §1905(b)(7)(B)(ii), Oct. 4, 1976, 90 Stat. 1823; Pub. L. 105–33, title IX, §9302(h)(2)(A), Aug. 5, 1997, 111 Stat. 674.)

AMENDMENTS

1997—Subsec. (a)(1). Pub. L. 105–33 inserted "or importer" after "manufacturer".

1976—Subsec. (a)(6). Pub. L. 94–455 redesignated par. (7) as (6), and in par. (6) as so redesignated substituted "or notices" for "notices, or stamps" and "section 5752;" for "section 5752(a); or". Former par. (6), relating to the affixing of improper stamps, was struck out.

Subsec. (a)(7). Pub. L. 94–455 redesignated par. (7) as (6).

Subsec. (a)(8) to (11). Pub. L. 94–455 struck out pars. (8) to (11) which related to emptying packages without destroying stamps, possessing emptied packages bearing stamps, refilling packages bearing stamps, and detaching stamps or possessing used stamps.

1965—Subsec. (a)(1). Pub. L. 89–44, §502(b)(12)(A), struck out reference to a dealer in tobacco materials.

Subsec. (a)(2). Pub. L. 89–44, §502(b)(12)(B), struck out reference to statements.

1958—Subsec. (a). Pub. L. 85–859 included export warehouse proprietors in par. (1), struck out provisions in pars. (6) and (9) to (11) which related to labels and notices, and added pars. (7) and (8).

EFFECTIVE DATE OF 1997 AMENDMENT

Amendment by Pub. L. 105–33 applicable to articles removed, as defined in section 5702(j) of this title, after Dec. 31, 1999, with transition rule, see section 9302(i) of Pub. L. 105–33, set out as a note under section 5701 of this title.

EFFECTIVE DATE OF 1976 AMENDMENT

Amendment by Pub. L. 94–455 effective on first day of first month which begins more than 90 days after Oct. 4, 1976, see section 1905(d) of Pub. L. 94–455, set out as a note under section 5005 of this title.

EFFECTIVE DATE OF 1965 AMENDMENT

Amendment by Pub. L. 89–44 applicable on and after January 1, 1966, see section 701(d) of Pub. L. 89–44, set out as a note under section 5701 of this title.

EFFECTIVE DATE OF 1958 AMENDMENT

Amendment by Pub. L. 85–859 effective Sept. 3, 1958, see section 210(a)(1) of Pub. L. 85–859, set out as an Effective Date note under section 5001 of this title.

§ 5763. Forfeitures

(a) Tobacco products and cigarette papers and tubes unlawfully possessed

(1) Tobacco products and cigarette papers and tubes possessed with intent to defraud

All tobacco products and cigarette papers and tubes which, after removal, are possessed with intent to defraud the United States shall be forfeited to the United States.

(2) Tobacco products and cigarette papers and tubes not property packaged

All tobacco products and cigarette papers and tubes not in packages as required under section 5723 or which are in packages not bearing the marks, labels, and notices, as required under such section, which, after removal, are possessed otherwise than with intent to defraud the United States, shall be forfeited to the United States. This paragraph shall not apply to tobacco products or cigarette papers or tubes sold or delivered directly to consumers from proper packages.

(b) Personal property of qualified manufacturers, qualified importers, and export warehouse proprietors, acting with intent to defraud

All tobacco products and cigarette papers and tubes, packages, machinery, fixtures, equipment, and all other materials and personal property on the premises of any qualified manufacturer or importer of tobacco products or cigarette papers and tubes, or export warehouse proprietor, who, with intent to defraud the United States, fails to keep or make any record, return, report, or inventory, or keeps or makes any false or fraudulent record, return, report, or inventory, required by this chapter; or refuses to pay any tax imposed by this chapter, or attempts in any manner to evade or defeat the tax or the payment thereof; or removes, contrary to any provision of this chapter, any article subject to tax under this chapter, shall be forfeited to the United States.

(c) Real and personal property of illicit operators

All tobacco products, cigarette papers and tubes, machinery, fixtures, equipment, and other materials and personal property on the premises of any person engaged in business as a manufacturer or importer of tobacco products or cigarette papers and tubes, or export warehouse proprietor, without filing the bond or obtaining the permit, as required by this chapter, together with all his right, title, and interest in the building in which such business is conducted, and the lot or tract of ground on which the building is located, shall be forfeited to the United States.

(d) General

All property intended for use in violating the provisions of this chapter, or regulations thereunder, or which has been so used, shall be forfeited to the United States as provided in section 7302.

(Aug. 16, 1954, ch. 736, 68A Stat. 718; Pub. L. 85–859, title II, § 202, Sept. 2, 1958, 72 Stat. 1426; Pub. L. 89–44, title V, § 502(b)(13), June 21, 1965, 79 Stat. 152; Pub. L. 94–455, title XIX, § 1905(b)(7)(C), Oct. 4, 1976, 90 Stat. 1823; Pub. L. 105–33, title IX, § 9302(h)(2)(A), (B), Aug. 5, 1997, 111 Stat. 674.)

AMENDMENTS

1997—Subsec. (b). Pub. L. 105–33 inserted "qualified importers," after "manufacturers," in heading and "or importer" after "manufacturer" in text.

Subsec. (c). Pub. L. 105–33, § 9302(h)(2)(A), inserted "or importer" after "manufacturer".

1976—Subsec. (a)(2). Pub. L. 94–455, § 1905(b)(7)(C)(i), substituted "and notices" for "notices, and stamps".

Subsec. (b). Pub. L. 94–455, § 1905(b)(7)(C)(ii), struck out "internal revenue stamps," after "packages,".

1965—Subsec. (b). Pub. L. 89–44, § 502(b)(13)(A), struck out references to tobacco materials, dealers in tobacco materials, and statements.

Subsec. (c). Pub. L. 89–44, § 502(b)(13)(B), struck out references to tobacco materials and dealers in tobacco materials.

1958—Subsec. (a). Pub. L. 85–859 substituted "tobacco products and cigarette papers and tubes" for "articles" wherever appearing and inserted provisions making par. (2) inapplicable to tobacco products or cigarette papers for tubes delivered directly to consumers from proper packages.

Subsecs. (b), (c). Pub. L. 85–859 included property of export warehouse proprietors.

Subsec. (d). Pub. L. 85–859 included property intended for use, or used, in violating regulations under this chapter.

EFFECTIVE DATE OF 1997 AMENDMENT

Amendment by Pub. L. 105–33 applicable to articles removed, as defined in section 5702(j) of this title, after Dec. 31, 1999, with transition rule, see section 9302(i) of Pub. L. 105–33, set out as a note under section 5701 of this title.

EFFECTIVE DATE OF 1976 AMENDMENT

Amendment by Pub. L. 94–455 effective on first day of first month which begins more than 90 days after Oct. 4, 1976, see section 1905(d) of Pub. L. 94–455, set out as a note under section 5005 of this title.

EFFECTIVE DATE OF 1965 AMENDMENT

Amendment by Pub. L. 89–44 applicable on and after Jan. 1, 1966, see section 701(d) of Pub. L. 89–44, set out as a note under section 5701 of this title.

EFFECTIVE DATE OF 1958 AMENDMENT

Amendment by Pub. L. 85–859 effective on Sept. 3, 1958, see section 210(a)(1) of Pub. L. 85–859, set out as an Effective Date note under section 5001 of this title.

CHAPTER 53—MACHINE GUNS, DESTRUCTIVE DEVICES, AND CERTAIN OTHER FIREARMS

PRIOR PROVISIONS

A prior chapter 53, act Aug. 16, 1954, ch. 736, 68A Stat. 721, was generally revised by Pub. L. 90–618, title II, § 201, Oct. 22, 1968, 82 Stat. 1227. The analysis reflects changes:

[1] Section numbers editorially supplied.

26 U.S. Code § 7302 - Property used in violation of internal revenue laws

Current through Pub. L. 114-38. (See Public Laws for the current Congress.)

§ 7302.
Property used in violation of internal revenue laws

It shall be unlawful to have or possess any property intended for use in violating the provisions of the internal revenue laws, or regulations prescribed under such laws, or which has been so used, and no property rights shall exist in any such property. A search warrant may issue as provided in chapter 205 of title 18 of the United States Code and the Federal Rules of Criminal Procedure for the seizure of such property. Nothing in this section shall in any manner limit or affect any criminal or forfeiture provision of the internal revenue laws, or of any other law. The seizure and forfeiture of any property under the provisions of this section and the disposition of such property subsequent to seizure and forfeiture, or the disposition of the proceeds from the sale of such property, shall be in accordance with existing laws or those hereafter in existence relating to seizures, forfeitures, and disposition of property or proceeds, for violation of the internal revenue laws.

(Aug. 16, 1954, ch. 736, 68A Stat. 867.)

same, who refuses to admit any officer or employee of the Treasury Department acting under the authority of section 7606 (relating to entry of premises for examination of taxable articles) or refuses to permit him to examine such article or articles, shall, for every such refusal, forfeit $500.

(Aug. 16, 1954, ch. 736, 68A Stat. 872.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 4083, 7606 of this title.

§ 7343. Definition of term "person"

The term "person" as used in this chapter includes an officer or employee of a corporation, or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs.

(Aug. 16, 1954, ch. 736, 68A Stat. 872.)

§ 7344. Extended application of penalties relating to officers of the Treasury Department

All provisions of law imposing fines, penalties, or other punishment for offenses committed by an internal revenue officer or other officer of the Department of the Treasury, or under any agency or office thereof, shall apply to all persons whomsoever, employed, appointed, or acting under the authority of any internal revenue law, or any revenue provision of any law of the United States, when such persons are designated or acting as officers or employees in connection with such law, or are persons having the custody or disposition of any public money.

(Aug. 16, 1954, ch. 736, 68A Stat. 872.)

CHAPTER 76—JUDICIAL PROCEEDINGS

AMENDMENTS

1998—Pub. L. 105–206, title III, § 3001(b), July 22, 1998, 112 Stat. 727, added item for subchapter E.

1976—Pub. L. 94–455, title XIX, § 1952(n)(4)(B), Oct. 4, 1976, 90 Stat. 1846, struck out item for subchapter E "Miscellaneous provisions".

1966—Pub. L. 89–719, title I, § 110(d)(3), Nov. 2, 1966, 80 Stat. 1145, substituted "Taxpayers and Third Parties" for "taxpayers" in item for subchapter B.

CHAPTER REFERRED TO IN OTHER SECTIONS

This chapter is referred to in section 7851 of this title.

Subchapter A—Civil Actions by the United States

[1] Section numbers editorially supplied.

AMENDMENTS

1987—Pub. L. 100–203, title X, § 10713(a)(2), Dec. 22, 1987, 101 Stat. 1330–469, added item 7409 and redesignated former item 7409 as 7410.

1982—Pub. L. 97–248, title III, § 321(b), Sept. 3, 1982, 96 Stat. 612, added item 7408 and redesignated former item 7408 as 7409.

1976—Pub. L. 94–455, title XII, § 1203(i)(4), Oct. 4, 1976, 90 Stat. 1695, added item 7407 and redesignated former item 7407 as 7408.

§ 7401. Authorization

No civil action for the collection or recovery of taxes, or of any fine, penalty, or forfeiture, shall be commenced unless the Secretary authorizes or sanctions the proceedings and the Attorney General or his delegate directs that the action be commenced.

(Aug. 16, 1954, ch. 736, 68A Stat. 873; Pub. L. 94–455, title XIX, § 1906(b)(13)(A), Oct. 4, 1976, 90 Stat. 1834.)

AMENDMENTS

1976—Pub. L. 94–455 struck out "or his delegate" after "Secretary".

§ 7402. Jurisdiction of district courts

(a) To issue orders, processes, and judgments

The district courts of the United States at the instance of the United States shall have such jurisdiction to make and issue in civil actions, writs and orders of injunction, and of *ne exeat republica*, orders appointing receivers, and such other orders and processes, and to render such judgments and decrees as may be necessary or appropriate for the enforcement of the internal revenue laws. The remedies hereby provided are in addition to and not exclusive of any and all other remedies of the United States in such courts or otherwise to enforce such laws.

(b) To enforce summons

If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides or may be found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data.

(c) For damages to United States officers or employees

Any officer or employee of the United States acting under authority of this title, or any person acting under or by authority of any such officer or employee, receiving any injury to his person or property in the discharge of his duty shall be entitled to maintain an action for damages therefor, in the district court of the United States, in the district wherein the party doing the injury may reside or shall be found.

[(d) Repealed. Pub. L. 92–310, title II, § 230(d), June 6, 1972, 86 Stat. 209]

(e) To quiet title

The United States district courts shall have jurisdiction of any action brought by the United States to quiet title to property if the title claimed by the United States to such property was derived from enforcement of a lien under this title.

(f) General jurisdiction

For general jurisdiction of the district courts of the United States in civil actions involving internal revenue, see section 1340 of title 28 of the United States Code.

(Aug. 16, 1954, ch. 736, 68A Stat. 873; Pub. L. 89–719, title I, § 107(a), Nov. 2, 1966, 80 Stat. 1140; Pub. L. 93–310, title II, § 230(d), June 6, 1972, 86 Stat. 209.)

AMENDMENTS

1972—Subsec. (d). Pub. L. 92–310 repealed subsec. (d) which granted district courts jurisdiction of actions brought on official bonds.

1966—Subsecs. (e), (f). Pub. L. 89–719 added subsec. (e) and redesignated former subsec. (e) as (f).

EFFECTIVE DATE OF 1966 AMENDMENT

Amendment by Pub. L. 89–719 applicable after Nov. 2, 1966, regardless of when title or lien of United States arose or when lien or interest of another person was acquired, with certain exceptions, see section 114(a)–(c) of Pub. L. 89–719, set out as a note under section 6323 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 7407, 7408, 7409, 7604 of this title.

§ 7403. Action to enforce lien or to subject property to payment of tax

(a) Filing

In any case where there has been a refusal or neglect to pay any tax, or to discharge any liability in respect thereof, whether or not levy has been made, the Attorney General or his delegate, at the request of the Secretary, may direct a civil action to be filed in a district court of the United States to enforce the lien of the United States under this title with respect to such tax or liability or to subject any property, of whatever nature, of the delinquent, or in which he has any right, title, or interest, to the payment of such tax or liability. For purposes of the preceding sentence, any acceleration of payment under section 6166(g) shall be treated as a neglect to pay tax.

(b) Parties

All persons having liens upon or claiming any interest in the property involved in such action shall be made parties thereto.

(c) Adjudication and decree

The court shall, after the parties have been duly notified of the action, proceed to adjudicate all matters involved therein and finally determine the merits of all claims to and liens upon the property, and, in all cases where a claim or interest of the United States therein is established, may decree a sale of such property, by the proper officer of the court, and a distribution of the proceeds of such sale according to the findings of the court in respect to the interests of the parties and of the United States. If the property is sold to satisfy a first lien held by the United States, the United States may bid at the sale such sum, not exceeding the amount of such lien with expenses of sale, as the Secretary directs.

(d) Receivership

In any such proceeding, at the instance of the United States, the court may appoint a receiver to enforce the lien, or, upon certification by the Secretary during the pendency of such proceedings that it is in the public interest, may appoint a receiver with all the powers of a receiver in equity.

(Aug. 16, 1954, ch. 736, 68A Stat. 874; Pub. L. 89–719, title I, § 107(b), Nov. 2, 1966, 80 Stat. 1140; Pub. L. 94–455, title XIX, § 1906(b)(13)(A), title XX, § 2004(f)(2), Oct. 4, 1976, 90 Stat. 1834, 1872; Pub. L. 97–34, title IV, § 422(e)(8), Aug. 13, 1981, 95 Stat. 316.)

AMENDMENTS

1981—Subsec. (a). Pub. L. 97–34 struck out "or 6166A(h)" after "section 6166(g)".

1976—Subsec. (a). Pub. L. 94–455, §§ 1906(b)(13)(A), 2004(f)(2), struck out "or his delegate" after "Secretary" and inserted provisions relating to the acceleration of payment under section 6166(g) or 6166A(h).

Subsecs. (c), (d). Pub. L. 94–455, § 1906(b)(13)(A), struck out "or his delegate" after "Secretary".

1966—Subsec. (c). Pub. L. 89–719 inserted sentence permitting the United States, if the property is sold to satisfy a first lien held by the United States, to bid at the sale such sum, not more than the amount of such lien with expenses of sale, as the Secretary or his delegate directs.

EFFECTIVE DATE OF 1981 AMENDMENT

Amendment by Pub. L. 97–34 applicable to estates of decedents dying after Dec. 31, 1981, see section 422(f)(1) of Pub. L. 97–34, set out as a note under section 6166 of this title.

EFFECTIVE DATE OF 1966 AMENDMENT

Amendment by Pub. L. 89–719 applicable after Nov. 2, 1966, regardless of when title or lien of United States arose or when lien or interest of another person was acquired, with certain exceptions, see section 114(a)–(c) of Pub. L. 89–719, set out as a note under section 6323 of this title.

§ 7404. Authority to bring civil action for estate taxes

If the estate tax imposed by chapter 11 is not paid on or before the due date thereof, the Secretary shall proceed to collect the tax under the provisions of general law; or appropriate proceedings in the name of the United States may be commenced in any court of the United States having jurisdiction to subject the property of the decedent to be sold under the judgment or decree of the court. From the proceeds of such sale the amount of the tax, together with the costs and expenses of every description to be allowed by the court, shall be first paid, and the balance shall be deposited according to the order of the court, to be paid under its direction to the person entitled thereto. This section insofar as it applies to the collection of a deficiency shall be subject to the provisions of sections 6213 and 6601.

EFFECTIVE DATE OF 1988 AMENDMENT

Amendment by Pub. L. 100–352 effective ninety days after June 27, 1988, except that such amendment not to apply to cases pending in Supreme Court on such effective date or affect right to review or manner of reviewing judgment or decree of court which was entered before such effective date, see section 7 of Pub. L. 100–352, set out as a note under section 1254 of this title.

EFFECTIVE DATE OF 1970 AMENDMENT

Section 199(a) of title I of Pub. L. 91–358 provided that: "The effective date of this title (and the amendments made by this title) [enacting sections 1363, 1451, and 2113 of this title and amending this section, sections 292 and 1869 of this title, section 5102 of Title 5, Government Organization and Employees, and section 260a of Title 42, The Public Health and Welfare] shall be the first day of the seventh calendar month which begins after the date of the enactment of this Act [July 29, 1970]."

§ 1258. Supreme Court of Puerto Rico; certiorari

Final judgments or decrees rendered by the Supreme Court of the Commonwealth of Puerto Rico may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of the Commonwealth of Puerto Rico is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(Added Pub. L. 87–189, §1, Aug. 30, 1961, 75 Stat. 417; amended Pub. L. 100–352, §4, June 27, 1988, 102 Stat. 662.)

AMENDMENTS

1988—Pub. L. 100–352 struck out "appeal;" before "certiorari" in section catchline and amended text generally. Prior to amendment, text read as follows: "Final judgments or decrees rendered by the Supreme Court of the Commonwealth of Puerto Rico may be reviewed by the Supreme Court as follows:

"(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

"(2) By appeal, where is drawn in question the validity of a statute of the Commonwealth of Puerto Rico on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity.

"(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of the Commonwealth of Puerto Rico is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution, treaties, or statutes of, or commission held or authority exercised under, the United States."

EFFECTIVE DATE OF 1988 AMENDMENT

Amendment by Pub. L. 100–352 effective ninety days after June 27, 1988, except that such amendment not to apply to cases pending in Supreme Court on such effective date or affect right to review or manner of reviewing judgment or decree of court which was entered before such effective date, see section 7 of Pub. L. 100–352, set out as a note under section 1254 of this title.

§ 1259. Court of Appeals for the Armed Forces; certiorari

Decisions of the United States Court of Appeals for the Armed Forces may be reviewed by the Supreme Court by writ of certiorari in the following cases:

(1) Cases reviewed by the Court of Appeals for the Armed Forces under section 867(a)(1) of title 10.

(2) Cases certified to the Court of Appeals for the Armed Forces by the Judge Advocate General under section 867(a)(2) of title 10.

(3) Cases in which the Court of Appeals for the Armed Forces granted a petition for review under section 867(a)(3) of title 10.

(4) Cases, other than those described in paragraphs (1), (2), and (3) of this subsection, in which the Court of Appeals for the Armed Forces granted relief.

(Added Pub. L. 98–209, §10(a)(1), Dec. 6, 1983, 97 Stat. 1405; amended Pub. L. 101–189, div. A, title XIII, §1304(b)(3), Nov. 29, 1989, 103 Stat. 1577; Pub. L. 103–337, div. A, title IX, §924(d)(1)(C), (2)(A), Oct. 5, 1994, 108 Stat. 2832.)

AMENDMENTS

1994—Pub. L. 103–337 substituted "Court of Appeals for the Armed Forces" for "Court of Military Appeals" in section catchline and wherever appearing in text.

1989—Pub. L. 101–189 substituted "section 867(a)(1)" for "section 867(b)(1)" in par. (1), "section 867(a)(2)" for "section 867(b)(2)" in par. (2), and "section 867(a)(3)" for "section 867(b)(3)" in par. (3).

EFFECTIVE DATE

Section effective on the first day of the eighth calendar month beginning after Dec. 6, 1983, see section 12(a)(1) of Pub. L. 98–209, set out as an Effective Date of 1983 Amendment note under section 801 of Title 10, Armed Forces.

CHAPTER 83—COURTS OF APPEALS

AMENDMENTS

1996—Pub. L. 104–331, §3(a)(2), Oct. 26, 1996, 110 Stat. 4069, added item 1296.

1984—Pub. L. 98–620, title IV, §402(29)(C), Nov. 8, 1984, 98 Stat. 3359, struck out item 1296 "Precedence of cases in the United States Court of Appeals for the Federal Circuit".

1982—Pub. L. 97–164, title I, §127(b), Apr. 2, 1982, 96 Stat. 39, added items 1295 and 1296.

1978—Pub. L. 95–598, title II, §236(b), Nov. 6, 1978, 92 Stat. 2667, directed the addition of item 1293, "Bankruptcy appeals", which amendment did not become effective pursuant to section 402(b) of Pub. L. 95–598, as amended, set out as an Effective Date note preceding section 101 of Title 11, Bankruptcy.

1961—Pub. L. 87–189, §4, Aug. 30, 1961, 75 Stat. 417, struck out item 1293 "Final decisions of Puerto Rico and Hawaii Supreme Courts".

§ 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit)

shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

(June 25, 1948, ch. 646, 62 Stat. 929; Oct. 31, 1951, ch. 655, § 48, 65 Stat. 726; Pub. L. 85–508, § 12(e), July 7, 1958, 72 Stat. 348; Pub. L. 97–164, title I, § 124, Apr. 2, 1982, 96 Stat. 36.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §§ 225(a), 933(a)(1), and section 1356 of title 48, U.S.C., 1940 ed., Territories and Insular Possessions, and sections 61 and 62 of title 7 of the Canal Zone Code (Mar. 3, 1911, ch. 231, § 128, 36 Stat. 1133; Aug. 24, 1912, ch. 390, § 9, 37 Stat. 566; Jan. 28, 1915, ch. 22, § 2, 38 Stat. 804; Feb. 7, 1925, ch. 150, 43 Stat. 813; Sept. 21, 1922, ch. 370, § 3, 42 Stat. 1006; Feb. 13, 1925, ch. 229, § 1, 43 Stat. 936; Jan. 31, 1928, ch. 14, § 1, 45 Stat. 54; May 17, 1932, ch. 190, 47 Stat. 158; Feb. 16, 1933, ch. 91, § 3, 47 Stat. 817; May 31, 1935, ch. 160, 49 Stat. 313; June 20, 1938, ch. 526, 52 Stat. 779; Aug. 2, 1946, ch. 753, § 412(a)(1), 60 Stat. 844).

This section rephrases and simplifies paragraphs "First", "Second", and "Third" of section 225(a) of title 28, U.S.C., 1940 ed., which referred to each Territory and Possession separately, and to sections 61 and 62 of the Canal Zone Code, section 933(a)(1) of said title relating to jurisdiction of appeals in tort claims cases, and the provisions of section 1356 of title 48, U.S.C., 1940 ed., relating to jurisdiction of appeals from final judgments of the district court for the Canal Zone.

The district courts for the districts of Hawaii and Puerto Rico are embraced in the term "district courts of the United States." (See definitive section 451 of this title.)

Paragraph "Fourth" of section 225(a) of title 28, U.S.C., 1940 ed., is incorporated in section 1293 of this title.

Words "Fifth. In the United States Court for China, in all cases" in said section 225(a) were omitted. (See reviser's note under section 411 of this title.)

Venue provisions of section 1356 of title 48, U.S.C., 1940 ed., are incorporated in section 1295 of this title.

Section 61 of title 7 of the Canal Zone Code is also incorporated in sections 1291 and 1295 of this title.

In addition to the jurisdiction conferred by this chapter, the courts of appeals also have appellate jurisdiction in proceedings under Title 11, Bankruptcy, and jurisdiction to review:

(1) Orders of the Secretary of the Treasury denying an application for, suspending, revoking, or annulling a basic permit under chapter 8 of title 27;

(2) Orders of the Interstate Commerce Commission, the Federal Communications Commission, the Civil Aeronautics Board, the Board of Governors of the Federal Reserve System and the Federal Trade Commission, based on violations of the antitrust laws or unfair or deceptive acts, methods, or practices in commerce;

(3) Orders of the Secretary of the Army under sections 504, 505 and 516 of title 33, U.S.C., 1940 ed., Navigation and Navigable Waters;

(4) Orders of the Civil Aeronautics Board under chapter 9 of title 49, except orders as to foreign air carriers which are subject to the President's approval;

(5) Orders under chapter 1 of title 7, refusing to designate boards of trade as contract markets or suspending or revoking such designations, or excluding persons from trading in contract markets;

(6) Orders of the Federal Power Commission under chapter 12 of title 16;

(7) Orders of the Federal Security Administrator under section 371(e) of title 21, in a case of actual controversy as to the validity of any such order, by any person adversely affected thereby;

(8) Orders of the Federal Power Commission under chapter 15B of title 15;

(9) Final orders of the National Labor Relations Board;

(10) Cease and desist orders under section 193 of title 7;

(11) Orders of the Securities and Exchange Commission;

(12) Orders to cease and desist from violating section 1599 of title 7;

(13) Wage orders of the Administrator of the Wage and Hour Division of the Department of Labor under section 208 of title 29;

(14) Orders under sections 81r and 1641 of title 19, U.S.C., 1940 ed., Customs Duties.

The courts of appeals also have jurisdiction to enforce:

(1) Orders of the Interstate Commerce Commission, the Federal Communications Commission, the Civil Aeronautics Board, the Board of Governors of the Federal Reserve System, and the Federal Trade Commission, based on violations of the antitrust laws or unfair or deceptive acts, methods, or practices in commerce;

(2) Final orders of the National Labor Relations Board;

(3) Orders to cease and desist from violating section 1599 of title 7.

The Court of Appeals for the District of Columbia also has jurisdiction to review orders of the Post Office Department under section 576 of title 39 relating to discriminations in sending second-class publications by freight; Maritime Commission orders denying transfer to foreign registry of vessels under subsidy contract; sugar allotment orders; decisions of the Federal Communications Commission granting or refusing applications for construction permits for radio stations, or for radio station licenses, or for renewal or modification of radio station licenses, or suspending any radio operator's license.

Changes were made in phraseology.

AMENDMENTS

1982—Pub. L. 97–164, § 124, inserted "(other than the United States Court of Appeals for the Federal Circuit)" after "The court of appeals" and inserted provision that the jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

1958—Pub. L. 85–508 struck out provisions which gave courts of appeals jurisdiction of appeals from District Court for Territory of Alaska. See section 81A of this title which establishes a United States District Court for the State of Alaska.

1951—Act Oct. 31, 1951, inserted reference to District Court of Guam.

EFFECTIVE DATE OF 1982 AMENDMENT

Amendment by Pub. L. 97–164 effective Oct. 1, 1982, see section 402 of Pub. L. 97–164, set out as a note under section 171 of this title.

EFFECTIVE DATE OF 1958 AMENDMENT

Amendment by Pub. L. 85–508 effective Jan. 3, 1959, on admission of Alaska into the Union pursuant to Proc. No. 3269, Jan. 3, 1959, 24 F.R. 81, 73 Stat. c16 as required by sections 1 and 8(c) of Pub. L. 85–508, see notes set out under section 81A of this title and preceding section 21 of Title 48, Territories and Insular Possessions.

TERMINATION OF UNITED STATES DISTRICT COURT FOR THE DISTRICT OF THE CANAL ZONE

For termination of the United States District Court for the District of the Canal Zone at end of the "transition period", being the 30-month period beginning Oct.

1, 1979, and ending midnight Mar. 31, 1982, see Paragraph 5 of Article XI of the Panama Canal Treaty of 1977 and sections 2101 and 2201 to 2203 of Pub. L. 96–70, title II, Sept. 27, 1979, 93 Stat. 493, formerly classified to sections 3831 and 3841 to 3843, respectively, of Title 22, Foreign Relations and Intercourse.

§ 1292. Interlocutory decisions

(a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed.

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however*, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

(c) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction—

(1) of an appeal from an interlocutory order or decree described in subsection (a) or (b) of this section in any case over which the court would have jurisdiction of an appeal under section 1295 of this title; and

(2) of an appeal from a judgment in a civil action for patent infringement which would otherwise be appealable to the United States Court of Appeals for the Federal Circuit and is final except for an accounting.

(d)(1) When the chief judge of the Court of International Trade issues an order under the provisions of section 256(b) of this title, or when any judge of the Court of International Trade, in issuing any other interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

(2) When the chief judge of the United States Court of Federal Claims issues an order under section 798(b) of this title, or when any judge of the United States Court of Federal Claims, in issuing an interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

(3) Neither the application for nor the granting of an appeal under this subsection shall stay proceedings in the Court of International Trade or in the Court of Federal Claims, as the case may be, unless a stay is ordered by a judge of the Court of International Trade or of the Court of Federal Claims or by the United States Court of Appeals for the Federal Circuit or a judge of that court.

(4)(A) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction of an appeal from an interlocutory order of a district court of the United States, the District Court of Guam, the District Court of the Virgin Islands, or the District Court for the Northern Mariana Islands, granting or denying, in whole or in part, a motion to transfer an action to the United States Court of Federal Claims under section 1631 of this title.

(B) When a motion to transfer an action to the Court of Federal Claims is filed in a district court, no further proceedings shall be taken in the district court until 60 days after the court has ruled upon the motion. If an appeal is taken from the district court's grant or denial of the motion, proceedings shall be further stayed until the appeal has been decided by the Court of Appeals for the Federal Circuit. The stay of proceedings in the district court shall not bar the granting of preliminary or injunctive relief, where appropriate and where expedition is reasonably necessary. However, during the period in which proceedings are stayed as provided in this subparagraph, no transfer to the Court of Federal Claims pursuant to the motion shall be carried out.

(e) The Supreme Court may prescribe rules, in accordance with section 2072 of this title, to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for under subsection (a), (b), (c), or (d).

(June 25, 1948, ch. 646, 62 Stat. 929; Oct. 31, 1951, ch. 655, § 49, 65 Stat. 726; Pub. L. 85–508, § 12(e), July 7, 1958, 72 Stat. 348; Pub. L. 85–919, Sept. 2, 1958, 72 Stat. 1770; Pub. L. 97–164, § 125, Apr. 2, 1982, 96 Stat. 36; Pub. L. 98–620, title IV, § 412, Nov. 8, 1984, 98 Stat. 3362; Pub. L. 100–702, title V, § 501, Nov. 19, 1988, 102 Stat. 4652; Pub. L. 102–572, title I, § 101, title IX, §§ 902(b), 906(c), Oct. 29, 1992, 106 Stat. 4506, 4516, 4518.)

AMENDMENTS

2002—Pub. L. 107–273, div. C, title I, §11020(b)(1)(B), Nov. 2, 2002, 116 Stat. 1827, added item 1369.

1999—Pub. L. 106–113, div. B, §1000(a)(9) [title III, §3009(2)], Nov. 29, 1999, 113 Stat. 1536, 1501A–552, substituted "trademarks" for "trade-marks" in item 1338.

1998—Pub. L. 105–304, title V, §503(b)(2)(B), Oct. 28, 1998, 112 Stat. 2917, inserted "designs," after "mask works," in item 1338.

1995—Pub. L. 104–88, title III, §305(a)(4), Dec. 29, 1995, 109 Stat. 944, substituted "Surface Transportation Board's" for "Interstate Commerce Commission's" in item 1336.

1994—Pub. L. 103–465, title III, §321(b)(3)(B), Dec. 8, 1994, 108 Stat. 4947, added item 1368.

1990—Pub. L. 101–650, title III, §310(b), Dec. 1, 1990, 104 Stat. 5114, added item 1367.

1988—Pub. L. 100–702, title X, §1020(a)(7), Nov. 19, 1988, 102 Stat. 4672, substituted "Actions" for "Action" in item 1330, inserted a period after "question" in item 1331, substituted "plant variety protection, copyrights, mask works, trade-marks," for "copyrights, and trade-marks" in item 1338, and inserted "and elective franchise" in item 1343.

1986—Pub. L. 99–336, §6(a)(1)(A), June 19, 1986, 100 Stat. 638, renumbered item 1364 "Senate actions" and item 1364 "Construction of references to laws of the United States or Acts of Congress" as items 1365 and 1366, respectively.

1984—Pub. L. 98–353, title I, §101(b), July 10, 1984, 98 Stat. 333, substituted "cases" for "matters" in item 1334.

1980—Pub. L. 96–486, §2(b), Dec. 1, 1980, 94 Stat. 2369, struck out "; amount in controversy; costs." after "question" in item 1331.

1978—Pub. L. 95–598, title II, §238(b), Nov. 6, 1978, 92 Stat. 2668, directed the substitution of "Bankruptcy appeals" for "Bankruptcy matters and proceedings" in item 1334, which amendment did not become effective pursuant to section 402(b) of Pub. L. 95–598, as amended, set out as an Effective Date note preceding section 101 of Title 11, Bankruptcy.

Pub. L. 95–572, §6(b)(2), Nov. 2, 1978, 92 Stat. 2457, added item 1363 and redesignated former item 1363 "Construction of references to laws of the United States or Acts of Congress", as 1364.

Pub. L. 95–521, title VII, §705(f)(2), Oct. 26, 1978, 92 Stat. 1880, added item 1364 "Senate actions".

Pub. L. 95–486, §9(c), Oct. 20, 1978, 92 Stat. 1634, substituted "Commerce and antitrust regulations; amount in controversy, costs" for "Commerce and antitrust regulations" in item 1337.

Pub. L. 95–393, §§7(b), 8(a)(2), Sept. 30, 1978, 92 Stat. 810, substituted "Consuls, vice consuls, and members of a diplomatic mission as defendant" for "Consuls and vice consuls as defendants" in item 1351 and added item 1364 "Direct actions against insurers of members of diplomatic missions and their families".

1976—Pub. L. 94–583, §2(b), Oct. 21, 1976, 90 Stat. 2891, added item 1330.

1970—Pub. L. 91–358, title I, §172(c)(2), July 29, 1970, 84 Stat. 591, added item 1363.

1966—Pub. L. 89–635, §2, Oct. 10, 1966, 80 Stat. 880, added item 1362.

1962—Pub. L. 87–748, §1(b), Oct. 5, 1962, 76 Stat. 744, added item 1361.

1958—Pub. L. 85–554, §4, July 25, 1958, 72 Stat. 415, inserted "costs" in items 1331 and 1332.

1953—Act Aug. 15, 1953, ch. 505, §3, 67 Stat. 589, added item 1360.

§ 1330. Actions against foreign states

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605–1607 of this title or under any applicable international agreement.

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

(c) For purposes of subsection (b), an appearance by a foreign state does not confer personal jurisdiction with respect to any claim for relief not arising out of any transaction or occurrence enumerated in sections 1605–1607 of this title.

(Added Pub. L. 94–583, §2(a), Oct. 21, 1976, 90 Stat. 2891.)

EFFECTIVE DATE

Section effective 90 days after Oct. 21, 1976, see section 8 of Pub. L. 94–583, set out as a note under section 1602 of this title.

§ 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

(June 25, 1948, ch. 646, 62 Stat. 930; Pub. L. 85–554, §1, July 25, 1958, 72 Stat. 415; Pub. L. 94–574, §2, Oct. 21, 1976, 90 Stat. 2721; Pub. L. 96–486, §2(a), Dec. 1, 1980, 94 Stat. 2369.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §41(1) (Mar. 3, 1911, ch. 231, §24, par. 1, 36 Stat. 1091; May 14, 1934, ch. 283, §1, 48 Stat. 775; Aug. 21, 1937, ch. 726, §1, 50 Stat. 738; Apr. 20, 1940, ch. 117, 54 Stat. 143).

Jurisdiction of federal questions arising under other sections of this chapter is not dependent upon the amount in controversy. (See annotations under former section 41 of title 28, U.S.C.A., and 35 C.J.S., p. 833 et seq., §§30–43. See, also, reviser's note under section 1332 of this title.)

Words "wherein the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs," were added to conform to rulings of the Supreme Court. See construction of provision relating to jurisdictional amount requirement in cases involving a Federal question in *United States v. Sayward*, 16 S.Ct. 371, 160 U.S. 493, 40 L.Ed. 508; *Fishback v. Western Union Tel. Co.*, 16 S.Ct. 506, 161 U.S. 96, 40 L.Ed. 630; and *Hall v. Indiana Manufacturing Co.*, 1900, 20 S.Ct. 272, 176 U.S. 68, 44 L.Ed. 374.

Words "all civil actions" were substituted for "all suits of a civil nature, at common law or in equity" to conform with Rule 2 of the Federal Rules of Civil Procedure.

Words "or treaties" were substituted for "or treaties made, or which shall be made under their authority." for purposes of brevity.

The remaining provisions of section 41(1) of title 28, U.S.C., 1940 ed., are incorporated in sections 1332, 1341, 1342, 1345, 1354, and 1359 of this title.

Changes were made in arrangement and phraseology.

AMENDMENTS

1980—Pub. L. 96–486 struck out ": amount in controversy; costs" in section catchline, struck out minimum amount in controversy requirement of $10,000 for original jurisdiction in federal question cases which necessitated striking the exception to such required minimum amount that authorized original jurisdiction in actions brought against the United States, any agency thereof, or any officer or employee thereof in an official capacity, struck out provision authorizing the district court except where express provision therefore was made in a federal statute to deny costs to a plaintiff and in fact impose such costs upon such plaintiff where plaintiff was adjudged to be entitled to recover less than the required amount in controversy, computed without regard to set-off or counterclaim and exclusive of interests and costs, and struck out existing subsection designations.

1976—Subsec. (a). Pub. L. 94–574 struck out $10,000 jurisdictional amount where action is brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.

1958—Pub. L. 85–554 included costs in section catchline, designated existing provisions as subsec. (a), substituted "$10,000" for "$3,000", and added subsec. (b).

EFFECTIVE DATE OF 1980 AMENDMENT; APPLICABILITY

Section 4 of Pub. L. 96–486 provided: "This Act [amending this section and section 2072 of Title 15, Commerce and Trade, and enacting provisions set out as a note under section 1 of this title] shall apply to any civil action pending on the date of enactment of this Act [Dec. 1, 1980]."

EFFECTIVE DATE OF 1958 AMENDMENT

Section 3 of Pub. L. 85–554 provided that: "This Act [amending this section and sections 1332 and 1345 of this title] shall apply only in the case of actions commenced after the date of the enactment of this Act [July 25, 1958]."

§ 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state, except that the district courts shall not have original jurisdiction under this subsection of an action between citizens of a State and citizens or subjects of a foreign state who are lawfully admitted for permanent residence in the United States and are domiciled in the same State;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $75,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title—

(1) a corporation shall be deemed to be a citizen of every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of—

(A) every State and foreign state of which the insured is a citizen;

(B) every State and foreign state by which the insurer has been incorporated; and

(C) the State or foreign state where the insurer has its principal place of business; and

(2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

(d)(1) In this subsection—

(A) the term "class" means all of the class members in a class action;

(B) the term "class action" means any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action;

(C) the term "class certification order" means an order issued by a court approving the treatment of some or all aspects of a civil action as a class action; and

(D) the term "class members" means the persons (named or unnamed) who fall within the definition of the proposed or certified class in a class action.

(2) The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which—

(A) any member of a class of plaintiffs is a citizen of a State different from any defendant;

(B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a for-

to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of any interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) The district courts shall not have jurisdiction under this section of any matter within the exclusive jurisdiction of the Court of International Trade under chapter 95 of this title.

(June 25, 1948, ch. 646, 62 Stat. 931; Pub. L. 95–486, § 9(a), Oct. 20, 1978, 92 Stat. 1633; Pub. L. 96–417, title V, § 505, Oct. 10, 1980, 94 Stat. 1743; Pub. L. 97–449, § 5(f), Jan. 12, 1983, 96 Stat. 2442; Pub. L. 104–88, title III, § 305(a)(3), Dec. 29, 1995, 109 Stat. 944.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 41(8), (23) (Mar. 3, 1911, ch. 231, § 24, pars. 8, 23, 36 Stat. 1092, 1093; Oct. 22, 1913, ch. 32, 38 Stat. 219).

Words "civil action" were substituted for "suits", in view of Rule 2 of the Federal Rules of Civil Procedure.

Changes were made in phraseology.

AMENDMENTS

1995—Subsecs. (a), (b). Pub. L. 104–88 substituted "11706 or 14706" for "11707".

1983—Pub. L. 97–449 substituted "section 11707 of title 49" for "section 20(11) of part I of the Interstate Commerce Act (49 U.S.C. 20(11)) or section 219 of part II of such Act (49 U.S.C. 319)" wherever appearing.

1980—Subsec. (c). Pub. L. 96–417 added subsec. (c).

1978—Pub. L. 95–486 designated existing provisions as subsec. (a), inserted proviso giving the district courts original jurisdiction of actions brought under sections 20(11) and 219 of the Interstate Commerce Act when the amounts in controversy for each receipt exceed $10,000, exclusive of interests and costs, and added subsec. (b).

EFFECTIVE DATE OF 1995 AMENDMENT

Amendment by Pub. L. 104–88 effective Jan. 1, 1996, see section 2 of Pub. L. 104–88, set out as an Effective Date note under section 701 of Title 49, Transportation.

EFFECTIVE DATE OF 1980 AMENDMENT

Amendment by Pub. L. 96–417 effective Nov. 1, 1980, and applicable with respect to civil actions pending on or commenced on or after such date, see section 701(a) of Pub. L. 96–417, set out as a note under section 251 of this title.

§ 1338. Patents, plant variety protection, copyrights, mask works, designs, trademarks, and unfair competition

(a) The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights and trademarks. Such jurisdiction shall be exclusive of the courts of the states in patent, plant variety protection and copyright cases.

(b) The district courts shall have original jurisdiction of any civil action asserting a claim of unfair competition when joined with a substantial and related claim under the copyright, patent, plant variety protection or trademark laws.

(c) Subsections (a) and (b) apply to exclusive rights in mask works under chapter 9 of title 17, and to exclusive rights in designs under chapter 13 of title 17, to the same extent as such subsections apply to copyrights.

(June 25, 1948, ch. 646, 62 Stat. 931; Pub. L. 91–577, title III, § 143(b), Dec. 24, 1970, 84 Stat. 1559; Pub. L. 100–702, title X, § 1020(a)(4), Nov. 19, 1988, 102 Stat. 4671; Pub. L. 105–304, title V, § 503(b)(1), (2)(A), Oct. 28, 1998, 112 Stat. 2917; Pub. L. 106–113, div. B, § 1000(a)(9) [title III, § 3009(1)], Nov. 29, 1999, 113 Stat. 1536, 1501A–551.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §§ 41(7) and 371(5) (Mar. 3, 1911, ch. 231, §§ 24, par. 7, 256, par. 5, 36 Stat. 1092, 1160).

Section consolidates section 41(7) with section 371 (5) of title 28, U.S.C., 1940 ed., with necessary changes in phraseology.

Words "of any civil action" were substituted for "all suits at law or in equity" and "cases" to conform section to Rule 2 of the Federal Rules of Civil Procedure.

Word "patents" was substituted for "patent-right" in said section 371 (Fifth) of title 28, U.S.C., 1940 ed.

Similar provisions respecting suits cognizable in district courts, including those of territories and possessions. (See section 34 of title 17, U.S.C., 1940 ed., Copyrights.)

Subsection (b) is added and is intended to avoid "piecemeal" litigation to enforce common-law and statutory copyright, patent, and trade-mark rights by specifically permitting such enforcement in a single civil action in the district court. While this is the rule under Federal decisions, this section would enact it as statutory authority. The problem is discussed at length in *Hurn v. Oursler* (1933, 53 S.Ct. 586, 289 U.S. 238, 77 L.Ed. 1148) and in *Musher Foundation v. Alba Trading Co.* (C.C.A. 1942, 127 F.2d 9) (majority and dissenting opinions).

AMENDMENTS

1999—Pub. L. 106–113 substituted "trademarks" for "trade-marks" in section catchline and subsec. (a) and substituted "trademark" for "trade-mark" in subsec. (b).

1998—Pub. L. 105–304, § 503(b)(2)(A), inserted "designs," after "mask works," in section catchline.

Subsec. (c). Pub. L. 105–304, § 503(b)(1), inserted ", and to exclusive rights in designs under chapter 13 of title 17," after "title 17".

1988—Pub. L. 100–702, § 1020(a)(4)(B), amended section catchline generally, inserting "mask works," after "copyrights,".

Subsec. (c). Pub. L. 100–702, § 1020(a)(4)(A), added subsec. (c).

1970—Pub. L. 91–577 inserted references to "plant variety protection" in section catchline and in subsecs. (a) and (b).

EFFECTIVE DATE OF 1970 AMENDMENT

Amendment by Pub. L. 91–577 effective Dec. 24, 1970, see section 141 of Pub. L. 91–577, set out as an Effective Date note under section 2321 of Title 7, Agriculture.

§ 1339. Postal matters

The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to the postal service.

(June 25, 1948, ch. 646, 62 Stat. 932.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 41(6) (Mar. 3, 1911, ch. 231, § 24, par. 6, 36 Stat. 1092).

Changes were made in phraseology.

§ 1340. Internal revenue; customs duties

The district courts shall have original jurisdiction of any civil action arising under any Act of Congress providing for internal revenue, or

revenue from imports or tonnage except matters within the jurisdiction of the Court of International Trade.

(June 25, 1948, ch. 646, 62 Stat. 932; Pub. L. 96–417, title V, § 501(21), Oct. 10, 1980, 94 Stat. 1742.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 41(5) (Mar. 3, 1911, ch. 231, § 24, par. 5, 36 Stat. 1092; Mar. 2, 1929, ch. 488, § 1, 45 Stat. 1475).

Words "Customs Court" were substituted for "Court of Customs and Patent Appeals." Section 41(5) of title 28, U.S.C., 1940 ed., is based on the Judicial Code of 1911. At that time the only court, other than the district courts, having jurisdiction of customs cases, was the Court of Customs Appeals which became the Court of Customs and Patent Appeals in 1929. The Customs Court was created in 1926 as a court of original jurisdiction over customs cases. (See reviser's note preceding section 251 of this title.)

Words "any civil action" were substituted for "all cases" in view of Rule 2 of the Federal Rules of Civil Procedure.

Changes were made in phraseology.

AMENDMENTS

1980—Pub. L. 96-417 redesignated the Customs Court as the Court of International Trade.

EFFECTIVE DATE OF 1980 AMENDMENT

Amendment by Pub. L. 96-417 effective Nov. 1, 1980, and applicable with respect to civil actions pending on or commenced on or after such date, see section 701(a) of Pub. L. 96-417, set out as a note under section 251 of this title.

§ 1341. Taxes by States

The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

(June 25, 1948, ch. 646, 62 Stat. 932.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 41(1) (Mar. 3, 1911, ch. 231, § 24, par. 1, 36 Stat. 1091; May 14, 1934, ch. 283, § 1, 48 Stat. 775; Aug. 21, 1937, ch. 726, § 1, 50 Stat. 738; Apr. 20, 1940, ch. 117, 54 Stat. 143).

This section restates the last sentence of section 41(1) of title 28, U.S.C., 1940 ed.

Other provisions of section 41(1) of title 28, U.S.C., 1940 ed., are incorporated in sections 1331, 1332, 1342, 1345, 1354, and 1359 of this title.

Words "at law or in equity" before "in the courts of such State" were omitted as unnecessary.

Words "civil action" were substituted for "suit" in view of Rule 2 of the Federal Rules of Civil Procedure.

Words "under State law" were substituted for "imposed by or pursuant to the laws of any State" for the same reason.

§ 1342. Rate orders of State agencies

The district courts shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency or a rate-making body of a State political subdivision, where:

(1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution; and,

(2) The order does not interfere with interstate commerce; and,

(3) The order has been made after reasonable notice and hearing; and,

(4) A plain, speedy and efficient remedy may be had in the courts of such State.

(June 25, 1948, ch. 646, 62 Stat. 932.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 41(1) (Mar. 3, 1911, ch. 231, § 24, par. 1, 36 Stat. 1091; May 14, 1934, ch. 283, § 1, 48 Stat. 775; Aug. 21, 1937, ch. 726, § 1, 50 Stat. 738; Apr. 20, 1940, ch. 117, 54 Stat. 143).

This section rearranges and restates the fourth sentence of section 41(1) of title 28, U.S.C., 1940 ed.

Other provisions of section 41(1) of title 28, U.S.C., 1940 ed., are incorporated in sections 1331, 1332, 1341, 1345, 1354, and 1359 of this title.

Words "at law or in equity" before "in the courts of such State" were omitted as unnecessary.

Words "civil action" were substituted for "suit," in view of Rule 2 of the Federal Rules of Civil Procedure.

Word "operation" was substituted for "enforcement, operation or execution" for the same reason.

§ 1343. Civil rights and elective franchise

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

(b) For purposes of this section—

(1) the District of Columbia shall be considered to be a State; and

(2) any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(June 25, 1948, ch. 646, 62 Stat. 932; Sept. 3, 1954, ch. 1263, § 42, 68 Stat. 1241; Pub. L. 85–315, part III, § 121, Sept. 9, 1957, 71 Stat. 637; Pub. L. 96–170, § 2, Dec. 29, 1979, 93 Stat. 1284.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 41(12), (13), and (14) (Mar. 3, 1911, ch. 231, § 24, pars. 12, 13, 14, 36 Stat. 1092).

Words "civil action" were substituted for "suits," "suits at law or in equity" in view of Rule 2 of the Federal Rules of Civil Procedure.

Numerous changes were made in arrangement and phraseology.

AMENDMENTS

1979—Pub. L. 96-170 designated existing provisions as subsec. (a) and added subsec. (b).

§ 1344. Election disputes

The district courts shall have original jurisdiction of any civil action to recover possession of any office, except that of elector of President or Vice President, United States Senator, Representative in or delegate to Congress, or member of a state legislature, authorized by law to be commenced, where in it appears that the sole question touching the title to office arises out of denial of the right to vote, to any citizen offering to vote, on account of race, color or previous condition of servitude.

The jurisdiction under this section shall extend only so far as to determine the rights of the parties to office by reason of the denial of the right, guaranteed by the Constitution of the United States and secured by any law, to enforce the right of citizens of the United States to vote in all the States.

(June 25, 1948, ch. 646, 62 Stat. 932.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 41(15) (Mar. 3, 1911, ch. 231, § 24, par. 15, 36 Stat. 1092).

Words "civil action" were substituted for "suits," in view of Rule 2 of the Federal Rules of Civil Procedure.

Words "United States Senator" were added, as no reason appears for including Representatives and excluding Senators. Moreover, the Seventeenth amendment, providing for the popular election of Senators, was adopted after the passage of the 1911 law on which this section is based.

Changes were made in phraseology.

§ 1345. United States as plaintiff

Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.

(June 25, 1948, ch. 646, 62 Stat. 933.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 41(1) (Mar. 3, 1911, ch. 231, § 24, par. 1, 36 Stat. 1091; May 14, 1934, ch. 283, § 1, 48 Stat. 775; Aug. 21, 1937, ch. 726, § 1, 50 Stat. 738; Apr. 20, 1940, ch. 117, 54 Stat. 143).

Other provisions of section 41(1) of title 28, U.S.C., 1940 ed., are incorporated in sections 1331, 1332, 1341, 1342, 1354, and 1359 of this title.

Words "civil actions, suits or proceedings" were substituted for "suits of a civil nature, at common law or in equity" in view of Rules 2 and 81(a)(7) of the Federal Rules of Civil Procedure.

Word "agency" was inserted in order that this section shall apply to actions by agencies of the Government and to conform with special acts authorizing such actions. (See definitive section 451 of this title.)

The phrase "Except as otherwise provided by Act of Congress," at the beginning of the section was inserted to make clear that jurisdiction exists generally in district courts in the absence of special provisions conferring it elsewhere.

Changes were made in phraseology.

§ 1346. United States as defendant

(a) The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 7104(b)(1) and 7107(a)(1) of title 41. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(b)(1) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(2) No person convicted of a felony who is incarcerated while awaiting sentencing or while serving a sentence may bring a civil action against the United States or an agency, officer, or employee of the Government, for mental or emotional injury suffered while in custody without a prior showing of physical injury.

(c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section.

(d) The district courts shall not have jurisdiction under this section of any civil action or claim for a pension.

(e) The district courts shall have original jurisdiction of any civil action against the United States provided in section 6226, 6228(a), 7426, or 7428 (in the case of the United States district court for the District of Columbia) or section 7429 of the Internal Revenue Code of 1986.

(f) The district courts shall have exclusive original jurisdiction of civil actions under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States.

(g) Subject to the provisions of chapter 179, the district courts of the United States shall

C

United States Code Annotated Currentness
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title VII. Judgment
Rule 56. Summary Judgment

<Notes of Decisions for 28 USCA Federal Rules of Civil Procedure Rule 56 are displayed in three separate documents. Notes of Decisions for subdivisions I to VI are contained in this document. For Notes of Decisions for subdivisions VII through XXV, see the second document for 28 USCA Federal Rules of Civil Procedure Rule 56. For Notes of Decisions for subdivisions XXVI to end, see the third document for 28 USCA Federal Rules of Civil Procedure Rule 56.>

(a) Motion for Summary Judgment or Partial Summary Judgment. A party may move for summary judgment, identifying each claim or defense--or the part of each claim or defense--on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

(b) Time to File a Motion. Unless a different time is set by local rule or the court orders otherwise, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery.

(c) Procedures.

(1) ***Supporting Factual Positions.*** A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

(2) ***Objection That a Fact Is Not Supported by Admissible Evidence.*** A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

(3) ***Materials Not Cited.*** The court need consider only the cited materials, but it may consider other materials