No. 19-14441

United States Court of Appeals for the Eleventh Circuit

JAMES CLAY AND AUDREY OSCEOLA,

Appellant,

v.

COMMISSIONER OF INTERNAL REVENUE,

Appellee.

ON APPEAL FROM THE UNITED STATES TAX COURT
No. 13104-11; 7870-13

BRIEF OF APPELLANT'S JAMES CLAY AND AUDREY OSCEOLA'S

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CERTIFICATE OF INTERESTED PARTIES AND CORPORATE DISCLOSURE STATEMENT

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

1. Abney, George B., Attorney for the Miccosukee Tribe of Indians of Florida.
2. Pugh, Cary Douglas, United States Tax Court Judge.
3. Bennett, Jeanine, In House Counsel for the Miccosukee Tribe of Indians of Florida
4. Bolen, Sarah, Attorney, Internal Revenue Service.
5. Lenuis, Marissa R., Attorney, Internal Revenue Service.
6. Saunooke, Robert O., Attorney for Sally Jim.
7. Sewell, Pamela, Attorney, Internal Revenue Service.
8. Toulou, Tracy, Director Office of Tribal Justice, Department of Justice.
9. Van Doran, Shelly, Attorney, Internal Revenue Service.

Appellant James Clay and Audrey Osceola further certifies that she is an individual, and has no parent corporation or stock.

STATEMENT REGARDING ORAL ARGUMENT

Appellant's request oral argument. This appeal presents an issue of first impression and cultural complexity as it relates to prior Supreme Court precedent in the treatment of funds paid for the use of lands owned and dedicated for the sole benefit of a federally recognized Indian Tribe and its members. In addition, this case presents unique questions on issues of federal income tax – which are not ordinarily before this Court. Specifically, inconsistent and confusing interpretations of prior IRS Revenue Rulings and Court decisions which need clarification by this Court in order to protect the sovereignty of a federally recognized Indian Tribe in carrying out and implementing its Self-Determination under applicable federal law. Given the complexity of the issues on appeal and the lengthy record below, oral argument will assist the Court in the resolution of this appeal.

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Appellants brought this action against the Appellee in the United States Tax Court following Notices of Deficiencies dated March 4, 2001 and January 10, 2013 filed by the IRS which determined a tax on income owed by the Appellants for tax years 2004, 2005 and 2006 respectively. After concessions and stipulations were entered into between the parties the issue for decision before the US Tax Court were: (1) whether quarterly distributions, Christmas bonuses, and miscellaneous payments to the Appellants by the Miccosukee Tribe of Indians of Florida are to be considered income under Internal Revenue Code (IRC) § 61 for the tax years 2004 through 2006 and (2) whether Appellants are liable for accuracy related penalties under IRC § 6662(a) for tax years 2004 and 2005.

The US Tax Court issued its opinion April 24, 2019 and issued its Final Decision August 5, 2019 finding deficiencies against Appellants for the tax years 2004 and 2005 in the amounts of $192,215.00 and $310,171.00, respectively; and that there are no penalties due from petitioners for the taxable years 2004 and 2005, under the provisions of I.R.C. § 6662 (a). The Appellants filed a timely notice of appeal on November 6, 2019. The Court, therefore, has jurisdiction pursuant to Rule 13 of the Federal Rules of Appellate Procedure.

STATEMENT OF THE ISSUES

1. **Did the Tax Court err in failing to apply well settled canons of construction when interpreting agreements with the Tribe and its members, including Appellants, that exempted payments made to them for use of Indian Lands from inclusion as taxable income pursuant to 25 U.S.C. § 1750?**

2. **Did the Tax court err in determining that the designated representative of the Bureau of Indian Affairs did not have the authority to interpret and bind the BIA to the applicability of 25 CFR 1.2 to other provisions of 25 CFR Part 162?**

3. **Did the Tax Court err in holding that payments of the gross receipts tax to members of the Miccosukee Tribe of Indians are not exempt from inclusion as income under IRC § 61 because it failed to recognize that such payments represent land lease payments exempt from tax.**

STATEMENT OF THE CASE

I. Factual Background

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

In 1962, Congress formally recognized the Tribe as a federally recognized Indian Tribe. Pursuant to the laws, traditions and customs of the Miccosukee people the lands on which the Miccosukee live, reside, work, and operate businesses are held for the benefit and use of all the members. More specifically, all members of the Miccosukee have an undivided interest in the use and benefit of Miccosukee lands. Interestingly there is no word in the Miccosukee language that describes individual ownership. The words of individual possession or exclusive control of Tribal lands and property do not exist among the Miccosukee people. Instead the Miccosukee language defines the land as for the use and benefit of all members. As evidence of this fact almost every aspect of how the Miccosukee conduct business is vested in the General Council of the Tribe.[1] No action, including valuation, leasing, and determination of how the Tribal lands are used, can take place without the members of the Tribe as owners of the lands approving the act.

[1] The General Council of the Miccouskee was later codified for the benefit of the United States in the Miccosukee Constitution as "all adult members 18 years of age or older." Miccosukee Const., Art. III §1.

Although it has been inherently understood by the Miccosukee in its sovereign laws and customs that Miccosukee lands, wherever located, are equally enjoyed by all the members of the Tribe, in 1961 this inherent right was codified and acknowledged by the United States in the Miccosukee Constitution, to permit government-to-government relations, the United States required the Tribe to create a formal written constitution that would be approved by the Bureau of Indian Affairs ("BIA") and Congress.

The Constitution was required by United States to codify and put into a written format the manner by which the Tribe and its members had governed themselves for thousands of years prior to interaction with the United States and aid the federal government and its agencies in its ability to interact and identify a government that was familiar to the United States but not familiar to the Tribe.

Formally, the Miccosukee Constitution, which was recognized by the United States government pursuant to 25 U.S.C. §476, provides that "[a]ll members of the Miccosukee Tribe" are "accorded equal political rights and equal opportunities to participate in the economic resources and activities of the Tribe." Miccosukee Const., Art. VI, §1. This Constitution was enacted and adopted by the members of the Tribe and was subsequently approved by Congress. (FO p.4)

The Miccosukee Constitution affirms the structural organization of the Tribe that predates federal recognition. Specifically, its Constitution, as approved and

acknowledged by the federal government, affirmed the Tribe's purpose as set out in the Preamble to "promote the general welfare [of the Tribe] and to conserve our lands and resources." (*See*, Micc.Const., at Art. IV, Section 3). The Constitution further affirmed the inherent right of the Tribe to levy and collect fees or taxes associated with the use of the Tribe's lands. The members of the Tribe collectively hold title and control to all property and land within the Reservation and held in Trust by the United States for their benefit. (Micc.Const., at Art. VI Sec. 1)

All actions taken by the Tribe, including day-to-day operations, creation of laws and ordinances, and protection of Tribal lands and resources are governed by its General Council, which consists of all enrolled members of the Tribe who are 18 years or older. The day-to-day operations of the Tribe are managed by the Business Council, at the direction and approval of the General Council. The Business Council consists of five elected positions: Chairman, Assistant Chairman, Secretary, Lawmaker and Treasurer. All authority of the Business Council to act and bind the Tribe is vested within the General Council which meets at least quarterly to, among other items, (1) approve actions of the Business Council taken subsequent to the last General Council meeting; (2) ratify or approve proposed expenditures of the Tribe including contracts and other financial matters; (3) approve proposed uses of Tribal lands, including compensation to

be paid to the members for said uses; (4) approve ordinances, laws, and resolutions involving the Tribe and its sovereignty; and (5) ratify or deny actions of the Business Council.

Pursuant to the Constitution, all members of the Tribe possess equal ownership of any and all Tribal assets, including Tribal lands. Furthermore, the Constitution requires that all members have the right to equally enjoy any benefits obtained by the Tribe through the use of its lands and resources. In essence all members enjoy an undivided interest in both equitable and legal title to the Tribes property. This is an important factor in the day to day lives of the Tribal members, including Appellants, as the current land designation represents less than one (1%) percent of the total land that was used, occupied or otherwise part of the traditional Miccosukee Nation prior to its appropriation.

James Clay and Audrey Osceola are members of the Miccosukee Tribe. They and their family are the beneficiaries of the rights and privileges reserved to, created for and inherent to enrolled members of the Miccosukee Tribe by various relevant treaties and settlement agreements between the Miccosukee Tribe and the United States as well as federal laws and regulations which are related to the well settled historical policy of the United States in reducing the aboriginal lands of the Miccosukee.

The United States and the Tribe reached various settlements and agreements that reflected not only the value of the land claims associated with said reduction, but also the continuing desire to protect the inherent sovereign right of the Miccosukee to govern, provide, and otherwise use all of the Tribal lands for the benefit of all of the Miccosukee members. These include the rights and privileges accruing to the Miccosukee Tribe and its members from federal statutes such as the Florida Indian Land Claims Settlement Act of 1982, the Miccosukee Settlement Act of 1997, and the Miccosukee Reserved Area Act (MRA) passed in 1998.

The Tribe, with the consent and approval of the General Council, hires advisers, including attorneys and accountants, to assist them with certain legal and financial concerns, including in assisting the Tribe in exercising its inherent sovereign authority. In addition, pursuant to the provisions of the Indian Self Determination and Education Assistance Act of 1975, 25 U.S.C.14, the Tribe has taken over the day to day operations formerly performed by the Bureau of Indian Affairs under various contracts and agreements, informally known as 638 contracts, including approval of ordinances, land use agreements, and related policies as codified in 25 CFR. [2]

[2] In 1975, Congress enacted P.L. 93-638 0f 1975, as amended – the Indian Self-Determination and Education Assistance Act (Act) (25 USC 5301 et seq.) (formerly 25

B. The Tribe Exercises its Sovereign Authority to Determine Compensation for use of its Lands.

Historically the Tribe consistently exercised powers of self-government which were recognized by the federal government in treaties and agreements pre-dating acquisition of Florida by the fledgling United States. This includes the determination of the manner, method, means and value associated with the use of the Tribal resources, including its lands.

Organizationally the method by which the Tribe manages its property occurs during four regularly scheduled General Council meetings held in February, June, August and November of each year. Additional meetings of the General Council may be held for various special or emergency issues and are called Special General Council Meetings. (See FO p. 5)

Following the direction of the General Council the Tribe is run by the Business Council. The Business Council has five members, each elected for four-year terms: the chairman, assistant chairman, secretary, treasurer and law maker. The Business Council meets regularly with the chairman only casting a vote in the

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U.S.C. 450 et seq.). The Act establishes a contracting framework with Federally recognized Indian tribes that assures maximum, effective, and meaningful tribal participation in the direction, planning, conduct, and administration of contractible programs, functions, services and activities (PFSAs) within the Department of the Interior which serve tribal communities and members.

case of a tie. The current chairman is Billy Cypress who has held that position from 1987 through 2009 and again from 2016 to the present.

Pursuant to the provisions of 638 contracting the chairman has for all intents and purposes also held the position as Superintendent of the BIA together with all the authority and responsibilities associated with that position. The chairman acts as the Secretary of the Interior's designee under any 638 contract provisions turned over to the Tribe pursuant to 25 USC § 14 and the Indian Self Determination Act. (See FO p. 4-5)

In 1984, to further increase development opportunities, and to provide a tangible understanding to the non-Indian community that sought to use the Tribe's lands, the Tribe formally passed an ordinance to provide for the means of compensating all members of the Tribe for use of its lands as required by the Constitution. Said Ordinance provided for payment by lessees and users of Tribal lands, of a fee, or tax, based on gross receipts of each business operated within the reservation. (FO p. 5). The action of the General Council in creating this formal codification was consistent with the historical and long settled practice of the Tribe in compensating for use of its resources as well as the provisions of 25 CFR §§ 162.014 – 162.018.

Pursuant to the authority given to Chairman Billy Cypress, as the BIA superintendent, all the ordinances, leases, and agreements for the use of Tribal

lands were approved on behalf of the BIA by Chairman Cypress. See generally 25 CFR §1.2 and Part 162. In short the 1984 Ordinance streamlined the method for compensating the members for use of Tribal lands held by and for the benefit of the Tribal members in an undivided interest and eliminated the necessity of securing hundreds of signatures for each lease or use of Tribal lands prior to a lease or development beginning operation. This 1984 Ordinance further gave credibility and a familiarity to the non-Indian community that sought to utilize the resources of the Tribe but struggled to identify fair market value.

The 1984 Ordinance was a formal codification and an extension of the Tribe's prior method for securing compensation for the use of its lands in accordance with the procedures established by the Bureau of Indian Affairs as set out in 25 CFR Part 162. The provisions of Part 162 include affirmative language supporting Tribal determinations of property including, but not limited to; valuation, compensation for use, method of leasing or permitting use, residential and business leases, and imposition of fees for use of lands belonging to the Tribe and to Tribal members. (See generally 25 CFR Part 162 et. Seq.)

C. The Tribe opens a gaming facility.

On April 7, 1989, the Tribe entered a contract with Tamiami Development Corp. (TDC) to construct, manage, and operate a Class II gaming facility for the Tribe called Miccosukee Indian Bingo and Gaming (Casino). The agreement,

which was later assigned to Tamiami Partners, Ltd. (TLP), was approved by the DOI. TDC built the Casino on land it purchased outside but adjacent to the Tribe's reservation land. The purchased land was placed into trust for the Tribe. (FO p.5) As required by the Tribes Constitution, as well as the provisions of 25 CFR Part 162 related to use of tribal lands, the Tribe, through the Business Council, determined the best method for valuing and receiving compensation from TDC and the gaming facility for the use of the land upon which it was located as reflected in its Gross Receipts Ordinance.

The Gross Receipts Ordinance, was treated as the imposition of a percentage of the gross revenue earned by all businesses operating on Tribal lands which would be paid to the Tribe and distributed to its members as required by the Tribe's Constitution. At the request of the third-party investor the Tribe agreed not to impose its gross receipts tax on the gaming facility for the initial years of operation to permit the investor to recoup its initial investment. A minimum monthly payment from the Tribe's share in the gaming facility to the Tribe was still required during this brief period. In 1990, the Tribe's gaming facility, known as Miccosukee Indian Bingo ("MIB"), opened for business. Pursuant to the provisions of the Indian Gaming Regulatory Act ("IGRA") the Tribe owned MIB and treated MIB as a separate business organization from the Tribe as a governmental entity.

The gross receipts taxes collected by the Tribe from MIB are placed into a "non-taxable distributable revenue" account, commonly referred to as the "NTDR" account and distributed to the members of the Tribe on a quarterly basis. (FO p. 8)

D. The Tribe distributed to its members a pro rata share of the gross receipts tax as rental payment and compensation for use of Tribal resources in accordance with the Tribal Constitution.

Prior and subsequent to the opening of its gaming facility, the Tribe used funds derived from its gross receipts tax to make distributions payments to each individual tribal member. This began in 1984, and the distributions payments have grown over time. The payments at issue are distributed pursuant to a long-standing tribal custom, or tribal government practice, which is to provide distributions payments to each member of the Tribe. This custom and practice was in place long before the Tribe enacted its gross receipts tax, and long before it opened its gaming facility, and was included in the Miccosukee Constitution relating to the members equally participating in all revenue and resources of the Tribe. (Micc. Const. at Art VI § 1)

The determination of how to value and obtain compensation for the use of its lands was made in accordance with he provisions of 25 CFR Part 162 and approved by the BIA through its duly designated representative chairman Billy Cypress acting in his capacity as BIA superintendent. The unique nature and

location of the lands of the Tribe made conventional valuations, such as comparable properties values, an impossibility.

Distributions of "net revenue" from gaming are governed by the provisions of the Indian Gaming Regulatory Act (IGRA). Specifically, IGRA permits use of gaming revenues for five (5) specific purposes. In brief those purposes are: (1) to fund tribal government operations or programs; (2) to provide for the general welfare of the Indian tribe and its members; (3) to promote tribal economic development; (4) to donate to charitable organizations; or(5) to help fund operations of local government agencies. 25 U.S.C. § 2710(2)(B).

A Tribe may also distribute per capita payments of "**NET REVENUE**" from any gaming facility. IGRA requires that **"PRIOR"** to any distribution of net gaming revenue the Tribe must have in place a plan approved by the BIA and Chairman of the National Indian Gaming Commission "NIGC" for allocating said revenue. 25 U.S.C. §2710(3)(A), emphasis added.

The Tribe has never distributed net revenue from any gaming conducted at any of its gaming facilities. Prior to conducting any gaming activity the Tribe has distributed per capita payments, of de minimis amounts, to its members from funds generated by the Tribe under the gross receipts tax for the use of lands by the Tribe and other businesses.

For a short period of time the Tribe, through a vote of the General Council as beneficiaries of any revenue generated from the use of Tribal lands, voted to suspend the imposition of the gross receipts tax for the new gaming facility. Specifically, the General Council approved a suspension of payment until such time as the developer had recovered funds equal to the cost of building the gaming facility. (FO p. 7)

The Tribe and the gaming developers had a falling out and the developers were removed and the Tribe as a governmental gaming entity took over the operation of the facility. The Tribe created Miccosukee Indian Gaming "MIG" and Miccosukee Indian Bingo "MIB" to operate the gaming facility and the General Council reinstated the gross receipts tax requiring MIB and MIG to pay to the Tribe a gross receipts tax as and for the continued use of the Tribal lands held in common for all the Tribal members. (FO p.7-10)

Payments to the Appellants were made during the years 2004 through 2006 as and for their share of the payments made to the Tribe for use of the land upon which the gaming facility is located. Said payments were made in accordance with the provisions of the Miccosukee Constitution requiring that all members benefit and share equally in the resources of the Tribe, including fees generated from the use of its lands. Micc. Const. Art VI Sec. 1.

The Appellees issued notices of deficiencies to the Appellants and this action was filed challenging the notices and underlying IRS interpretation of inclusion of the payments for use of Tribal lands as income subject to taxation under 25 U.S.C. Sec. 61.

SUMMARY OF THE ARGUMENT

This case centers on how much authority a federally recognized sovereign Tribe has in valuing and determining not only the use of its lands but how compensation for said lands is determined and distributed. Can a Tribe in exercising its powers of self-determination, and following the policies of the agency which provides oversight and trust responsibilities to Tribes, enact legislation that provides for alternative forms of leasing payments for land use?

If the answer to that question is in the affirmative then can another agency, namely the IRS, ignore statutory construction, and BIA policies over Tribal issues, and impose its own interpretation of lease compensation to include such payments made to members of a federally recognized Indian Tribe in the calculation of income for the purpose of imposing federal income taxes?

This case demands that the federal government abide by the treaties, settlement agreements and obligations associated with the illegal and unlawful taking of the Tribe's lands and the resolution as of said illegal actions in favor of the Tribe by means of agreements exempting the Tribe's lands from Federal

taxation. Furthermore, as set out in prior Supreme Court precedent the interpretation of these agreements or treaties must be governed by how the Tribe understood them and any ambiguities should be resolved in the Tribe's favor.

Respectfully, due to numerous errors by the Tax Court, including the failure to follow well settled Supreme Court precedent in analyzing treaties, statutes and agreements impacting Indian Tribes, the Tax Court's decision must be reversed and the sovereign authority of the Miccosukee Tribe of Indians of Florida to value and determine the method for compensation for its lands must be upheld.

STANDARD OF REVIEW

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

ARGUMENT AND CITATION OF AUTHORITY

I. The Tax Court erred in failing to apply well settled canons of construction when interpreting agreements with the Tribe and its members, including Appellants, that exempted payments made to them for use of Indian Lands from inclusion as taxable income pursuant to 25 U.S.C. § 1750.

It is well settled law that agreements, treaties and statutes governing or applicable to Indian Tribes are not to be read or understood in accordance with standard canons of construction. Instead the language applicable to Tribes should

be read as the Tribe understood it at the time of its creation with any ambiguities being interpreted in favor of the Tribe. *U.S. v. Winans*, 198 U.S. 371, 25 S.Ct. 662, 49 L.Ed. 1089(1905)(*construe [agreements] . . . with the Indians as an unlettered people understood it . . . without regard to the technical rules*); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed. 129 (1973)(*not to be read as an ordinary contract . . . by parties dealing at arms length having equal bargaining positions*)

The Tax Court dismissed the language of 25 U.S.C. § 1750(e)[3] as being of no consequence or application to either the land upon which the gaming facility was located or the revenue generated from fees, or taxes, imposed on the use of said land. Instead the Tax court relied on this Court's opinion in *United States v. Sally Jim*, 891 F.3d 1242 (11th Cir. 2018) treating the Appellants in the same standing as Sally Jim without any analysis or review of the underlying facts or basis for the statutory construct and interpretation. (FO p. 28-29)

In *Jim* the court considered a tax return filed by Sally Jim which, upon the advice of her then-attorney, reported distributions she received from the Tribe as income. No such factual situation exists in the instant case as James Clay and

[3] The Miccosukee Settlement Act of 1997 (Miccosukee Settlement Act), Pub. L. 105-83, sec. 707(c), 111 Stat. at 1624, was originally codified at 25 U.S.C. §§ 1750-1750e(c), but has since been omitted from the U.S. Code.

Audrey Osceola did not file tax returns claiming distributions from use of Tribal lands as income.

What is clear is that 25 U.S.C. § 1750(c)(1)(B) states in relevant part *"None of the lands conveyed to the Miccosukee Tribe under this part or the Settlement Agreement shall be taxable under Federal or State law."* This language was understood by the Tribe and its members as part of a larger settlement releasing claims against the United States for potentially millions of acres of lands taken from the Tribe by the United States in violation of treaties and agreements between the United States and the Tribe.

Undisputed testimony during the trial from the Tribal chairman Billy Cypress clearly indicated that the Tribe understood the terms of the settlement agreement to include the right for the Tribe to use its lands, impose and collect fees for its use, and distribute those fees to members of the Tribe without inclusion of said fees in any taxable income determination. The Tax Court appears to limit this understanding and application even though no other testimony to the contrary was presented by the IRS. (FO p. 29-30)

Additionally, interpretation of statutes and agreements applicable to Tribes is within the sole authority of the Secretary of Interior and/or its designated representatives. 25 U.S.C. § 2 which states in relevant part "*The Commissioner of Indian Affairs shall, . . ., have the management of all Indian affairs and of all*

matters arising out of Indian relations." Emphasis added. In addition, implementation and interpretation of statutes and language applicable to Tribes permits the Commissioner or its designee to *". . . waive or make exceptions to his regulations . . . in all cases where permitted by law and the Secretary finds that such waiver or exception is in the best interest of the Indians.* 25 CFR § 1.2.

As set out herein and above the chairman Billy Cypress was the superintendent of the Tribe pursuant to contractual designations from the Department of Interior under 638 contracts relating to implementation of programs and use of lands within the reservation. In the capacity as superintendent chairman Cypress' job was to interpret and approve actions taken by the General Council and, when appropriate, waive or make exceptions to the statutes and agreements *"in the best interest of the [Tribe]"*.

Chairman Cypress approved all Ordinances including the Gross Receipts Tax and provided copies of same to the BIA offices, both regional and national. At no time prior to this action did the Secretary of the Interior, Regional Director of the BIA or any other agent over Indian affairs object to or raise any concerns about the interpretation and implementation approved by chairman Cypress as superintendent.

The Tax Court ignored the undisputed testimony of chairman Cypress to these factual representations and instead imposed its own interpretation. Such

action is in direct contravention of canons of construction applicable to Indian agreements and the clear authority of chairman Cypress as set out in statute. It is inapposite of the clear language of 25 U.S.C. § 1750(e)(B)(c) which chairman Cypress interpreted as applying to the lands upon which the gaming facility was located.

The Tax court further minimized not only the authority of Chairman Cypress to interpret, waive or otherwise act in approving the 1984 Ordinance as payments for use by supporting its position by stating that canons of construction applicable to tax exclusion only applies when the language can "reasonably be construed to confer income exemptions". (FO p. 32) citing *Holt v. Commissioner*, 364 F.2d. 38 (8th Cir. 1966). The Tax court then ignores the clear language of 25 U.S.C. § 1750(e)(B)(c), the clear language of 25 CFR§ 1.2 and the authority given to the Chairman as the designated representative of the Secretary of Interior and imposes its own determination. The Tax court simply ignores the undisputed testimony and evidence of Chairman Cypress' authority.

Courts have recognized that treaties and statutes relating to the right of noncompetent Indians should be liberally construed in favor of Indians. *Squire v. Capoeman*, 351 U.S. 1, 6-7, 76 S.Ct. 611; *Carpenter v. Shaw*, 280 U.S. 363, 367, 50 S.Ct. 121, 74 L.Ed. 478. However, such principle comes into play only if such statute or treaty contains language which can reasonably be construed to confer

income exemptions. The language could not be any clearer in exempting the Miccosukee lands from federal and state taxes, including the income derived therefrom. Even if the language were ambiguous then canons of construction mandate that the ambiguities be resolved in favor of the Tribe and the undisputed testimony of Chairman Cypress should be determinative. See *U.S. v. Winans* Id.

In *Holt* the Court determined that the constitution of the tribe, which is set out in the Tax Court opinion, confers no rights in tribal land upon individual tribe members and that any income derived from tribal land accrues for the benefit of the tribe as a whole. *Holt v. Commissioner*, 364 F.2d. at 41. Unlike the analysis in *Holt,* upon which the Tax court relies, the Miccosukee Constitution does confer very specific rights to the Tribal members for use of lands and sharing in Tribal resources.

It is without question that leasing of the Miccosukee Tribal lands are exempt from inclusion in any calculation of income tax due or owing. The clear language of the applicable federal statutes exempting the lands of the Tribe from any federal or state tax was an material component of the Tribe's settlement and release of claims for millions of acres. Said exemption is not inferred as determined by the Tax Court and if it is to be considered ambiguous in its clarity that ambiguity should be resolved in favor the Tribe and its members. As such the decision of the Tax court as to exemption from inclusion as taxable income should be reversed.

II. The Tax court erred in determining that the designated representative of the Bureau of Indian Affairs did not have the authority to interpret and bind the BIA to the applicability of 25 CFR § 1.2 to other provisions of 25 CFR Part 162

As set out herein and above, Chairman Cypress is the duly designated representative of the Secretary of Interior under various 638 contract between the Miccosukee Tribe of Indians of Florida and the BIA. It is for this reason that the Chairman has no voting rights during the day-to-day operations of the Tribe other than to break a tie in voting. The Chairman sits in an advisory capacity and carries out all the responsibilities typically associated with services previously provided by the BIA.

At trial testimony regarding the Chairman and his duties was entered into the record without objection and without any contradicting testimony. The IRS did not provide any testimony or other evidence to refute the representations of the Tribe and Chairman Cypress on this point. The Tax court did not doubt the testimony of Chairman Cypress in its decision but did however impose an additional level of proof without requiring the IRS to refute in any capacity the representations of Chairman Cypress or the Tribe.

The superintendent of the BIA is part of the day to day operations of the Bureau of Indian Affairs. On its website it is described as follows:

> The BIA carries out its core mission to serve 573 Federally recognized tribes through four offices. The Office of Indian Services

> operates the BIA's general assistance, disaster relief, Indian child welfare, tribal government, Indian Self-Determination, and reservation roads programs. The Office of Justice Services directly operates or funds law enforcement, tribal courts, and detention facilities on Federal Indian lands. The Office of Trust Services works with tribes and individual American Indians and Alaska Natives in the management of their trust lands, assets, and resources. Finally, the Office of Field Operations oversees 12 regional offices and **83 agencies which carry out the mission of the Bureau at the tribal level.**
>
> www.bia.gov/bia (emphasis added)

The superintendent carries out the mission of the BIA at the Tribal level. The Chairman, in the capacity of superintendent, is the BIA designee for interpreting and implementing policies, statutes, and services that are applicable to Tribes.

In that capacity Chairman Cypress approved the 1984 Ordinance as permissible and appropriate under 25 CFR Part 162. The 1984 Ordinance was sent to the Secretary of Interior, even though not required to be done. In addition, under 25 CFR §1.2 Chairman Cypress determined that 25 USC §1750 applied to all lands of the Tribe. This determination was proper under the clear language of 25 USC § 2 mandating that "*management of all Indian affairs and of all matters arising out of Indian relations is within the sole authority of the Secretary of Interior or authorized designees*."

In *Kerr-McGee Corp. v. Navajo Tribe*, 471 U.S. 195 (1985) the Supreme Court rejected the argument that the law requires secretarial approval of all tribal government actions. The Court specifically stated that the Indian Reorganization Act of 1934 (IRA) authorized any Tribe to adopt a constitution and that such authority did not mandate or provide that a tribal constitution must condition Secretarial approval on any Tribal Ordinances. *Kerr-McGee Corp*. 471 U.S. at 198-99.

The Miccosukee Tribe's constitution was adopted in accordance with the provisions of IRA and does not require Secretarial approval of Ordinances and resolutions passed by the General Council. The Tribe has always been considered as distinct political community retaining its original natural inherent rights of self-government. The Tribe did not surrender its authority to the Federal Government but rather it "*retained its right to self-government, by associating with a stronger [government] and taking its protection.*" *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 159(1982). It retains this power until Congress divests it from them.

In its decision the Tax court appears to minimize Chairman Cypress' authority to interpret and apply statutes and agreements with the Tribe to only those submitted and approved by the Secretary. In fact, there is no such requirement for such a submission prior to approval or validity of any resolution or Ordinance passed by the General Council.

The Chairman also relied on prior Revenue Rulings which exempted leases and income from undeveloped lands from inclusion as taxable income. *See generally* IRS Rev.Rul. 56-342; Rev.Rul. 67-284; and Rev.Rul. 63-244. The Tax court rejected the Chairman's review and interpretation of these statutes and any waiver, exemption or applicability to the Tribe as being in the Tribe's best interest. 25 CFR § 1.2.

As the court noted in *Merrion* the mere fact that the government imposes fees and also enjoys rents or royalties as the lessor does undermine its authority. *Merrion* 455 U.S. at 138. Additionally, the clear statutory declaration that all members of the Tribe share equally in all the resources of the Tribe is a matter left to the Tribe for interpretation not the IRS.

III. Payments of the Gross Receipts Tax are exempt from inclusion as income under 26 U.S.C. § 61 as they are land lease payments.

"Indian tribes retain elements of sovereign status, including the power to protect tribal self-government and to control internal relations." *Smith v. Babbitt*, 100 F.3d 556, 558 (8th Cir. 1996) (*citing Montana v. United States*, 450 U.S. 544, 564 (1981)). Therefore, "[f]ederal courts have consistently affirmed the principle that it is important to guard 'the authority of Indian governments over their reservations.'" *Longie v. Spirit Lake Tribe*, 400 F.3d 586, 589 (8th Cir. 2005) (*quoting Williams v. Lee*, 358 U.S. 217, 223 (1959)).

The clear language of 25 CFR Part 162 permits a Tribe to establish the way its lands are leased and used including the method of compensation for said use. 25 CFR § 162.016. Further, the Tribe could contract the duties of the Bureau of Indian Affairs away from the Secretary and assume all responsibility for self-governance including the right to interpret and apply the rules, regulations and statutes governing Indian country to their own lands and day-to-day operations. 25 CFR § 162.018.

The General Council and the Business Council, exercising powers of self-government and in compliance with 25 CFR Part 162, determined that they would lease land to MIB and MIG.

> Indian tribes, adult Indian landowners, and emancipated minors, may consent to a lease of their land, *including undivided interests* in fractionated tracts.
>
> 25 CFR § 162.013(a).

The General Council determined the valuation, method and manner for permitting MIB and MIG to use property allotted to all members of the General Council. The General Council determined that the best method of compensation was the imposition of a gross receipts fee that allocated payment of a percentage of revenue generated by any business conducted on the land. 25 CFR §162.420.

Chairman Cypress as the superintendent of the BIA handling the implementation of the policies and procedures set out in 25 CFR Part 162,

approved all resolutions associated with the use of the land. Further, Chairman Cypress determined that the valuation, method, and manner for permitting MIB and MIG to use the property complied with all provisions of 25 CFR Part 162.

The Tax Court ignored the unrefuted testimony at trial that the Secretary of Interior had designated Chairman Cypress as its Superintendent over the Miccosukee Tribe and charged him with interpreting and applying statutes applicable to Tribes under Title 25 of the United States Code and Title 25 of the Code of Federal Regulation. The actions of the Tribe, through its General Council, and the approval by Chairman Cypress, as the duly designated representative of the Secretary of the Interior, were never called into question for the entire period of time that that Chairman Cypress served as superintendent, a period of over 26 years.

There is no question that the 1984 Ordinance was passed and considered by the General Council as the appropriate method for compensating members of the Tribe, including the Appellants, for use of resources of the Tribe as required by the Miccosukee Constitution. These acts were clearly an exercise of self-determination property within "the authority of Indian governments over their reservations.'" *Longie v. Spirit Lake Tribe*, 400 F.3d 586, 589 (8th Cir. 2005).

The IRS' "Internal Revenue Manual" guidelines narrowly "define 'per capita payments' as those payments made or distributed to all members of the tribe or to

identified groups of members which are paid directly from the ***net revenues*** of any gaming activity." IRS Internal Revenue Manual, 4.88.1.6.1-2 (emphasis added). Likewise, regulations of the Department of Interior, Bureau of Indian Affairs, define "per capita payment" as "the distribution of money ... which is paid directly from the ***net revenues*** of any tribal gaming activity." 25 C.F.R. § 290.2 (emphasis added).

The clear language of these authorities do not describe "gross revenue" or "gross receipts" and they do not apply to distributions received by Appellants. The payments from MIB and MIG are not per capita payments made directly from the net revenues of its gaming operations as defined by IGRA. To the contrary, the payments are an above the line expense paid directly to the Tribe for the use of the lands upon which MIB and MIG are located. It includes a percentage of revenue generated from all businesses located on the lands including: (1) its revenues from the Tribe's fixed tax assessments on the gross revenues of the Tribe's gaming enterprises; (2) its fuel tax on the Tribe's fueling station; and, (3) its income from tribal leases, licenses and enterprises on other tribal trust lands.

There was no dispute, and no other testimony, relating to the payments which refuted the testimony of Chairman Cypress, accountants for the Tribe, and other Business Council members that the revenue was gross revenue and not net revenue. There was also no dispute that the payments were intended to

compensate all members of the Tribe for use of the land as required by the Miccosukee Constitution.

Revenue from the leasing of undeveloped Tribal lands has always been considered tax exempt. *See, generally,* IRS Rev.Rul. 56-342; Rev.Rul. 59-354. The fact that a building or other permanent structure is constructed on the lands does not change the initial determination of exemption, and 25 CFR Part 162 contains provisions for separating improvements from land when entering into a lease. 25 CFR §§ 162.414 and 162.425.

In short, the General Council of the Tribe, in its exercise of self-government, followed all provisions of federal law relating to the lease, use, valuation, and distribution of funds related to the lands upon which MIG and MIB are located. Chairman Cypress, as the duly designated BIA superintendent, approved of the actions of the General Council relating to the use, compensation, and distribution of revenue from the gross receipts tax as compensation for use of the land. The NIGC has never required the Tribe to submit a Revenue Allocation Plan relating to the distribution of the gross receipts tax to the members of the Tribe even though such a plan is mandated prior to "net revenue" distributions. 25 U.S.C. § 2710(a)(3).

Although not required to do so, the Tribe submitted all documents, acts of the General Council, and the 1984 Ordinance, to the BIA Regional director and to

the Secretary of the Interior repeatedly over the past 26 plus years. At no time were any of the actions taken by the Tribe questioned as improper. The NIGC conducted regular audits of MIB and MIG and never raised any issue or required the Tribe to prepare and submit any revenue allocation plan.

The Tax Court rejected all of the above undisputed facts and testimony and simply imposed its own interpretation of the facts when no testimony or other evidence was provided to refute the testimony of Chairman Cypress and others. In exercising its powers of self-government, and in the absence of any testimony to the contrary, the determination by the Tribe of the method, manner, valuation and compensation for use of its lands should not be disturbed and the decision of the Tax Court should be reversed.

CONCLUSION

Based on the unchallenged testimony at trial it is clear that Chairman Cypress was the duly designated representative of the BIA handling day-to-day mission of the BIA and its policies at the tribal level. In that capacity Chairman Cypress exercised his authority under applicable federal law and policies of the BIA and approved, waived, modified or otherwise applied statutes and polices of the BIA as related to the use of lands held by the Miccosukee Tribe for the benefit of its members, including the Appellants.

The fees the Tribe charged MIB and MIG were a fee for the use of tribal lands, regardless of what the fees are called. Chairman Cypress approved the manner, method, and distribution of those fees to the members of the Tribe, including Appellants. Said fees are lease payments for undeveloped lands as defined by 25 CFR Part 162, and were approved by the duly designated superintendent of the BIA. The payments are directly derived from the lands of the Tribe.

In determining that the distributions were not exempt from taxable income, the Tax Court applied its own interpretation of the undisputed testimony regarding the authorized actions of Chairman Cypress under applicable federal law and instead imposed its own beliefs. In doing so, the Tax Court ignored IRS Revenue Rulings and applicable federal statutes, including IGRA's requirement of a Revenue Allocation Plan (RAP) prior to distributing "net revenues" from gaming.

The Tax Court's ruling is contrary to the applicable law, contrary to the interpretation of statutes and agreements as the Tribe understood them, and contrary to the approval of the Tribal actions by the sole authority in charge of all matters arising out of Indian Country under 25 U.S.C. § 2. The Tax Court's decision, therefore, should be reversed.

Respectfully submitted this 14th day of January 2020.

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CERTIFICATE OF SERVICE

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

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