19-14441-JJ

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JAMES CLAY AND AUDREY OSCEOLA,

Petitioners – Appellants

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent – Appellee

ON APPEAL FROM THE DECISIONS OF THE UNITED STATES TAX COURT

BRIEF FOR THE APPELLEE

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James Clay and Audrey Osceola v. Commissioner
(11th Cir. – No. 19-14441-JJ)

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

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

George Abney, attorney for Miccosukee Tribe

Johnson Billie, a taxpayer in a separate proceeding bound to the outcome of this proceeding for some issues

Nina Billie, same as Johnson Billie

Sarah R. Bolen, attorney, Internal Revenue Service

Agnes Brady, same as Johnson Billie

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

Jacob E. Christensen, attorney, Tax Division, Dept. of Justice

Betty Clay, same as Johnson Billie

Kendall B. Coffey, former attorney for James Clay and Audrey Osceola

Billie Cypress, same as Johnson Billie

Evelyn Cypress, same as Johnson Billie

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

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Heather Cypress, same as Johnson Billie

Pricilla Cypress-Buster, same as Johnson Billie

Jerry L. and Diane T. Cypress, same as Johnson Billie

Greg Kelly, same as Johnson Billie

Mary Kelly, same as Johnson Billie

Diane Kroupa, former Tax Court judge

Marissa R. Lenius, attorney, Internal Revenue Service

Peter Panuthos, Special Trial Judge, United States Tax Court

Elizabeth Crewson Paris, United States Tax Court Judge

Laura A. Price, attorney, Internal Revenue Service

Cary Douglas Pugh, United States Tax Court Judge

Armando Rosquete, former attorney for James Clay and Audrey Osceola

Robert O. Saunooke, attorney for James Clay and Audrey Osceola

Jonathan Strouse, former attorney for James Clay and Audrey Osceola

Michael R. Tein, former attorney to James Clay and Audrey Osceola

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

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Luther Tiger, same as Johnson Billie

Edna Tigertail, same as Johnson Billie

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to 11th Cir. R. 28-1(c) and Fed. R. App. P. 34(a), counsel for the Commissioner respectfully inform this Court that they believe oral argument would assist the Court in the resolution of this appeal.

GLOSSARY

IGRA	Indian Gaming Regulatory Act
I.R.C.	Internal Revenue Code
IRS	Internal Revenue Service
MSA	Miccosukee Settlement Act of 1997, Title VII of Pub. L. 105-83, 111 Stat. 1543 (1997).
NTDR	Nontaxable Distributable Revenue

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STATEMENT OF JURISDICTION

1. Jurisdiction in the United States Tax Court

On March 14, 2011, the Commissioner of Internal Revenue issued a notice of deficiency to James Clay and Audrey Osceola ("taxpayers") regarding their income tax returns for 2004 and 2005. On June 2, 2011, within 90 days after the issuance of the notice of deficiency, taxpayers timely filed a petition in the Tax Court to redetermine their tax liabilities for 2004 and 2005. (Doc. 1.)[1]

On January 10, 2013, the Commissioner of Internal Revenue issued a notice of deficiency to taxpayers regarding their income tax return for 2006. On April 8, 2013, within 90 days after the issuance of that notice of deficiency, taxpayers timely filed a petition in the Tax Court to redetermine their tax liability for 2006. (Doc. 1 in No. 7870-13.) The Tax Court had jurisdiction over both petitions under I.R.C. §§ 6213(a), 6214, and 7442.

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[1] Unless otherwise specified, "Doc." references are to the documents contained in the record on appeal in Tax Court case number 013104-11, as numbered by the clerk of the Tax Court. Other "Doc." references are to the documents contained in the record on appeal in Tax Court case number 7870-13, as numbered by the clerk of the Tax Court.

2. Jurisdiction in the Court of Appeals

The Tax Court entered separate decisions regarding the 2004 and 2005 deficiencies (Doc. 191) and the 2006 deficiency (Doc. 173 in No. 7870-13) on August 5, 2019, disposing of all claims of all parties. On November 4, within 90 days of the decisions, taxpayers timely mailed to the Tax Court notices of appeal.[2] (Doc. 194 and Doc. 176 in No. 7870-13.) *See* Fed. R. App. P. 13(a)(1); I.R.C. §§ 7483, 7502(f). This Court has jurisdiction over the appeal under I.R.C. § 7482(a).

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[2] I.R.C. § 7502 provides for a timely-mailing-is-timely-filing rule. Thus, even though taxpayers' notices of appeal were not filed with the Tax Court until November 6, 2019 (beyond the 90-day appeal period), they are deemed to be timely because they were properly mailed via UPS Next Day Air within the 90-day period. I.R.C. § 7502(f); 26 C.F.R. § 301.7502-1(b)(1)(iii), (c)(3); Notice 2016-30, 2016-18 I.R.B. 676 (2016) (designating UPS Next Day Air).

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ON APPEAL FROM THE DECISIONS OF THE UNITED STATES TAX COURT

BRIEF FOR THE APPELLEE

STATEMENT OF THE ISSUE

Whether the Tax Court correctly determined that the payments taxpayers received from the Miccosukee Tribe were includible in their gross income.

STATEMENT OF THE CASE

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

The IRS issued two notices of deficiency to taxpayers determining that they underreported their taxable income in 2004, 2005 and 2006, and were liable for income tax deficiencies for these years in the amounts of $192,215, $310,171, and $389,613, respectively. The IRS also determined that they were liable for accuracy-related penalties pursuant to I.R.C. § 6662(a). Taxpayers sought redetermination of the deficiencies and penalties in the United States Tax Court in separate petitions. The Tax Court consolidated the petitions for briefing and trial.

Following trial, the Tax Court issued an opinion (reported at 152 T.C. 223) sustaining the deficiency determinations but not the accuracy-related penalties. The Tax Court entered separate decisions from which taxpayers now appeal.

(ii) Statement of the facts

Contrary to Rule 28(a)(6), Fed. R. App. P., and 11th Cir. R. 28-1(i), taxpayers' recitation of facts (Br. 3-15) lacks appropriate references to the record on appeal. The Tax Court chastised taxpayers for similar

behavior there, stating that "[i]n violation of [Tax Court] Rule 151(e)(3), petitioners' opening brief does not cite, in support of their proposed findings of fact, any evidence that was submitted." (Doc. 188 at 25 n.8.) The Tax Court added that the omission was "surprising" because of discussion at the end of trial regarding how to cite the record. (*Id.*; Doc. 147 at 447-453.)

A. The Miccosukee Tribe and its businesses

During the years relevant to this case, taxpayers were members of the Miccosukee Tribe of Indians of Florida (the Tribe). (Doc. 54, ¶ 3.) The Tribe is a federally recognized Indian tribe, organized under the Indian Reorganization Act of June 18, 1934. (Doc. 54, ¶ 4.) The authority of the Tribe is vested in the Miccosukee General Council (General Council), which is comprised of all Tribal members 18 years of age or older. (Doc. 54, ¶ 8.) The General Council elects five members to serve on the Business Council, which controls and directs the day-to-day affairs of the Tribe. (Doc. 54, ¶¶ 11-12.)

In 1984, the Tribe implemented a tribal sales tax (Sales Tax) that was applied to the sales price of each item sold by any Tribal business enterprise operated on Tribal land. The Sales Tax was passed on to

consumers and was reflected as a Tribal sales tax on receipts for goods and services. (Doc. 54, ¶¶ 18-19.) The Tribe collected the sales tax receipts into a separate account, the "Tribal Tax" account, and used the funds to help finance the general day-to-day operations of the Tribe. The Tribe occasionally distributed small amounts from the Tribal Tax account to its members, usually no more than $100 per quarter per member. The revenues generated by the Sales Tax were modest in comparison to the revenues generated later by the Casino. For example, for the year ended September 30, 1995, the Sales Tax generated $112,956 in revenue. (Doc. 54, ¶ 23.)

B. Casino development

On April 7, 1989, the Tribe entered into an agreement whereby Tamiami Development Corporation (TDC) (later assigned to Tamiami Partners, Ltd. (TPL)) agreed to construct, manage and operate a Class II gaming facility for the Tribe. (Doc. 54, ¶ 24.) Pursuant to the agreement, TDC purchased a parcel of land outside the Tribe's reservation area for the purpose of constructing a gaming facility, which

land was eventually placed into trust for the Tribe.[3] (Doc. 54, ¶ 26.) Since September 15, 1990, the Tribe has conducted bingo and similar games, denominated as Class II games under the Indian Gaming Regulatory Act ("IGRA"), at its gaming facility, referred to variously as Miccosukee Indian Bingo and Gaming, Miccosukee Indian Gaming, Miccosukee Indian Bingo, MIBG, MIB, MIG, and the Bingo Hall.[4] The parties agreed to use the term "Casino" in the Tax Court. (Doc. 54, ¶ 27.) The Casino's related enterprises include a hotel, concert hall, food court, restaurant, and gift shop. (Doc. 54, ¶ 28.)

From the inception of the Tribe's gaming activities in 1990 and until January of 1995, the Tribe did not formally impose any tax or fee on the Casino or its related operations. (Doc. 54, ¶ 40.)

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[3] The Tribe's dispute with TPL over operation of the Casino was exhaustively litigated and made three appearances in this Court. *Tamiami Partners, Ltd. ex rel. Tamiami Dev. Corp. v. Miccosukee Tribe of Indians of Fla., et al.*, 177 F.3d 1212, 1214 (11th Cir. 1999).

[4] Taxpayers suggest that the Tribe created two entities, Miccosukee Indian Gaming and Miccosukee Indian Bingo. (Br. 14.) The stipulation, however, refers to a single gaming facility that went by multiple names. (Doc. 54, ¶ 27.)

C. The Tribe reacts to a new requirement that tribes withhold income tax on distributions of casino revenues and report payments to the IRS

Although IGRA had always required Indians to pay income tax on any "per capita payments to members" of the "[n]et revenues from any class II gaming activities," 25 U.S.C. § 2710(b)(3), it had not required the tribes to withhold income tax from those distributions. In 1994, however, Congress added a new requirement that tribes withhold income tax from the distributions and report to the IRS the amounts distributed and withheld. The new requirement was approved on December 8, 1994, and became effective for payments made after December 31, 1994. Uruguay Round Agreements Act, Pub. L. No. 103-465, § 701, 108 Stat. 4809, 4995-96; I.R.C. § 3402(r).

The Tribe acted quickly in an apparent effort to defeat the new requirements by redirecting and renaming its net revenues from gaming activities. The Tribe's General Council approved a "Gross Receipts Tax Ordinance" on February 2, 1995, and made it retroactive to January 1, 1995. (Doc. 54, ¶¶ 41, 44, 48, Ex. 6-J.) The ordinance imposed a tax of 6.5% on all amounts received by the Casino. (Doc. 54, ¶¶ 42-43.) The Tribe opened a new checking account to receive and

disburse the Casino receipts which it referred to as the N.T.D.R. or NTDR account, for "non-taxable distributable revenue." (Doc. 54, ¶¶ 52-53.) Unlike the Tribe's sales tax, the gross receipts tax was not passed along to casino customers and was not reflected on customer receipts. The Tribe simply treated it on the Casino's books and records as an operating expense. (Doc. 54, ¶ 46.)

D. Distributing the net casino revenues

From 1995 through and including 2006, the Tribe distributed funds from the NTDR account quarterly in equal amounts to each member. (Doc. 54, ¶¶ 56-57.) For the twelve quarters of the years at issue (2004-2006), the amount of each distribution ranged from $22,000 to $41,700 for each tribe member, including children. (Doc. 188 at 9.) Additional distributions of the Casino's revenue were paid to Tribal members as Christmas bonuses. The Christmas bonuses were distributed annually, but otherwise in a fashion similar to the quarterly distributions. (Doc. 54, ¶ 64.) The Christmas bonuses for 2004, 2005, and 2006 were $5,500, $6,000, and $7,000, respectively, per member. (Doc. 188 at 10.)

Distributions to minor children were generally given to their Tribal member mother, and a Tribal member husband generally received his own distribution. (Doc. 54, ¶ 58.) Thus, James Clay received his own distributions, while Audrey Osceola received one distribution for herself and five additional distributions for her minor children, none of whom filed their own tax returns for the years at issue. (Doc. 54, ¶¶ 147-194; Doc. 188 at 14-15.)

During 2004 and 2005, the Christmas bonus checks were paid from the Tribe's General account. (Doc. 54, ¶ 65.) In 2006, the Tribe increased the Gross Receipts Tax rate to 8% and paid the Christmas bonuses from the NTDR account.

E. Settlement of *Miccosukee Tribe of Indians of Florida v. State of Florida, et al.*

In 1991, the Tribe sued Florida in connection with a highway project in *Miccosukee Tribe of Indians of Florida v. State of Florida, et al.* (S.D. Fla. No. 91-cv-6285). The parties reached a settlement in 1996 whereby Florida would transfer to the Tribe real property and $2,173,000, and the Tribe would grant Florida rights-of-way and easements appurtenant to the highway project.

Since the settlement included transfers of Indian property, the parties agreed to cooperate to obtain any approval that might be deemed necessary by the United States. (Doc. 130, ¶¶ 223-225, Ex. 139, ¶¶ 2(a), (g), 3). That approval was given by means of the "Miccosukee Settlement Act of 1997," included as part of the "Department of the Interior and Related Agencies Appropriations Act, 1998." The Act authorized the Secretary of the Interior to sign the settlement agreement and assist in effecting the land conveyances specified in it. The Act also exempted the conveyances and cash payment from tax consequences. As a result, in 1997 the Tribe received several parcels of land including one six-acre parcel near the Casino. That parcel has been used as a free parking lot for the patrons of the Casino. (Doc. 54, ¶¶ 29-31.)

F. Tax Court proceedings

The IRS issued taxpayers two notices of deficiency, one for 2004-2005 and another for 2006. The Commissioner determined deficiencies and penalties based on taxpayers' failure to report as income the quarterly and Christmas distributions.

Taxpayers filed two timely petitions in the Tax Court seeking redeterminations. (Doc. 1; Doc. 1 in No. 7870-13.) The Tax Court consolidated the petitions. (Doc. 49.) The matter was heard on stipulations of facts and exhibits and four days of trial (July 31-August 3, 2017), and the record was closed on August 31, 2017. (Docs. 54, 130, 132, 136, 144.)

On January 8, 2018, the Tax Court ordered the Commissioner to address the effect of a recent opinion, *Graev v. Commissioner*, 149 T.C. 485 (Dec. 20, 2017), on the Commissioner's burden of production with respect to the accuracy-related penalties. (Doc. 157.) Additional proceedings were conducted with respect to this issue.

G. The Tax Court's opinion

The Tax Court upheld the Commissioner's determinations with respect to the tax deficiencies, but not the penalties. (Doc. 188.) Preliminarily, the court noted that it did not find any "real dispute between the parties on the facts," but only a disagreement over how to characterize the source of the distributions. (*Id.* at 27.) The court first noted that in *United States v. Jim*, 891 F.3d 1242 (11th Cir. 2018), *cert. denied*, 139 S. Ct. 2637 (2019), this Court held that per capita payments

of gaming revenue were taxable under IGRA, and that there were no factual distinctions between the distributions to James Clay and Audrey Osceola and those to Sally Jim and, therefore, the distributions to taxpayers were taxable under the IGRA. (Doc. 188 at 28-29.)

The Tax Court rejected taxpayers' argument that the distributions were exempt from income tax under the Miccosukee Settlement Act (MSA). The MSA authorized the Secretary of the Interior to agree to a settlement of a lawsuit between the Tribe and Florida that included an exchange of lands and exempted from tax "the lands conveyed" under the settlement. Taxpayers acknowledged that the Casino was not located on any of the lands conveyed pursuant to the settlement, but contended that their distributions of the Casino revenues were nevertheless exempt because the Tax Court was bound to accept the interpretation of the Tribe's Chairman, Billy Cypress, that the tax exemption applied to all the Tribe's lands. The Tax Court held that it was not required to accept Chairman Cypress's interpretation which, it noted, contradicted the plain meaning of the statute. (Doc. 188 at 30-32.) The court also rejected taxpayers' contention that the gaming distributions were exempt from income because they were derived

directly from renting tribal land as inconsistent both with the record evidence and the opinion in *Sally Jim*. (*Id*. at 34-38.)

The court did not sustain the Commissioner's determination of accuracy-related penalties because the Commissioner had not satisfied his burden to show that the examining agent had obtained timely supervisory approval for such penalties, as required by I.R.C. § 6751. (Doc. 188 at 39-45.) On August 5, 2019, the court entered decisions sustaining the tax deficiencies as determined in the notices of deficiency, but not the penalties. (Doc. 191, Doc. 173 in No. 7870-13.) (The Commissioner did not appeal the ruling on penalties.)

(iii) Statement of the standard of review

The Tax Court's determination that the tax exemptions of the Miccosukee Settlement Act did not apply to the distributions was a legal conclusion reviewed *de novo*. *Ocmulgee Fields, Inc. v. Commissioner*, 613 F.3d 1360, 1364 (11th Cir. 2010). Whether the source of the distributions was net revenues from gaming or rent was a question of fact reviewed for clear error. *Foyt v. United States*, 561 F.2d 599, 602-03 (5th Cir. 1977) (deductibility of alleged rent was primarily a factual determination).

SUMMARY OF ARGUMENT

The quarterly and Christmas distributions that taxpayers received constitute taxable income under both I.R.C. § 61 (defining "gross income") and the Indian Gaming Regulatory Act (per capita distributions of net gaming revenues are subject to tax), as this Court recently held in *United States v. Jim*, 891 F.3d at 1250 n.17.

The distributions are not exempted from income taxation by the Miccosukee Settlement Act. The tax exemptions of the MSA explicitly—and unambiguously—exempted only certain lands and money conveyed pursuant to the 1996 settlement of a lawsuit between the Tribe and Florida. Those items were conveyed in 1997, and necessarily did not include taxpayers' per capita distributions of the Casino's gaming revenues in 2004-2006. There is neither legal authority nor record evidence to support taxpayers' erroneous theory that the Tax Court should have deferred to Chairman Cypress's interpretation of the MSA.

Nor are the distributions exempted from income taxation because they derived from renting tribal land to the Casino. First, the evidence established that the Tribe consistently characterized the Casino

revenues as deriving from its "gross receipts tax" upon the Casino's operations, not from rent, and there is no lease or similar contract between the Tribe and the Casino in the record. Moreover, even if the payments consisted of rent, the distributions to taxpayers would still be "gross income," taxable to them, pursuant to I.R.C. § 61, and not exempted by statute or treaty.

The decisions of the Tax Court are correct and should be affirmed.

ARGUMENT

The Tax Court correctly determined that the tribal distributions were taxable income

A. The tribal distributions were taxable income pursuant to I.R.C. § 61 and 25 U.S.C. § 2710

In general, each person's gross income includes "all income from whatever source derived." I.R.C. § 61. Income has long been defined to include any "accessions to wealth, clearly realized, and over which the taxpayers have complete dominion." *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426, 431 (1955). Indians are subject to the same requirement to pay federal income taxes as non-Indians, unless exempted by a treaty or agreement between the United States and the Indian's tribe or an Act of Congress dealing with Indian affairs. *Squire v. Capoeman*, 351 U.S. 1, 6 (1956) (recognizing an exemption for income

directly derived from land allotted under the General Allotment Act: there, a sale of standing timber); *Cypress v. United States*, 646 F. App'x 748, 751 (11th Cir. 2016); *see* Rev. Rul. 67-284, 1967-2 C.B. 55.

The Indian Gaming Regulatory Act ("IGRA"), Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified at 25 U.S.C. § 2701 *et seq*.), provides a statutory basis for the operation and regulation of gaming by Indian tribes. 25 U.S.C. § 2702; *Seminole Tribe of Florida v. Fla.*, 517 U.S. 44, 48 (1996). As relevant here, tribes are permitted to use gaming revenues to make per capita payments to members, but such payments are subject to Federal taxation. 25 U.S.C. § 2710(b)(2)(B); *United States v. Jim*, 891 F.3d at 1244-45.

Taxpayers do not dispute that the distributions to them, whatever their source, are "gross income" as defined by I.R.C. § 61. They contend instead that the distributions were excluded by an Act of Congress, specifically, the Miccosukee Settlement Act. (Br. 17-21.) Alternatively, they contend that the distributions consisted of rent paid by the Casino to the Tribe for the use of the Tribe's land, rather than gaming revenues, and therefore were excluded from income under an

unspecified Act of Congress pertaining to income derived directly from use of Indian land. (Br. 25-30). We address these contentions in turn.

B. The tribal distributions were not exempt under the Miccosukee Settlement Act of 1997

The Tax Court correctly rejected taxpayers' contention that the distributions were exempt from tax pursuant to the Miccosukee Settlement Act of 1997 ("MSA"), Title VII of Pub. L. 105-83, 111 Stat. 1543 (1997).[5] The unambiguous language of the MSA, as well as its context and purposes, demonstrates that it does not apply to the distributions at issue in this case.

1. The Miccosukee Settlement Act of 1997

In *Miccosukee Tribe of Indians of Florida v. State of Florida, et al.*, (S.D. Fla. No. 91-cv-6285), the Tribe sued Florida in connection with highway project across tribal lands and other matters. The parties reached a settlement in 1996 whereby Florida would transfer to the Tribe real property and $2,173,000, and the Tribe would grant Florida rights-of-way and easements appurtenant to the highway project. (Doc.

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[5] Portions of the MSA were added to the United States Code at 25 U.S.C. § 1750, *et seq*., but have since been removed. We will cite to its sections, as enacted, and have included it as an addendum to this brief.

130, ¶ 225, Ex. 139 at 1.(a).) The parties recognized that consent of the United States might be required for the land transfers and agreed to seek such consent. (Doc. 130, ¶¶ 223-225, Ex. 139, ¶¶ 2(a), (g), 3).

The United States gave its consent on November 14, 1997, when Congress passed the "Miccosukee Settlement Act of 1997" as Title VII of the Department of the Interior and Related Agencies Appropriations Act, 1998. Pub. L. No. 105-83, 111 Stat. 1543, 1624 (1997). The MSA begins with Congressional findings that (i) the lawsuit existed, (ii) the parties had reached a resolution of the dispute, (iii) the proposed settlement required Congressional consent, (iv) the settlement was in the best interests of the Tribe because it would receive money, new reservation land to be held in trust by the United States, and other benefits, and (v) Congress shared the parties' desire to resolve the dispute and settle the lawsuit. Pub. L. No. 105-83, § 702. The MSA further provides that the United States approved the settlement agreement and authorized the Secretary of the Interior to assist in executing its terms, including receiving land to hold in trust for the Tribe. Pub. L. No. 105-83, §§ 704, 705. Finally, the MSA provides that "[n]one of the moneys paid" and "[n]one of the lands conveyed" to the

Tribe "under this Act or the Settlement Agreement shall be taxable under Federal or State law." Pub. L. No. 105-83, § 707(c).

2. The Miccosukee Settlement Act does not affect the taxability of per capita distributions of net revenues from gaming

The MSA expressly—and unambiguously—prohibits only a tax on the moneys paid to the Tribe and the lands conveyed to the Tribe "under this Act or the Settlement Agreement." Pub. L. No. 105-83, § 707(c). The exemption from tax on lands plainly does not apply to the Casino revenues because the Casino is not located on the lands conveyed in the settlement. The Casino was completed several years before any lands were conveyed to the Tribe as a result of the settlement. (Doc. 54, ¶ 27.) Therefore, any exemption applicable to the lands conveyed by the settlement cannot apply to the Casino, as the Tax Court correctly held. (Doc. 188 at 30.)

Taxpayers contend that the Tax Court erred because it ignored Chairman Cypress's authority to determine that the MSA applied to the Tribe's other real estate. Specifically, taxpayers contend that Chairman Cypress could and did make a determination extending the tax exemption for lands conveyed in the MSA to the land on which the

Casino was constructed. (Br. 23.) But both premises of this argument are flawed.

Taxpayers rely on 25 C.F.R. § 1.2 and 25 U.S.C. § 2 as conferring authority on Chairman Cypress to alter the otherwise plain meaning of a statute (Br. 18-19, 23, 25), but neither of those provisions comes close to conferring such authority. One provision simply grants authority to the Commissioner of Indian Affairs to govern Indian relations. 25 U.S.C. § 2. The other authorizes the Secretary of the Interior to waive or make exceptions to Interior Department *regulations*. 25 C.F.R. § 1.2. These provisions do not permit anyone to make exceptions to a statutory enactment.

Moreover, taxpayers failed to establish in their brief that there is any evidence in the record that the Tribe's Chairman actually made any sort of formal decision or determination that the Tax Court overlooked. Taxpayers' assertions regarding the Chairman's acts are difficult to evaluate because they have failed to identify any evidence in the record supporting these assertions.

At all events, taxpayers have not established that the exemption from tax for "lands" in the MSA, even if it applied to the Tribe's other

lands, would further extend to income derived from operating a business on such land. A statutory tax exemption for "lands" may support an exemption from tax on income derived from such land if clearly supported by the context and purposes of the enactment. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 at 155-56 (1973) (citing *Squire v. Capoeman*, 351 U.S. 1 (1956)). Absent clear statutory guidance, however, "courts ordinarily will not imply tax exemptions [for income] simply because the land from which it is derived, or its other source, is itself exempt from tax." *Mescalero,* 411 U.S. at 156.

Squire v. Capoeman, 351 U.S. 1 (1956), is instructive. The Court held that income from timber harvesting on land allotted to an individual Indian under the General Allotment Act, and held in trust for him by the federal government, was exempt from federal income tax. Under the General Allotment Act, the Court explained, Indians were to be allotted lands on their reservations to be held in trust for them by the federal government for a defined period of time, after which they were to receive their allotted land "in fee, discharged of said trust and free of all charge or incumbrance whatsoever." 351 U.S. at 3. The Court construed this language, together with that of a subsequent

amendment to the Act that explicitly referenced taxes,[6] as reflecting congressional intent that "the allotment shall be free from all taxes" until after a patent in fee issued to the allottee. *Id*. at 7–8.

The Court determined that the exemption created by the General Allotment Act extended to income "derived directly" from allotted land held in trust. *Id*. at 8-9. Noting that the timber constituted "the major value" of the Indian's allotted land, *id*. at 10, the Court determined that, to avoid frustrating the purpose of the Act "to prepare the Indians to take their place as independent, qualified members of the modern body politic," it was "necessary to preserve the trust and income derived directly therefrom." *Id*. at 9.

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[6] The amendment added the following proviso to Section 6 of the General Allotment Act, including an explicit reference to taxation:

> 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 . . .

Capoeman, 351 U.S. at 7 (quoting the amendment) (emphasis added); *see* 25 U.S.C. § 349.

This case, like *Capoeman*, involves a tax not on land itself, but on income earned on a particular tract of land. Unlike in *Capoeman*, however, the income at issue in this case derives from improvements to land and business activities related to those improvements, rather than sale of the land's primary valuable resource. Cases since *Capoeman* considering income earned on Indian allotments have generally denied exemptions from income tax where the income derives from investment in improvements to the land and business activities related to such investments. *See, e.g., Hoptowit v. Commissioner*, 78 T.C. 137, 145 (1982) (smokeshop); *Dillon v. United States*, 792 F.2d 849, 856 (9th Cir. 1986) (smokeshop); *Critzer v. United States*, 597 F.2d 708, 709 (Ct. Cl. 1979) (en banc) (income from operation of a motel, restaurant and gift shop); *Campbell v. Commissioner*, T.C. Memo. 1997-502, 1997 WL 690178 at *4 (casino operations), *aff'd and remanded*, 164 F.3d 1140 (8th Cir. 1999); *Beck v. Commissioner*, T.C. Memo. 1994-122, 1994 WL 100623 (rental income derived from "utilization of a capital asset, *i.e.*, the apartment complex, and not the land."), *aff'd*, 64 F.3d 655 (table), 1995 WL 17056707 (4th Cir. 1995).

Here, the context and purposes of the MSA do not support broadening its explicit tax exemption for "lands" to also include income derived from operating a business on such land. The purposes of the MSA were simply to give the consent of the United States to the settlement reached by the parties to that suit, receive and accept in trust for the benefit of the Tribe ownership of land, and resolve some of the tax consequences that might have otherwise attended the exchange of real estate interests and money. In general, when a taxpayer exchanges one property for another, the exchange is treated as the sale of the relinquished property followed by purchase of the received property, and the taxpayer must immediately recognize the gain or loss on the sale of the relinquished property. *See, e.g., Ocmulgee Fields v. Commissioner*, 613 F.3d at 1364. Here, the Tribe surrendered several property interests (easements and rights of way) for other properties and cash, potentially creating a complex problem of determining the Tribe's gain or loss on the exchange. The tax provisions of the MSA eliminated any such requirement. Thus, in contrast with *Capoeman* where the Court discerned a conflict between the purposes of the General Allotment Act and the tax imposed on the sale of the allottee's

standing timber, there is no conflict between the purposes of the MSA and taxation of the income earned by a casino on the conveyed land (to say nothing of the land located nearby).

Taxpayers' contrary argument rests heavily on interpretive canons favoring Indians and theories suggesting extreme deference to Indians. The principle that treaties and statutes are to be construed liberally in favor of Indians, however, requires only that reasonable ambiguities be resolved in the Indians' favor. *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986); *cf. Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001) (rejecting application of pro-Indian canon where statute was not " 'fairly capable' of two interpretations") (citation omitted); *Miccosukee Tribe of Indians of Fla. v. U.S. Army Corps of Engineers*, 619 F.3d 1289, 1303 n.22 (11th Cir. 2010) (same). Here, the tax exemption provisions of the MSA are neither ambiguous nor capable of an interpretation that would include business income earned by operating a casino on land other than the land conveyed in the settlement.

C. Taxpayers' argument that the distributions are exempted from federal income taxation because they derived from renting tribal land to the Casino is unavailing

Taxpayers' next argument is that the distributions consisted of rent that the Casino paid the Tribe for use of its land rather than gaming profits. (Br. 25-30.) The Tax Court correctly found otherwise. (Doc. 188 at 37-38.) Its finding is not clearly erroneous and should be affirmed.

1. The record does not support taxpayers' contention that the distributions derived from lease payments to the Tribe

First, taxpayers' theory that the distributions consisted of lease payments lacks any factual support in the record. There is no "lease" or similar written contract in the record between the Tribe and the Casino. Moreover, the Tribe itself characterized the revenues from the Casino as "gross receipts taxes." Thus, the 1995 Gross Receipts Tax Ordinance makes no mention of a lease or rent. (Doc. 56, ¶48, Ex. 6-J.)

Without citation to the trial record, taxpayers baldly assert that the Tribe's Councils "determined that they would lease land to" the Casino, "determined the valuation, method and manner for permitting" the Casino to use the Tribe's property, and "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." (Br. 26.) Taxpayers have not supported any of these assertions with citations to the record. Nor have taxpayers specifically identified the "unrefuted testimony at trial" regarding Chairman Cypress's authority to make such determinations that they charge the Tax Court with ignoring. (Br. 27.)

Moreover, this Court has already rejected another Tribe member's similar efforts to recharacterize the Miccosukee Tribe's distributions as something other than "net revenue" from gaming. In *Sally Jim*, the taxpayer contended that her tribal distributions derived from the "use of reservation land or the resources of the land." This Court stated that the Casino's income comes from improvements upon the land and business activities conducted thereon. *Jim*, 891 F.3d at 1250 n.17.

2. Taxpayers' argument fails even assuming *arguendo* that the distributions derived from lease payments to the Tribe

At all events, even assuming for the purposes of argument that the Tribe received rents, the distributions to taxpayers would still be taxable to them as "gross income" under I.R.C. § 61. Taxpayers have

not identified any statute or treaty exempting from income their share of the Tribe's purported rental income. *See Squire v. Capoeman*, 351 U.S. at 6 ("[I]n the ordinary affairs of life, not governed by treaties or remedial legislation, [Indians] are subject to the payment of income taxes as are other citizens."); *United States v. King Mountain Tobacco Co., Inc.*, 899 F.3d 954, 960 (9th Cir. 2018) ("Indians—like all citizens—are subject to federal taxation unless expressly exempted by a treaty or congressional statute."). The exemption for income derived directly from land allowed in *Capoeman* is limited to individually allotted land under the General Allotment Act or similar acts. *Anderson v. United States*, 845 F.2d 206, 208 (9th Cir. 1988) (no exemption from income tax for share of rents from unallotted tribal land); *Jourdain v. Commissioner*, 617 F.2d 507, 508 (8th Cir. 1980) (*Capoeman* exemption applies only to income derived from allotted land). The Tribe's land has never been allotted. (Doc. 54, ¶ 33.) Accordingly, taxpayers' argument fails because they have identified no treaty or Act of Congress that exempts the distributions they received from federal income taxation.

CONCLUSION

The decisions of the Tax Court are correct and should be affirmed.

Respectfully submitted,

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APRIL 2020

CERTIFICATE OF COMPLIANCE

With Type-Volume Limit, Typeface Requirements, and Type-Style Requirements

Check the appropriate box in section 1, and check the box in section 2.

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[X] This document complies with the word limit of FRAP 32(a)(7)(B) because, excluding the parts of the document exempted by FRAP 32(f), this document contains 5,224 words.

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(s) Robert J. Branman

Attorney for Commissioner

Dated: April 6, 2020

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of April, 2020, this brief was filed with the Clerk of the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system.

/s/ Robert J. Branman
ROBERT J. BRANMAN
Attorney

STATUTORY ADDENDUM

PL 105–83, November 14, 1997, 111 Stat 1543

SEE LINE ITEM VETO MESSAGE AT END OF DOCUMENT

UNITED STATES PUBLIC LAWS
105th Congress - First Session
Convening January 7, 1997

Additions and Deletions are not identified in this document.

PL 105–83 (HR 2107)
November 14, 1997
DEPARTMENT OF THE INTERIOR AND RELATED AGENCIES APPROPRIATIONS ACT, 1998

AN ACT making appropriations for the Department of the Interior and related agencies for the fiscal year ending September 30, 1998, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the fiscal year ending September 30, 1998, and for other purposes, namely:

TITLE I—DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
MANAGEMENT OF LANDS AND RESOURCES

For expenses necessary for protection, use, improvement, development, disposal, cadastral surveying, classification, acquisition of easements and other interests in lands, and performance of other functions, including maintenance of facilities, as authorized by law, in the management of lands and their resources under the jurisdiction of the Bureau of Land Management, including the general administration of the Bureau, and assessment of mineral potential of public lands pursuant to Public Law 96–487 (16 U.S.C. 3150(a)), $583,270,000, to remain available until expended, of which $2,043,000 shall be available for assessment of the mineral potential of public lands in Alaska pursuant to section 1010 of Public Law 96–487 (16 U.S.C. 3150); and of which $3,000,000 shall be derived from the special receipt account established by the Land and Water Conservation Act of 1965, as amended (16 U.S.C. 4601–6a(i)); and of which $1,500,000 shall be available in fiscal year 1998 subject to a match by at least an equal amount by the National Fish and Wildlife Foundation, to such Foundation for challenge cost share projects supporting fish and wildlife conservation affecting Bureau lands; in addition, $27,650,000 for Mining Law Administration program operations, to remain available until expended, to be reduced by amounts collected by the Bureau and credited to this appropriation from annual mining claim fees so as to result in a final appropriation estimated at not more than $583,270,000; and in addition, not to exceed $5,000,000, to remain available until expended, from annual mining claim fees; which shall be credited to this account for the costs of administering the mining claim fee program, and $2,000,000 from communication site rental fees established by the Bureau for the cost of administering communication site activities: Provided, That appropriations herein made shall not be available for the destruction of healthy, unadopted, wild horses and burros in the care of the Bureau or its contractors.

WILDLAND FIRE MANAGEMENT

For necessary expenses for fire use and management, fire preparedness, suppression operations, and emergency rehabilitation by the Department of the Interior, $280,103,000, to remain available until expended, of which not to exceed $6,950,000 shall be for the renovation or construction of fire facilities: Provided, That such funds are also available for repayment of advances to other appropriation accounts from which funds were previously transferred for such purposes: Provided further, That persons hired pursuant to 43 U.S.C. 1469 may be furnished subsistence and lodging without cost from funds available from this appropriation.

CENTRAL HAZARDOUS MATERIALS FUND

"(i) IN GENERAL.—The Secretary concerned may waive documentation and reporting requirements for a person if—

"(I) an audit of the records of the facility of the person reveals substantial compliance with all notice, reporting, painting, and branding requirements during the preceding year; or

"(II) the person transferring the unprocessed timber and the person processing the unprocessed timber enter into an advance agreement with the Secretary concerned regarding the disposition of the unprocessed timber by domestic processing.

"(ii) REVIEW AND TERMINATION OF WAIVERS.—A waiver granted under clause (i)—

"(I) shall, to the maximum extent practicable, be reviewed once a year; and

"(II) shall remain effective until terminated by the Secretary.".

TITLE VII—MICCOSUKEE SETTLEMENT

<< 25 USCA § 1750 NOTE >>

SEC. 701. SHORT TITLE.—This title may be cited as the "Miccosukee Settlement Act of 1997".

<< 25 USCA § 1750 >>

SEC. 702. CONGRESSIONAL FINDINGS.—Congress finds that:

(1) There is pending before the United States District Court for the Southern District of Florida a lawsuit by the Miccosukee Tribe that involves the taking of certain tribal lands in connection with the construction of highway Interstate 75 by the Florida Department of Transportation.

(2) The pendency of the lawsuit referred to in paragraph (1) clouds title of certain lands used in the maintenance and operation of the highway and hinders proper planning for future maintenance and operations.

(3) The Florida Department of Transportation, with the concurrence of the Board of Trustees of the Internal Improvements Trust Fund of the State of Florida, and the Miccosukee Tribe have executed an agreement for the purpose of resolving the dispute and settling the lawsuit.

(4) The agreement referred to in paragraph (3) requires the consent of Congress in connection with contemplated land transfers.

(5) The Settlement Agreement is in the interest of the Miccosukee Tribe, as the Tribe will receive certain monetary payments, new reservation lands to be held in trust by the United States, and other benefits.

(6) Land received by the United States pursuant to the Settlement Agreement is in consideration of Miccosukee Indian Reservation lands lost by the Miccosukee Tribe by virtue of transfer to the Florida Department of Transportation under the Settlement Agreement.

(7) The lands referred to in paragraph (6) as received by the United States will be held in trust by the United States for the use and benefit of the Miccosukee Tribe as Miccosukee Indian Reservation lands in compensation for the consideration given by the Tribe in the Settlement Agreement.

(8) Congress shares with the parties to the Settlement Agreement a desire to resolve the dispute and settle the lawsuit.

<< 25 USCA § 1750a >>

SEC. 703. DEFINITIONS.—In this title:

(1) BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENTS TRUST FUND.—The term "Board of Trustees of the Internal Improvements Trust Fund" means the agency of the State of Florida holding legal title to and responsible for trust administration of certain lands of the State of Florida, consisting of the Governor, Attorney General, Commissioner of Agriculture, Commissioner of Education, Controller, Secretary of State, and Treasurer of the State of Florida, who are Trustees of the Board.

(2) FLORIDA DEPARTMENT OF TRANSPORTATION.—The term "Florida Department of Transportation" means the executive branch department and agency of the State of Florida that—

(A) is responsible for the construction and maintenance of surface vehicle roads, existing pursuant to section 20.23, Florida Statutes; and

(B) has the authority to execute the Settlement Agreement pursuant to section 334.044, Florida Statutes.

(3) LAWSUIT.—The term "lawsuit" means the action in the United States District Court for the Southern District of Florida, entitled Miccosukee Tribe of Indians of Florida v. State of Florida and Florida Department of Transportation, et al., docket No. 6285–Civ–Paine.

(4) MICCOSUKEE LANDS.—The term "Miccosukee lands" means lands that are—

(A) held in trust by the United States for the use and benefit of the Miccosukee Tribe as Miccosukee Indian Reservation lands; and

(B) identified pursuant to the Settlement Agreement for transfer to the Florida Department of Transportation.

(5) MICCOSUKEE TRIBE; TRIBE.—The terms "Miccosukee Tribe" and "Tribe" mean the Miccosukee Tribe of Indians of Florida, a tribe of American Indians recognized by the United States and organized under section 16 of the Act of June 18, 1934 (48 Stat. 987, chapter 576; 25 U.S.C. 476) and recognized by the State of Florida pursuant to chapter 285, Florida Statutes.

(6) SECRETARY.—The term "Secretary" means the Secretary of the Interior.

(7) SETTLEMENT AGREEMENT; AGREEMENT.—The terms "Settlement Agreement" and "Agreement" mean the assemblage of documents entitled "Settlement Agreement" (with incorporated exhibits) that—

(A) addresses the lawsuit; and

(B)(i) was signed on August 28, 1996, by Ben G. Watts (Secretary of the Florida Department of Transportation) and Billy Cypress (Chairman of the Miccosukee Tribe); and

(ii) after being signed, as described in clause (i), was concurred in by the Board of Trustees of the Internal Improvements Trust Fund of the State of Florida.

(8) STATE OF FLORIDA.—The term "State of Florida" means—

(A) all agencies or departments of the State of Florida, including the Florida Department of Transportation and the Board of Trustees of the Internal Improvements Trust Fund; and

(B) the State of Florida as a governmental entity.

<< 25 USCA § 1750b >>

SEC. 704. RATIFICATION.—The United States approves, ratifies, and confirms the Settlement Agreement.

<< 25 USCA § 1750c >>

SEC. 705. AUTHORITY OF SECRETARY.—As Trustee for the Miccosukee Tribe, the Secretary shall—

(1)(A) aid and assist in the fulfillment of the Settlement Agreement at all times and in a reasonable manner; and

(B) to accomplish the fulfillment of the Settlement Agreement in accordance with subparagraph (A), cooperate with and assist the Miccosukee Tribe;

(2) upon finding that the Settlement Agreement is legally sufficient and that the State of Florida has the necessary authority to fulfill the Agreement—

(A) sign the Settlement Agreement on behalf of the United States; and

(B) ensure that an individual other than the Secretary who is a representative of the Bureau of Indian Affairs also signs the Settlement Agreement;

(3) upon finding that all necessary conditions precedent to the transfer of Miccosukee land to the Florida Department of Transportation as provided in the Settlement Agreement have been or will be met so that the Agreement has been or will be fulfilled, but for the execution of that land transfer and related land transfers—

(A) transfer ownership of the Miccosukee land to the Florida Department of Transportation in accordance with the Settlement Agreement, including in the transfer solely and exclusively that Miccosukee land identified in the Settlement Agreement for transfer to the Florida Department of Transportation; and

(B) in conjunction with the land transfer referred to in subparagraph (A), transfer no land other than the land referred to in that subparagraph to the Florida Department of Transportation; and

(4) upon finding that all necessary conditions precedent to the transfer of Florida lands from the State of Florida to the United States have been or will be met so that the Agreement has been or will be fulfilled but for the execution of that land transfer and related land transfers, receive and accept in trust for the use and benefit of the Miccosukee Tribe ownership of all land identified in the Settlement Agreement for transfer to the United States.

<< 25 USCA § 1750d >>

SEC. 706. MICCOSUKEE INDIAN RESERVATION LANDS.—The lands transferred and held in trust for the Miccosukee Tribe under section 705(4) shall be Miccosukee Indian Reservation lands.

<< 25 USCA § 1750e >>

SEC. 707. MISCELLANEOUS. (a) RULE OF CONSTRUCTION.—Nothing in this Act or the Settlement Agreement shall—

(1) affect the eligibility of the Miccosukee Tribe or its members to receive any services or benefits under any program of the Federal Government; or

(2) diminish the trust responsibility of the United States to the Miccosukee Tribe and its members.

(b) NO REDUCTIONS IN PAYMENTS.—No payment made pursuant to this Act or the Settlement Agreement shall result in any reduction or denial of any benefits or services under any program of the Federal Government to the Miccosukee Tribe or its members, with respect to which the Tribe or the members of the Tribe are entitled or eligible because of the status of—

(1) the Miccosukee Tribe as a federally recognized Indian tribe; or

(2) any member of the Miccosukee Tribe as a member of the Tribe.

(c) TAXATION.—

(1) IN GENERAL.—

(A) MONEYS.—None of the moneys paid to the Miccosukee Tribe under this Act or the Settlement Agreement shall be taxable under Federal or State law.

(B) LANDS.—None of the lands conveyed to the Miccosukee Tribe under this Act or the Settlement Agreement shall be taxable under Federal or State law.

(2) PAYMENTS AND CONVEYANCES NOT TAXABLE EVENTS.—No payment or conveyance referred to in paragraph (1) shall be considered to be a taxable event.

This Act may be cited as the “Department of the Interior and Related Agencies Appropriations Act, 1998”.

Approved November 14, 1997.

Line Item Veto Message

NOTICES

OFFICE OF MANAGEMENT AND BUDGET

Cancellation Pursuant to Line Item Veto Act; Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 1998, and Department of Interior and Related Agen cies Appropriations Act, 1998

Monday, November 24, 1997

November 20, 1997.

Two Special Messages from the President under the Line Item Veto Act are published below. The President signed these messages on November 20, 1997. Under the Act, the messages are required to be printed in the Federal Register (2 U.S.C. 691a(c)(2)).

Clarence C. Crawford,

Associate Director for Administration.

THE WHITE HOUSE,

Washington

November 20, 1997.

