Nos. 18-891 and 18-895

In the Supreme Court of the United States

SALLY JIM, PETITIONER

v.

UNITED STATES OF AMERICA

THE MICCOSUKEE TRIBE OF INDIANS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether an Indian tribe's per-capita distributions of gaming revenues are taxable income under the Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2467 (1988), and the Tribal General Welfare Exclusion Act of 2014, Pub. L. No. 113-168, 128 Stat. 1883.

2. Whether gaming revenues derive directly from trust land and are thus exempt from income tax.

3. Whether a tribe may, by subjecting its casino to a "gross-receipts" tax, exempt gaming revenues from taxation.

4. Whether the Miccosukee Tribe's chairman has the authority to exempt payments to tribal members from federal taxation.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-22)[1] is reported at 891 F.3d 1242. The orders of the district court (Pet. App. 33-47, 48-72) are not published in the Federal Supplement but are available at 2016 WL 7539132 and 2016 WL 6995455.

[1] Both petitions include the same appendix with identical pagination.

JURISDICTION

The opinion of the court of appeals was entered on June 4, 2018. Petitioner Miccosukee Tribe's petition for rehearing was denied on August 9, 2018. (Pet. App. 73-74). On October 12, 2018, Justice Thomas extended the time within which to file the petitions for writs of certiorari to and including January 6, 2019, and the petitions were filed on January 7, 2019 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. For purposes of federal taxation, a person's gross income generally includes "all income from whatever source derived." 26 U.S.C. 61. Income includes 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. See *Squire* v. *Capoeman*, 351 U.S. 1, 6 (1956).

a. The Indian Gaming Regulatory Act (IGRA), Pub. L. No. 100-497, 102 Stat. 2467 (1988), authorizes the operation and regulation of gaming by Indian tribes. 25 U.S.C. 2702; see *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 48 (1996). As relevant here, IGRA permits tribes to use gaming revenues "to fund tribal government operations and programs" and "to provide for the general welfare of the Indian tribe and its members." 25 U.S.C. 2710(b)(2)(B)(i) and (ii). Tribes may also use gaming revenues to make per-capita payments to members, but only if, among other things, "the Indian tribe has prepared a plan to allocate revenues to" an author-

ized use, "the plan is approved by the Secretary as adequate," and "the per capita payments are subject to Federal taxation and tribes notify members of such tax liability when payments are made." 25 U.S.C. 2710(b)(3)(A), (B), and (D).

In 1994, Congress amended the Internal Revenue Code to require Indian tribes distributing "net revenues" from gaming to tribal members to deduct and withhold income taxes from such payments. 26 U.S.C. 3402(r); see Uruguay Round Agreements Act (URAA), Pub. L. No. 103-465, § 701(a), 108 Stat. 4995-4996. The Senate Report accompanying that amendment explained that tribes had previously made "taxable distributions" to members but had not been required to withhold taxes on such payments—an omission that "may result in significant tax liability" to the members. S. Rep. No. 412, 103d Cong., 2d Sess. 136 (1994). Congress concluded that a withholding requirement would eliminate the need for some members to make quarterly estimated payments and would "reduce the likelihood that they will face penalties for underpayment of tax at the time of tax filing." *Ibid.* Accordingly, Congress added a new provision, effective for payments made after December 31, 1994, requiring that:

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

26 U.S.C. 3402(r); see URAA § 701(a), 108 Stat. 4995-4996.

b. Although 26 U.S.C. 61 does not expressly exclude "welfare benefits" from the definition of gross income, the IRS has long taken the position that government disbursements promoting the general welfare are not taxable income to the individuals receiving those benefits.[2] The Tax Court has acknowledged the existence of this "general welfare exclusion." *Bailey* v. *Commissioner*, 88 T.C. 1293, 1299-1301 (1987). And the IRS has issued guidance explaining that, to qualify for the exclusion, payments must "(i) be made from a governmental fund, (ii) be for the promotion of the general welfare (*i.e.*, generally based on individual or family needs), and (iii) not represent compensation for services." Rev. Rul. 2005-46, 2005-2 C.B. 120.

In 2014, following several years of consultation with tribal leaders,[3] the IRS published additional guidance to ensure that benefits provided under Indian tribal general-welfare programs would qualify for the exclusion on the same basis as welfare programs of other governmental entities. Rev. Proc. 2014-35, 2014-26 I.R.B. 1110-1112, §§ 2.02, 2.03, 2.05 (Rev. Proc. 2014-35). The guidance defined a qualifying "general welfare"

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[2] See, *e.g.*, I.R.S. Notice 99-3, 1999-1 C.B. 271 (payments received as Temporary Assistance to Needy Families by individuals performing work under state welfare-to-work programs); Rev. Rul. 78-170, 1978-1 C.B. 24 (government payments to assist low-income persons with utility costs); Rev. Rul. 76-395, 1976-2 C.B. 16, 17 (government grants to assist low-income city inhabitants to refurbish homes); Rev. Rul. 76-144, 1976-1 C.B. 17 (government grants to persons eligible for disaster relief); Rev. Rul. 57-102, 1957-1 C.B. 26 (benefits paid to blind persons under state public-assistance law).

[3] See I.R.S. Notice 2011-94, 2011-49 I.R.B. 834 (inviting comments concerning the application of the general-welfare exclusion to Indian tribal general-welfare programs); I.R.S. Notice 2012-75, 2012-51 I.R.B. 715 (proposing a revenue procedure addressing the matter).

payment in terms similar to previous guidance—*i.e.*, that "the payments must (1) be made pursuant to a governmental program, (2) be for the promotion of the general welfare (that is, based on need), and (3) not represent compensation for services." *Id.* § 2.02. The guidance further provided that a qualifying program "may be funded from casino revenues," but that it could not consist of per-capita distributions of gaming revenues. *Id.* § 2.03. The guidance accordingly explained:

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

Ibid.

In recognition of the unique circumstances of Indian tribes, the IRS also sought to identify which tribal welfare programs would satisfy the "individual or family need" requirement applicable to other general-welfare programs. Rev. Proc. 2014-35 § 2.03. To that end, the Revenue Procedure stated that it would "conclusively presume[]" that the "individual need" requirement had been satisfied, *ibid.*, if a program provided benefits consistent with certain "general criteria" and if the benefits were of a certain type. *Id.* § 5.02. The "general criteria" included that the benefits must be provided pursuant to a specific tribal program, that the program must have written guidelines, that the benefit must be available to any tribal member who satisfies the program's guidelines, that the program must not discriminate in favor of members of the governing body, that the benefit must

not be lavish or extravagant under the circumstances, and that the benefit must not be compensation for services. *Id.* § 5.02(1). The types of benefits that may be distributed cover a wide range of basic needs, including benefits for housing and education, care of elderly and disabled persons, transportation from the reservation to providers of essential services, relocation costs for persons displaced from their homes, expenses associated with cultural activities, and "assistance to individuals in exigent circumstances." *Id.* § 5.02(2).

A few months after the IRS published Rev. Proc. 2014-35, Congress passed the Tribal General Welfare Exclusion Act of 2014 (GWEA), Pub. L. No. 113-168, 128 Stat. 1883.[4] The GWEA amends the Internal Revenue Code by adding Section 139E, which provides that "[g]ross income does not include the value of any Indian general welfare benefit." 26 U.S.C. 139E(a). It defines an "Indian general welfare benefit" as:

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[4] The GWEA appears designed to codify the just-issued Rev. Proc. 2014-35, as its sponsor and other legislators uniformly indicated. See, *e.g.*, 160 Cong. Rec. S5616 (daily ed. Sept. 16, 2014) (statement of Sen. Moran) ("The IRS recently issued a notice that establishes the tribal [general] welfare exclusion * * * but we want to make certain that this policy is extended and codified."); 160 Cong. Rec. S5617 (daily ed. Sept. 16, 2014) (statement of Sen. Heitkamp) ("The IRS recently issued helpful guidance * * * we also must make sure that parity provided by that guidance is in statutory language."); 160 Cong. Rec. H7601 (daily ed. Sept. 16, 2014) (statement of Rep. Nunes) ("The provisions in H.R. 3043 would codify this IRS guidance."); 160 Cong. Rec. H7601 (daily ed. Sept. 16, 2014) (statement of Rep. Kind) ("[T]his legislation would codify existing IRS practice."); see also Joint Comm. on Taxation, *General Explanation of Tax Legislation Enacted in the 113th Cong.*, 113th Cong., 2d Sess. 40 (Comm. Print 2015) (stating that the GWEA "contains similar requirements to Rev. Proc. 2014-35 in terms of which benefits would qualify for exclusion under the general welfare doctrine").

> any payment made or services provided to or on behalf of a member of an Indian tribe (or any spouse or dependent of such member) pursuant to an Indian tribal government program, but only if—
>
> (1) the program is administered under specified guidelines and does not discriminate in favor of members of the governing body of the tribe, and
>
> (2) the benefits provided under such program—
>
> (A) are available to any tribal member who meets such guidelines,
>
> (B) are for the promotion of general welfare,
>
> (C) are not lavish or extravagant, and
>
> (D) are not compensation for services.

26 U.S.C. 139E(b).

2. Petitioner Miccosukee Tribe of Indians of Florida (Tribe) is engaged in gaming, as authorized by IGRA. Pet. App. 2. In 2001, it used the revenue from its gaming activities to fund quarterly per-capita distributions to its members, but it neither reported the distributions to the IRS nor withheld taxes on them. *Ibid.*

Petitioner Sally Jim is a member of the Tribe. Pet. App. 6. In 2001, she was paid wages of $25,990 for her work in the Tribe's healthcare facility. *Id.* at 7. She also received $272,000 in per-capita distributions from the Tribe, representing four shares of $68,000 each for herself, her husband, and her two children. *Id.* at 6-7. She did not file a tax return reporting either the wage income or the distributions. *Id.* at 7; see *id.* at 7 n.7 (noting that in 2015, after these proceedings had been initiated, she eventually filed her 2001 return, on which she stated that the distribution payments were non-taxable).

The United States sued Jim to obtain a judgment for her unpaid 2001 income tax and penalties. Pet. App. 7. The Tribe intervened. *Ibid.* Jim acknowledged that she had received a total of $272,000 in quarterly distributions from the Tribe, but she and the Tribe contended that the payments were exempt from income tax pursuant to the GWEA. *Id.* at 8, 52.[5]

The United States moved for summary judgment, and the district court granted that motion in part. Pet. App. 48-72. The court determined that per-capita distributions of gaming revenues remain taxable income under IGRA, even if the distributions might be characterized as promoting general welfare under the GWEA, because IGRA "expressly governs." *Id.* at 61; see *id.* at 61-64. The court also rejected Jim's argument that the distributions were exempt from taxation as income derived from the land. *Id.* at 66-68. The court concluded, however, that summary judgment was not warranted regarding liability for tribal distributions derived from non-gaming sources. *Id.* at 59, 68, 71.

After a bench trial, the district court found that "[t]he vast majority, if not all, of the Tribe's distributions come from the Tribe's net gaming revenue." Pet. App. 37. It observed that the Tribe had not produced any "documentary evidence substantiating its claim that sources other than" gaming contributed to the per-capita distributions. *Ibid.* The court thus concluded that Jim was liable to the United States for her unpaid

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[5] The GWEA was made effective for all taxable years for which the period of limitation on refund or credit under 26 U.S.C. 6511 had not expired as of September 26, 2014, the date of enactment. See GWEA § 2(d)(1), 128 Stat. 1884. Since Jim had not filed a 2001 tax return through the date of enactment, the GWEA was made effective for her 2001 income tax liability.

income taxes on the full distributions from the Tribe, plus penalties and interest. *Id.* at 47.

3. The court of appeals affirmed. Pet. App. 1-23. In addressing the asserted conflict between IGRA and the GWEA, the court applied the principle of statutory construction that the more specific statute governs. *Id.* at 16 (citing *Morton* v. *Mancari*, 417 U.S. 535, 550-551 (1974), and *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 153 (1976)). The court explained that IGRA specifically imposed income tax on per-capita distributions of gaming revenues, whereas the GWEA provided a tax exemption of general application without regard to the source of the income. See *id.* at 15-16. It reasoned that "Congress spoke clearly when it imposed federal income taxation on per capita payments derived from gaming revenue" and that, if it "intended GWEA to undo this arrangement, it knew the words to do so" yet "chose not to use them." *Id.* at 17. The court noted that, to the contrary, the GWEA's legislative history suggested that Congress intended to codify the approach of Rev. Proc. 2014-35, which had reiterated that "per capita payments to tribal members of tribal gaming revenues that are subject to the Indian Gaming Regulatory Act are . . . not excludable from gross income under the general welfare exclusion or this revenue procedure." *Id.* at 16 n.22 (citation omitted).

The court of appeals also rejected Jim's two alternative arguments that the distributions were not subject to taxation. Pet. App. 14 n.17. First, Jim had contended that distributions did not come from casino revenues under IGRA because the Tribe imposed a tax on the activities of its casino and other businesses on its reservation. *Ibid.* The court rejected that argument as an "invitation to place form over substance," explaining that

IGRA and the Internal Revenue Code subject the distribution of gaming revenues to taxation "no matter the mechanisms devised to collect the revenue or administer the payments." *Ibid.* Second, Jim had contended that the casino revenues were derived directly from reservation land and were therefore exempt from taxation. *Id.* at 15 n.17. The court rejected that contention as well, explaining that the gaming revenues derived not from the use of reservation land or the resources of the land but rather from improvements on the land and from business activities related to those assets. *Ibid.*

ARGUMENT

The Tribe renews its contention that per-capita distributions from gaming revenues are exempt from federal income taxation under the GWEA, notwithstanding IGRA's express provision for the taxation of such payments. Jim, meanwhile, raises three alternative arguments for avoiding taxation of the distributions from the Tribe: (1) that casino revenues derive from the land, (2) that the Tribe's mode of collecting money from the casino strips the funds of their character as casino revenues, and (3) that the Tribe's chairman was empowered to exempt the per-capita distributions from taxation. The court of appeals properly rejected each of those arguments (except the final one, which the court did not address), and its decision does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. a. The court of appeals correctly determined that the GWEA did not alter the tax treatment of per-capita distributions of net revenues from gaming established by IGRA and the Internal Revenue Code.

Distributions from net gaming revenues fall within the meaning of "income" for purposes of 26 U.S.C. 61,

which generally includes "all income from whatever source derived." *Ibid.*; see *Commissioner* v. *Glenshaw Glass Co.*, 348 U.S. 426, 431 (1955) (noting that income includes any "accessions to wealth, clearly realized, and over which the taxpayers have complete dominion"). IGRA, which comprehensively regulates Indian gaming, confirms that understanding. It expressly provides that per-capita distributions of net gaming revenues are "subject to Federal taxation." 25 U.S.C. 2710(b)(3)(D). Congress further confirmed that such distributions are taxable by requiring that tribes withhold income taxes from those distributions to protect individuals from the burden of either quarterly payments of estimated tax or underpayment penalties. See 26 U.S.C. 3402(r). It was therefore clear in 2001 that the Tribe's per-capita payment of net gaming revenues was gross income to Jim under 26 U.S.C. 61, that it was "subject to Federal taxation" under IGRA, and that the Tribe was subject to the withholding requirements of 26 U.S.C. 3402(r).

Nothing in the GWEA alters the tax treatment of such payments. The GWEA provides that gross income does not include an "Indian general welfare benefit," which it defines as a payment under certain programs "for the promotion of general welfare." 26 U.S.C. 139E(a)-(b). The GWEA nowhere specifies that per-capita distributions from gaming revenues qualify as general-welfare programs. To the contrary, the "general welfare" doctrine that the GWEA codifies for Indian tribes has long encompassed payments based on *need*. See *Bailey* v. *Commissioner*, 88 T.C. 1293, 1300 (1987) (explaining that the general-welfare doctrine applies to "program[s] requiring the individual recipient to establish need"); Rev. Rul. 2005-46, 2005-2 C.B. 120 (defining payments "for the promotion of the general

welfare" to mean payments "generally based on individual or family needs"); Rev. Proc. 2014-35 § 2.02 (stating that excluded Indian tribal government benefits must "be for the promotion of the general welfare (that is, based on need)"); Rev. Proc. 2014-35 § 5.03 (providing examples of qualifying housing, educational, elder and disabled, and cultural and religious programs). A distribution of gambling revenues made equally to every tribal member does not satisfy that established and ordinary meaning of a "general welfare benefit." See Rev. Proc. 2014-35 § 2.03 (reaffirming that per-capita payments of gaming revenues would continue to be taxable under 25 U.S.C. 2710(b)(3) and 26 U.S.C. 61, as well as subject to the information reporting and withholding requirements of 26 U.S.C. 6041 and 3402(r)).

Even if the GWEA might otherwise be read to cover per-capita distributions of gaming revenues, as the Tribe urges (Tribe Pet. 8-11), those distributions still would not be exempt from taxation. As the court of appeals explained, IGRA addresses the "very specific situation" of the taxation of per-capita distributions to tribal members from net gaming revenues. *Morton* v. *Mancari*, 417 U.S. 535, 550 (1974); see Pet. App. 15-16. The GWEA, by contrast, is a statute "of general application" to welfare payments to tribal members. *Mancari*, 417 U.S. at 550. Although the Tribe suggests (Tribe Pet. 15-16) that the GWEA is the more specific statute, the GWEA does not expressly address the type of payments here, in contrast to IGRA, which does. Compare 26 U.S.C. 139E(a)-(b), with 25 U.S.C. 2710(b)(3)(D). And "[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *Mancari*, 417 U.S. at 550-551; see *Radzanower* v.

Touche Ross & Co., 426 U.S. 148, 153 (1976) ("It is a basic principle of statutory construction that a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum."). Moreover, as noted above, the legislative history of the GWEA confirms that it codifies the IRS's application of the "general welfare" doctrine to payments by tribal governments, which excludes payments made per capita rather than based on need. See pp. 4-6 & n.4, *supra*.

Finally, the Tribe contends (Tribe Pet. 14-15) that, in the GWEA, Congress provided that any ambiguity must be construed in favor of the Indian tribe. See GWEA § 2(c), 128 Stat. 1884. But that rule of construction applies only to actual "[a]mbiguities" in the statute. *Ibid.*; cf. *South Carolina* v. *Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986) (explaining that canon of construing statutes in favor of Indian tribes "does not permit reliance on ambiguities that do not exist; nor does it permit disregard of the clearly expressed intent of Congress"). Here, no ambiguities exist: IGRA confirms that the Internal Revenue Code subjects per-capita payments of gaming revenues to taxation, and the GWEA does not express any contrary intent.

b. The Tribe does not assert that the court of appeals' decision conflicts with any decision of any other court of appeals. Indeed, the decision below appears to be the first appellate decision interpreting the GWEA.

Recognizing the absence of any conflict, the Tribe contends (Tribe Pet. 16-17) that this Court frequently addresses issues of importance to Indian tribes that have been considered by a single federal appellate court. But the Tribe's examples concerned nonstatutory questions, see *Plains Commerce Bank* v. *Long*

Family Land & Cattle Co., 554 U.S. 316 (2008) (jurisdiction of tribal courts over nonmembers); *United States* v. *Jicarilla Apache Nation*, 564 U.S. 162 (2011) (attorney-client privilege), or statutory questions that are committed to the jurisdiction of the Court of Federal Claims, see *United States* v. *Navajo Nation*, 556 U.S. 287 (2009); *United States* v. *Tohono O'Odham Nation*, 563 U.S. 307 (2011). Income-tax disputes like this one, by contrast, arise in every circuit in which Indian taxpayers reside. See Tribe Pet. 8 (contending that this issue is of interest to "approximately 238 federally recognized Indian tribes engaged in gaming"). Yet the Tribe does not identify any other court that has considered the question presented, let alone decided it in the Tribe's favor. Review of the first question presented is thus unwarranted.

2. In her separate petition, Jim advances three additional arguments. The court of appeals correctly rejected two of them and did not address the third. None warrants further review.

a. Jim first contends (Jim Pet. 10-12) that the gaming revenue at issue is exempt from taxation because it was derived directly from Miccosukee trust land. The court of appeals correctly rejected that contention, and its decision is consistent with decisions of other courts of appeals.

In *Squire* v. *Capoeman*, 351 U.S. 1, 6 (1956), this Court noted that the Indian General Allotment Act, ch. 119, 24 Stat. 388 (1887), requires the United States to transfer allotted property at the end of the trust period "free of all charge or incumbrance whatsoever." In light of that obligation, the Court determined that the

Act exempts income "derived directly" from trust property, including from the sale of timber. *Capoeman*, 351 U.S. at 9.[6] As the Court explained:

> Once logged off, the land is of little value. The land no longer serves the purpose for which * * * it was allotted to him. * * * Unless the proceeds of the timber sale are preserved for [the tribal member], he cannot go forward when declared competent with the necessary chance of economic survival in competition with others.

Id. at 10 (footnote omitted). The Court, however, recognized a distinction between nontaxable income directly derived from trust property and taxable "reinvestment income," or "income derived from [the] investment of surplus income from land, or income on income." *Id.* at 9 (citing Felix S. Cohen, *Handbook of Federal Indian Law* 265 (1942)) (footnote and internal quotation marks omitted).

The exemption for income "derived directly" from trust properties accordingly is limited to activities involving the exploitation of allotted lands themselves and their natural resources. See, *e.g.*, *Stevens* v. *Commissioner*, 452 F.2d 741 (9th Cir. 1971) (farming and ranching income); *United States* v. *Daney*, 370 F.2d 791 (10th Cir. 1966) (oil and gas income); *Big Eagle* v. *United States*, 300 F.2d 765 (Ct. Cl. 1962) (per curiam) (royalty income from mineral deposits). By contrast, income from activities that do not exploit the land or its natural resources is not exempt from taxation even though

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[6] The rule that income directly derived from allotted land is exempt from tax has been extended to property held under the Indian Reorganization Act, ch. 576, 48 Stat. 984 (1934). *Stevens* v. *Commissioner*, 452 F.2d 741, 746-747 (9th Cir. 1971).

those activities may take place on trust property. See, *e.g.*, *Campbell* v. *Commissioner*, 164 F.3d 1140, 1142 (8th Cir.) (casino revenues), cert. denied, 526 U.S. 1117 (1999); *Beck* v. *Commissioner*, 64 F.3d 655 (4th Cir. 1995) (per curiam) (rental income from apartment building); *Dillon* v. *United States*, 792 F.2d 849, 856 (9th Cir. 1986) (income from smokeshop), cert. denied, 480 U.S. 930 (1987); *Critzer* v. *United States*, 597 F.2d 708, 713 (Ct. Cl.) (en banc) (income from operation of motel, restaurant, and gift shop), cert. denied, 444 U.S. 920 (1979).

Under that framework, the court of appeals correctly determined that casino revenues are not exempt because they derive from improvements to land and business operations conducted thereon. See Pet. App. 15 n.17. A casino does not generate revenues directly from the use of the land or the natural resources found in that land. Nor does its operation, as in *Capoeman* itself, *supra*, diminish the value of the land upon which it is constructed. In addition, the General Allotment Act does not exempt from taxation the income that an Indian receives from her use of tribal land or another allottee's trust land, as such taxation cannot represent a burden or encumbrance on the tribe's (or other allottee's) interest in the land. See *United States* v. *King Mountain Tobacco Co.*, 899 F.3d 954, 965 (9th Cir. 2018), petition for cert. pending, No. 18-984 (filed Jan. 18, 2019); *United States* v. *Anderson*, 625 F.2d 910, 914 (9th Cir. 1980), cert. denied, 450 U.S. 920 (1981); *Holt* v. *Commissioner*, 364 F.2d 38, 41 (8th Cir. 1966), cert. denied, 386 U.S. 931 (1967).

b. Jim next contends (Jim Pet. 12-14), joined in part by the Tribe (Tribe Pet. 12-13), that the distributions at issue do not constitute gaming revenues because the

Tribe received the funds by imposing a tax on its own business operations. The court of appeals correctly rejected that factbound contention.

Under IGRA, per-capita payments to tribal members from "[n]et revenues from" gaming are subject to federal income taxation. See 25 U.S.C. 2710(b)(3)(D). As the court of appeals determined, allowing the Tribe to rebrand those gaming revenues as the profits of a gross-receipts tax placed on its own business would "place form over substance in analyzing the taxability of the distributions." Pet. App. 14 n.17. That determination does not, as Jim contends (Jim Pet. 12-13), disparage the Tribe's method of self-government. Indeed, it does not restrict the Tribe's form or method of self-government in any fashion. It means only that the Tribe's methods of collecting and administering its gaming revenues do not alter the character of the per-capita distributions as gaming revenues for purposes of federal taxation. And neither Jim nor the Tribe disputes that the proceeds of the Tribe's gross-receipts tax consist almost entirely of gaming revenues, despite being afforded the opportunity to isolate gaming revenues from other sources. See Pet. App. 10 (noting that at trial Jim and the Tribe "made no effort to establish how much of the distributions came from a source other than gaming activities"); see also *id.* at 37.

c. Finally, Jim contends (Jim Pet. 14-15) that the Tribe's chairman had authority to "interpret" various statutes and regulations to reach a different result than the Internal Revenue Code and IGRA require. As Jim notes (*id.* at 14), the court of appeals did not address this argument, perhaps because of a lack of clarity about its scope. See 16-17109 Jim C.A. Br. 52-54 (citing regulations promulgated under the Indian Self-

Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (1975)).

In any event, the argument lacks merit. Jim appears to contend (Pet. 14) that because the Secretary of the Interior may waive or make exceptions to regulations, see 25 C.F.R. 1.2, and because the Tribe's chairman is an authorized representative of the Tribe, the chairman may waive federal taxation requirements. That is not correct. The Secretary of the Interior has not attempted to exclude certain income from federal taxation under IGRA, and he certainly has not delegated authority to individual tribal representatives to do so.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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