APPENDIX

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**UNITED STATES COURT OF APPEALS,
FOR THE ELVENTH CIRCUIT**

James CLAY, Audrey Osceola, Petitioners-Appellants,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent-Appellee.

No. 19-14441

Submitted: 12/17/2020
Filed: March 16, 2021

Before WILSON, GRANT, and TJOFLAT, Circuit Judges.

1. Opinion

GRANT, Circuit Judge:

In the late 1980s, the Miccosukee Tribe decided to build a casino in Florida. Acres of land between Miami and the Everglades now host a hotel, a concert hall, a food court, a restaurant, and a gift shop. And, of course, gaming. The casino's profits skyrocketed, and the Tribe chose to share those profits with its members. During the years relevant to this case, each tribe member—man, woman, and child—received large payments, starting at almost $100,000 annually and climbing to nearly $160,000.

But the Tribe did more than just write the checks; it also encouraged members to hide their payments from the IRS. The taxpayers here followed the Tribe's

advice, and they are now subject to hundreds of thousands of dollars in tax deficiencies. They offer various reasons why they do not owe taxes on these payments. One assertion is that any taxes are barred by a statute that exempted an earlier land transfer from taxation; another is that the payments are merely non-taxable lease payments from the casino. Unfortunately for these Tribe members, the payments are just income—taxable income. That means we affirm.

I.

The Miccosukee Tribe of Indians of Florida is a federally recognized American Indian tribe under the Indian Reorganization Act of 1934. *See* Pub. L. No. 73-383, 48 Stat. 984. James Clay and Audrey Osceola, a married couple with five children at home, are enrolled members of the Tribe. And that enrollment can have financial benefits. For example, starting in 1984 the Tribe collected a small sales tax on goods sold by tribal businesses on its land. The Tribe used those revenues to fund its day-to-day operations, and also to make quarterly distributions to its enrolled members. Those early distributions weren't much, though; they typically amounted to no more than $100 per quarter for each member.

Things began to change in 1988. That year, Congress enacted the Indian Gaming Regulatory Act. *See* Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified at 25 U.S.C. § 2701 *et seq*.). The Gaming Act authorized tribes to engage in various gaming activities—lotteries, bingo, poker, and so on. *See* 25 U.S.C. §§ 2703(7)(A), 2710(b)(1). So the following year the Tribe decided to enter the gaming business and struck a deal

with an outside company to "construct, manage and operate a Class II gaming facility for the Tribe."[1] To that end, the company purchased land near the Tribe's reservation—land which was eventually placed in trust for the Tribe—and went about building the casino there. But relations between the Tribe and company quickly soured, and the Tribe took over full management of the casino in 1993.

Once the casino proved to be profitable, the Tribe started imposing a gross receipts tax on "all amounts" received by the casino, including admission fees, wagers, and revenues from its gift shop and other activities. The Tribe's chairman instructed its finance director to open a checking account to hold the proceeds from the gross receipts tax. Like it had done with its sales tax, the Tribe used those funds to make quarterly distributions and other payments to its members. At the end of every quarter, the Tribe calculated the amount it received in gross receipts taxes and then allocated an equal share to each member. Distributions for minor children were typically given to their mothers.

But the Tribe's involvement ran deeper than just handing out the money. For years, the Tribe's leadership also urged members not to report the payments on their tax returns. The Tribe even encouraged members to cash their checks at its

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[1] The Gaming Act "divides Indian gaming into three categories: class I, class II, and class III." *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians of Fla.*, 63 F.3d 1030, 1032 n.3 (11th Cir. 1995). Class II gaming covers bingo and includes "pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo." 25 U.S.C. § 2703(7)(A). It can also include some types of card games. *Id.*

administration office rather than at banks; according to the Tribe's chairman, cashing the checks at banks "would likely result in a report being made to the IRS." Going even further, the Tribe's chairman told members "not to list the quarterly distributions on credit applications or when applying for food stamps, Medicare, or Medicaid." As he put it, that would frustrate the Tribe's efforts to "protect tribal members from facing problems with [the] IRS." The chairman also warned that if the IRS found out about the cash, it may "investigate how the money was obtained."

It turns out he was right. Despite the chairman's best efforts, the IRS caught wind of the payments. In 2010, it "audited dozens of returns filed by members of the Tribe," including Clay and Osceola's. The next year, the IRS issued Clay and Osceola a notice of deficiency for the 2004 and 2005 tax years. And two years later, it issued them another notice of deficiency for 2006. The notices for those years informed them that they were liable for yearly income tax deficiencies of roughly $192,000, $310,000, and $389,000. The notices also stated that Clay and Osceola were subject to accuracy-related penalties under 26 U.S.C. § 6662(a).

Clay and Osceola challenged the deficiency findings and penalties in both notices in the tax court. They had partial success—the tax court issued a 45-page opinion sustaining the deficiency determinations, but rejecting the accuracy-related penalties. They appealed.

II.

We review the tax court's legal conclusions de novo. *Ocmulgee Fields, Inc. v. Comm'r*, 613 F.3d 1360, 1364 (11th Cir. 2010). But we review its factual findings for clear error. *Id.*

III.

The Internal Revenue Code casts a wide net. For starters, it applies to everyone, including American Indians. *See Squire v. Capoeman*, 351 U.S. 1, 6, 76 S.Ct. 611, 100 L.Ed. 883 (1956). It also applies to everything—at least, everything that makes up one's "gross income." 26 U.S.C. § 61(a). And the definition of gross income "sweeps broadly," including "all income from whatever source derived." *United States v. Burke*, 504 U.S. 229, 233, 112 S.Ct. 1867, 119 L.Ed.2d 34 (1992) (quoting 26 U.S.C. § 61(a)). Unless there is a specific exemption, all gains are subject to taxation. *See Comm'r v. Glenshaw Glass Co.*, 348 U.S. 426, 430, 75 S.Ct. 473, 99 L.Ed. 483 (1955).

5Here, Clay and Osceola do not dispute that their per capita payments qualify as "gross income" under the Code. It is not hard to see why. For one thing, the very statute that allows tribes to run class II gaming activities—the Gaming Act—also says that any "per capita payments" made from those activities must be "subject to Federal taxation." 25 U.S.C. § 2710(b)(3); *see also United States v. Jim*, 891 F.3d 1242, 1244–45 (11th Cir. 2018).[2]

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[2] We reject any contention that the payments do not come from "net revenues" simply because the Tribe taxes the casino's "gross receipts" instead. In *United States v. Jim*, we declined to "place form over substance in analyzing the taxability" of these distributions. 891 F.3d at 1250 n.17. We now do so yet again and reiterate that the Gaming Act "subjects to federal taxation the per capita payments an Indian tribe makes to its members from gaming revenue, no matter the mechanisms devised to collect the revenue or administer the payments." *Id.* We also reiterate that even if the payments did not come from "net revenues," they would

So Clay and Osceola are left to argue that Congress exempted their payments from taxation. The problem for them is that any tax exemption must be "clearly expressed." *Capoeman*, 351 U.S. at 6, 76 S.Ct. 611. Absent "clear statutory guidance" we "ordinarily will not imply tax exemptions." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 156, 93 S.Ct. 1267, 36 L.Ed.2d 114 (1973). Even so, Clay and Osceola contend that Congress provided them with two qualifying exemptions. First, they point to the Miccosukee Settlement Act of 1997. *See* Pub. L. No. 105-83, 111 Stat. 1624 (codified at 25 U.S.C. § 1750 *et seq*. (2006)).[3] And second, they claim an exemption for "land lease" payments. Neither of the asserted exemptions, however, offers relief.

A.

Clay and Osceola first look to the Miccosukee Settlement Act in their search for a workable exemption. Congress passed the Settlement Act in 1997, marking the end of a dispute between Florida and the Tribe. That dispute began in 1991 when Florida sought to build a highway through Miccosukee lands. The Tribe sued, and after years of litigation, the parties reached a settlement agreement. In that agreement, Florida promised to give the Tribe, among other things, a six-acre parcel of land and nearly $2.2 million. In exchange, the Tribe agreed to grant the

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still be included in gross income absent a "clearly expressed" tax exemption. *Capoeman*, 351 U.S. at 6, 76 S.Ct. 611.

[3] Portions of the Settlement Act were codified at 25 U.S.C. § 1750 *et seq.*, but have since been omitted. We therefore cite to the 2006 edition of the U.S. Code throughout this opinion when referencing the Settlement Act.

State the rights-of-way and easements it needed for the highway project.

Because the settlement agreement "contemplated land transfers," it required Congress's blessing. 25 U.S.C. § 1750(4) (2006). And—after finding that the agreement was "in the interest of the Miccosukee Tribe"—Congress gave that blessing in the Settlement Act. *Id.* § 1750(5). But it also went a step further, and provided that none of the "moneys paid" or "lands conveyed" to the Tribe under the Settlement Act or the agreement would be "taxable under Federal or State law." *Id.* § 1750e(c).

Clay and Osceola hang their hats on this provision, asserting that it exempts their per capita payments from taxation. They say that the Settlement Act "could not be any clearer in exempting the Miccosukee lands from federal and state taxes." And they read the Act broadly—even as empowering the Tribe to collect and distribute money to its members without the members including it in "any taxable income determination." But Clay and Osceola do not simply offer their own interpretation of the Settlement Act for our consideration. They also say that we *must* adopt that interpretation for ourselves. In their words, we are obliged to read it as "the Tribe understood it at the time of its creation with any ambiguities being interpreted in favor of the Tribe."

To be sure, courts construe statutes "liberally" in favor of American Indians and resolve reasonable ambiguities to their benefit. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766, 105 S.Ct. 2399, 85 L.Ed.2d 753 (1985); *see also South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506, 106

S.Ct. 2039, 90 L.Ed.2d 490 (1986). But that rule has its limits. After all, we cannot "ignore plain language" that "clearly runs counter" to their claims. *Oregon Dep't of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 774, 105 S.Ct. 3420, 87 L.Ed.2d 542 (1985); *Catawba*, 476 U.S. at 506, 106 S.Ct. 2039. Nor can we create "ambiguities that do not exist." *Catawba*, 476 U.S. at 506, 106 S.Ct. 2039.

Yet Clay and Osceola ask us to do just that. Simply put, the Settlement Act is unambiguous; it exempts from taxation only the "moneys paid" and "lands conveyed" to the Tribe "under this part or the Settlement Agreement." 25 U.S.C. § 1750e(c) (2006). The scope of that tax exemption is no mystery. In the Act itself, Congress notes that the Tribe will receive "monetary payments" and "new reservation lands" under the agreement. *Id.* § 1750(5). In fact, Congress references those specific lands throughout the Act. *See id.* §§ 1750(6), (7); 1750a(4); 1750c(4); 1750d. With that context, the language's meaning is clear—it merely negated the normal tax effects of the money and land transfers described in the Settlement Act.

That said, even the most generous reading of the Settlement Act wouldn't help. Say we interpreted the Act as providing an indefinite tax exemption for the "lands" conveyed under it or the agreement. The casino revenues still don't fit the bill. For one thing, the casino's land was not conveyed under either the Settlement Act or the agreement. As Clay and Osceola concede, the casino was built nearly a decade before on land placed in trust for the Tribe. Moreover, an exemption for "lands" only exempts income "derived directly" from those lands. *Capoeman*, 351 U.S. at 9, 76 S.Ct. 611 (quotation omitted). And this Court has

already held that casino revenues do "not derive directly from the land." *Jim*, 891 F.3d at 1250 n.17. That means even the reading of the Settlement Act espoused by Clay and Osceola would not provide the tax exemption they seek.[4]

B.

Clay and Osceola argue in the alternative that the payments are tax exempt because they stem from a lease for the use of the Tribe's lands. This argument has both a factual problem and a legal one. First, the factual problem. The tax court found that there was no lease agreement, and that finding was not clearly erroneous. *See Ocmulgee Fields*, 613 F.3d at 1364. Indeed, Clay and Osceola have not pointed to anything in the record even resembling a lease agreement. And a closer look reveals why: no lease ever existed. Consider the ordinance that funds the Tribe's per capita payment scheme. That ordinance says that the casino "shall be subject to a gross receipts tax"—it never says anything about a lease. And the casino's financial statements reinforce that point. Those

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[4] At one point, Clay and Osceola contend that the Tribe's chairman is the Secretary of the Interior's "designated representative," and that he was therefore entitled to interpret the Settlement Act as exempting from taxation "all lands of the Tribe." Even assuming the chairman's status as a "designated representative," we find no support for his claimed authority to definitively interpret unambiguous acts of Congress. And the only two provisions they cite say nothing of the sort. The first is 25 U.S.C. § 2. That provision just confers on the Commissioner of Indian Affairs general authority over "Indian affairs." And the second is a regulation permitting the Commissioner to "waive or make exceptions to his regulations" in certain circumstances. 25 C.F.R. § 1.2. But of course, the Settlement Act is a statute—not a regulation.

statements specifically confirm that "[n]o rental payment is currently required for the use of" the Tribe's land. It is hard to make a case that the payments were lease payments without a lease.

The second problem is a basic doctrinal one. Tax exemptions, as we said earlier, must be "clearly expressed." *Capoeman*, 351 U.S. at 6, 76 S.Ct. 611. That means "clear statutory guidance" is required. *Mescalero*, 411 U.S. at 156, 93 S.Ct. 1267. But Clay and Osceola have not identified any statutory exemption for lease payments. They instead assert that revenue from the "leasing of undeveloped Tribal lands has always been considered tax exempt," and that development makes no difference for the application of that rule. They cite a handful of revenue rulings to support this claim.

Revenue rulings, of course, are not binding authorities. *Batchelor-Robjohns v. United States*, 788 F.3d 1280, 1297 (11th Cir. 2015). But even if we were obligated to follow them, the rulings cited here offer no aid. To begin, two of the rulings have nothing at all to do with leases. The first notes that payments to members of tribal councils for their services are not "wages" for some purposes. Rev. Rul. 59-354, 1959-2 C.B. 24. The second deals with "lands held in trust by the United States Government for the Sac and Fox Indians." Rev. Rul. 63-244, 1963-2 C.B. 21. And the others, by contrast, do mention "rentals." *See* Rev. Rul. 56-342, 1956-2 C.B. 20; Rev. Rul. 67-284, 1967-2 C.B. 55. But they do so in the context of *Squire v. Capoeman*, a Supreme Court decision holding that income "derived directly" from lands allotted under the General

Allotment Act of 1887 is exempt from taxation.[5] 351 U.S. at 9, 76 S.Ct. 611 (quotation omitted); Pub. L. No. 49-105, 24 Stat. 388. *Capoeman*'s holding on that issue cannot apply here though—Miccosukee lands have never been allotted, under the General Allotment Act or otherwise. And again, we have already held that casino revenues do "not derive directly from the land" anyway. *Jim*, 891 F.3d at 1250 n.17. So this argument misses the mark legally as well as factually.

* * *

The Miccosukee leadership correctly predicted that its members would face "problems" with the IRS if the agency learned of the Tribe's unreported payments. Because Clay and Osceola have not identified any applicable tax exemptions, the judgments of the tax court are **AFFIRMED**.

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[5] The General Allotment Act sought to "allot" tribal lands—that is, parcel them "into smaller lots owned by individual tribe members." *McGirt v. Oklahoma*, —— U.S. ——, 140 S. Ct. 2452, 2463, 207 L.Ed.2d 985 (2020).

UNITED STATES TAX COURT

James CLAY, Audrey Osceola, Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Nos. 13104-11, 7870-13

Filed: April 24, 2019

Before Hon. Cary Douglas Pugh

1. Opinion

PUSH, Judge:

In notices of deficiency dated March 4, 2011, and January 10, 2013, respondent determined the following deficiencies and penalties:[1]

Year	Deficiency	Penalty sec. 6662(a)
2004	$ 192,215	$ 38,443
2005	310,171	62,034
2006	389,613	77,923

After concessions, the issues for decision are whether quarterly distributions, Christmas bonuses, and a miscellaneous payment to petitioners are income under section 61 for tax years 2004 through 2006 and

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[1] Unless otherwise indicated, all section references are to the Internal Revenue Code of 1986, as amended and in effect for the years in issue. Rule references are to the Tax Court Rules of Practice and Procedure. All monetary amounts are rounded to the nearest dollar.

whether petitioners are liable for accuracy-related penalties under section 6662(a) for tax years 2004 and 2005. These consolidated cases are lead cases for a larger group all with the common legal issue of the tax treatment of the distributions and Christmas bonuses (collectively, distributions).[2]

FINDINGS OF FACT

Some of the facts have been stipulated and are so found. The stipulated facts are incorporated in our findings by this reference. Petitioners James Clay and Audrey Osceola were residents of Florida when they timely filed their petitions.

I. The Miccosukee Tribe of Indians of Florida

The Miccosukee Tribe of Indians of Florida (Tribe) is a federally recognized tribe of Indians. The Tribe's members ratified and adopted its constitution on December 17, 1961, and it was approved by the Department of the Interior (DOI) on January 11, 1962. The constitution vests power and authority in the Miccosukee General Council (General Council), which includes all enrolled tribal members who are at least 18 years of age. The General Council has four "Regular General Council Meetings" each year on the first Saturday of February, June, August, and November. Meetings of the General Council other than Regular General Council Meetings are called "Special General Council Meetings". Meetings of the General Council

[2] Sixteen related cases are bound by the outcome of these cases with respect to the taxability of the distributions. Those cases have been docketed under these numbers: 15157-10, 11729-11, 11750-11, 13105-11, 26196-11, 2805-12, 20038-12, 3157-13, 8075-13, 20287-13, 22976-13, 25476-13, 25815-13, 26518-13, 26748-13, and 27734-13.

are recorded, transcribed, and approved by the General Council at the next meeting.

The Business Council controls the day-to-day operations of the Tribe, subject to the General Council's approval. The Business Council has five members, each elected to a four-year term by the General Council: the chairman, the assistant chairman, the secretary, the treasurer, and the lawmaker. The Business Council meets regularly, and the chairman only votes in the case of a tie. Billy Cypress served as chairman from 1987 through 2009 and was elected chairman again in 2016. As a function of his position as chairman of the Tribe, Mr. Cypress also acted as the Bureau of Indian Affairs (BIA) superintendent of the Tribe. The Tribe's primary operating bank account is its general account. All revenues not specifically allocated to another tribal account are deposited into this account, and the Tribe pays general operating expenses and capital improvement costs, among other expenses, from it.

A. Tribal Sales Tax

The General Council enacted a tribal sales tax on November 7, 1984. It was approved by the DOI on December 13, 1984. It applied to sales of goods and services or lease rentals by any business operating on the Tribe's reservation; these include a gas station, a gift shop, a restaurant, a tourist village, and an air boat tour business. The tax was passed on to customers and was reflected on the customers' receipts. The small businesses were only modestly profitable, and the tribal sales tax collected was used primarily to pay for trash pickup. The Tribe deposited the tribal sales tax revenue into a separate tribal bank account, not its general account. The Tribe distributed tribal sales tax

revenue to its members only once; each member received about $ 100.

B. The Tribe's Casino

On April 7, 1989, the Tribe entered into 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. The Tribe has never allotted any of its lands to tribal members.

The Tribe has conducted gaming activities at the Casino since September 15, 1990. The General Council created the Miccosukee Tribal Gaming Authority on August 9, 1991. The Tribe's relationship with TLP ended amid dispute and litigation, and the Tribe has operated the Casino under the supervision of the Miccosukee Tribal Gaming Authority since October 13, 1993. It now owns and controls the Casino.

After receiving land and cash as part of a 1996 settlement with the State of Florida, the Tribe built a parking lot on a six-acre portion contiguous to the land on which the Casino is located. The parking lot is free for patrons of the Casino. The Tribe also owns and operates several enterprises related to the Casino, including a hotel, a concert hall, a food court, a restaurant, and a gift shop. The Casino and its related enterprises operate on a fiscal year ending on June 30 of each year.

C. Taxation of the Casino

The Tribe agreed to waive taxes on the Casino's gross revenue until TLP recouped its investment, and the Tribe imposed no taxes on the Casino from its opening in 1990 until 1995. Effective January 1, 1995, the General Council imposed a 6.5% gross receipts tax on any amount received by the Casino, including wagers, admission fees, and the sales revenue of the Casino's related enterprises. The gross receipts tax is treated as an above-the-line expense of the Casino and its related enterprises. The Casino must estimate its gross receipts for each month on the last day of each month and pay the Tribe at least 90% of the tax on these gross receipts for that month using its estimate. The Casino then has 15 days after the end of the month to calculate the actual gross receipts and gross receipts tax for that month; and if the actual gross receipts tax exceeds what the Casino previously paid, it must pay that excess. The Casino receives a credit against future gross receipts tax if its estimate is greater than the actual gross receipts tax.

On February 27, 1995, after operations of the Casino were under the Tribe's control, Mr. Cypress directed the Tribe's finance director, Mike Hernandez, to open a checking account, called the nontaxable distribution revenue (NTDR) account, into which the Tribe would deposit the gross receipts tax revenue. Mr. Hernandez opened the NTDR account shortly thereafter, and the Tribe has deposited the gross receipts tax revenue into that account ever since. Most of the funds in the NTDR account came from the Casino although revenue from the Tribe's small businesses and land leases and easements was deposited there as well. What remained of the Casino's profits--after paying the gross receipts

tax and other expenses--was deposited into the Tribe's general account.

D. Distributions

The Tribe has made quarterly per capita distributions since at least 1989. Until 1995 the Tribe distributed funds to its members from its general account. The largest sources of this revenue were the Tribe's small businesses, land leases for cattle grazing, hunting camps, pipelines, and cell towers. Distributions made before the opening of the Casino were around $ 100 per member per quarter. The distributions grew considerably with the Casino's success.

The Tribe has made quarterly distributions to its members from the NTDR account since it was opened in 1995. The date of the quarterly distributions and the number of enrolled members is set at General Council meetings. Only enrolled members of the Tribe can participate in General Council meetings and receive distributions. One must have at least one Miccosukee parent to be an enrolled member in the Tribe. The amount of the distributions each quarter is determined by dividing the gross receipts tax revenue for that quarter by the number of enrolled members. Distributions to minor children generally go to their tribal member mother because the Tribe is matrilineal--membership in a clan within the Tribe is determined by a tribal member's mother--and the mother is generally the head of the household. The father generally receives only his distribution. The Tribe may deduct certain amounts from a member's quarterly distribution upon request or if the member participates in one of the Tribe's loan programs. The quarterly

distributions to a tribal member for the years at issue--2004, 2005, and 2006--were as follows:

Quarter	2004	2005	2006
First	$ 22,000	$ 27,500	$ 36,000
Second	23,000	32,000	40,000
Third	26,900	33,500	40,700
Fourth	27,600	33,500	41,700

Members could cash their distribution checks at any bank or at the tribal administration building for a 1% fee. At the encouragement of Mr. Cypress, most members chose to cash their quarterly distribution checks at the tribal administration building. The Tribe also opened investment accounts for its members with Smith Barney. These accounts allowed members to avoid certain requirements imposed on financial institutions while investing their otherwise idle cash and made it easier to make payments on large purchases, such as cars. Not every member chose to open a Smith Barney account. Those who did could request to have a portion of their quarterly distributions deposited into their Smith Barney accounts.

The Tribe also has paid its members Christmas bonuses since at least 2002. Christmas bonuses were paid from the Tribe's general account through 2005. The Tribe began paying Christmas bonuses from the NTDR account in 2006 because it was concerned that it would have to issue tax forms for distributions to members from the general account. The gross receipts tax rate was increased to 8% in 2006 to fund Christmas bonuses. The Christmas bonuses for 2004, 2005, and 2006 were $ 5,500, $ 6,000, and $ 7,000, respectively.

E. The Tribe's Tax Position

The Tribe has maintained since 1995 that its distributions are not taxable to members and need not be reported on their income tax returns. In a memorandum dated January 24, 1995, Mr. Cypress advised Mr. Hernandez that the tribal attorney has assured him that the distributions should not be reported on members' tax returns. Mr. Cypress continued that "I expect you, and your staff, to prepare tax returns for the members of the Tribe in accordance with, and relying on, our attorney's opinion." From 1995 through 2007 Mr. Cypress encouraged tribal members to cash their quarterly distribution checks at the tribal administration office and to omit quarterly distributions from credit applications to avoid inviting scrutiny from the Internal Revenue Service (IRS). He told the General Council that the tribal administration office denies knowledge of the quarterly distributions when lenders call to verify them. During a Special General Counsel Meeting on February 6, 2003, Mr. Cypress was recorded in meeting minutes as stating the following:

> Business Council has repeatedly asked that they do not claim the NTDR money as income on the credit applications but tribal members continue to do this. By doing this, tribal members run the risk of eventually having IRS problems. They (IRS) will see the money reported on their credit applications and start to tax them on it. The tribe has this money categorized as a license tax item in order to avoid IRS problems for tribal members. But with the actions of tribal members, this is being compromised.

The minutes go on to state that

> Chairman Cypress explained how the distribution was set up to avoid the government/IRS taxing us on the funds. Our plans for the distribution were set up when we started the gaming operation. These plans were sent to BIA for their review and were approved by the Department of Interior. If these monies were classified as per capita payment to tribal members then IRS could tax us but we do not classify it as such. But due to the actions of maybe two or three tribal members, all tribal members could be affected.

The minutes for this meeting also record the following comments by another tribal officer, Assistant Chairman Jasper Nelson: "When tribal members are asked to not divulge NTDR money, it is for their own good. He stated by doing this, it will give IRS the opportunity to find out about the money and tax us on it. This would jeopardize the livelihood of tribal members who depend on this money."

Minutes of a Special General Council Meeting on February 10, 2005, record Mr. Cypress stating that

> there are members who share information with non-Indians about the money they receive from the Tribe. The consequences these members are faced with as well as putting the rest of the Tribe in this predicament, they cannot blame anyone but themselves as these are the reason why we repeatedly stressed to tribal members to keep information to themselves.

In several General Council meetings in 1999, 2003, and 2006, Mr. Cypress and the Tribe's legal counsel, Dexter Lehtinen, also discussed the tax treatment of the neighboring Seminole tribe's distributions. They warned that the Tribe would be required to withhold tax on its distributions, like the Seminoles, if tribal members did not follow their directions. But in one General Council meeting in 2006, Mr. Cypress and Mr. Lehtinen distinguished the Tribe's distribution scheme from the Seminoles', explaining that the Seminoles' distributions were taxed because they were from net profits while the Tribe's distributions were nontaxable because they were from the gross receipts tax.

The Tribe requested a legal opinion in 2003 from its outside counsel, White & Case, on the taxability of the Tribe's distributions to its members and on the Tribe's compliance with the Indian Gaming Regulatory Act of 1988 (IGRA), Pub. L. No. 100-497, 102 Stat. 2467 (codified at 25 U.S.C. secs. 2701-2721 (2012)). This opinion stated that the distributions are taxable to tribal members. The Tribe opened a reserve account at or near the commencement of an IRS audit of the Tribe and the Casino around 2005. This reserve account was meant to prepare for the possibility that the Tribe would be required to make a payment to the IRS as part of a settlement on behalf of the Tribe relating to compliance with the IGRA or members relating to taxes on distributions.

II. Petitioners' Distributions and Income Tax Returns

Ms. Osceola grew up on the reservation and went to elementary school there but stopped attending school after fifth grade. She was employed by several businesses around the reservation but had not been

employed for over 20 years as of the time of trial. Mr. Clay grew up in a village outside the reservation. He never attended school and only became an enrolled member of the Tribe in 2005 to secure medical care for his mother. Petitioners speak Miccosukee as their primary language and testified at trial with the help of an interpreter.

Petitioners received quarterly distributions for each of the years at issue determined by the number of enrolled members in their family. Ms. Osceola received her distributions as well as those of her dependent children. Her net distributions after deductions for housing and loan repayment--during the years in issue--were as follows:

Distribution	2004	2005	2006
First quarter	$ 131,850	$ 128,400	$ 215,700
Second quarter	128,020	181,030	239,700
Third quarter	123,530	200,700	243,900
Fourth quarter	128,900	200,700	249,900
Christmas bonus	27,500	36,000	42,000

Ms. Osceola cashed her distribution checks at the tribal administration office during the years in issue. She did not give each of her children their distributions after collecting them; rather, she kept them and spent them on family expenses as she determined necessary. In addition to the distributions, Ms. Osceola received a miscellaneous payment from the Tribe of $ 1,295 in

2006.[3] The Tribe made this payment out of the general account.

Mr. Clay did not receive distributions until he became an enrolled member of the Tribe in the second quarter of 2005. Mr. Clay received net distributions during the years at issue in the following amounts:

Distribution	2005	2006
First quarter	---	$ 36,000
Second quarter	$ 32,000	40,000
Third quarter	33,500	40,700
Fourth quarter	33,500	41,700
Christmas bonus	6,000	7,000

Petitioners were married during the years at issue, and they filed a joint Form 1040, U.S. Individual Income Tax Return, for each of those years. Omar Barrera, an accountant in Gainesville, Florida, prepared petitioners' Forms 1040 for the years in issue. Petitioners reported five of their children as dependents for each of the years in issue for a total of seven exemptions. None of their dependent children filed income tax returns for the years at issue. Petitioners provided Mr. Barrera with Forms W-2G, Certain Gambling Winnings, for the years in issue for purposes of preparing their Forms 1040 and reported gaming income and losses on their Form 1040 for each year. However, petitioners did not report their quarterly distributions or Christmas bonuses on their

[3] As a result of an error, respondent determined the deficiency for tax year 2006 after including a miscellaneous payment of $ 1,200 in the notice of deficiency rather than one of $ 1,295. Respondent concedes the $ 95 that was omitted in the notice of deficiency.

Forms 1040 for the years in issue. Petitioners never disclosed their quarterly distributions or Christmas bonuses to Mr. Barrera, and he never advised them on the taxability of their distributions.

III. IRS Audit of Petitioners' Returns

In 2010 the IRS audited dozens of returns filed by members of the Tribe who received distributions, in addition to petitioners.[4] On or before August 4, 2010, Supervisory Revenue Agent Anita D. Gentry prepared a memorandum regarding the "Miccosukee Project" giving preliminary approval for accuracy-related penalties for substantial understatements of income tax in cases developed for members of the Tribe, to be placed behind penalty workpapers in each case file. On September 13, 2010, the agent examining petitioners' returns sent them a revenue agent report (RAR), Form 4549-A, Income Tax Discrepancy Adjustments, containing proposed adjustments for 2004 and 2005, along with Form 872, Consent to Extend the Time to Assess Tax. While the record does not include a final copy of what was sent to petitioners (respondent states that the RAR is included as part of the notice of deficiency), the agent's notes indicate that there was a "30-day letter" giving petitioners the option to file a protest and request a conference before the IRS Office of Appeals (Appeals) within 30 days.[5]

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[4] As we explain infra Section IV, we are reopening the record to include certain exhibits relevant to respondent's penalty determination.

[5] The examining officer's activity record entry for October 18, 2010, after the expiration of the 30-day period, states: "Prepared case to send to review. Printed work papers, unagreed report and

On October 18, 2010, the agent sent the case to Ms. Gentry for review. Ms. Gentry spent between 5 and 15 minutes reviewing the case before approving the penalties that day. A Civil Penalty Approval Form dated August 22, 2010, and bearing the typewritten initials "AG" dated October 18, 2010, indicates that "Substantial Understatement" and "Other Accuracy Related" penalties were approved for 2004 and 2005. "Negligence" penalties were not approved for those years. Ms. Gentry based her review on an August 9, 2010, memorandum and calculations prepared by the agent recommending application of the six-year statute of limitations under section 6501(e) (because petitioners omitted more than 25% of their income), and photocopies of distribution checks to petitioners.

Respondent issued a notice of deficiency to petitioners on March 14, 2011, determining deficiencies and penalties for negligence and substantial understatement of tax for tax years 2004 and 2005. Respondent issued a second notice of deficiency on January 10, 2013, determining deficiencies and penalties for negligence and substantial understatement for tax year 2006.

OPINION

I. Burden of Proof

Ordinarily, the burden of proof in cases before the Court is on the taxpayer. Rule 142(a)(1); Welch v. Helvering, 290 U.S. 111, 115, 54 S.Ct. 8, 78 L.Ed. 212 (1933). Under section 7491(a), in certain circumstances the burden of proof may shift from the taxpayer to the

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90 day 886A". And the entry for March 11, 2011, states in part: "No protest. SND needs to be prepared for 2004 and 2005."

Commissioner. Petitioners have not claimed or shown that they meet the specifications of section 7491(a) to shift the burden of proof to respondent as to any relevant factual issue.

II. Posttrial Briefing Issues[6]

A. Respondent's Motion To Strike

Rule 52 provides that the Court can strike from any brief "any insufficient claim or defense or any redundant, immaterial, impertinent, frivolous, or scandalous matter." Respondent requests that we strike from petitioners' simultaneous reply brief arguments relating to: (1) the "General Welfare Doctrine" because petitioners conceded this issue before trial;[7] (2) the Per Capita Act of 1983, Pub. L. No.

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[6] We address each of petitioners' and respondent's motions to reopen the record with respect to our decision in Graev v. Commissioner (Graev III), 149 T.C. 485 (2017), supplementing and overruling in part Graev v. Commissioner (Graev II), 147 T.C. 460 (2016) infra Section IV.

[7] We will use the term the "General Welfare Doctrine" as shorthand for arguments relating to Rev. Rul. 2005-46, 2005-2 C.B. 120; Rev. Proc. 2014-35, 2014-26 I.R.B. 1110 (applicable in tax years for which the period of limitations under sec. 6511 had not expired); and the Tribal General Welfare Exclusion Act of 2014, Pub. L. No. 113-168, sec. 2(a), 128 Stat. at 1883 (codified as amended at sec. 139E, and applicable in tax years for which the period of limitations under sec. 6511 had not expired.) Tribal General Welfare Exclusion Act, sec. 2(d)(1), 128 Stat. at 1884.

Sec. 139E(a) provides that gross income does not include the value of any Indian general welfare benefit. Indian general welfare benefits include payments to and services provided to or on behalf of a member of an Indian tribe pursuant to an Indian tribal program. Sec. 139E(b). However, the income is only excluded if (1) the program is administered under specific guidelines and does

98-64, 97 Stat. 365 (codified at 25 U.S.C. secs. 117a-117c (2012)) and the Indian Land Consolidation Act, Pub. L. No. 97-459, sec. 211, 96 Stat. at 2519 (codified at 25 U.S.C. sec. 2210 (2012)), because petitioners abandoned these arguments by omitting them from their opening brief; and (3) two documents petitioners rely on in support of their proposed findings and argument, because they were not in evidence.

Motions to strike are generally disfavored by Federal courts. Estate of Jephson v. Commissioner, 81 T.C. 999, 1001 (1983); Allen v. Commissioner, 71 T.C. 577, 579 (1979). "A motion to strike should be granted only when the allegations have no possible relation to the controversy. When the court is in doubt whether under any contingency the matter may raise an issue, the motion should be denied." Estate of Jephson v. Commissioner, 81 T.C. at 1001 (quoting Samuel Goldwyn, Inc. v. United Artists Corp., 35 F.Supp. 633, 637 (S.D.N.Y. 1940)). In addition, if "the subject of the motion involves disputed and substantial questions of law, the motion should be denied and the allegations should be determined on the merits." Id. And "a motion to strike will usually not be granted unless there is a showing of prejudice to the moving party." Id.; see also Pony Creek Cattle Co. v. Great Atl. & Pac. Tea Co. (In re Beef Industry Antitrust Litigation), 600 F.2d 1148, 1168-1169 (5th Cir. 1979) ("[U]nnecessary evidentiary details are usually not stricken from the

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not discriminate in favor of tribal leadership and (2) the benefits are available to any member who meets the guidelines, are for the promotion of general welfare, are not lavish or extravagant, and are not compensation for services. Id.

complaint unless prejudicial or of no consequence to the controversy[.]").

1. Issues Included in the Stipulation of Settled Issues

Our Rules require parties "to stipulate, to the fullest extent to which complete or qualified agreement can or fairly should be reached, all matters not privileged which are relevant to the pending case, regardless of whether such matters involve fact or opinion or the application of law to fact." Rule 91(a)(1). Before trial the parties filed a stipulation of settled issues stating that "petitioners concede that the quarterly and Christmas distributions at issue in this case are not tax-exempt general welfare payments as described in Rev. Rul. 2005-46, 2005-2 C.B. 120; Rev. Proc. 2014-35, 2014-26 I.R.B. 1110; or I.R.C. § 139E." Our Rules are explicit about the binding nature of stipulations. "A stipulation shall be treated * * * as a conclusive admission by the parties to the stipulation, unless otherwise permitted by the Court or agreed upon by those parties." Rule 91(e); see also Enis v. Commissioner, T.C. Memo. 2017-222, at *4, n.3. "The Court will not permit a party to a stipulation to qualify, change, or contradict a stipulation in whole or in part, except that it may do so where justice requires." Rule 91(e); Bail Bonds by Marvin Nelson, Inc. v. Commissioner, 820 F.2d 1543, 1547 (9th Cir. 1987) ("A stipulation will generally be enforced unless manifest injustice would result."), aff'g T.C. Memo. 1986-23.

Petitioners have not shown any reason why we should release them from their stipulation. This is not a circumstance of a stipulated fact's being contradicted by other facts in the record. See, e.g., Jasionowski v.

Commissioner, 66 T.C. 312 (1976). Rather this was a strategic decision before trial not to pursue an argument that then shaped the parties' trial presentations. In fact, counsel for petitioners even used the stipulation as a basis for objecting to questions asked by respondent's counsel, stating at trial that "this is not a general welfare case." It would be prejudicial to allow petitioners to duck questions at trial about an issue on the basis that they have abandoned it, only to revive the dispute on brief. However, as we discuss infra Section III.A, we are not the first court to consider this issue. The U.S. Court of Appeals for the Eleventh Circuit, to which these cases are appealable absent stipulation to the contrary, see sec. 7482(b), has ruled that section 139E does not provide a tax exemption for the distributions, see United States v. Jim, 891 F.3d 1242 (11th Cir. 2018); see also Golsen v. Commissioner, 54 T.C. 742, 756-757 (1970), aff'd, 445 F.2d 985 (10th Cir. 1971). Whether we deem petitioners to have abandoned the argument, strike the argument, or decide it on its merits following the U.S. Court of Appeals for the Eleventh Circuit, their argument is unavailing. We therefore will deny respondent's motion as to this issue and reject it on its merits.

2. Issues Not Raised in Petitioners' Opening Brief

We may consider an issue raised for the first time in a party's answering brief to be abandoned and conceded. See Dutton v. Commissioner, 122 T.C. 133, 142 (2004) ("Our practice is not to consider new issues raised for the first time in an answering brief."); Krause v. Commissioner, 99 T.C. 132, 177 (1992), aff'd sub nom. Hildebrand v. Commissioner, 28

F.3d 1024 (10th Cir. 1994). Petitioners did not raise the Per Capita Act of 1983 in their pretrial memorandum, at trial, or in their opening brief and, while they raised the Indian Land Consolidation Act in their pretrial memorandum, they did not raise it again until their reply brief. We therefore could deem petitioners to have abandoned arguments based on the Per Capita Act of 1983 and the Indian Land Consolidation Act. See Dutton v. Commissioner, 122 T.C. at 142; Krause v. Commissioner, 99 T.C. at 177. However, as we explain infra Section III. B and C, they do not provide a tax exemption for the distributions. We therefore will deny as moot respondent's motion as to these arguments.

3. Documents Not in Evidence

Petitioners rely on two documents not in evidence in their opening and reply briefs: a 1989 contract between the Tribe and TDC and a 1995 letter from the Tribe to the BIA's acting director, Frank Keel. Tacitly conceding that they cannot rely on facts not in evidence, petitioners counter respondent's motion to strike these two documents and petitioners' arguments based on them by moving to reopen the record to admit them into evidence. They argue that these documents should be admitted to "clarify and confirm testimonial evidence received by the Court at trial" and respond to issues raised by respondent in his opening brief.

The decision to reopen the record to admit additional evidence is within our broad discretion. Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 331-332, 91 S.Ct. 795, 28 L.Ed.2d 77 (1971); Butler v. Commissioner, 114 T.C. 276, 286-287 (2000), abrogated on other grounds, Porter v.

Commissioner, 132 T.C. 203 (2009); see also SEC v. Rogers, 790 F.2d 1450, 1460 (9th Cir. 1986) (citing Zenith Radio Corp., 401 U.S. at 332, 91 S.Ct. 795), overruled on other grounds, Pinter v. Dahl, 486 U.S. 622, 108 S.Ct. 2063, 100 L.Ed.2d 658 (1988). The Court of Appeals for the Eleventh Circuit considers four factors in determining whether to reopen the record: (1) the timeliness of the motion to reopen the record, (2) the character of the testimony to be offered, (3) the effect of granting the motion to reopen to record, and (4) the reasonableness of the request to reopen the record. United States v. Byrd, 403 F.3d 1278, 1284 (11th Cir. 2005); Dynamo Holdings Ltd. P'ship v. Commissioner, 150 T.C. ——, —— – ——, 2018 WL 2106443 *3–4 (May 7, 2018).

The third factor--the effect of reopening the record--is most relevant here. We will not reopen the record to admit these documents because we find that they are cumulative and would not change the outcome of the case. They do not bear on the outcome of either of the issues in this case: whether the distributions are taxable to petitioners and whether petitioners are liable for accuracy-related penalties. Therefore we will deny petitioners' motion to reopen the record to admit these two documents and will grant respondent's motion to strike those portions of petitioners' brief that rely on them.[8]

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[8] In violation of Rule 151(e)(3), petitioners' opening brief does not cite, in support of their proposed findings of fact, any evidence that was admitted. This is surprising especially because at the end of trial we discussed posttrial briefs with the parties. Nor did their reply brief comply with our Rules. Thus, these posttrial briefing issues appear to be part of a pattern of disregarding our Rules. Lack of familiarity with this Court and lack of resources are

B. Petitioners' Motion To Amend the First Stipulation of Facts

Petitioners also move to amend four paragraphs of the first stipulation of facts to correct what they contend are factual errors. We may amend a stipulation when "to accept * * * [the unamended stipulation] would have been manifestly unjust or if the evidence contrary to the stipulation was substantial." Loftin & Woodard, Inc. v. United States, 577 F.2d 1206, 1232 (5th Cir. 1978); see Rule 91(e). Petitioners' proposed amendments are belated wording tweaks to bolster their posttrial arguments and do not change our conclusions on the legal issues before us. In addition, petitioners have not identified any manifest injustice or substantial evidence that contradicts the stipulations they seek to amend. Therefore, we will deny their motion to amend the first stipulation of facts.

III. Taxability of Distributions to Tribal Members

Section 61 provides that "gross income means all income from whatever source derived" unless an exception is provided. The Supreme Court stated that gross income comprises all "accessions to wealth, clearly realized, and over which the taxpayers have

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unappealing excuses for failure to read and comply with our Rules and are no excuse for failure to heed discussions with the Court on the record with a transcript to remind the parties of those discussions. Brewer Quality Homes, Inc. v. Commissioner, T.C. Memo. 2003-200, 2003 WL 21545886, at *1 n.3 ("[Petitioners'] counsel is put on notice that (1) the Rule is designed both to facilitate the work of the Court and also to provide a 'level playing field' to the parties, and (2) the Court will be inclined to impose formal sanctions in the event of future similar violations."), aff'd, 122 F. App'x 88 (5th Cir. 2004).

complete dominion." Commissioner v. Glenshaw Glass Co., 348 U.S. 426, 431, 75 S.Ct. 473, 99 L.Ed. 483 (1955). Individual tribal members are subject to Federal income taxation unless a treaty or an Act of Congress provides an exemption. Squire v. Capoeman, 351 U.S. 1, 6, 76 S.Ct. 611, 100 L.Ed. 883 (1956). An exemption from income tax must be clearly expressed. Id.; Holt v. Commissioner, 44 T.C. 686, 690 (1965), aff'd, 364 F.2d 38 (8th Cir. 1966). We cannot create a tax exemption by implication. Hoptowit v. Commissioner, 78 T.C. 137, 142 (1982), aff'd, 709 F.2d 564 (9th Cir. 1983); Jourdain v. Commissioner, 71 T.C. 980, 990 (1979), aff'd, 617 F.2d 507 (8th Cir. 1980).

The parties first dispute whether the distributions are made from net gaming revenues taxable under the IGRA. The IGRA provides that as a condition of making per capita payments to tribal members out of net gaming revenues from a Class II gaming facility, "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. sec. 2710(b)(3)(D). Petitioners argue that the distributions are from leases of land (and also, as noted above, that they are exempt from tax under the General Welfare Doctrine). Irrespective of whether the distributions come from net gaming revenues or leasing revenues, if petitioners can identify no exception from gross income, then they are taxable. We do not find any real dispute between the parties on the facts, although the parties strongly disagree over how to characterize the source of these distributions.

A. IGRA

We are not the first court to consider petitioners' arguments that the distributions are not net gaming revenues and that the General Welfare Doctrine exempts them from taxation.[9] The U.S. Court of Appeals for the Eleventh Circuit recently ruled on a case regarding the taxability of distributions to another member of the Miccosukee Tribe, Sally Jim. Jim, 891 F.3d 1242. In that case, the Government moved for summary judgment that the distributions to Ms. Jim, which were derived from gaming proceeds, were not exempt from taxation as general welfare payments or income from the land. United States v. Jim, No. 14-22441, 2016 WL 6995455 (S.D. Fla. Aug. 19, 2016). The Tribe intervened.

The District Court granted the Government's summary judgment motion in part but held that material disputes of fact remained over how much of the distribution was from nongaming revenue and whether Ms. Jim was taxable on the entire distribution, including the amounts she received that were attributable to her family members. After a bench trial, the court concluded that no exemption applied to the income. Id.

On appeal, the Court of Appeals affirmed that section 139E does not exempt per capita payments from gaming revenue designated as taxable by the IGRA. Jim, 891 F.3d 1242. It also rejected the argument that the distributions were out of gross revenue, not net revenue, and therefore were not

[9] As noted above, before trial, petitioners conceded that the distributions were not general welfare payments.

subject to the IGRA.[10] Id. at 1250 n.17. And it quickly rejected the argument that the distributions were exempted from tax by the Miccosukee Settlement Act of 1997 (Miccosukee Settlement Act), Pub. L. 105-83, sec. 707(c), 111 Stat. at 1624 (codified at 25 U.S.C. secs. 1750-1750e(c) (2006)). Jim, 891 F.3d at 1250 n.17.

We see no factual distinctions between the distributions to petitioners and to Ms. Jim and therefore hold that the distributions to petitioners are taxable under the IGRA.

B. Petitioners' Other Statutory Arguments

Petitioners made other arguments that were not considered (or were considered only briefly) by the Court of Appeals. Petitioners point to three Acts of Congress that they maintain exempt the Tribe's distributions from Federal income taxation: the Miccosukee Settlement Act; the Act of Oct. 17, 1975, Pub. L. No. 94-114, sec. 6, 89 Stat. at 579 (codified at 25 U.S.C. sec. 459e (2006));[11] and the

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[10] Even accepting petitioners' claim that the gross receipts tax is a continuation of the tribal sales tax adopted in 1984, as the Court of Appeals concluded, the gross receipts tax still is a mechanism for collecting gaming revenue from the Casino to fund per capita distributions to members eligible for no other exception to the definition of gross income, as we explain below. See United States v. Jim, 891 F.3d 1242, 1250 n.17 (11th Cir. 2015). We similarly reject petitioners' argument that distributions are not taxable because they were not out of net gaming revenue but rather were out of gross revenue.

[11] 25 U.S.C. sec. 459e has been reclassified as sec. 5506 of the same title.

Indian Land Consolidation Act.[12] None of these provisions would exempt the distributions from the IGRA. And even were we to conclude that the distributions were not out of net gaming revenue, none of those provisions apply to the land on which the Casino is located and, therefore, none exempt the distributions from Federal income tax.

The Miccosukee Settlement Act is the codification of the effects of the Tribe's 1996 settlement agreement with the State of Florida as it relates to the Federal Government. The Miccosukee Settlement Act sec. 707(c)(1)(A) addresses the tax effects of the settlement agreement, providing in relevant part that no money or land paid or conveyed to the Tribe "under this Act or the Settlement Agreement shall be taxable under Federal or State law." Petitioners contend that Miccosukee Settlement Act sec. 707(c) makes all of the Tribe's land tax exempt. However, the plain wording of the provision limits its application to "lands conveyed to the Miccosukee Tribe under this part or the Settlement Agreement". The Casino is not located on any of the land that the Tribe received in the settlement agreement. Therefore, the Miccosukee

[12] Petitioners take the position that no agency other than the BIA has any authority to interpret or apply Federal law, treaties, or other matters arising out of Indian affairs, including the taxation of the tribes and their members. Petitioners cite no cases, nor did we find any support for such a broad interpretation of the authority given to the BIA by statute. And certainly a statutory grant of authority to the BIA to interpret the statutes could not supplant our role or the role of other courts to interpret and apply these provisions.

Settlement Act does not provide an exemption from tax for petitioners' distributions.[13]

Petitioners also contend that 25 U.S.C. sec. 459e exempts their distribution from taxation. That section provides a tax exemption to any land conveyed pursuant to subchapter IV of title 25, which relates to the conveyance of submarginal land to Indian tribes. 25 U.S.C. secs. 459-459e. It provides that any land conveyed to Indian tribes under that subchapter and any distribution of gross receipts derived from those lands are exempt from Federal, State, and local taxation. Id. sec. 459e. And 25 U.S.C. sec. 459a provides a list of the specific properties conveyed under that subchapter to specific tribes but the Tribe is not included in that list. Thus, 25 U.S.C. sec. 459e does not apply to the land on which the Casino is located and does not exempt petitioners' distributions from tax.

Finally, petitioners contend that the Indian Land Consolidation Act provides a tax exemption for the distributions.[14] The Indian Land Consolidation Act allows Indian tribes to enter into a "land consolidation plan providing for the sale or exchange of any tribal lands or interest in lands for the purpose of eliminating undivided fractional interests in Indian trust or restricted lands or consolidating its tribal land

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[13] While the Miccosukee Settlement Act may apply to the land on which the parking lot is built, the Tribe does not charge a fee for use of the parking lot so the parking lot does not provide another revenue source for the distributions.

[14] As noted above, petitioners raised this argument only in their reply brief, and respondent argues petitioners should be deemed to have abandoned it.

holdings". Id. sec. 2203(a). Title 25 U.S.C. sec. 2210 provides that land or interests in land acquired by the Federal Government for an Indian or an Indian tribe as part of a consolidation plan under the Indian Land Consolidation Act is exempt from Federal, State, and local taxation. The Casino is located on land purchased by TDC and placed into trust for the Tribe; there is no evidence that the land or an interest in the land was acquired as part of a consolidation plan under the Indian Land Consolidation Act. Thus, 25 U.S.C. sec. 2210 does not apply to the Tribe's land and does not exempt the distributions from tax.

Petitioners are correct that to the extent possible we resolve ambiguities in treaties and statutes in favor of Indians and construe Indian treaties in the sense in which the Indians understood them. See Capoeman, 351 U.S. at 6-7, 76 S.Ct. 611; Choctaw Nation of Indians v. United States, 318 U.S. 423, 432, 63 S.Ct. 672, 87 L.Ed. 877 (1943). However, this rule of construction "comes into play only if such statute or treaty contains language which can reasonably be construed to confer income exemptions." Holt v. Commissioner, 364 F.2d at 40. This is not the case with the three provisions to which petitioners have pointed. "We are not free to create, by implication, a tax exemption for petitioner[s]." Hoptowit v. Commissioner, 78 T.C. at 142. Furthermore, we do not agree with petitioners' contention that we must accept Mr. Cypress' interpretation of these statutes as he was the BIA Superintendent, regardless of whether or to

what extent he is a delegate of the Secretary of the Interior.[15]

C. Distributions Not Directly Derived From the Land

Petitioners next contend that the distributions are exempt from Federal tax because they are derived directly from tribal lands. They base this argument on Capoeman and on the Per Capita Act of 1983 and/or the Land Consolidation Act (which we addressed above).[16] The Supreme Court held in Capoeman, 351 U.S. at 10, 76 S.Ct. 611, that the General Allotment Act provided the noncompetent Indian[17] taxpayer an exemption for proceeds directly derived from his allotted parcel of reservation land--in that case, proceeds from the sale of standing timber on his allotment. Here, the Tribe has not made any

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[15] Petitioners have not presented any evidence that Mr. Cypress was delegated any authority by the Secretary of the Interior by virtue of his position as superintendent. Even if we assume that the Secretary of the Interior has delegated Mr. Cypress some authority, we are not bound to his informal interpretations of the statutes and regulations concerning the Tribe and Indians more generally. Moreover, his interpretations of these statutes are contradicted by the statutes' plain meaning, and we do not find them to be persuasive.

[16] Again, this is an argument that petitioners raised only in their reply brief, and respondent argues petitioners should be deemed to have abandoned it.

[17] A noncompetent Indian, in this context, is a member of a tribe who received an allotment of land that is held in trust for him or her by the Federal Government and who, under the terms of General Allotment Act, was prohibited from alienating or encumbering the land with the Federal Government's consent. Hoptowit v. Commissioner, 78 T.C. 137, 138 n.2 (1982), aff'd, 617 F.3d 507 (8th Cir. 1980).

allotments of land to its members. See Fry v. United States, 557 F.2d 646, 648 (9th Cir. 1977); Perkins v. Commissioner, 150 T.C. ——, 2018 WL 1146343 *5 (Mar. 1, 2018); Holt v. Commissioner, 44 T.C. at 691.

The Per Capita Act of 1983 permits tribes to make to members per capita payments of funds held in trust by the Secretary of the Interior. 25 U.S.C. sec. 117a. Per capita distributions made under the Per Capita Act of 1983 are exempt from Federal and State tax. Id. sec. 117b(a) (referencing the Act of Oct. 19, 1973, Pub. L. No. 93-134, sec. 7, 87 Stat. at 468). However, not all per capita distributions qualify for the Per Capita Act's tax exemption; the funds must come from approved sources and be distributed from qualifying accounts. 25 C.F.R. secs. 115.701-703 (2001). Petitioners argue that the NTDR account is a qualifying account and the gross receipts tax revenue is an approved source, specifically that it was derived directly from tribal lands.

The U.S. Court of Appeals for the Eleventh Circuit already has concluded that the Tribe's distributions to members come "from 'investment in ... improvements' on the land and 'business activities related to those assets,' namely gambling" and "therefore * * * [do] not derive directly from the land." Jim, 891 F.3d at 1250 n.17 (citations omitted; alteration in original). And we have held that income derived from a business on reservation land was not necessarily derived directly from the land. Hoptowit v. Commissioner, 78 T.C. at 145. We have limited our definition of income derived directly from the land to income earned through "exploitation of the land itself". Cross v. Commissioner, 83 T.C. 561, 566 (1984), aff'd sub nom. Dillon v. United States, 792 F.2d 849 (9th Cir. 1986); see also Stevens v. Commissioner, 452 F.2d 741 (9th Cir. 1971) (holding

that income from farming and ranching on taxpayer's allotted land is tax exempt), aff'g in part and rev'g in part 52 T.C. 330 (1969); Rickard v. Commissioner, 88 T.C. 188, 192 (1987) (holding that farming income on taxpayer's allotted land is tax exempt).

Our definition does not include income earned by use of the land along with capital assets and labor. Cross v. Commissioner, 83 T.C. at 566 (holding that income from operating a smokeshop on reservation land was not directly derived from the land); see also Critzer v. United States, 597 F.2d 708, 713-714 (Ct. Cl. 1979) (holding that neither income from operation of a motel, restaurant, gift shop, and apartment complex nor income from leases of buildings is directly derived from the land); Hoptowit v. Commissioner, 78 T.C. at 145 (holding that income from operating a smokeshop on reservation land was not directly derived from the land); Beck v. Commissioner, T.C. Memo. 1994-122 (holding that rental income from an apartment complex on tribal land is not derived directly from the land), aff'd, 64 F.3d 655 (4th Cir. 1995); Tonasket v. Commissioner, T.C. Memo. 1985-365 (holding that income from operating a smokeshop on the taxpayer's allotted land was not directly derived from the land).

We also have held that per capita payments of casino revenue are not directly derived from the land merely by virtue of the casino's location on tribal land. Doxtator v. Commissioner, T.C. Memo. 2005-113, 2005 WL 1163978, at *9; Campbell v. Commissioner, T.C. Memo. 1997-502, 1997 WL 690178, at *4 (holding that income from the operation of a casino on tribal land was not derived directly from the land), aff'd and remanded, 164 F.3d 1140 (8th Cir. 1999).

Petitioners argue that the distributions are directly derived from the land because they are, in substance, their share of rental payments that the Tribe receives for leasing Tribal land--owned communally by all members--to the Casino. They cite Rev. Rul. 56-342, 1956-2 C.B. 20, as support for their contention that their distributions are nontaxable. The revenue ruling lists "rentals (including crop rentals)" as income the IRS understands to be exempt as directly derived from the land under Capoeman. Id. But whether payments " 'were in fact rent instead of something else paid under the guise of rent' * * * is a question of fact to be resolved on the basis of all the facts and circumstances." K & K Veterinary Supply, Inc. v. Commissioner, T.C. Memo. 2013-84, at *26-*27 (quoting Place v. Commissioner, 17 T.C. 199, 203 (1951), aff'd, 199 F.2d 373 (6th Cir. 1952)).

We are not bound by a revenue ruling, but even if we found its analysis persuasive, the record does not support petitioners' recharacterization of the gross receipts tax as rent payments that fall outside the IGRA. See Webber v. Commissioner, 144 T.C. 324, 352-353 (2015) ("We are not bound by revenue rulings; under Skidmore, the weight we afford them depends upon their persuasiveness and the consistency of the Commissioner's position over time."). There is no written lease between the Tribe and the Casino, and the 1995 gross receipts tax ordinance makes no mention of a lease or the use of tribal land. Nor have we found any reference to a lease from the Tribe to the Casino in any of the General Council meeting minutes in the record.

To the contrary, the evidence in the record illustrates the Tribe's intention that the gross receipts tax be a tax

rather than rent payments. The 1995 gross receipts tax ordinance "declared * * * the intent of the Miccosukee Tribe of Indians of Florida that the * * * Miccosukee Indian Bingo & Gaming (MIBG) * * * shall be subject to a gross receipts tax." And if we regard the 1995 gross receipts tax as an application of the 1984 tribal sales tax to the Casino, the 1984 ordinance states that the Tribe is imposing the tax under its authority "to levy and collect assessments". In each the Tribe's financial statements for fiscal years 1995 through 2002, the gross receipts tax revenue is listed under the section "Owners Compensation Fees" rather than with the Tribe's leases. Finally, each of the Casino's financial statements from fiscal years 1995-1996 through 2005-2006 states that while the Casino is on the Tribe's land, "[n]o rental payment is currently required for the use of such land."

Petitioners have not shown that they are entitled to a tax exemption with respect to their distributions. Petitioners have not introduced any evidence or made any argument concerning the inclusion of the $ 1,200 miscellaneous payment to Ms. Osceola in 2006 in her gross income. And none of petitioners' arguments address the Christmas bonuses for 2004 and 2005, which were paid out of the Tribe's general account. Therefore, we also sustain respondent's determination that the Christmas bonuses and Ms. Osceola's miscellaneous payment are taxable under section 61.

Concluding that the Tribe's distributions are taxable to petitioners does not call into question the Tribe's sovereign authority to impose tax; nor does the Tribe's sovereign authority affect our analysis of the taxability of the distributions. That depends on the law and whether any exceptions to taxability apply.

IV. Underpayment Penalties

Section 6662(a) and (b)(1) and (2) imposes a penalty equal to 20% of the portion of an underpayment of tax required to be shown on the return that is attributable to "negligence or disregard of rules or regulations" and/or a "substantial understatement of income tax." Negligence includes "any failure to make a reasonable attempt to comply with the provisions of this title". Sec. 6662(c). An understatement of income tax is a "substantial understatement" if it exceeds the greater of 10% of the tax required to be shown on the return or $ 5,000. Sec. 6662(d). In the notices of deficiency, respondent determined both the negligence penalty and the substantial understatement penalty.

The Commissioner bears the burden of production with respect to an individual taxpayer's liability for a penalty and is required to present sufficient evidence showing that the penalty is appropriate. Sec. 7491(c); Higbee v. Commissioner, 116 T.C. 438, 446-447 (2001). To meet this burden for the substantial understatement penalty, the Rule 155 computations must confirm a substantial understatement. Sec. 7491(c). The Commissioner must also show that he complied with the procedural requirements of section 6751(b)(1). See sec. 7491(c); Graev v. Commissioner (Graev III), 149 T.C. 485, 492-493 (2017), supplementing and overruling in part Graev v. Commissioner (Graev II), 147 T.C. 460 (2016). Once the Commissioner meets his burden of production, the taxpayer bears the burden of proving that the Commissioner's determination is incorrect. Higbee v. Commissioner, 116 T.C. at 446-447.

A. Section 6751(b) Motions

Trial of this case was held, and the record was closed, before the issuance of our Opinion in Graev III. After the Court's decision in Graev III, we ordered respondent to file a response addressing the effect of section 6751(b) on these cases and directing the Court to any evidence of section 6751(b) supervisory approval in the record, and petitioners to respond. Respondent was unable to direct the Court to any evidence in the record that satisfies his burden of production with respect to section 6751(b)(1) and filed a motion to reopen the record to include two Civil Penalty Approval Forms accompanied by declarations from Ms. Gentry, one for both the 2004 and 2005 tax years and one for the 2006 tax year.

Petitioners did not oppose respondent's motion, but in their response they asked that they be "also given the opportunity to reopen the record to call witnesses who prepared and/or signed the declarations and penalty approval forms, or introduce other evidence bearing on the validity of such declarations and forms." They also raised issues with the documents respondent proffered in support of his compliance with section 6751(b).

We granted petitioners' request to conduct additional discovery regarding respondent's compliance with section 6751(b), including interrogatories. After that discovery, petitioners moved to reopen the record to include certain additional documents relating to respondent's review of the penalties, namely Ms. Gentry's August 4, 2010, memorandum, the agent's August 9, 2010, memorandum regarding the six-year statute of limitations, the agent's activity log, and respondent's responses to petitioners' interrogatories.

Respondent did not oppose that motion. We therefore will grant these two motions to reopen the record to admit evidence pertaining to 2004 and 2005. The parties also filed a stipulation of settled issues in which respondent conceded that he could not meet his burden of production as to the negligence penalty for 2004 and 2005, and that petitioners are not liable for the accuracy-related penalty for 2006. We therefore will deny respondent's motion as to evidence relating to penalty approval for 2006.

B. Petitioners' Section 6751(b) Arguments

Petitioners argue that (1) the supervisory approval for the 2004 and 2005 substantial understatement penalties was not timely and (2) the supervisor's review itself was not meaningful. Section 6751(b)(1) generally provides that no penalty shall be assessed unless the Commissioner shows that "the initial determination" of the assessment was "personally approved (in writing) by the immediate supervisor of the individual making such determination". The U.S. Court of Appeals for the Second Circuit held in Chai v. Commissioner, 851 F.3d 190, 221 (2d Cir. 2017), aff'g in part, rev'g in part T.C. Memo. 2015-42, that written approval is required no later than the issuance of the notice of deficiency rather than the assessment of the tax. In so holding, the court noted the ambiguity in the statute, as the IRS cannot determine an assessment. Id. at 218; see also Graev II, 147 T.C. at 512 (Gustafson, J., dissenting) ("One can determine whether to make an assessment, but one cannot 'determine' an 'assessment'."). Because Congress enacted section 6751(b) to ensure that "penalties should only be imposed where appropriate and not as a bargaining chip", Chai v. Commissioner, 851 F.3d at 219 (quoting S. Rept. No. 105-174, at

65 (1998), 1998-3 C.B. 537, 601), and because the taxpayer decides whether to petition the Tax Court after receiving the notice of deficiency, the court held that the IRS must obtain supervisory approval no later than the date the IRS issues the notice of deficiency, Chai v. Commissioner, 831 F.3d at 221. But left open was the question we face: whether approval can come after the agent sends the taxpayer proposed adjustments that include penalties. In other words, must an agent secure penalty approval before sending to the taxpayer written notice that penalties will be proposed, in this case in the form of a notice of proposed adjustment that gives the taxpayer right to appeal the proposed penalties with Appeals.

Petitioners argue that the initial determination of a penalty is "the first time an IRS official introduced the penalty into the conversation". See Graev III, 149 T.C. at 500, 501 (Lauber, J., concurring). They contend that the RAR contained the first suggestion of penalties, making the RAR--and not the notice of deficiency--the initial determination.

The RAR is the report sent to the taxpayer "indicating the adjustments to income as reported on the return and the nature of the adjustments * * * [the revenue agent] proposes to make." Branerton Corp. v. Commissioner, 64 T.C. 191, 194-195 (1975). When a 30-day letter is sent, the taxpayer may protest those adjustments at Appeals and a notice of deficiency may follow if the taxpayer does not protest the adjustments (or if the taxpayer and Appeals do not settle). See secs. 601.105(d), 601.106(b), Statement of Procedural Rules. The notice of deficiency is the means by which the Commissioner notifies the taxpayer that he has determined a deficiency. Sec. 6212(a). Once the IRS

determines a deficiency, including any penalties, the IRS can assess that deficiency unless the taxpayer timely petitions this Court for redetermination of that liability. See sec. 6213(a).

The determinations made in a notice of deficiency typically are based on the adjustments proposed in an RAR. See Branerton Corp. v. Commissioner, 64 T.C. at 194-195; Globe Tool & Die Mfg. Co. v. Commissioner, 32 T.C. 1139, 1141 (1959) ("[R]espondent sent to petitioner by registered mail a notice of deficiency determining deficiencies in income tax for the taxable years 1951 and 1952. * * * Said determination by respondent was based on the adjustments contained in the revenue agent's report[.]"); Fitzner v. Commissioner, 31 T.C. 1252, 1255 (1959) ("[I]t is obvious that petitioner * * * is relying upon the revenue agent's report of examination upon which respondent based his determination of deficiency."). And when those proposed adjustments are communicated to the taxpayer formally as part of a communication that advises the taxpayer that penalties will be proposed and giving the taxpayer the right to appeal them with Appeals (via a 30-day letter), the issue of penalties is officially on the table. See Palmolive Bldg Inv'rs, LLC v. Commissioner, 152 T.C. ——, ——, 2019 WL 994184, *7–9 (Feb. 28, 2019). Therefore, we conclude that the initial determination for purposes of section 6751(b) was made no later than September 13, 2010, when respondent issued the RAR to petitioners proposing adjustments including penalties and gave them the right to protest those proposed adjustments.

Next we consider when Ms. Gentry approved these penalties. Respondent does not contend that, nor do we consider whether, Ms. Gentry's August 4, 2010,

memorandum satisfies his burden; he directed us to the penalty approval form initialed by Ms. Gentry on October 18, 2010. We therefore hold that Ms. Gentry approved the penalty determinations for 2004 and 2005 on October 18, 2010--after the initial determination of proposed penalties had been communicated to petitioners--and therefore supervisory approval was not timely under section 6751(b).

Because we hold that respondent did not timely obtain written supervisory approval, we need not reach petitioners' second argument that Ms. Gentry failed to conduct a meaningful review.

Any contentions we have not addressed we deem irrelevant, moot, or meritless.

To reflect the foregoing,

Appropriate orders will be issued, and decisions will be entered under Rule 155.

25 U.S.C. § 2

§ 2. Duties of Commissioner

The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations.

25 U.S.C. § 2701

§ 2701. Findings.

The Congress finds that--

(1) numerous Indian tribes have become engaged in or have licensed gaming activities on Indian lands as a means of generating tribal governmental revenue;

(2) Federal courts have held that section 81 of this title requires Secretarial review of management contracts dealing with Indian gaming, but does not provide standards for approval of such contracts;

(3) existing Federal law does not provide clear standards or regulations for the conduct of gaming on Indian lands;

(4) a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government; and

(5) Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.

25 C.F.R. § 162.013

§ 162.013. Who is authorized to consent to a lease?

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

(b) The following individuals or entities may consent on behalf of an individual Indian landowner:

(1) An adult with legal custody acting on behalf of his or her minor children;

(2) A guardian, conservator, or other fiduciary appointed by a court of competent jurisdiction to act on behalf of an individual Indian landowner;

(3) Any person who is authorized to practice before the Department of the Interior under 43 CFR 1.3(b) and has been retained by the Indian landowner for this purpose;

(4) BIA, under the circumstances in paragraph (c) of this section; or

(5) An adult or legal entity who has been given a written power of attorney that:

(i) Meets all of the formal requirements of any applicable law under § 162.014;

(ii) Identifies the attorney-in-fact; and

(iii) Describes the scope of the powers granted, to include leasing land, and any limits on those powers.

(c) BIA may give written consent to a lease, and that consent must be counted in the percentage ownership described in § 162.012, on behalf of:

(1) The individual owner if the owner is deceased and the heirs to, or devisees of, the interest of the deceased owner have not been determined;

(2) An individual whose whereabouts are unknown to us, after we make a reasonable attempt to locate the individual;

(3) An individual who is found to be non compos mentis or determined to be an adult in need of assistance who does not have a guardian duly appointed by a court of competent jurisdiction, or an individual under legal disability as defined in part 115 of this chapter;

(4) An orphaned minor who does not have a guardian duly appointed by a court of competent jurisdiction;

(5) An individual who has given us a written power of attorney to lease their land; and

(6) The individual Indian landowners of a fractionated tract where:

(i) We have given the Indian landowners written notice of our intent to consent to a lease on their behalf;

(ii) The Indian landowners are unable to agree upon a lease during a 3 month negotiation period following the notice; and

(iii) The land is not being used by an Indian landowner under § 162.005(b)(1).

25 C.F.R. § 162.016

§ 162.016. Will BIA comply with tribal laws in making lease decisions?

Unless contrary to Federal law, BIA will comply with tribal laws in making decisions regarding leases, including tribal laws regulating activities on leased land under tribal jurisdiction, including, but not limited to, tribal laws relating to land use, environmental protection, and historic or cultural preservation.

25 C.F.R. § 162.018

§ 162.018. May tribes administer this part on BIA's behalf?

A tribe or tribal organization may contract or compact under the Indian Self–Determination and Education Assistance Act (25 U.S.C. 450f et seq.) to administer any portion of this part that is not an approval or disapproval of a lease document, waiver of a requirement for lease approval (including but not limited to waivers of fair market rental and valuation, bonding, and insurance), cancellation of a lease, or an appeal.

25 C.F.R. § 162.402

§ 162.402. Is there a model business lease form?

There is no model business lease form because of the need for flexibility in negotiating and writing business leases; however, we may:

(a) Provide other guidance, such as checklists and sample lease provisions, to assist in the lease negotiation process; and

(b) Assist the Indian landowners, upon their request, in developing appropriate lease provisions or in using tribal lease forms that conform to the requirements of this part.

25 C.F.R. § 162.420

§ 162.420. How much monetary compensation must be paid under a business lease of tribal land?

(a) A business lease of tribal land may allow for any payment amount negotiated by the tribe, and we will defer to the tribe and not require a valuation if the tribe submits a tribal authorization expressly stating that it:

(1) Has negotiated compensation satisfactory to the tribe;

(2) Waives valuation; and

(3) Has determined that accepting such negotiated compensation and waiving valuation is in its best interest.

(b) The tribe may request, in writing, that we determine fair market rental, in which case we will use a valuation in accordance with § 162.422. After providing the tribe with the fair market rental, we will defer to a tribe's decision to allow for any payment amount negotiated by the tribe.

(c) If the conditions in paragraph (a) or (b) of this section are not met, we will require that the lease provide for fair market rental based on a valuation in accordance with § 162.422.

25 C.F.R. § 290.2

§ 290.2. Definitions.

Appropriate Bureau official (ABO) means the Bureau official with delegated authority to approve tribal revenue allocation plans.

IGRA means the Indian Gaming Regulatory Act of 1988 (Public Law 100–497) 102 Stat. 2467 dated October 17, 1988, (Codified at 25 U.S.C. 2701–2721(1988)) and any amendments.

Indian Tribe means any Indian tribe, band, nation, or other organized group or community of Indians that the Secretary recognizes as:

(1) Eligible for the special programs and services provided by the United States to Indians because of their status as Indians; and

(2) Having powers of self-government.

Legal incompetent means an individual who is eligible to participate in a per capita payment and who has been declared to be under a legal disability, other than being a minor, by a court of competent jurisdiction, including tribal justice systems or as established by the tribe.

Member of an Indian tribe means an individual who meets the requirements established by applicable tribal law for enrollment in the tribe and—

(1) Is listed on the tribal rolls of that tribe if such rolls are kept or

(2) Is recognized as a member by the tribal governing body if tribal rolls are not kept.

Minor means an individual who is eligible to participate in a per capita payment and who has not reached the age of 18 years.

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

Resolution means the formal document in which the tribal governing body expresses its legislative will in accordance with applicable tribal law.

Secretary means the Secretary of the Interior or his/her authorized representative.

Superintendent means the official or other designated representative of the BIA in charge of the field office which has immediate administrative responsibility for the affairs of the tribe for which a tribal revenue allocation plan is prepared.

Tribal governing body means the governing body of an Indian tribe recognized by the Secretary.

Tribal revenue allocation plan or allocation plan means the document submitted by an Indian tribe that provides for distributing net gaming revenues.

You or your means the Indian tribe.

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4.88.1.4.1 (03-07-2019)

Guidelines for Per Capita Distribution Plans

1. In December 1992, the Department of Interior issued "Guidelines to Govern the Review and Approval of Per Capita Distribution Plans" (Guidelines). The guidelines, revised, effective April 1, 2014, give the procedures on the submission, review, and approval of tribal revenue allocation plans or ordinances for distributing net revenues from a gaming activity (Title 25, Chapter 1, Part 290). Under the guidelines:
    A. A tribal revenue allocation plan or ordinance (allocation plan) specifying the distribution of net gaming revenues must be approved by the Department of Interior if it gives sufficient detail to determine that it complies with the Guidelines and IGRA.
    B. The tribe must list a percentage breakdown of the uses for which the tribe intends to allocate its net gaming revenues and the allocation plan must state that the tribe plans to dedicate a significant portion of its net gaming revenues to one or more of the purposes in 25 U.S.C. Section 2710(b)(2)(B).
2. The Guidelines define "per capita" payments as those payments made or distributed to all members of the tribe or to identifiable groups of

members which are paid directly from the net revenues of any gaming activity.

3. Per capita payments don't include benefits for special purposes or programs, such as social welfare, medical assistance, or education. Even if a tribe improperly designates any of these benefits as per capita payments, it doesn't determine their tax status.