

UNITED STATES TAX COURT
WASHINGTON, DC 20217

JAMES CLAY & AUDREY OSCEOLA, ET)
AL.,) **SD**
)
Petitioners,)
)
v.) Docket No. 13104-11, 7870-13.
)
COMMISSIONER OF INTERNAL REVENUE,)
)
Respondent)
)

ORDER

Pending before the Court are two pre-trial matters: (1) respondent's motion for partial summary judgment, filed on September 9, 2016, and (2) motions concerning petitioners' subpoenas seeking testimony and production of documents from Chairman of the National Indian Gaming Commission Jonodev O. Chaudhuri, Assistant Secretary of Indian Affairs Kevin Washburn and Acting Assistant Secretary of the Interior Lawrence Roberts (the Interior witnesses).

Background

This case was set for trial at the Court's January 11, 2016, trial calendar in Miami, Florida. In advance of trial, petitioners issued subpoenas to the Interior witnesses on December 14, 2015. Petitioners filed a Motion to Enforce the Subpoena on December 18, 2015, and respondent filed a Motion in Limine to exclude that testimony on December 30, 2015.

On January 8, 2016, respondent filed a Motion to Quash or Modify Subpoena By Stephanie Sasarak on Behalf of Jonodev O. Chaudhuri, Kevin Washburn, and Larry Roberts as well as an Opposition to Motion to Enforce Subpoena Issued to Acting Assistant Secretary of the Interior Larry Roberts by Stephanie Sasarak on Behalf of Larry Roberts. In support of the motion to quash and the opposition to the motion to enforce, respondent submitted declarations of the Interior witnesses.

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In his motion to quash and his opposition to the motion to enforce, respondent argues that forcing high ranking government officials to appear for testimony is unduly burdensome and that the information requested is either not relevant or is a question of law that should be determined by the Court. After argument on the motions was heard on January 13, 2016, the parties were ordered to submit supplemental briefs on the issue. We did not receive petitioners' reply brief which was due on June 27, 2016, but were advised informally that the motions would be rendered moot by anticipated notices of deposition. To date, however, we have not received any filings relating to possible depositions of the Interior witnesses; nor have we received petitioners' reply brief. Instead, respondent filed the pending Motion for Partial Summary Judgment to which petitioners have responded. Against this procedural backdrop, we conclude that these motions are ripe for decision. We first decide respondent's motion for partial summary judgment.

Summary Judgment

Rule 121(b)¹ provides in part that after a motion for summary judgment and opposing response are filed: "A decision shall thereafter be rendered if the pleadings * * * and any other acceptable materials, together with the affidavits or declarations, if any, show that there is no genuine dispute as to any material fact and that a decision may be rendered as a matter of law." Summary judgment is intended to expedite litigation and avoid unnecessary and expensive trials. Fla. Peach Corp. v. Commissioner, 90 T.C. 678, 681 (1988).

Respondent's motion for partial summary judgment asks us to decide the central issue in the case: whether certain distributions from the Miccosukee Tribe of Florida to petitioners are taxable. Respondent argues that we need not determine whether the distributions are of gaming revenue to conclude that they are taxable under section 61. Petitioners argue that the distributions are not taxable citing a number of statutes, including the exclusion from gross income provided under section 139E (the Tribal General Welfare Exclusion Act of 2014, Pub. L. No. 113-168, 128 Stat. 1883).

¹ Unless otherwise indicated all rule references are to the Tax Court Rules of Practice and Procedure. All section references are to the Internal Revenue Code of 1986, as amended and in effect at all relevant times.

We conclude that applying the statutory provisions cited by petitioners would require us, at the least, to determine the source of the distributions to petitioners – whether from gaming revenue or from the land – which is in dispute. Further, we would require a trial as to factual disputes surrounding application of the exclusion under section 139E.² We also reject respondent’s argument that we should dismiss petitioners’ “new” arguments as improper because they were not included in the amended petition – especially given the delay, these arguments are no surprise to respondent and he has identified no prejudice.

Even were we to determine that the primary source of the distributions is gaming revenue and that the exclusion under section 139E does not apply³, we nonetheless would require a trial to determine other sources of funding which might cause some portion of the distributions to be nontaxable. In addition, petitioners claim that part of the disputed deficiency relates to distributions attributable to other family members, not petitioners.⁴ Lastly, even were we to grant respondent’s motion, a trial would be necessary to determine whether penalties should be imposed. For these reasons we hold that summary judgment is not appropriate at this time. Having determined that trial is necessary, we now turn to the subject of the testimony sought from the Interior witnesses.

² The Eleventh Circuit has yet to consider whether section 139E overrides the Indian Gaming Regulatory Act, 25 U.S.C. section 2701 et seq., which expressly treats “per capita” distributions of gaming revenue as taxable income, although it has expressed skepticism. See United States v. Billie, 611 F. App’x 608, 611-612 (11th Cir. 2015). The District Court of the Southern District of Florida has ruled in favor of the government, granting a motion for summary judgment that per capita distributions derived from gaming revenue are taxable income rather than general welfare payments. See United States v. Sally Jim, Dkt. no. 1:14-cv-22441-CMA, Order entered June 3, 2016. While we found the analysis by the district court helpful, it is not binding on us and, as trial will be required in any event, the benefit of granting respondent’s motion is diminished.

³ To be clear, we are reserving our ruling on both of these questions until after trial.

⁴ Our conclusion that summary judgment is not appropriate as to these two points is consistent with the conclusion of the district court in United States v. Sally Jim, Dkt. no. 1:14-cv-22441-CMA, Order entered June 3, 2016.

Interior Witnesses' Testimony

Petitioners argue that it is the responsibility of the Bureau of Indian Affairs (BIA) and the National Indian Gaming Commission (NIGC) to interpret all statutes and treaties under Title 25. They seek the testimony of the Interior witnesses to interpret the Indian Gaming Regulatory Act and its relevance to the Miccosukee Tribe. Petitioners have failed to demonstrate why this case presents an exception to the general rule that it is improper for witnesses to offer legal conclusions and to testify about domestic law. Laureys v. Commissioner, 92 T.C. 101, 127-129 (1989); see United States v. Oliveros, 275 F.3d 1299, 1306-1307 (11th Cir. 2001); Alumax v. Commissioner, 109 T.C. 133, 171 (1997); Konikov v. Orange County, Florida, 290 F. Supp. 2d 1315, 1317 (M.D. Fla. 2003). The Court has the authority to interpret the relevant statutes and it would be improper to permit these government witnesses to interpret the statutes for the Court and to opine on relevant questions of law. See United States v. Oliveros, 275 F.3d at 1306-1307 (11th Cir. 2001); Konikov v. Orange County, Florida, 290 F. Supp. 2d at 1317; see also Laureys v. Commissioner, 92 T.C. at 127-129. However, we make no ruling as to the proper scope of testimony by tribal witnesses as to their understanding of treaties and agreements. See United States v. Winans, 198 U.S. 371, 380-381 (1905).

Petitioners also argue that under Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837 (1984), this Court must defer to the BIA's determination as to whether the Miccosukee Tribe is engaged in gaming activity under Title 25. Petitioners argue that if the BIA has made a determination that the Miccosukee Tribe is not engaged in gaming activity as regulated under 25 USC section 2710 then this Court cannot hold that the distributions are derived from gaming revenue for purposes of section 61. But Chevron deference to agency interpretation only applies when "it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." United States v. Mead Corp., 533 U.S. 218, 226-227 (2001); see Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837 (1984). In this case no regulation or other rule making has been issued so there is no agency determination to which we could give deference.

Petitioners have not pointed to any questions of fact that the Interior witnesses could answer relevant to this case that cannot be established by less burdensome means. To the extent that petitioners seek testimony as to the status of any administrative determination regarding whether the Miccosukee Tribe is

engaged in gaming activity, the parties stated on the record at our January hearing that no enforcement actions have been taken. And the question before us (the taxability of the distributions) is different than the question before those agencies. Inaction by the Department of Interior or NIGC does not prove that the Miccosukee Tribe is not engaged in gaming activity for purposes of determining whether the distributions are taxable under the Internal Revenue Code. We must make that legal determination on the facts before us.

Upon due consideration and for cause, it is

ORDERED that petitioners' Motion to Enforce Subpoena is denied. It is further

ORDERED that respondent's Motion in Limine is granted. It is further

ORDERED that respondent's Motion for Partial Summary Judgment is denied. It is further

ORDERED that this case is set for a status report at the Court's Miami, Florida, trial session, scheduled to commence December 12, 2016 at 10:00 a.m. in Courtroom 1524, Claude Pepper Federal Building, 51 SW 1st Avenue, Miami, Florida 33130.

**(Signed) Cary Douglas Pugh
Judge**

Dated: Washington, D.C.
November 23, 2016