UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 14-22441-CIV-ALTONAGA/O'Sullivan

UNITED STATES OF AMERICA,

Plaintiff,

v.

SALLY JIM,

Defendant.
_____/

ORDER

THIS CAUSE came before the Court upon Plaintiff, United States of America's ("Plaintiff['s]") Third Renewed Motion for Summary Judgment . . . [ECF No. 156], filed on April 1, 2016. Defendant, Sally Jim ("Jim"), and Intervenor-Defendant, the Miccosukee Tribe of Indians of Florida ("the Tribe"), filed their Response . . . ("Response") [ECF No. 159], on April 22, 2016; Plaintiff filed its Reply . . . ("Reply") [ECF No. 160] on May 2, 2016. The Court has considered the parties' submissions,[1] the record, and applicable law.

I. BACKGROUND

Since approximately the 1960s, the Miccosukee Tribe of Indians of Florida has made quarterly assistance payments to its members to help them provide for their needs. (*See* Pl.'s SMF ¶ 8; *see also* Mot., Ex. 12, Deposition of Colley Billie ("Billie Deposition") [ECF No. 156-7] 61:7–64:11). The Tribe distributes these payments in the form of checks or cash issued in equal amounts to each tribal member, on a quarterly basis. (*See* Billie Dep. 60:3–20; *see also* Mot., Ex. 13, Deposition of Gabriel K. Osceola ("Osceola Deposition") [ECF No. 156-7] 87:22–

[1] Other documents include Plaintiff's Statement of Undisputed Facts ("Plaintiff's SMF") [ECF No. 156-1] and Jim and the Tribe's Response to United States' Statement of Undisputed Facts ("Defendants' SMF") [ECF No. 159-1].

23 ("We don't discriminate between member to member. Everybody gets the same.")). Originally, the payment amounts were small, starting at around $20–25 several times a year, gleaned from various forms of tribal revenue. (*See* Billie Dep. 61:16–23).

Around 1990, the Tribe started operating a gaming facility known as the Bingo Hall or Miccosukee Indian Bingo Gaming (hereinafter, the "Bingo Hall"), which offers class II gaming, including bingo, poker, and video pull-tab machines. (*See* Pl.'s SMF ¶ 9). The Bingo Hall began generating larger amounts of income, allowing the Tribe to distribute increased quarterly assistance payments to its members. (*See id*. ¶ 10). Currently, the Tribe's quarterly distributions can reach into tens of thousands of dollars per tribal member. (*See* Billie Dep. 69:18–70:15 (stating the distribution account generally contains between $17-20 million, and distributions are calculated by dividing this amount equally among the Tribe's approximately 600 members)).

On December 8, 1994, Congress added a provision to the Internal Revenue Code, requiring American Indian tribes to withhold federal income tax from any payment of net revenue from class II gaming. (*See* Mot. 4; *see also* 26 U.S.C. § 3402(r)). In response to this provision, Plaintiff asserts the Tribe "devised a scheme" to be able to argue its quarterly assistance payments did not constitute net revenue from gaming. (Pl.'s SMF ¶ 11). Specifically, the Tribe enacted a "gross receipts tax" or "gross receipts license fee," which it applied to its gaming facility. (*Id*.). This license fee is a percentage of the gross revenue of the Bingo Hall, and the Tribe places the fee into a non-taxable distributable revenue ("NTDR") account. (*See id*.).

Currently, the license fee is set at over 8% of the Bingo Hall's gross revenue. (*See id*. ¶ 12). The Tribe distributes its quarterly assistance payments to its members from this NTDR account. (*See id*. ¶ 12). The Tribe asserts these distributions are not taxable because they are

general welfare payments for the benefit of tribal members, as opposed to per capita distributions of net gaming revenue. (*See generally* Resp.).

The Tribe also places funds from other sources into the NTDR account, such as taxes assessed on other tribal businesses, shops, and fishing. (*See* Mot., Ex. 15, Deposition of Jose I. Marrero ("Marrero Deposition") [ECF No. 156-7] 154:12–17 ("Best of my recollection, there was [sic] other sources of funds that came revenues [sic], because there was a tax they assessed on other businesses, whether it was their . . . shops that they had or their fishing. Everything that generated revenues went into that account." (alteration added)); *see also* Billie Dep. 65:16–25 ("Into that [NTDR] account I know that we have money we collect from — from our rental of our radio towers and our land lease that we have for the purposes of cattle grazing, and other areas that we collect monies from." (alteration added)). Nevertheless, most of the funds in the NTDR account stem from gaming revenues. (*See* Marrero Dep. 155:12–18 ("[T]he revenue from gaming was significantly greater than the revenue from any other source." (alteration added)). Also, the Tribe often subsidized the non-gaming tribal businesses with gaming revenue in order to keep them afloat. (*See* Osceola Dep. 27:1–29:8). For example, in the year 2001, the non-gaming tribal enterprises would not have made a profit without the Tribe's assistance. (*See id*. 126:10–127:3).

From before 1995 to 2009, Billy Cypress ("Cypress") was chairman of the Tribe. (*See* Pl.'s SMF ¶ 19). At the Tribe's General Council meetings, Cypress often instructed tribal members not to claim the NTDR distributions as income. (*See* Mot., Ex. 6, Special General Council Meeting Minutes [ECF No. 156-5] L000443). In particular, Cypress told the Tribe members not to claim the NTDR money as income when applying for credit, and stated "if the [Internal Revenue Service] IRS were to find out about these monies then we could end up being

taxed . . . ." (*Id*. (alterations added)). Cypress also instructed members not to cash their distribution checks in places where they would be reported to the IRS. (*See* Mot., Ex. 8, Special General Council Meeting Minutes [ECF No. 156-6] SJ001412 ("[Chairman Cypress] stated the only way the tribal member's [sic] money will not be reported to the IRS is if they cash their checks at the Administration office, this is the only way they can be assured they will not be reported. He stated if a tribal member also has a banking account (with a substantial amount of money) then this too will be reported and the IRS will investigate into how the money was obtained." (alteration added))).

Cypress notified members the Tribe would keep a reserve should the members ultimately need to pay taxes on their distributions. (*See* Mot., Ex. 1, Special General Council Meeting Minutes [ECF No. 156-5] L000339). Dexter Lehtinen, former counsel to the Tribe, gave tribal members at General Council meetings legal advice that the Tribe's distributions were not taxable. (*See* Mot., Ex. 11, Deposition of Sally Jim ("Jim Deposition") [ECF No. 156-7] 76:5–23).

Sally Jim is a member of the Tribe. (*See* Defs.' SMF ¶ 3). Jim attended numerous General Council meetings and recalls Cypress making some of these statements. (*See id*. ¶ 15; *see also* Jim Dep. 60:25–62:3). Plaintiff asserts Jim received $272,000.00 in quarterly distributions from the Tribe in 2001. (*See* Pl.'s SMF ¶ 4). Jim admits receiving payments from the Tribe and states she used the money to provide for household expenses. (*See* Jim Dep. 41:16–42:2). Jim also worked for the Tribe's healthcare facility and received wages in the amount of $25,990 in 2001. (*See* Defs.' SMF ¶ 5). Jim did not timely file a tax return for the year 2001. (*See id*. ¶ 7). In January 2015, she attempted to submit a belated 2001 tax return to the IRS, in which she stated she received $272,000 in benefits from the Tribe as "other income,"

excluded from gross income as Indian general welfare benefits. (*See id*. ¶ 4; *see also* Mot., Ex. 5, Return [ECF No. 156-5]).

Plaintiff asserts Jim is indebted to the United States for her federal income tax liabilities for 2001, including interest, penalties, and statutory additions, in the amount of $278,758.83. (*See* Declaration of Berlinda Nez ("Nez Declaration") [ECF No. 156-2] ¶ 6). Jim does not dispute she owes taxes on her wage income, but argues the quarterly distributions she received from the Tribe constitute general welfare benefits, and thus are not taxable income. (*See generally* Resp.). Plaintiff presently moves for summary judgment, arguing U.S. tax law requires Jim to pay taxes on the distributions she received from the Tribe and no exclusions apply. (*See generally* Mot.).

II. LEGAL STANDARD

Summary judgment shall be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. *See* FED. R. CIV. P. 56(a), (c). In making this assessment, the Court "must view all the evidence and all factual inferences reasonably drawn from the evidence in the light most favorable to the nonmoving party," *Stewart v. Happy Herman's Cheshire Bridge, Inc.*, 117 F.3d 1278, 1285 (11th Cir. 1997), and "must resolve all reasonable doubts about the facts in favor of the non-movant," *United of Omaha Life Ins. Co. v. Sun Life Ins. Co. of Am.*, 894 F.2d 1555, 1558 (11th Cir. 1990). "An issue of fact is material if it is a legal element of the claim under the applicable substantive law which might affect the outcome of the case." *Burgos v. Chertoff*, 274 F. App'x 839, 841 (11th Cir. 2008) (quoting *Allen v. Tyson Foods Inc.*, 121 F.3d 642, 646 (11th Cir. 1997) (internal quotation marks omitted)). "A factual dispute is genuine 'if the evidence is such that a reasonable jury could

return a verdict for the nonmoving party.'" *Channa Imps., Inc. v. Hybur, Ltd.*, No. 07-21516-CIV, 2008 WL 2914977, at *2 (S.D. Fla. July 25, 2008) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

The movant's initial burden on a motion for summary judgment "consists of a responsibility to inform the court of the basis for its motion and to identify those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact." *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1115 (11th Cir. 1993) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (alterations and internal quotation marks omitted)). "[T]he plain language of Rule 56 mandates the entry of summary judgment against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Jones v. UPS Ground Freight*, 683 F.3d 1283, 1292 (11th Cir. 2012) (alteration added) (quoting *Celotex*, 477 U.S. at 322 (alterations and internal quotation marks omitted)).

III. ANALYSIS

The parties predominantly dispute the following issues: (1) whether the Tribe's distributions are excludable from income as general welfare payments; (2) whether the IRS's assessment is inflated because it includes distributions made to Jim's husband and children; and (3) whether the distributions constitute income from the land. (*See generally* Mot.; Resp.). The Court addresses each in turn, as well as Plaintiff's argument — not addressed in the Response — that Jim is liable for penalties for her failure to file a tax return and pay taxes when due.

A. General Welfare Payments

Plaintiff argues the Tribe's distributions are subject to taxation pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. section 2701 *et seq*. ("IGRA"), as "per capita" distributions of gaming revenue. (*See* Mot. 11). Jim contends the distributions are not subject to taxation because they constitute general welfare payments pursuant to 26 U.S.C. section 139E(b), the Tribal General Welfare Exclusion Act ("Tribal GWE Act"). (*See* Resp. 4–5). Because the intersection of these two statutes forms the crux of the present dispute, the Court provides a brief statutory analysis.

In 1988, Congress passed the IGRA to promote Indian tribes' gaming operations as a means of tribal economic development and to ensure the operations were conducted in accordance with the law. *See* 25 U.S.C. § 2702. The IGRA allows tribes to distribute gaming revenues amongst their members in the form of per capita payments, but only if these payments are subject to federal taxation. *See id*. § 2710(b)(3). Many tribes provide these per capita payments to their members. *See* Kathryn R.L. Rand & Steven A. Light, *Virtue or Vice? How Igra Shapes the Politics of Native American Gaming, Sovereignty, and Identity*, 4 VA. J. SOC. POL'Y & L. 381, 418 (1997) ("As of March 1996, twenty-three tribes were making per capita payments to members."). In some smaller tribes, these per capita distributions from gaming revenues provide sufficient income for the entire community. *See* Eric Henderson, *Indian Gaming: Social Consequences*, 29 ARIZ. ST. L.J. 205, 236 (1997).

Separately, years later, the IRS issued guidance regarding when benefits provided by Indian tribal governments to their members may qualify as general welfare, thus exempted from federal taxation. *See* Rev. Proc. 2014-35, 2014-26 I.R.B. 1110 (2014). The Guidance expressly referenced the IGRA and per capita distributions, stating:

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

Id. (alteration and emphasis added).

Congress codified part of this IRS Guidance in 2014, when it enacted the Tribal GWE Act. *See* 160 Cong. Rec. H7599-02 (Sept. 16, 2014) (statement of Rep. Kind) ("[This legislation] would codify existing IRS practice . . . . [referring to segments of Rev. Proc. 2014-35]." (alterations added)). The Tribal GWE Act defines the term "Indian general welfare benefit" as:

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

26 U.S.C. § 139E(b).

"Ambiguities in [the Tribal GWE Act] . . . shall be resolved in favor of Indian tribal governments and deference shall be given to Indian tribal governments for the programs administered and authorized by the tribe to benefit the general welfare of the tribal community." Pub. L. 113–168, § 2(c) (alterations added). Yet, "this canon of interpretation does not permit [courts to rely] on ambiguities that do not exist," and "the canon's force may be overcome by other circumstances evidencing congressional intent." *Maniilaq Ass'n v. Burwell*, No. CV 15-

152 (JDB), 2016 WL 1118256, at *4 (D.D.C. Mar. 22, 2016) (internal quotation marks and citations omitted; alteration in original).

Analyzing the two statutes in conjunction indicates the Tribal GWE Act was not meant to supplant the IGRA; that is, per capita distributions of gaming revenue remain taxable income, even if these distributions arguably promote the general welfare of a tribe. This conclusion is supported by the IRS Guidance, which distinguished that while general welfare programs may be funded by casino revenues, per capita distributions of casino revenue still constitute taxable income. *See* Rev. Proc. 2014-35, 2014-26 I.R.B. 1110 (2014). The Eleventh Circuit appears to agree the Tribal GWE Act does not replace or modify the IGRA. In an opinion related to the instant case, *United States v. Billie*, the court considered whether an IRS administrative summons directing the Miccosukee Tribe to release records regarding its alleged distribution of casino revenue was enforceable. *See* 611 F. App'x 608, 609 (11th Cir. 2015). The Tribe asserted the Tribal GWE Act mandated suspension of the examination; however, the court cited to the IGRA and stated, "much of the [Tribal GWE] Act at least arguably conflicts with separate U.S. Code provisions that mandate reporting, withholding, and taxation of distributions of tribal gaming revenue [such as the IGRA]." *Id*. at 612 (alterations added).

In determining whether the IGRA applies to the present case, the Court must decide whether the Tribe's payments to Jim constitute per capita distributions of gaming revenue. *See* 25 U.S.C. § 2710. In her Response to Plaintiff's Statement of Undisputed Facts, Jim denies the tribal distributions are "per capita" (*see* Defs.' SMF ¶ 8), and also states the payments were funded, in part, by gross receipts of tax revenue derived from non-gaming related activities (*see id*. ¶ 16). Yet, the record undisputedly establishes the distributions were "per capita." (*See* Mot., Ex. 4, IRS Meeting Notes [ECF No. 156-5] 00027 ("Per Marrero and Lehtinen — none of the

payments were need based — they were equal to each tribal member"); *see also* Osceola Dep., 87:22–23 ("We don't discriminate between member to member. Everybody gets the same.")). Jim presents no evidence to the contrary, and her mere statement in a response brief the tribal distributions are not "per capita" cannot prevent summary judgment on its own. *See Godwin v. Kelley*, No. 2:12CV164-WHA-CSC, 2013 WL 3325777, at *12 (M.D. Ala. July 1, 2013) ("Plaintiffs[']' mere statement in brief that the conduct [in] the case is 'at least negligence' is not sufficient to create a question of fact under Rule 56." (alterations added)).

In contrast, Jim's statement the tribal distributions were funded, in part, by gross receipts of tax revenue derived from non-gaming related activities presents a genuine issue as to a material fact. The Court acknowledges the record indicates gaming revenues constituted a significant amount of the tribal distributions. (*See* Osceola Dep., 27:5–17 ("[A]ll the other operations [other than Miccosukee Indian Bingo and Gaming] are not substantial . . . . The enterprises, they don't make any money."); *id*. 123:8–127:3 (noting many of the tribal enterprises did not make a profit without tribal assistance)). (*See also* Mot., Ex. 7, Special General Council Meeting Minutes [ECF No. 156-6] 6 ("NTDR payments would be in accordance with revenue generated at MIBG. Business has been good and NTDR payments have been increasing and not decreasing."); Marrero Dep. 155:12–18 ("[T]he revenue from gaming was significantly greater than the revenue from any other source." (alteration added))). Furthermore, one witness testified the non-gaming tribal enterprises would not have made a profit in 2001 without the Tribe's assistance. (*See* Osceola Dep. 126:10–127:3).

Nonetheless, Jim has presented evidence indicating at least some portion of the tribal distributions might arise from non-gaming sources. (*See* Marrero Dep. 154:12–17 ("[T]here was [sic] other sources of funds that came revenues [sic], because there was a tax they assessed on

other businesses, whether it was their . . . shops that they had or their fishing. Everything that generated revenues went into that account." (alterations added)); *see also* Billie Dep. 65:16–25 ("Into that [NTDR] account I know that we have money we collect from — from our rental of our radio towers and our land lease that we have for the purposes of cattle grazing, and other areas that we collect monies from." (alteration added)). This issue is significant because while gaming revenues distributed per capita to tribal members clearly constitute taxable income under the IGRA, revenues derived from non-gaming activities may be more likely to qualify as general welfare payments or fall under another exception, such as income from the land. While the evidence at trial may ultimately reveal the non-gaming revenue sources contributed *de minimis* or non-existent amounts to the NTDR in 2001, the current state of the record presents a material issue of fact on this issue. Therefore, summary judgment is denied on the question of whether the NTDR distributions derived from non-gaming sources constitute taxable income.

Nevertheless, summary judgment is warranted finding the tribal distributions derived from gaming revenue constitute taxable income, rather than qualify as general welfare payments. Because the IGRA applies, the distributions derived from gaming revenue are taxable income unless Defendant can identify an express exemption. *See Campbell v. C.I.R.*, 164 F.3d 1140, 1142 (8th Cir. 1999). Jim's argument the Tribal GWE Act provides this exemption fails to persuade. The Court is sensitive to the fact that deference should be given to tribal governments in implementing social welfare programs tailored to fit their communities' needs. *See* Pub. L. 113–168, § 2(c) ("Ambiguities in [the Tribal GWE Act] . . . shall be resolved in favor of Indian tribal governments and deference shall be given to Indian tribal governments for the programs administered and authorized by the tribe to benefit the general welfare . . . ." (alterations added)).

Yet, tribes are also not permitted to merely brand payments as "general welfare" for the purpose of evading taxes, especially where, as here, another statute expressly governs.

There are several indications the Tribe's distributions derived from gaming revenue do not qualify as general welfare under the Tribal GWE Act. Primarily, one of the Act's guidelines is that benefits provided may not be "lavish or extravagant." 26 U.S.C. § 139E(b). It is undisputed Jim's family received approximately 272,000.00 dollars' worth of distributions in one year. (*See* Pl.'s SMF ¶ 4).[2] Admittedly, the Secretary of the Treasury and the Tribal Advisory Committee have not yet "establish[ed] guidelines for what constitutes lavish or extravagant benefits with respect to Indian tribal government programs." 26 U.S.C. § 139E(c)(3) (alteration added). But it is difficult to believe such an amount would not qualify, especially when it was simply used for household expenses (*see* Jim Dep. 41:16–42:2), and provided in addition to the Tribe's other benefits, including housing, education, medical care, and elder care (*see* Defs.' SMF ¶ 25).[3] The Eleventh Circuit in *United States v. Billie*, indicated its agreement on this issue, noting in *dictum* "because the present examination involves up to $300 million distributed to 600 tribal members or to service providers, there is a high likelihood the present payments would not qualify as 'general welfare payments.'" 611 F. App'x at 609.

Another of the Act's guidelines requires the benefits be for "the promotion of general welfare." 26 U.S.C. § 139E(b). Jim argues the tribal distributions are intended for the promotion of general welfare, and she asserts Congress intended for this phrase to be construed

[2] While the record will be further developed at trial, it is undisputed the majority of the $272,000.00 derived from gaming revenues as opposed to non-gaming sources. (*See* Marrero Dep. 155:12–18).

[3] The cases and Internal Revenue Code provisions cited by Jim do not provide otherwise. (*See* Resp. 11). As Jim acknowledges, "today, no standard exists for determining whether the benefits received by Ms. Jim are lavish or extravagant." (*Id.*). Rather, the cases and provisions she cites concern topics such as the deductibility of lavish business expenses and reporting spousal income, as opposed to addressing the concept of extravagance within the social welfare context. (*See generally id.* 11–13). Accordingly, the Court does not find these sources assist the present analysis.

broadly. (*See* Resp. 8). While this may be the case, it seems clear Congress did not intend to allow tribal members to utilize the Tribal GWE Act to circumvent the IGRA by broadly labeling per capita distributions of gaming revenue as welfare payments.

In re Hutchinson is instructive on this point. *See* 354 B.R. 523, 530–31 (Bankr. D. Kan. 2006). There, a tribal member claimed his per capita distributions derived from casino revenues were exempt from a bankruptcy proceeding because they constituted "a local public assistance benefit" pursuant to an applicable Kansas statute. *Id*. at 529. The court acknowledged the IGRA requires tribes to use net revenues "to provide for the general welfare of the Indian tribe and its members," among other purposes; however, this fact was insufficient to exempt the distributions as public assistance benefits. *Id*. at 530. In its decision, the court noted: "Although [the tribe's] distributions may be made with the goal of providing for the general welfare of the tribe and its members, as required by the IGRA, there is no indication that these distributions are specifically aimed at assisting needy, blind, aged, or disabled persons and to dependent children [as required by the Kansas statute] . . . . In fact, the distributions are made in equal amounts to all enrolled tribal members regardless of need." *Id*. at 530–31 (alterations added).

While the Kansas statute at issue in *Hutchinson* and the Tribal GWE Act differ slightly textually, their premise is similar. In both, it is certainly possible the tribal distributions derived from gaming revenues are being utilized by tribal members to care for their general needs and promote the general welfare of the Tribe. However, where those distributions: (1) clearly fall under the IGRA; and (2) are not based on need, but rather distributed to all members equally; it is unlikely they fall within the purview of general welfare payments. *See generally id*. The Court refrains from holding every payment made under the Tribal GWE Act must be based on need in order to satisfy the "promote the general welfare" prong. As Jim points out, the Act

itself does not specifically mandate this, and tribal programs providing for general welfare should typically be construed broadly. (*See* Resp. 8). However, viewing the following undisputed facts in their entirety: (1) the distributions are lavish, (2) the IGRA clearly applies, and (3) the distributions are not based on need, the Court finds there is no genuine issue of material dispute the tribal distributions derived from gaming revenue are not general welfare payments, but rather constitute taxable income under the IGRA.

B. Distributions to Jim's Husband and Children

Jim argues even if the Tribe's distributions do not constitute general welfare payments, the IRS's assessment against her is inflated because the $272,000.00 she listed on her tax return included tribal distributions made to her family members. (*See* Resp. 14). In particular, Jim asserts she sometimes took physical possession of the quarterly assistance payments made out to her husband and daughter. (*See* Jim Dep. 38:19–39:19, 48:8–25 (stating at times Jim put her daughter's distribution in a tribal account, and other times she cashed the check and put the cash in a safe); *see id*. 46:25–47:25 (stating Jim picked up her husband's distribution check and cashed it); *see also* Billie Dep. 115:9–12 (stating that ordinarily the entire distribution check goes to one or two members of the family)). Jim argues payments she received on behalf of her family members do not constitute income to her; thus, the IRS assessment against her should be reduced. (*See* Resp. 14).

Plaintiff asserts Jim has already admitted she received 272,000.00 dollars' worth of "benefits from Indian welfare payments," because she listed this amount on her belated IRS tax return which an attorney helped her prepare, and she did not dispute the amount during her deposition. (*See* Reply 2–3). Plaintiff contends Jim should not be allowed to question the amount in dispute for the first time now; however, this argument fails to persuade. (*See id*. 3).

While Jim did not indicate her intent to challenge the amount in dispute during her deposition, she did state she received checks on behalf of her family members. (*See* Jim Dep. 46:25–47:25). Plaintiff was on notice of this issue and could have more vigorously pursued discovery related to Jim's husband, and/or other relevant witnesses.[4] *See, e.g.*, *Stolarczyk ex rel. Estate of Stolarczyk v. Senator Int'l Freight Forwarding, LLC*, 376 F. Supp. 2d 834, 843 (N.D. Ill. 2005) (declining to exclude a witness's affidavit offered in support of the plaintiff's summary judgment response where, while the plaintiff never disclosed the witness in its Rule 26 disclosures, a second witness identified the first witness in his deposition testimony; thus, the defendant was on notice the first witness may have had information relevant to the case.).

Jim's statements she possessed and cashed the distribution checks made out to her husband and her daughter indicate the $272,000.00 assessment likely includes some of these amounts. Jim has identified a genuine question of material fact as to the amount of the IRS assessment personally asserted against her. *See Hoeper v. Tax Comm'n of Wis.*, 284 U.S. 206, 218 (1931) ("[A]ny attempt by a state to measure the tax on one person's property or income by reference to the property or income of another is contrary to due process of law as guaranteed by the Fourteenth Amendment. That which is not in fact the taxpayer's income cannot be made such by calling it income." (alteration added)). Trial testimony may ultimately reveal the sum of $272,000.00 is, in fact, the correct assessment applied to Jim. However, considering there is a genuine dispute of material fact, summary judgment on the limited issue of the amount of the assessment is not appropriate.

[4] Plaintiff notes it subpoenaed and was prepared to depose Alexander Osceola, Jim's husband, on this issue, but he left the deposition site prior to his deposition. (*See* Reply 3 n. 2). Plaintiff asserts it would have vigorously pursued this issue in discovery, had it known Jim would contest the amount of the distributions. (*See id.*).

C. Income from the Land

Jim also argues the Tribe's distributions are exempt from taxation because they are income derived from tribal lands. (*See* Resp. 16–30). She relies on several statutes: 25 U.S.C. section 1750(d), which establishes the Miccosukee Indian Reservation lands; 25 U.S.C. section 2210, which provides that lands given to the Indian tribes are exempt from taxation; and 25 U.S.C. section 459(e), which states that property conveyed to tribes is exempt from taxation as long as the property is held in trust by the United States. (*See* Resp. 17 n.9).

A review of tribal jurisprudence reveals income derived from tribal lands may be exempt from taxation, but only where: (1) the income is derived directly from the land itself (*e.g.*, farming and timber-cutting) as opposed to businesses on the land, *see Critzer v. United States*, 597 F.2d 708, 715 (Ct. Cl. 1979) (finding income received from the operation of businesses and building leases on tribal lands is not exempt from federal taxation); or (2) the income is derived from a trust allotment held by an individual tribal member, as opposed to the Tribe as a whole, *see United States v. Anderson*, 625 F.2d 910, 914 (9th Cir. 1980) (noting income derived from an Indian's individually allotted land was not taxable). Courts have specifically found income generated by tribal casinos does not constitute income "directly derived from the land." *Matter of Cabazon Indian Casino*, 57 B.R. 398, 402 (B.A.P. 9th Cir. 1986) ("The income derived from operating the casino stems in a far more important fashion from card playing, liquor sales and food preparation, than it does from the land alone."); *see also Campbell v. C.I.R.*, 74 T.C.M. (CCH) 1121, *4 (T.C. 1997), *aff'd and remanded*, 164 F.3d 1140 (8th Cir. 1999) ("The courts have confined the exemption to income received from activities that diminish or exploit the value of the land (such as logging, mining, or farming). Income earned through the investment of

capital or labor, such as restaurants, motels, tobacco shops, and similar improvements to the land, fail to qualify for the exemption, although the activity takes place on land held in trust.").

As discussed, the tribal distributions Jim received were derived predominantly from gaming revenues. *See supra* 9–10. Accordingly, whatever percentage of the NTDR distributions was derived from gaming revenues does not constitute income derived directly from the land. *See Matter of Cabazon Indian Casino*, 57 B.R. at 403. There is a genuine question of material fact regarding whether the percentage of the distributions derived from non-gaming sources might constitute income derived from the land. (*See* Billie Dep. 65:16–25 ("Into that [NTDR] account I know that we have money we collect from — from our rental of our radio towers and our land lease that we have for the purposes of cattle grazing, and other areas that we collect monies from." (alteration added)). Accordingly, summary judgment is denied on the issue of whether the tribal distributions derived from non-gaming sources constitute income derived from the land.

D. Liability for Penalties

Plaintiff argues Jim is liable for penalties for her failure to file a tax return and pay taxes when due. (*See* Mot. 28). Jim does not address this issue in her Response; nonetheless, the Court analyzes it. (*See generally* Resp.). Under 26 U.S.C. section 6651(a)(1), if a taxpayer fails to timely file her tax return, "unless it is shown that such failure is due to reasonable cause and not due to willful neglect," the IRS shall impose a penalty in the form of "5 percent of the amount of such tax if the failure is for not more than 1 month, with an additional 5 percent for each additional month or fraction thereof during which such failure continues, not exceeding 25 percent in the aggregate . . . ." *Id*. (alteration added). Similarly, 26 U.S.C. section 6651(a)(2) provides that "unless it is shown that such failure is due to reasonable cause and not due to

willful neglect," if a taxpayer fails to timely pay her required taxes, the IRS shall impose a penalty in the form of "0.5 percent of the amount of such tax if the failure is for not more than 1 month, with an additional 0.5 percent for each additional month or fraction thereof during which such failure continues, not exceeding 25 percent in the aggregate." *Id*.

The term "willful neglect" may be read as meaning "a conscious, intentional failure or reckless indifference," while "reasonable cause" calls on the taxpayer to demonstrate she exercised "ordinary business care and prudence" but nevertheless was "unable to file the return within the prescribed time." *United States v. Boyle*, 469 U.S. 241, 245–46 (1985); *see also In re Sanford*, 979 F.2d 1511, 1514 n.8 (11th Cir. 1992) (Treasury Regulation § 301.6651-1(c)(1) "considers a delay in filing a required return to be due to reasonable cause if the taxpayer 'exercised ordinary business care and prudence in providing for payment of his tax and was nevertheless either unable to pay the tax or would suffer an undue hardship' if he paid the tax on time."). While under some circumstances reliance on a tax expert can constitute reasonable cause for failing to meet a deadline "where [the] taxpayer made full disclosure to [the] expert, [and] relied on his advice," *James v. United States*, No. 8:11-CV-271-T-30AEP, 2012 WL 3522610, at *3 (M.D. Fla. Aug. 14, 2012) (alterations added); simply forgetting to file a return does not constitute reasonable cause, *see Halbin v. C.I.R.*, 97 T.C.M. (CCH) 1066, *4 (T.C. 2009).

Jim admitted she forgot to file her return for the year 2001. (*See* Jim Dep. 58:1–4 ("Q: Could you describe what efforts you took if any to determine whether you needed to file a tax return for 2001? A: I think I had everything ready, but I just completely forgot to file that year.")). Consequently, the Court finds Jim has not established her failure to timely file her 2001 tax return is excused by reasonable cause, and sanctions are appropriate pursuant to 26 U.S.C.

section 6651(a)(1). Whether sanctions are warranted pursuant to 26 U.S.C. section 6651(a)(2), however, is a different story. While Jim is liable for penalties for her failure to timely file her tax return, she is not necessarily liable for penalties for failing to pay her taxes — at least the taxes on her tribal distributions. *See Estate of Thouron v. United States*, 752 F.3d 311, 312–15 (3d Cir. 2014) (finding a genuine issue of material fact regarding whether the plaintiff's reliance on the advice of its tax expert, as to the applicable tax law, was reasonable cause for failure to pay its full tax liability by the appropriate deadline).

The record shows Bernie Roman ("Roman"), Jim's personal attorney, assisted her in preparing her 2001 tax return. (*See* Jim Dep. 92:12–15). While Jim does not explicitly state Roman advised her not to report her tribal distributions as taxable income, his assistance in the process, coupled with her limited education (*see* Defs.' SMF ¶ 4), indicates this might have been the case. Furthermore, while they were not her personal attorneys, both Billy Cypress and Dexter Lehtinen, the Tribe's lawyer, advised tribal members at General Council meetings the Tribe's distributions did not constitute taxable income. (*See* Jim Dep. 76:5–23; *see also* Mot., Ex. 6, Special General Council Meeting Minutes [ECF No. 156-5] L000443). Certainly Cypress's and Lehtinen's statements alone would not be enough to excuse Jim's failure to include tribal distributions as taxable income on her tax return, but their comments, when viewed in the greater context of tribal dynamics, could be said to have some impact on the "reasonable cause" analysis.

Overall, given the combination of Roman's assistance, Cypress's and Lehtinen's comments, and the fact the issue of whether the tribal distributions constitute taxable income is a new and unsettled area of the law, there is a genuine dispute as to whether penalties under 26 U.S.C. section 6651(a)(2) are warranted. The same conclusion applies to the penalties under 26

U.S.C. section 6651(a)(1) solely with respect to the percentages assessed on the tribal distribution amounts.

IV. CONCLUSION

For the foregoing reasons, it is

ORDERED AND ADJUDGED that the Motion **[ECF No. 156]** is **GRANTED in part** and **DENIED in part** as follows:

1. Jim is liable for paying federal income taxes on the tribal distributions derived from gaming revenue, as these distributions are governed by the IGRA.

2. Summary judgment is not warranted regarding Jim's liability for tribal distributions derived from non-gaming sources. A genuine issue of material fact exists regarding whether these distributions qualify as income derived from the land or general welfare benefits.

3. Summary judgment is not appropriate regarding the amount of the 2001 IRS assessment against Sally Jim. A genuine issue of material fact exists regarding at least whether any of her husband's personal income was included in the assessment.

4. Summary judgment is not warranted imposing penalties pursuant to 26 U.S.C. sections 6651(a)(2) and 6651(a)(1) solely with respect to the percentages assessed on the tribal distribution amounts.

DONE AND ORDERED in Miami, Florida, this 3rd day of June, 2016.

Cecilia M. Altonaga

CECILIA M. ALTONAGA
UNITED STATES DISTRICT JUDGE

cc: counsel of record