

**Testimony of Christie J. Jacobs
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Before the House Subcommittee on Indian and Alaska Native Affairs

“Per Capita Act and Federal Treatment of Trust Per Capita Distributions”

Friday, September 14, 2012

Introduction

Good morning, Chairman Young, Ranking Member Lujan, and members of the Subcommittee.

I appreciate the opportunity to be here this morning to discuss the taxation of per capita payments made by tribes to their tribal members from proceeds of certain settlements or assets held in trust.

At the opening of my testimony, I want to acknowledge that the United States has a unique government-to-government relationship with Indian tribes as set forth in the Constitution of the United States, treaties, statutes, executive orders, and court decisions. The Office of Indian Tribal Governments within the Internal Revenue Service (IRS) was created in response to requests by tribal leaders. The office exists to facilitate government-to-government interactions and to assist tribes in meeting their Federal tax obligations.

The Principal Issues

There are two distinct, but related, issues for discussion today: (1) per capita payments made by tribes to their members from proceeds of certain settlements of tribal trust cases between the United States and those Indian tribes, and (2) per capita payments made by tribes to their members from resources held in trust by the United States.

In order to provide context to this discussion, I would like to briefly explain the legal principles involved.

Brief Explanation of Legal Principles

Section 61(a) of the Internal Revenue Code, which defines gross income, and the Per Capita Act (25 U.S.C. §117a, *et. seq.*) are both relevant to this discussion.

Section 61(a) of the Internal Revenue Code provides that, except as otherwise provided by law, gross income is defined as all income from

whatever source derived. Under §61, Congress intends to tax all gains and “undeniable accessions to wealth, clearly realized,[] over which taxpayers have complete dominion.” *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426 (1955). Indians are citizens subject to the payment of income taxes. *Squire v. Capoeman*, 351 U.S. 1, 6 (1956). An exemption from the payment of taxes “should be clearly expressed.” *Id.*

Unless an express exception – like a statute, treaty or agreement – applies, the general rule is that gross income is all income from whatever source derived. The Federal courts have applied this rule to per capita distributions from a tribe to its members from trust assets and found them subject to tax. See, e.g., *Tonasket v. C.I.R.*, T.C. Memo. 1985-365. However, these cases have not considered the application of the Per Capita Act.

The Per Capita Act, codified in 25 U.S.C. §§117a through 117c, provides authority to Indian tribes to make per capita payments to Indians out of tribal trust funds. Under the Per Capita Act, funds held in trust by the Secretary of the Interior for an Indian tribe that are to be distributed per capita to members of that tribe may be distributed by either the Secretary of the Interior or, at the request of the governing body of the tribe and subject to the approval of the Secretary of the Interior, the tribe.

The Per Capita Act provides, in 25 U.S.C. § 117b(a), that funds distributed under that Act are subject to the provisions of 25 U.S.C. §1407 of the Indian Tribal Judgment Funds Use or Distribution Act. Under §1407, the funds described in that section, and all interest and investment income accrued on the funds while held in trust, are not subject to federal income taxes.

Per Capita Payments from Settlement Proceeds – Notice 2012-60

Recently, the United States has entered into settlement agreements – and foresees the possibility of entering into additional similar agreements in the future with other tribal trust litigants – with federally recognized Indian tribes resolving litigation in which the tribes allege that the Department of the Interior and the Department of the Treasury (Treasury) mismanaged monetary assets and natural resources the United States holds in trust for the benefit of the tribes. Upon receipt of the settlement proceeds, the tribes will dismiss their claims with prejudice.

On September 6, 2012, Treasury and the IRS published Notice 2012-60. The notice concluded that the per capita payments described above are excluded from the tribal members’ gross incomes.

The notice applies to per capita payments made from agreements settling trust mismanagement claims. The notice states that “other per capita payments made by the Secretary of the Interior or Indian tribes to members of

Indian tribes[,]”are “outside the scope of this notice and may be addressed in future guidance.”

Prior to issuing this notice, we engaged in direct consultation as requested by several tribes and other affiliated organizations and in the spirit of Executive Order 13175. These consultations and conversations were extremely useful in preparing the notice.

Per Capita Payments from Trust Resources

The notice applies only to per capita payments from proceeds of the settlements that are described in the notice and upon which we engaged in consultation with affected tribes. The issue of per capita distributions from trust assets is outside the scope of the notice, but as stated in the notice, this issue may be addressed in future guidance after further consultation.

This concludes my testimony this morning. I would be happy to answer any questions you might have.