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An Argument in Support of Tax-Free Per-Cap Distribution Payments Derived from Native American Nations Gaming Sources

ARTHUR ACEVEDO*

Gaming activities play important social, cultural, and economic roles for many Native American tribes. During the 1970s and 1980s, gaming activities spread throughout the country, and became more accessible to non-native individuals. This growth in gaming activities drew the attention of state and local officials who sought to limit and regulate Native American gaming.

In California v. Cabazon Band of Mission Indians, the State of California, arguing before the Supreme Court, asserted that it could exercise jurisdiction over Native American gaming activities. In a stunning defeat, the Supreme Court ruled against the State of California when it announced its decision in 1987. The Cabazon decision effectively removed all state and local regulatory oversight from Native American gaming activities, thereby leaving states powerless to regulate this area. In response to Cabazon, Congress enacted the Indian Gaming Regulatory Act ("IGRA") in 1988. The purpose of IGRA is to regulate Indian gaming activities conducted by Native American tribes. A key feature of IGRA allows tribes to make discretionary per-capita distributions to members of its tribe from the net revenues of its gaming operations. However, one of IGRA's distribution conditions requires that per-capita payments be "subject to Federal taxation." That means per-capita payments are counted toward one's income.

Section 61 of the Income Tax Code defines gross income for income tax purposes. In broad and sweeping language, § 61 provides that "gross income includes all income from whatever source derived." This language is structured to capture all forms of income. The IRS has stated in a private letter ruling that per-capita distributions constitute gross income under § 61 of the Income Tax Code. Notwithstanding § 61's broad language, a taxpayer may exclude an item from income only by proving that such item qualifies under one of the exclusionary tax provisions of the Income Tax Code.

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This Article argues that per-capita distributions qualify for exclusion from gross income as a gift. This Article first discusses the evolution and regulation of the gaming industry within the Native American community. Next, this Article examines the controversial history of defining “gross income” since the enactment of the federal income tax in 1913. Finally, this Article presents several arguments supporting the proposition that per-capita distribution payments constitute gifts under the Income Tax Code—and are therefore non-taxable to the recipient.

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I. INTRODUCTION AND SYNOPSIS

In 1988, Congress enacted the Indian Gaming Regulatory Act (“IGRA”).¹ The purpose of IGRA is to regulate Indian gaming activities conducted by Native American tribes by “establish[ing] a detailed regulatory,

1. 25 U.S.C.A. §§ 2701-21 (West 2016).

record keeping, and reporting regime for tribal gaming” activities.² A key feature of IGRA is that it allows tribes to make per capita distributions to members of its tribe from the net revenues of the gaming operations. However, one of IGRA’s distribution conditions requires that per capita payments be “subject to Federal taxation.”³

Section 61⁴ of the Income Tax Code is the section that defines income for income tax purposes. Section 61 is the default provision that captures all forms of income. Specifically, section 61 provides that gross income includes “all income from whatever source derived.”⁵ The IRS has stated that per capita distributions constitute gross income under section 61 of the Income Tax Code.⁶

Despite the broad sweep of the Income Tax Code, and IGRA’s requirement that per capita payments be “subject to federal taxation”⁷, I construct an argument supporting the proposition that per capita distributions should not be subject to federal tax. Specifically, I argue per capita payments constitute gifts under the Income Tax Code and are therefore, excludable from gross income.

This Paper explores the question, whether gaming distributions can be excluded from gross income as a gift. Part II discusses the evolution and the regulation of the gaming industry within the Native American community. Part III discusses the controversial history in defining “gross income” under the Income Tax Code. Part IV presents arguments supporting the proposition that per capita payments are gifts. Part V presents the conclusion.

II. HISTORY AND IMPACT OF GAMING WITHIN THE NATIVE AMERICAN COMMUNITY

“Gaming activities have become a significant source of revenue for many Indian tribes.”⁸ The National Indian Gaming Commission reports that as of 2014, Indian gaming is a 28.5-billion-dollar industry.⁹ There are 567

2. JOINT COMM. ON TAXATION, JCX-40-12, *Overview of Federal Tax Provisions and Analysis of Selected Issues Relating to Native American Tribes and Their Members* 11 (May 14, 2012), <https://www.jct.gov/publications.html?func=startdown&id=4426>.

3. 25 U.S.C.A. § 2710 (West 2016).

4. 26 U.S.C.A. § 61 (West 2016).

5. *Id.*

6. I.R.S. Priv. Ltr. Rul. 199908006 (Feb. 26, 1999), <https://www.irs.gov/pub/irs-wd/9908006.pdf>.

7. 25 U.S.C.A. § 2710 (West 2016).

8. JOINT COMM. ON TAXATION, JCX-40-12, *Overview of Federal Tax Provisions and Analysis of Selected Issues Relating to Native American Tribes and Their Members* 21 (2012).

9. *2014 Indian Gaming Revenues Increase 1.5 Percent*, NAT’L INDIAN GAMING COMM’N (July 23, 2015), <http://www.nigc.gov/news/detail/2014-indian-gaming-revenues-increase>.

federally recognized tribes in the United States as of 2016¹⁰ with “236 Indian tribes operating 422 casinos of varying sizes within 28 of the States.”¹¹

Gambling activities create the public perception that it generates vast sums of wealth and financial opportunity for Native Americans. One paper notes that “[o]n the whole, Indian gaming has made and continues to make significant contributions to the U.S. economy. Specifically, it has stimulated economic activity, created jobs, and provided wages—all of which have benefitted tribal economies and generated tax revenue to federal, state, and local governments.”¹²

Separating the reality of Indian gaming from its myth becomes important when evaluating policy decisions relating to Native nations. “There is a growing belief in American society that Indians have struck it rich with the establishment of Indian casinos.” The reality, however, is that gaming activities have not generated broad macro-level economic relief for many Native Americans. “[The] unemployment [rate] among adult Indians is about 15 percent – roughly three times the national average – and Native Americans remain America’s poorest people.”¹³ Moreover, “[a]n estimated 23 percent of all Native American families in the United States . . . earned incomes that are below the poverty line.”¹⁴ These statistics confirm that the American Dream of economic prosperity and economic security enjoyed by other segments of the American society continues to elude Native Americans.

Gaming activities have deep roots within the Native American culture. However, “[g]aming certainly isn’t new to Native Americans.”¹⁵ What is new is Indian gaming’s explosive growth as a source of revenue. From 1988 to 2013, gaming revenues grew at a compound annual growth rate of 25.29% from \$100 million to \$28.5 billion.¹⁶

10. *Frequently Asked Questions*, U.S. DEP’T OF INTERIOR, BUREAU OF INDIAN AFFAIRS, <http://www.bia.gov/FAQs/> (last visited Oct. 7, 2016).

11. JOINT COMM. ON TAXATION, *supra* note 2.

12. Alan P. Meister, Kathryn R.L. Rand & Steven Andrew Light, *Indian Gaming and Beyond: Tribal Economic Development and Diversification*, 54 S.D. L. REV. 375, 383 (2009).

13. *Dispelling the Myths about Indian Gaming*, NATIVE AM. RIGHTS FUND, <http://www.narf.org/indian-gaming/> (last visited Mar. 19, 2016).

14. U.S. DEP’T. OF THE INTERIOR, *2013 American Indian Population and Labor Force Report 11* (2014), <http://www.bia.gov/cs/groups/public/documents/text/idc1-024782.pdf> (data reported for year ending 2010).

15. *History of Native American Gaming*, SANTA YNEZ BAND OF CHUMASH INDIANS, http://www.santaynezechumash.org/gaming_history.html (last visited Mar. 24, 2016).

16. Randall K. Q. Akee, Katherine A. Spilde & Jonathan B. Taylor, *The Indian Gaming Regulatory Act and Its Effects on American Indian Economic Development*, 29 J. ECON. PERSP. 185, 186 (2015); S. REP. NO. 100-446, at 3072 (1988); NAT’L INDIAN GAMING COMM’N, *2014 Tribal Gaming Revenues by Gaming Operation Revenue Range*, <http://www.nigc.gov/images/uploads/reports/2014GGRbyGamingOperationRevenueRange.pdf> (last visited Nov. 10, 2016).

A. PUBLIC LAW 280 – CEDING FEDERAL OVERSIGHT OF TRIBES TO THE STATES

Indian nation sovereignty is a complex issue. The regulation of Indian tribes raises vexing questions concerning jurisdiction, sovereignty, and self-governance. Indian tribes are subject to the plenary power of the United States government. The plenary power claimed by the United States government over Indian nations is rationalized on the basis of a divestment theory, which asserts:

Indian tribes are . . . no longer ‘possessed of the full attributes of sovereignty.’ Their incorporation within the territory of the United States, and their acceptance of its protection, necessarily divested them of some aspects of the sovereignty which they had previously exercised. By specific treaty provision they yielded up other sovereign powers; by statute, in the exercise of its plenary control, Congress has removed still others.¹⁷

Native nations’ claims of sovereignty and self-governance have been blunted by federal policies of regulation and oversight. An inherent tension between Native nations and the federal government exists over matters of sovereignty often leading to jurisdictional conflicts between tribes and the federal government. The degree of complexity for jurisdictional questions intensifies when state and local governments seek to invoke their police powers of regulation. One commentator writes that:

When it comes to incorporating Indian tribes as third sovereigns within the United States political system, one has to acknowledge that unlike the sovereignty of the states, which is recognized under the Tenth and Eleventh Amendments to the United States Constitution, the tribes’ inherent sovereignty and right to self-government is not guaranteed nor protected in the Constitution. . . . To remedy this problem, the tribes need either the trust doctrine, a

17. *United States v. Wheeler*, 435 U.S. 313, 323 (1978).

constitutional amendment, or some organic congressional legislation that cannot be easily repealed.¹⁸

The remedy came in the form of a federal statute. In 1953, Congress enacted Public Law 280¹⁹ to address the scope of jurisdiction state governments can exercise over tribal matters. Public Law 280 granted to state governments the authority to regulate Indian activities under limited circumstances. Prior to the enactment of Public Law 280, jurisdiction over criminal and civil actions was shared between the federal government and tribal nations. When enacting Public Law 280, Congress's primary concern "was [to address] the problem of lawlessness on certain Indian reservations, and the absence of adequate tribal institutions for law enforcement."²⁰ This federal statute delegated to the states, Congress's oversight power to regulate Indian activities over tribal matters in criminal and civil matters. The initial delegation of authority was granted to six enumerated states.²¹ The federal statute allowed additional state governments to opt in and access the delegated power.²²

"Section 2 of 'Public Law 280[]' . . . immediately placed enumerated Indian lands under the full criminal jurisdiction of the states they were located in."²³ This allowed state governments to exercise their police powers over Indians with respect to matters of state law.²⁴ Moreover, "Section 7 of 'Public Law 280' granted the necessary federal consent for states to take full criminal jurisdiction over all other Indian lands, if the state passed legislation

18. Alex Tallchief Skibine, *Indian Gaming and Cooperative Federalism*, 42 ARIZ. ST. L.J. 253, 263-64 (2009).

19. Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162, 28 U.S.C. § 1360, 25 U.S.C. §§1321-26 (2010)).

20. *Bryan v. Itasca Cty.*, 426 U.S. 373, 379 (1976).

21. The six states are Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin. 18 U.S.C.A. § 1162 (West 2016).

22. See 25 U.S.C.A. § 1321(a) (West 2016) (regarding criminal jurisdiction, granting "[t]he consent of the United States is hereby given to *any* State . . . to assume, with the consent of the Indian tribe . . . which could be affected by such assumption, such measure of jurisdiction over any or all of such offenses.") (emphasis added); see 25 U.S.C.A. § 1322(a) (West 2016) (mirroring the permissive grant to "any State" of §1321(a) but in a civil context).

23. *United States v. Farris*, 624 F.2d 890, 894-95 (9th Cir. 1980).

24. *Id.* at 895 ("Under [Public Law 280], Washington . . . took jurisdiction over its Indian and Indian lands . . . [and] over eight specific subject areas chiefly welfare, family law and motor vehicles but not gambling.").

to that effect.”²⁵ President Eisenhower expressed “grave doubts”²⁶ about Public Law 280 when he signed it into law. He explained:

My objection to the bill arises because of the inclusion in it of Sections 6 and 7. These Sections permit other states to impose on Indian tribes within their borders, the criminal and civil jurisdiction of the state, removing the Indians from Federal jurisdiction, and, in some instances, effective self-government.²⁷

Nonetheless, President Eisenhower signed the bill into law.

The explosive growth of Indian gaming during the last quarter of the twentieth century did not go unnoticed by state and local governments. In response, governments moved to regulate or prohibit Indian gaming activities within their borders. The showdown between the competing claims of Indian sovereignty and State Power reached the federal courts resulting in stinging defeats for state and local governments, and wins for the Native tribes. Congress ultimately stepped in and enacted IGRA in 1988.

B. *SEMINOLE V. BUTTERWORTH*

The conflict between Indian sovereignty and state power of regulation played out in the federal courts in the case of *Seminole Tribe of Florida v. Butterworth*.²⁸ This is the first case where a federal court of appeals substantively reviewed the issue of gaming activities on an Indian reservation. The issue centered on a jurisdictional conflict between Indian sovereignty and State’s Power.

The Seminole Tribe sought to operate a bingo game on an Indian reservation. To achieve this objective, the Seminole Tribe entered into a contract “with a private limited partnership that agreed to build and operate a bingo hall on the Indian reservation in exchange for a percentage of the profits as management fees.”²⁹

The sheriff of Broward County, Florida, objected to the bingo gaming activity of the tribe and sought to prevent the gaming activity. He “informed the tribe that he would make arrests for any violations”³⁰ of the state statute

25. *Id.*

26. Dwight D. Eisenhower, *Statement by the President Upon Signing Bill Relating to State Jurisdiction Over Cases Arising on Indian Reservations*, THE AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/index.php?pid=9674> (last visited Apr. 1, 2016).

27. *Id.*

28. *Seminole Tribe of Fla. v. Butterworth*, 658 F.2d 310 (5th Cir. 1981).

29. *Id.* at 311.

30. *Id.*

prohibiting bingo operations.³¹ The “Seminole Indian tribe brought an action . . . seeking a declaratory judgment and injunctive relief . . . against the [local] sheriff”³² In response to the suit initiated by the Seminole Indian Tribe, “[t]he attorney general of the state of Florida filed a petition on behalf of the state seeking leave to participate in the case as *amicus curiae*, and leave was granted.”³³

The State asserted that bingo activities are subject to state regulation. The State relied on its grant of authority to regulate Indian tribes pursuant to Public Law 280,³⁴ arguing this law “permit[ted] states to exercise civil and criminal jurisdiction over Indian tribes.”³⁵ In response, the Seminole Tribe asserted its sovereign independence and resisted the State’s attempt at regulation.

The court of appeals began its analysis by examining the distinction between statutes that are “civil/regulatory”³⁶ as distinguished from statutes that are “criminal/prohibitory in nature.”³⁷ The analytical framework distinguishing statutes that are civil/regulatory from criminal/prohibitory was established by the Supreme Court’s earlier decision in *Bryan v. Itasca County*.³⁸ The court of appeals acknowledged that “[i]f the [Florida] statute is [found to be] civil/regulatory . . . the statute cannot be enforced against the Seminole Tribe of Florida.”³⁹

The court of appeals examined the Florida statute⁴⁰ noting that its “general prohibition . . . does not apply to prevent ‘nonprofit or veterans’ organizations engaged in charitable, civic, community . . . or other similar activities . . . from conducting bingo games”⁴¹ The court of appeals next examined the Florida State Constitution noting that “lotteries . . . are . . . prohibited” but that other types of “pari-mutuel pools authorized by law” are not prohibited. The court of appeals then examined a Florida State Supreme Court decision observing its deference to the State Legislature when the court of appeals noted that “the Supreme Court of Florida stated . . . the legislature, in its wisdom, has seen fit to permit bingo as a form of recreation, and . . . has allowed worthy organizations to receive the benefits.”⁴²

31. See FLA. STAT. § 849.093 (repealed 1992).

32. *Seminole*, 658 F.2d at 311.

33. *Id.* at 311-12.

34. 18 U.S.C.A. § 1162 (West 2016); 28 U.S.C.A. § 1360 (West 2016).

35. *Seminole*, 658 F.2d at 311.

36. *Id.* at 314.

37. *Id.*

38. *Bryan v. Itasca Cty.*, 426 U.S. 373 (1976).

39. *Seminole*, 658 F.2d at 314.

40. See FLA. STAT. § 849.093 (repealed 1992).

41. *Seminole*, 658 F.2d at 314.

42. *Id.* (citing to *Carrol v. State*, 361 So. 2d 144 (Fla. 1978)).

The court of appeals ruled in favor of the Seminole Tribe and held that the State of Florida did not have the power to regulate bingo activities on the Seminole Reservation, which was located within the State of Florida. The court of appeals reasoned that “[b]ingo appears to fall in a category of gambling that the state has chosen to regulate by imposing certain limitation to avoid abuses.”⁴³ Critical to the court’s reasoning is the court’s finding that the Florida state statute exempts charitable organizations and veteran’s organizations from the prohibition on gaming activities. As a result, the court reasoned that “the bingo statute in question is regulatory,”⁴⁴ and not prohibitory. The court “concluded that the Florida bingo statute cannot be enforced against the Seminole tribe”⁴⁵

C. CALIFORNIA V. CABAZON BAND OF MISSION INDIANS

The conflict between Indian Sovereignty and State Power continued to play out in the federal courts. This time, however, the conflict presented itself before the Supreme Court. In *California v. Cabazon Band of Mission Indians*,⁴⁶ the United States Supreme Court examined the question of Indian gambling activities. The Cabazon and Morongo Bands of Mission Indians operated bingo games on their reservation. The Cabazon Band also conducted other cards games, including poker. The games were open to the public and played by many non-Indians.

Interest in the outcome of the *Cabazon* decision was intense. California’s appeal, “supported by 20 other states . . . said at least 100 tribal bingo operations existed in 19 states, generating ‘huge tribal revenues’ and providing ‘opportunities for organized criminal intrusion.’”⁴⁷ State governments saw their state interests and police powers being diminished while Native tribes saw their sovereignty in the balance.

The Supreme Court began its analysis with the declaration that “[t]he Court has consistently recognized that Indian tribes retain ‘attributes of sovereignty over both their members and their territory’ . . . and that ‘tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States.’”⁴⁸ The Supreme Court then restated its distinction between

43. *Seminole*, 658 F.2d at 314.

44. *Id.* at 315.

45. *Id.* at 316.

46. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), *superseded by statute*, Indian Gaming Regulatory Act of 1988, Pub. L. No. 100-497, § 11, 102 Stat. 247, *as recognized in* *Michigan v. Bay Mills Indian Cmty.*, 134 U.S. 2024 (2014).

47. *Supreme Court Roundup; Right Upheld to Present Situation at Confession*, N.Y. TIMES (June 10, 1986), <http://www.nytimes.com/1986/06/10/us/supreme-court-roundup-right-upheld-to-present-situation-at-confession.html>.

48. *California*, 480 U.S. at 207.

statutes that are prohibitory in nature from statutes that are regulatory in nature.

The Supreme Court noted that the State of California “statute does not entirely prohibit the playing of bingo but permits it when the games are operated and staffed by members of designated charitable organizations”⁴⁹ The State of California invoked Public Law 280 as its legal justification for regulating gambling activities.⁵⁰ The State of California reasoned that pursuant to Public Law 280, it was granted the authority to regulate Indian gambling activities.⁵¹

The Supreme Court ruled in favor of the Cabazon Tribe stating that state and local government cannot regulate the gaming activities of Indian tribes unless the regulation qualifies as a criminal/prohibitory statute or unless Congress expressly granted States the power to regulate. The Supreme Court reasoned, “California does not prohibit all forms of gambling. California itself operates a state lottery, and daily encourages its citizens to participate in this state-run gambling.” The fact that a state permits an activity, albeit subject to regulation, was critical to the Supreme Court’s analysis. The effect of the Cabazon decision was to remove all state and local regulatory oversight from Indian gaming activities. As a result of Cabazon, tribes were now free to engage in gaming activities without the burdens of any regulation.

Congress responded swiftly to the Cabazon decision. One year later, in 1988, Congress enacted IGRA. The Congressional policy behind IGRA states that “the purpose of this Act is to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments.”⁵² Congress

49. *Id.* at 205.

50. *Id.* at 207.

51. *Id.*

52. Indian Gaming Regulatory Act, Pub. L. No. 100-497, § 3(1), 102 Stat. 247 (1988) (codified as 25 U.S.C. § 2702(1)). Two additional declared policies include:

(2) to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players; and

(3) to declare that the establishment of independent Federal regulatory authority for gaming on Indian lands, the establishment of Federal standards for gaming on Indian lands, and the establishment of a National Indian Gaming Commission are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue.

also created a new administrative agency, “the National Indian Gaming Commission (“NIGC”) [vesting it with] general oversight responsibility for Indian gaming”⁵³ activities when it enacted IGRA.

IGRA “divides gaming [activities] on Indian lands into three classes . . . and provides a different regulatory scheme for each class.”⁵⁴ The term “class I gaming” means social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations and is regulated solely by the tribe.⁵⁵ Class II gaming is defined as “the game of chance commonly known as bingo. . . and card games that are explicitly authorized by the laws of the State”⁵⁶ and are regulated jointly between the tribe and the state pursuant to a state compact.⁵⁷ Class III gaming is IGRA’s catch-all provision and includes “all forms of gaming that are not class I gaming or class II gaming.”⁵⁸ Class III is regulated jointly between the tribe, the state, and the Commissioner.⁵⁹

In 1988, when IGRA was enacted “revenues from Indian gaming . . . averaged around \$200 million per year.”⁶⁰ By 2014, Indian gaming swelled to a 28.5-billion-dollar industry.⁶¹ Still, many Native Americans continued to experience high unemployment and high poverty rates.⁶²

53. JOINT COMM. ON TAXATION, *supra* note 2.

54. *Idaho v. Coeur d’Alene Tribe*, 794 F.3d 1039, 1041 (9th Cir. 2015).

55. 25 U.S.C.A. §2710(a)(1) (West 2016).

56. 25 U.S.C.A. § 2703(7)(A)(i), (ii)(I) (West 2016). The same statute permits card games that

are not explicitly authorized and provide that if card games are not explicitly prohibited by the laws of the State and are played at any location in the State, but only if such card games are played in conformity with those laws and regulations (if any) of the State regarding hours or periods of operation of such card games or limitations on wagers or pot sizes in such card games.

25 U.S.C.A. § 2703(7)(A)(ii)(II) (West 2016).

57. 25 U.S.C.A. §2710(2) (West 2016).

58. 25 U.S.C.A. § 2703(8) (West 2016).

59. 25 U.S.C.A. §2710(d)(1) (West 2016).

60. Alex Tallchief Skibine, *Indian Gaming and Cooperative Federalism*, 42 ARIZ. ST. L.J. 253, 255 (2009).

61. NAT’L INDIAN GAMING COMM’N, *supra* note 9.

62. Compare U.S. CENSUS BUREAU, *Selected Population Profile in the United States: 2015 American Community Survey 1-Year Estimates*, http://factfinder.census.gov/bkmk/table/1.0/en/ACS/15_1YR/S0201//popgroup~006 (last visited Nov. 11, 2016) [<https://perma.cc/JS6D-7QH7?type=image>] (listing unemployment rate among the American Indian and Alaskan Native population group at 12% in 2015), with U.S. DEPARTMENT OF LABOR BUREAU OF LABOR STATISTICS, *Labor Force Statistics from the Current Population Survey*, <http://data.bls.gov/timeseries/LNS14000000> (last updated Nov. 11, 2016) [<https://perma.cc/3KXJ-NADE>] (listing highest unemployment rate nationally in 2015 at 5.7%). U.S. CENSUS BUREAU, *Poverty Status in the Past 12 Months: 2015 American Commu-*

III. THE CONTROVERSIAL HISTORY AND CHALLENGE IN DEFINING THE CONTOURS OF “GROSS INCOME” UNDER THE INCOME TAX CODE

A. GROSS INCOME

IGRA allows for a distribution of a per capita payment to members of a tribe. Specifically, IGRA provides that “[n]et revenues . . . may be used to make per capita payments to members of the Indian tribe only if . . . the per capita payments are subject to Federal taxation.”⁶³ Per capita distributions “also are subject to special withholding requirements.”⁶⁴ “Tribes may use gaming revenue to fund tribal government operations and programs, provide for the general welfare of their constituents, and promote tribal economic development.”⁶⁵

Per capita payments are treated as income under the Income Tax Code. Specifically, section 61 of the Income Tax Code provides that “[e]xcept as otherwise provided in this subtitle, gross income means all income from whatever source derived.” The Supreme Court stated “that this language was used by Congress to exert ‘the full measure of its taxing power.’”⁶⁶ Section 61 also enumerates a non-exhaustive list of fifteen classes of income which constitute gross income under the Income Tax Code.⁶⁷

The Income Tax Regulations reiterate the broad sweep of section 61. They clarify “[g]ross income means all income from whatever source derived, unless excluded by law. Gross income includes income realized in any form, whether in money, property, or services. Income may be realized,

nity Survey 1-Year Estimates, http://factfinder.census.gov/bkmk/table/1.0/en/ACS/15_1YR/S1701 (last visited Nov. 11, 2016) [<https://perma.cc/9G35-ZZ3M?type=image>] (listing poverty rate among the American Indian and Alaskan Native population group at 26.6% compared to 14.7% nationally in 2015).

63. 25 U.S.C.A. § 2710(b)(3)(D) (West 2016).

64. JOINT COMM. ON TAXATION, *supra* note 2, at 12.

65. Meister et al., *supra* note 12, at 385.

66. *Comm’r v. Glenshaw Glass Co.*, 348 U.S. 426, 429 (1955) (citing *Helvering v. Clifford*, 309 U.S. 331, 334 (1940)).

67. 26 U.S.C.A. § 61 (West 2016). The fifteen items listed in Section 61 are:

- (1) Compensation for services, including fees, commissions, fringe benefits, and similar items;
- (2) Gross income derived from business;
- (3) Gains derived from dealings in property;
- (4) Interest;
- (5) Rents;
- (6) Royalties;
- (7) Dividends;
- (8) Alimony and separate maintenance payments;
- (9) Annuities;
- (10) Income from life insurance and endowment contracts;
- (11) Pensions;
- (12) Income from discharge of indebtedness;
- (13) Distributive share of partnership gross income;
- (14) Income in respect of a decedent;
- and (15) Income from an interest in an estate or trust.

therefore, in the form of services, meals, accommodations, stock, or other property, as well as in cash.”⁶⁸

The default setting of the Income Tax Code is to treat all forms of income regardless of source as gross income. This includes income that is actively generated directly by the taxpayer’s efforts, passively generated by the taxpayer’s capital investments, or indirectly received by the taxpayer in the form of some economic benefit. The most common forms of income which can be characterized as actively generated directly by the taxpayer include wages and net earnings from a trade or business activity. The most common forms of income which can be characterized as passively generated by a taxpayer’s capital investments include interest, dividends, gains, and rental income.

Indirect income is another form of income recognized by the IRS and the courts. Indirect forms of income result in gross income to the taxpayer on the theory that the taxpayer has received an economic benefit or has been relieved of an obligation. Examples of indirect forms of gross income include the payment of a CEO’s income tax liability by the corporation,⁶⁹ the redemption of an outstanding debt obligation at less than face value,⁷⁰ or the assumption of a non-recourse liability by the purchaser.⁷¹

Notwithstanding a statutory definition of income, the question, “*What is income?*” has been one of continuing debate and controversy ever since Congress passed the Revenue Act of 1913.⁷² The Supreme Court has taken two occasions to consider the definition of “income.” The Supreme Court’s first foray occurred during the early years of the newly enacted federal income tax. Three years after the federal income tax was enacted, the Supreme Court addressed the question, “*What is income?*” in the case of *Eisner v. Macomber*.⁷³

The issue in *Eisner v. Macomber* was “whether . . . Congress has the power to tax, as income of the stockholder . . . a stock dividend made lawfully and in good faith against profits accumulated by the corporation since March 1, 1913.”⁷⁴ The taxpayer was a shareholder in the Standard Oil Corporation. The taxpayer received a 50% stock dividend from the Standard Oil Corporation. The taxpayer asserted that the stock dividend was nontaxable, while the IRS claimed that the stock dividend was taxable. In holding for the taxpayer, the court reasoned that:

68. 26 C.F.R. § 1.61-1(a) (2016).

69. *Old Colony Trust Co. v. Comm’r*, 279 U.S. 716 (1929).

70. *United States v. Kirby Lumber Co.*, 284 U.S. 1 (1931).

71. *Crane v. Comm’r*, 331 U.S. 1 (1947).

72. *Tariff Act of 1913*, ch. 16, 38 Stat. 114.

73. *Eisner v. Macomber*, 252 U.S. 189 (1920).

74. *Id.* at 199.

A stock dividend really takes nothing from the property of the corporation, and adds nothing to the interests of the shareholders. Its property is not diminished, and their interests are not increased. * * * The proportional interest of each shareholder remains the same. The only change is in the evidence which represents that interest, the new shares and the original shares together representing the same proportional interest that the original shares represented before the issue of the new ones. In short, the corporation is no poorer and the stockholder is no richer than they were before.⁷⁵

The Court then proceeded to define “income” as “[t]he gain derived from capital, from labor, or from both combined, provided it be understood to include profit gained through a sale or conversion of capital assets”⁷⁶ This approach modeled income as a result obtained from one’s labor or capital. The majority held for the taxpayer and ordered a refund of income taxes paid. There was much critique surrounding this narrow definition of income.⁷⁷

In 1955, the Supreme Court took a second look at the definition of “income” with the case of *Commissioner v. Glenshaw Glass Co.*⁷⁸ This time, more than forty years of tax jurisprudence had developed. Both the economy and the tax law matured considerably, and both were each developing into even more complex institutions.

The Supreme Court used the occasion presented by *Glenshaw Glass*⁷⁹ to determine whether an award of punitive damages constituted income under the Income Tax Code. The taxpayer sued a competitor for antitrust violations. The taxpayer prevailed and received an award of treble damages. The taxpayer, however, asserted that the award of punitive damages was not subject to tax as gross income. In contrast, the IRS maintained that the payment was includable in gross income. The Supreme Court held for the IRS reasoning that the term gross income as used in the Income Tax Code “was used by Congress to exert . . . ‘the full measure of its taxing power.’”⁸⁰

75. *Id.* at 202-03.

76. *Id.* at 207.

77. See Alice G. Abreu & Richard K. Greenstein, *Defining Income*, 11 FLA. TAX REV. 295, 301 (contrasting the narrow definition of income the court announced in *Eisner* with the much broader definition in *Comm’r v. Glenshaw Glass Co.*, 348 U.S. 426 (1995)); see also Patrick E. Hobbs, *The Personal Injury Exclusion: Congress Gets Physical but Leaves the Exclusion Emotionally Distressed*, 76 NEB. L. REV. 51, 67 (pointing out that the narrow definition of income in *Eisner* gave rise to the nonphysical personal injury exclusion).

78. *Glenshaw Glass Co.*, 348 U.S. at 426.

79. *Id.*

80. *Id.* at 429.

Most importantly, the Supreme Court used *Glenshaw Glass* to refine and expand its earlier definition of income articulated in *Macomber*. This time, the Court broadly defined “income” as resulting from “instances of undeniable accessions to wealth, clearly realized, and over which the taxpayers have complete dominion.” This shift in thought by the Supreme Court from a “capital . . . labor” model, to an “accessions to wealth” model greatly expanded the scope and the reach of Congress’s taxing power under the Income Tax Code.

Despite the statutory guidance defining gross income, two areas in tax continually produced controversy for taxpayers and the IRS – determining what is a prize or award, and determining what is a gift.

B. PRIZES AND AWARDS

The first of the controversial areas involve the tax treatment of prizes and awards. Three cases help to illustrate the challenges encountered by taxpayers and the IRS when determining whether an item is a prize or award, or includable as gross income. In *Washburn v. Commissioner*, commonly known as the Pot O’ Gold case, the taxpayer received a random phone call from a radio station announcing that the taxpayer won a “Pot O’ Gold.”⁸¹ The taxpayer “asked what she should do. The voice answered, ‘Nothing, Within a half hour you will receive the money.’ Petitioner asked how much money, and she was told \$900.”⁸²

The IRS argued that the award constituted income. Upon review, Tax Court held that “Under the . . . set of facts, we conclude without difficulty that the \$900 received by the petitioner was an outright gift, without any of the earmarks of income.”⁸³

Next, in *McDermott v. Commissioner*,⁸⁴ commonly known as the Ross Essay case, the taxpayer entered a writing contest and “‘was awarded * * * the prize’, which was a check for \$3000, and a certificate, ‘for the best discussion of the subject selected.’”⁸⁵ The IRS maintained that the payment of the \$3000 prize constituted gross income to the taxpayer. Upon review, “the Tax Court of the United States sustained the Commissioner”⁸⁶ and held the prize constituted income.

81. *Washburn v. Comm’r*, 5 T.C. 1333, 1334 (1945).

82. *Id.*

83. *Id.* at 1335.

84. *McDermott v. Comm’r*, 150 F.2d 585 (D.C. Cir. 1945).

85. *Id.* at 586. “[T]he American Bar Association announced a prize of \$3,000 to be awarded for the best essay submitted for the year 1939 entitled, ‘To What Extent Should Decisions of Administrative Tribunals be Reviewable by the Courts?’” *McDermott v. Comm’r*, 3 T.C. 929, 929 (1944).

86. *McDermott*, 150 F.2d at 585.

On appeal, the United States Court of Appeals District of Columbia reversed declaring that the award of the \$3000 prize was not income, but a “gift”.⁸⁷ Despite the competitive nature of the writing competition and the entry by the taxpayer, the Court of Appeals held that “the award was a gift and not income.” Using curious language, the Court of Appeals reasoned that “[n]o one not talking law would be likely to say that the Association paid petitioner \$3000 for writing an essay or that it paid \$3000 for the essay which petitioner wrote. In plain English the Association gave petitioner the prize.”⁸⁸ The Court further reasoned “[t]he purpose of Judge Ross and the American Bar Association in creating and administering the Ross prize was likewise to ‘give’ and to ‘incite,’ not to employ or buy.”⁸⁹ The Court also placed significance on the fact that the “long-continued administrative interpretation”⁹⁰ of not collecting taxes for prizes “is entitled to great weight.”⁹¹

Finally, in *Robertson v. United States*,⁹² a composer entered a contest and won a \$25,000 prize. The taxpayer initially “included that amount in his 1947 income tax return as gross income.”⁹³ The taxpayer subsequently “filed a claim for refund on the ground that the award constituted a nontaxable gift.”⁹⁴

The IRS argued that the prize constituted income. The Supreme Court accepted certiorari to resolve a split between the circuits.⁹⁵ The case ultimately made it to the Supreme Court. The Supreme Court held that the prize constituted gross income. The Supreme Court reasoned that “the discharge of legal obligations—the payment for services rendered or consideration paid pursuant to a contract—is in no sense a gift.”⁹⁶

In 1954, Congress resolved the dispute concerning the taxability of prizes and awards by enacting section 74.⁹⁷ The Senate Report states:

[Section 74] is intended to eliminate some existing confusion in court decisions over whether a prize is

87. *Id.* at 587. *But see id.* at 588 (Groner, C.J., dissenting) (“I am of [the] opinion that the award to [the taxpayer] . . . was compensation, and hence income within the meaning of the tax statutes.”).

88. *Id.* at 587.

89. *Id.* at 589.

90. *Id.* at 588.

91. *McDermott*, 105 F.2d at 588.

92. *Robertson v. United States*, 343 U.S. 711 (1952).

93. *Id.* at 712.

94. *Id.* at 713.

95. *Id.* The conflict was between the decision below (*Robertson v. United States*, 190 F.2d 680 (1951)), the District of Columbia Circuit in *McDermott v. Comm’r*, 150 F.2d 585 (1945), and the United States Court of Claims in *Williams v. United States*, 84 F. Supp. 362 (1949). *Id.*

96. *Robertson*, 343 U.S. at 713.

97. 26 U.S.C.A. § 74 (West 2016).

income or a gift and would overrule both the Pot O'Gold case⁹⁸ and the Ross Essay Contest case⁹⁹ insofar as each held prizes were not income.¹⁰⁰

Section 74 clarified for taxpayers and the IRS alike, the question *When is a prize or award includable in gross income?* Specifically, section 74 establishes a rigid and limited framework for the exclusion of prizes and awards. As a result of section 74, prizes and awards are included in gross income unless they comply with a narrowly defined exception. The Senate Report expressly stated that “[a]mounts received from radio and television give-away shows, or as door prizes, or in any similar type contest would also not be” eligible for exclusionary treatment.¹⁰¹

C. GIFTS

The other area of tax controversy involved the question, “*What constitutes a gift?*”. Section 102 of the Income Tax Code provides that “[g]ross income does not include the value of property acquired by gift, bequest, devise, or inheritance.”¹⁰² However, Congress did not define what constitutes a gift for purposes of this statute. As a result, the IRS, taxpayers, and the courts struggled in determining when a transfer of property constituted income or a gift.

For example, in *Blair v. Rosseter*,¹⁰³ the taxpayer worked as the “president of the Sperry Flour company”¹⁰⁴ for a ten-year period from 1910 to 1920. “[T]he stockholders of the company, by unanimous vote, instructed the board of directors to authorize the payment of \$50,000 to the [taxpayer] as a gift in recognition of his able and successful direction of the affairs of the

98. Washburn v. Comm’r, 5 T.C. 1333 (1945).

99. McDermott v. Comm’r, 150 F.2d 585 (D.C. Cir. 1945).

100. S. REP. NO. 83-1622, at 4813 (1954).

101. *Id.*

102. 26 U.S.C.A. § 102(a) (West 2016).

103. *Blair v. Rosseter*, 33 F.2d 286 (9th Cir. 1929). In *Bass v. Hawley*, the court stated:

Each of these cases in holding payments to employees to be nontaxable gifts relies on the fact that there was no obligation to pay and the payments were over and above the wages and salaries due. The controlling importance of that fact has since been denied by the Supreme Court in *Old Colony Trust Co. v. Commissioner*, 279 U. S. at page 730, 49 S. Ct. 499, 504, 73 L. Ed. 918, where the question was whether the litigant owed a tax, saying: ‘The payment for services, even though entirely voluntary, was nevertheless compensation within the statute.’

Bass v. Hawley, 62 F.2d 721, 722 (5th Cir. 1933).

104. *Blair*, 33 F.2d at 286.

company during the past ten years.”¹⁰⁵ The taxpayer maintained that the payment constituted a gift. In contrast, the IRS maintained that the payment constituted “taxable income.”¹⁰⁶ The Circuit Court of Appeals for the Ninth Circuit held that “the payment . . . was a gift within the accepted meaning of that term.”¹⁰⁷ The court determined that “[a] gift is generally defined as a voluntary transfer or property by one to another, without any consideration or compensation therefore.”¹⁰⁸

In *Fernandez v. Fahs*,¹⁰⁹ the taxpayer and his wife sought to exclude from gross income the value of a car they won at a baseball game. “During the 1948 baseball season the Tampa Smokers [baseball team] . . . advertised that they would give away a 1948 Dodge automobile” during one of their baseball games.¹¹⁰ The taxpayer and his wife entered the contest and won the automobile. They drove away with the automobile after the game. On audit, the IRS “determined a deficiency against the [taxpayers] upon the ground that the value of the automobile constituted taxable income to them.”¹¹¹

The taxpayer testified that “[h]e did not subsequently perform any services for the ball club nor for the owners of the club. He was not asked to appear on the radio, to have his picture taken or to make any testimonial on behalf of the ball club.”¹¹² The record further indicates that neither the taxpayer nor his wife “performed any services nor invested any capital as consideration for the receipt of the automobile.”¹¹³ Without citing a standard or defining what constitutes a gift, the court starkly declared that the taxpayers “received the automobile as a gift and not as taxable income.”¹¹⁴

In 1960, the Supreme Court entered the disputed and uncertain terrain of “gifts” with the case of *Commissioner v. Duberstein*.¹¹⁵ Here, the Supreme Court examined the issue whether a transfer of property constituted a gift. *Duberstein* is a consolidation of two cases: *Commissioner v. Duberstein*, and its companion case, *Stanton v. Commissioner*.

In the first case, *Commissioner v. Duberstein*, the taxpayer Duberstein and his business contact Berman “transact[ed] . . . business with each other, which consisted of buying and selling metals.”¹¹⁶ On occasion, Duberstein would provide Berman with customer referrals. One of these referrals proved

105. *Id.*

106. *Id.*

107. *Id.* at 287.

108. *Id.*

109. *Fernandez v. Fahs*, 144 F. Supp. 630, 630 (S.D. Fla. 1956).

110. *Id.* at 631.

111. *Id.* at 630.

112. *Id.* at 631.

113. *Id.*

114. *Fernandez*, 144 F. Supp. at 632.

115. *Comm’r v. Duberstein*, 363 U.S. 278 (1960).

116. *Id.* at 280.

fruitful to Berman. In appreciation, "Berman telephoned Duberstein and said that the information Duberstein had given him had proved so helpful that he wanted to give" Duberstein a Cadillac automobile as a present.¹¹⁷ Duberstein indicated he already owned two cars, one of them being a Cadillac. The record indicates that "Berman insisted that Duberstein accept the car, and [Duberstein] did so, protesting however that he had not intended to be compensated for the information."¹¹⁸ Duberstein asserted that the receipt of the Cadillac constituted a gift and therefore, "did not include the value of the Cadillac in gross income."¹¹⁹

In the companion case, *Stanton v. Commissioner*, the taxpayer, Stanton worked for approximately ten years as a "comptroller of the Church corporation, and [as] president" of the church's wholly owned real estate subsidiary.¹²⁰ Stanton "resigned from both positions to go into business for himself."¹²¹ The Church and its wholly owned subsidiary adopted a resolution awarding Stanton "a gratuity . . . of Twenty Thousand Dollars . . . provided that, with the discontinuance of his services, the Corporation of Trinity Church is released from all rights and claims to pension and retirement benefits"¹²² Stanton argued the payment constituted a gift and therefore did not include this amount in his income.

The Supreme Court held that the transfer of the car to Duberstein constituted income instead of a gift. With respect to the companion case of Stanton, the Supreme Court vacated the judgment of the Court of Appeals and remanded the case to the District Court to address the question concerning the \$20,000 gratuity.¹²³ Most importantly, in reaching its decisions, the Supreme Court announced a standard of analysis for gifts. The Supreme Court stated that "[a] gift in the statutory sense proceeds from a detached and disinterested generosity, 'out of affection, respect, admiration, charity or like impulses.' In this regard, the most critical consideration is the transferor's 'intention.'"¹²⁴

Despite the standard announced in the Duberstein decision, the federal courts continued grappling with the contours of a gift. For example, in *Goodwin v. United States*¹²⁵ the taxpayer, a minister of a church, alleged that "special occasion gifts" in the form of a cash collection by the members of the church for the taxpayer and his wife constituted a gift and therefore were

117. *Id.*

118. *Id.* at 280-81.

119. *Id.* at 280.

120. *Duberstein*, 363 U.S. at 281.

121. *Id.*

122. *Id.* at 281-82.

123. *Id.* at 291-93.

124. *Id.* at 285.

125. *Goodwin v. United States*, 67 F.3d 149 (8th Cir. 1995).

excludable from gross income.¹²⁶ The IRS argued that the collection of cash from the church members constituted gross income. The District Court held for the Commissioner and the Court of Appeals for the Eight Circuit affirmed.¹²⁷

Another case, *Olk v. United States*,¹²⁸ is instructive because it provides insight into the transferor's intent. In *Olk*, the Court of Appeals for the Ninth Circuit examined the circumstances to see if a transfer of gambling tokens from a customer to the craps dealer constituted income or a gift.¹²⁹ The taxpayer was employed as a craps dealer in a Las Vegas gambling casino. The taxpayer received tokens¹³⁰ from customers who visited the gambling casino. The taxpayer contended that the tokens constituted gifts. The IRS however, maintained that the tokens were income.

At issue was whether the “[t]okens [given to the dealers were] the result of detached and disinterested generosity on the part of . . . patrons.”¹³¹ At trial, the District Court found

that patrons sometimes give money to dealers, other players or mere spectators at the game, but that between 90-95% of the patrons give nothing to a dealer. No obligation on the part of the patron exists to give to a dealer and ‘dealers perform no service for patrons which a patron would normally find compensable.’¹³²

The trial court . . . held that ‘tokens’ were gifts.¹³³

However, on appeal the Court of Appeals found that a “detached and disinterested generosity” was lacking. Specifically, when testing for the donor’s intention, the court found that the donor’s intent was prompted by “[i]mpulsive generosity or superstition on the part of the players.”¹³⁴ The Court of Appeals noted,

126. *Id.* at 150.

127. *Id.* at 153.

128. *Olk v. United States*, 536 F.2d 876 (9th Cir. 1976).

129. *Id.* at 876.

130. MEG ELAINE SCHNEIDER & STANLEY ROBERTS, *THE EVERYTHING CASINO GAMBLING BOOK: FEEL CONFIDENT, HAVE FUN, AND WIN BIG!* 218 (2d ed. 2004) (“‘Tokens’ is casino jargon for tips, especially for dealers.”).

131. *Olk*, 536 F.2d at 877.

132. *Id.*

133. *Id.* at 876.

134. *Id.* at 879.

In the context of gambling in casinos open to the public such a motive is quite understandable. However, our understanding also requires us to acknowledge that payments so motivated are not acts of ‘detached or disinterested generosity.’ Quite the opposite is true. Tribute to the gods of fortune which it is hoped will be returned bounteously soon can only be described as an ‘involved and intensely interested’ act.¹³⁵

The Court of Appeals for the Ninth Circuit held that the “tokens [were] taxable income”¹³⁶ in the hands of the dealers and ruled in favor of the IRS.

From a policy perspective, “[t]he rationale for the exclusion of gifts is not altogether clear.”¹³⁷ Moreover, “[t]he legislative history of section 102 does not reveal precisely why Congress exclude[s] gifts”¹³⁸ from gross income. However, what is now clear, is that *Duberstein* provides the current standard for determining whether a transfer of property is income or a gift, and as the Supreme Court indicates, “the most critical consideration . . . is the transferor’s ‘intention’.”¹³⁹

IV. ARE PER CAPITA PAYMENTS GIFTS? CONSTRUCTING THE GIFT ARGUMENT

It is a truism in tax that the broad sweep of section 61¹⁴⁰ requires the inclusion of all income. It is also true that applying the Supreme Court’s reasoning in *Commissioner v. Glenshaw Glass* that “undeniable accessions of wealth, clearly realized, over which the taxpayer has dominion,”¹⁴¹ requires the inclusion of all forms of income satisfying this standard. And, it is also true that IGRA provides that “[n]et revenues . . . may be used to make per capita payments to members of the Indian tribe only if . . . the per capita payments are subject to Federal taxation”¹⁴²

How then, is it possible in the face of such authority, to assert that per capita payments made pursuant to IGRA are anything other than income? The answer lies in the uncertainty created by IGRA. When Congress enacted

135. *Id.*

136. *Olk*, 536 F.2d at 879.

137. MICHAEL D. ROSE & JOHN C. CHOMMIE, FEDERAL INCOME TAXATION 31 (3d ed. 1988).

138. *Id.*

139. *Comm’r v. Duberstein*, 363 U.S. 278, 285 (1960).

140. 26 U.S.C.A. § 61 (West 2016).

141. *Comm’r v. Glenshaw Glass Co.*, 348 U.S. 426, 431 (1955).

142. 25 U.S.C.A. § 2710(b)(3)(D) (West 2016) (emphasis added).

IGRA, did it intend the subject IGRA language, “per capita payments are subject to Federal taxation,” to mean that the per capita, payments are *only includable in gross income under section 61 but not excludable from gross income under section 102*? Or, did Congress intend the subject IGRA language to mean that the per capita payments are both *includable in gross income under section 61 and excludable from gross income under section 102*? The legislative history for IGRA is silent on this point.¹⁴³ It bears noting that income tax exclusions are a matter of legislative grace and are strictly construed by courts.¹⁴⁴ And if a taxpayer can demonstrate they satisfy the statute, they are entitled to access the exclusion.¹⁴⁵ Therefore, the unresolved and open question is whether per capita payments may qualify as “gifts” under section 102 of the Income Tax Code?

A. INCOME TAX STATUTE AND REGULATIONS

We begin the analysis by examining the relevant income tax statute and underlying regulations. Section 61 of the Income Tax Code is a broad tax rule of inclusion which provides “[e]xcept as otherwise provided in this subtitle, gross income means all income from whatever source derived”¹⁴⁶ Section 102 of the Income Tax Code is a tax rule of exclusion and provides “[g]ross income does not include the value of property acquired by gift, bequest, devise, or inheritance.”¹⁴⁷ Section 102 however, fails to define what constitutes a “gift” for federal income tax purposes. The underlying income tax regulations for section 102 state “[p]roperty received as a gift . . . is not includible in gross income”¹⁴⁸ The income tax regulations also fail to define what constitutes a “gift” for income tax purposes. Unfortunately, without statutory and regulatory guidance, the federal courts, taxpayers, and the IRS are left to resolve their disputes in audit or through litigation.

B. COMMON LAW ANALYSIS

Next, given the absence of statutory and regulatory guidance, taxpayers and the IRS must then consider how the common law analyzes gifts. In this regard, the *Duberstein* case is instructive. The Supreme Court stated that

143. See S. REP. NO. 100-446 (1988); 134 CONG. REC. H8146-01 (1988).

144. *Zimmermann v. C.I.R.*, 241 F.2d 338, 344 (8th Cir. 1957) (citing *Deputy v. du Pont*, 308 U.S. 488, 493 (1940)).

145. *Gross v. C.I.R.*, No. 3440-98, 2000 WL 1672624, at *5 (T.C. Nov. 7, 2000) (“[A taxpayer] must bring [himself] within the clear scope of the exclusion . . . [and] bears the burden of proof with respect to whether he is entitled to an exclusion.”).

146. 26 U.S.C.A. § 61 (West 2016).

147. 26 U.S.C.A. § 102(a) (West 2016).

148. 26 C.F.R. § 1.102-1(a) (2016).

when analyzing for a gift “[w]hat controls is the intention with which payment, however voluntary, has been made.”¹⁴⁹ Inevitably, context is an inescapable factor in any tax analysis, and it is especially relevant in a gift analysis.

When testing for the donor’s intention, one must be mindful of the guidance offered by the *Duberstein* court, namely, whether the transfer “proceeds from a ‘detached and disinterested generosity’”¹⁵⁰ Analyzing the per capita payment with this phrase in mind, a reasonable person will likely ask, *Why did the Tribe make the per capita payment?* Here, context becomes important when inquiring into the intention of the transferor.

As both the *Duberstein* and the *Olk* cases illustrate, federal courts have considered gifts within the context of business relationships and commercial settings only. For example, *Duberstein* and its companion case, *Stanton*,¹⁵¹ both involved property transfers to the recipient within a business setting. *Duberstein* occurred within the context of a supplier-buyer relationship, *Stanton* occurred within the context of a retiring corporate executive, and *Olk* involved payments that were given by a patron to the dealer within the context of a commercial gambling setting.¹⁵²

In contrast to *Duberstein*, and to *Olk*, per capita payments arise within a non-business context. Although the Supreme Court rejected any attempt to distinguish between gifts made in a business context from gifts made in a personal context,¹⁵³ the Supreme Court did note that “the question [of the transferor’s intent] here remains basically one of fact, for determination on a case-by-case basis.”¹⁵⁴

In this regard, discerning the intent of the transferor within the context of the per capita distribution payment will require examining the per capita payments on a case-by-case basis. After analyzing the reasons for these payments, a reasonable person will be drawn to the conclusion that the intention of the Tribe in making the payment is not to award compensation, it is not to observe a legal duty, nor is it to honor a moral duty. The per capita payment is unequivocally free from any such indicators of employment, commerce, or obligation. Instead, the intention behind the per capita distribution payment is to make “a fair and equitable per capita distribution of revenues . . . from

149. *Comm’r v. Duberstein*, 363 U.S. 278, 286 (1960).

150. *Id.* at 285.

151. *Stanton v. United States*, 268 F.2d 727 (2d Cir. 1959), *vacated*, *Comm’r v. Duberstein*, 363 U.S. 278 (1960).

152. *Cf. Comm’r v. Groetzinger*, 480 U.S. 23 (1987) (where the Supreme Court found that the taxpayer was engaged in a trade or business and therefore eligible for business deductions under 26 U.S.C.A. § 162 (West 2016)).

153. “The Government suggests that we promulgate a new ‘test’ in this area to serve as a standard to be applied by the lower courts and by the Tax Court in dealing with the numerous cases that arise. We reject this invitation.” *Duberstein*, 363 U.S. at 285.

154. *Id.* at 290.

gaming activities conducted by and on behalf of the Nation is necessary in promoting the general welfare of the Nation and its members”¹⁵⁵ A fair and equitable distribution system to promote the general welfare of the members of a community without any performance obligation on behalf of the transferor, is the quintessential essence of a gift.

Moreover, attention must be drawn to the Supreme Court’s statement in *Duberstein* that “if the payment proceeds primarily from ‘the constraining force of any moral or legal duty,’ or from ‘the incentive of anticipated benefit’ of an economic nature, it is not a gift.”¹⁵⁶ Native tribes do not have a moral duty to make a per capita payment. Approximately twenty-five percent of tribes with gaming operations make per capita payments.¹⁵⁷ If a moral duty were to exist, it then follows that the percentage of Native tribes making distributions would rise substantially higher to reflect the presence of a moral obligation by Native tribes. In addition, the statement of the moral duty referenced in the Supreme Court’s decision in *Bogardus*¹⁵⁸ and which is cited by the *Duberstein* Court, arose within the context of providing severance payments to departing employees and in one case, providing a death benefit to a surviving family member.¹⁵⁹ The moral circumstances calling for payments in *Bogardus*,¹⁶⁰ namely severance payments and a death benefit, are clearly not present when a tribe distributes a per capita payment to its members.

Olk is equally instructive because it illustrates that a donor’s motive can be based not only on ordinary beliefs and expectations, but can include extraordinary beliefs, expectations, and as reported in *Olk*, superstition.¹⁶¹ In *Olk*, the Ninth Circuit Court of Appeals held that the donor’s motive for paying the dealer with the gambling tokens was to offer “[t]ribute to the gods of fortune.”¹⁶² In contrast, the per capita payments made by Native nations to its members are markedly different. Per capita payments are not motivated

155. HO-CHUNK NATION CODE, 2 H.C.C. § 12(3) (2006), http://www.narf.org/nill/codes/hochunkcode/2HCC12_PerCap.pdf.

156. *Duberstein*, 363 U.S. at 285.

157. *Facts About Indian Gaming*, OKLA. INDIAN GAMING ASS’N, <http://oiga.org/faqs/> (last visited May 18, 2016). The Oklahoma Indian Gaming Association website reports that “[t]hree-fourths of gaming Tribes devote all of their revenue to Tribal governmental services, economic and community development, to neighboring communities and to charitable purposes. 75% of tribes do not give out per capita payments.” *Id.* The website adds that “[o]nly about one-fourth of Tribes engaged in gaming distribute per capita payments to tribal members.” *Id.*

158. *Bogardus v. Comm’r*, 302 U.S. 34 (1937); *Duberstein*, 363 U.S. at 285.

159. *Bogardus*, 302 U.S. at 37 (the Court notes that “[s]ome of the recipients had been out of the employ of the Universal company for many years; and one of them was the sister of an employee killed in an explosion about the year 1919.”).

160. *Id.*

161. *Olk v. United States*, 536 F.2d 876, 877 (9th Cir. 1976).

162. *Id.* at 879.

by a quid pro quo expectation, nor motivated in exchange for some pecuniary gain be it present or deferred. Nor are the per capita payments made by the Native tribe to its members motivated by fear, reprisal, or superstition as was demonstrated in *Olk*. Instead the per capita payments are made by the Native tribe out of a detached and disinterested generosity, and out of a concern for the well-being and care of its tribal members. The per capita payments made by the tribes, and contemplated by IGRA, are intended to alleviate the economic hardship endured by members of many Native nations. Unlike a business or commercial investment, where a return on investment is intentionally calculated and expected,¹⁶³ there is no comparable expected return to the Tribal nation. Instead, there is simply the desire to address the general welfare of its members. A transfer of property under these circumstances bears the hallmark of a gift.

C. IGRA STATUTORY ANALYSIS

Next, the statutory placement of IGRA's tax obligation outside of the Income Tax Code is extraordinary and remarkable. Not only does its placement outside the Income Tax Code strain the question whether per capita payments are eligible for exclusionary treatment under the Income Tax Code, it also raises the question whether recipients of per capita payments are eligible to claim other statutory benefits such as the personal exemption,¹⁶⁴ or the standard deduction.¹⁶⁵ IGRA's legislative history does not offer any guidance on this point. Discerning Congressional intent regarding this phrase is difficult without clear guidance. The questions created by the IGRA phrase "subject to Federal taxation" and its unusual placement within IGRA further muddles an already indeterminate situation regarding Congress's intention.

It is noteworthy to point out that IGRA's placement of the tax language outside of the Income Tax Code runs contrary to Congress's expressed desire to unify the tax laws. To that end, Congress created Subchapter B of the Income Tax Code. This subchapter captioned *Items Specifically Included in Gross Income* prescribes the mandated inclusion of specific items into gross income. This subchapter was added with the 1954 code revision.¹⁶⁶ The report of the Senate Committee on Finance declares that it

163. See, e.g., William Langer, *The Role of Private Sector Investment in International Microfinance and the Implications of Domestic Regulatory Environments*, 5 *BYU INT'L L. & MGMT. REV.* 1, 8 (2008) (stating that "fully commercial investment . . . seeks market-based, risk-adjusted returns. . . . [B]lended value investment . . . seeks commercial or near-commercial gains and a substantial social return on investment.").

164. 26 U.S.C.A. § 151 (West 2016).

165. 26 U.S.C.A. § 63(c) (West 2016).

166. 26 U.S.C.A. § 61(a) (West 2016).

has joined with the House Committee on Ways and Means in undertaking the first comprehensive revision of the internal revenue laws since before the turn of the century and the enactment of the income tax. This revision includes a rearrangement of the provisions to place them in a more logical sequence, the deletion of obsolete material, and an attempt to express the internal revenue laws in a more understandable manner.¹⁶⁷

Subchapter B of the Income Tax Code promotes Congress's goals of logic and comprehension by indicating the inclusion into income the items mandated by Congress in one place. For example, Congress has expressly indicated the following items of income within Subchapter B of the Income Tax Code: section 71 Alimony and separate maintenance payments; section 74 Prizes and awards; section 75 Dealers in tax-exempt securities; section 77 Commodity credit loans; section 78 Dividends received from certain foreign corporations by domestic corporations choosing foreign tax credit; section 82 Reimbursement for expenses of moving; section 83 Property transferred in connection with performance of services; section 84 Transfer of appreciated property to political organizations; and section 85 Unemployment Compensation. One writer notes:

[n]ot only has Congress expanded the list of items specifically included in 'gross income,' under § 61, it has also added a number of sections which expressly characterize certain receipts as income. In almost every case, in expanding the scope of gross income, Congress has been motivated by a desire to clarify the law, to make the tax laws more equitable, or to expand the tax base.¹⁶⁸

To the average person, the Income Tax Code is impenetrable and incomprehensible. But to seasoned tax professionals, the structure of the Income Tax Code is a product of form, logic, and internal consistency.¹⁶⁹ The Income Tax Code itself has eleven subtitles with each subtitle further subdi-

167. S. REP. NO. 83-1622, at 4629 (1954).

168. J. MARTIN BURKE & MICHAEL K. FRIEL, *TAXATION OF INDIVIDUAL INCOME* 26 (11th ed. 2015).

169. This is not to advance the claim that the Income Tax Code is simple and uncomplicated, for it is not. It is to advance the claim that the Income Tax Code has an expected design and structure.

vided by topic into parts, subparts, sections, subsections, and addressing specific subject areas such as Income Tax, Gift Tax, and Income Tax Procedure.¹⁷⁰ Trained income tax professionals and ardent devotees of tax law look to its expected design and predictable structure when navigating the Income Tax Code. For instance, corporate income tax provisions are located in Subchapter C, partnership income tax provisions are located in Subchapter K, and qualifying small business corporate provisions are located in Subchapter S. The design structure of the Income Tax Code makes it navigable, promotes certainty, and establishes congressional intent concerning the tax treatment of a multitude of items.

It is not entirely out of the question for Congress to enact tax legislation and place it outside of the Income Tax Code. For example, section 505¹⁷¹ of the Bankruptcy Code provides:

[T]he court may determine the amount or legality of any tax, any fine or penalty relating to a tax, or any addition to tax, whether or not previously assessed, whether or not paid, and whether or not contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction.¹⁷²

The purpose of section 505 is “to expedite the adjudication of tax liability.”¹⁷³ Another example, section 960 of the Judiciary and Judicial Procedure Code provides “[a]ny officers and agents conducting any business under authority of a United States court shall be subject to all Federal, State and local taxes applicable to such business to the same extent as if it were conducted by an individual or corporation.”¹⁷⁴ The purpose of section 960 is “to equalize the tax status of businesses being operated as going concerns by federal receivers with the tax status of their competitors.”¹⁷⁵ However, unlike section 505 and section 960, which either authorize an income tax consequence or describe an income tax consequence, the IGRA language is distinguishable because it prescribes a direct income tax consequence on the taxpayer. Specifically, IGRA imposes an affirmative federal income tax obligation on a taxpayer, namely, the inclusion into income of the per capita payment. Simply put, sections 505 and 960 are descriptive of an income tax obligation,

170. A complete analysis of the structure and organization of the Income Tax Code, and related tax statutes is beyond the scope of this Article. It bears noting that Title 11 and Title 28 also contain tax statutes. *E.g.*, 11 U.S.C.A. § 505 (West 2016); 28 U.S.C.A. § 960 (West 2016) (these sections however, do not impose a tax obligation).

171. 11 U.S.C.A. § 505 (West 2016).

172. 11 U.S.C.A. § 505(a) (West 2016).

173. *In re Grand Chevrolet, Inc.*, 153 B.R. 296, 300 (Bankr. C.D. Cal. 1993).

174. 28 U.S.C.A. § 960 (West 2016).

175. *In re Hubs Repair Shop, Inc.*, 28 B.R. 858, 868 (Bankr. N.D. Iowa 1983).

whereas the IGRA section is prescriptive of an income tax obligation. Affirmative obligations on taxpayers have been placed within the Income Tax Code, and not without.

Moreover, the IGRA language, “shall be subject to federal tax” creates an additional confusion. What does this language mean? Does this language mean that a tribal member is not entitled to claim their personal exemption¹⁷⁶ or, their standard deduction?¹⁷⁷ For example, would a tribal member receiving a modest per capita distribution payment, say \$3,000, be entitled to claim their personal exemption or their standard deduction? A strict reading of the IGRA language would suggest the answer to this question is “no,” thereby making the entire amount “subject to federal tax.” The United States Tax Court recognized IGRA’s ability to impose a tax when it reasoned “[t]hrough not specifically addressed in the Internal Revenue Code, revenue from casino gambling conducted on American Indian reservations is specifically subjected to Federal taxes under the Indian Gaming Regulatory Act.”¹⁷⁸ The Tax Court added, “The Indian Gaming Regulatory Act provides that ‘per capita payments [of net revenues from gaming activities conducted or licensed by any Indian tribe] are subject to Federal taxation’”¹⁷⁹ However, the Tax Court did not address the question of whether a tribal member is entitled to claim their personal exemption or standard deduction.

Moreover, when Congress intends to include items into income, it uses clear and unequivocal language. For example, the alimony statute reads “gross income includes,”¹⁸⁰ the unemployment compensation statute reads “gross income includes,”¹⁸¹ and the statute regulating prizes and awards reads “gross income includes.”¹⁸² These statutes demonstrate Congress’s clear and unequivocal intention when it invokes the phrase “gross income includes.” In contrast, the IGRA language reads “[n]et revenues . . . may be used to make per capita payments to members of the Indian tribe only if . . . the per capita payments *are subject to Federal taxation*”¹⁸³ Unfortunately, the IGRA language is neither descriptive nor prescriptive, rather it is abstruse and perplexing. In the case of the IGRA statute, the statutory language “per capita payments are subject to Federal taxation” invites uncertainty and controversy into the discussion, instead of clarity and certainty.

Taxpayers, the IRS, and the courts may debate whether the placement of the tax obligation within IGRA was intentional, an oversight, or possibly an afterthought. To be clear, Congress has the authority to place the IGRA

176. 26 U.S.C.A. § 151 (West 2016).

177. 26 U.S.C.A. § 63 (West 2016).

178. Campbell v. Comm’r, No. 9244-95, 1997 WL 690178, at *3 (T.C. 1997).

179. *Id.*

180. 26 U.S.C.A. § 71(a) (West 2016).

181. 26 U.S.C.A. § 85 (West 2016).

182. 26 U.S.C.A. § 74 (West 2016).

183. 25 U.S.C.A. § 2710(b)(3)(D) (West 2016) (emphasis added).

tax language wherever it deems proper. But, if Congress is signaling a new structure for the administration of the income tax laws, then it should do so clearly and unambiguously. For instance, what administrative challenges would arise if in addition to the IGRA tax language, Congress began placing separate taxing statutes for merger transactions in Title 15 (Commerce and Trade), for wages in Title 29 (Labor), or embezzlement in Title 18 (Crimes and Criminal Procedure), instead of the Income Tax Code. Without clear guidance from Congress, taxpayers, the IRS, and the courts will grapple with the uncertainty and with the contrasting results that will inevitably arise.

D. THE EXCLUSIONARY PROVISIO

Finally, it bears noting that section 61 opens with an exclusionary proviso that reads “Except as otherwise provided”¹⁸⁴ This proviso is intended to allow statutory exclusions to operate with full force when applicable. It is undisputed that section 61 mandates the inclusion into gross income of the per capita payment. However, the open and continuing question is whether the per capita payments are eligible to be excluded as a gift pursuant to section 102 of the Income Tax Code. A cardinal principle of statutory interpretation in tax law is “that exclusions from income must be narrowly construed.”¹⁸⁵ If a native member of a tribe can successfully demonstrate that a gift is intended, then section 102 should apply and exclude the payment from gross income. Clearly, the opening proviso in section 61 contemplates the use of one of the many exclusionary sections of the Income Tax Code, including the gift provision of section 102. The Supreme Court has noted that the structure and placement of language is instrumental in discerning congressional intent.¹⁸⁶ The plain language of section 61 clearly contemplates circumstances where income will be excluded from gross income.

Absent Congressional guidance, a harmonious interpretation of the relevant federal statutes in this case would allow for the exclusion of the per capita payment as a gift under section 102¹⁸⁷ in addition to its inclusion into income under the IGRA statute.¹⁸⁸ In *United States v. Rodgers*, the Supreme Court declared that where “one interpretation contravenes both traditional rules of law and the common sense and common values on which they are built, the fact that it favors the Government’s interests cannot be dispositive.”¹⁸⁹ This statement holds true in the case of per capita payments.

184. 26 U.S.C.A. § 61(a) (West 2016).

185. *Comm’r v. Schleier*, 515 U.S. 323, 328 (1995).

186. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 486 (1996) (“Congress’s intent . . . primarily is discerned from the language of the . . . statute. . . . Also relevant . . . is the ‘structure and purpose of the statute as a whole,’ . . .”).

187. 26 U.S.C.A. § 102 (West 2016).

188. 25 U.S.C.A. § 2710(b)(3)(D) (West 2016).

189. *United States v. Rodgers*, 461 U.S. 677, 724 (1983).

E. ARE TRIBAL PER CAPITA PAYMENTS ANALOGOUS TO THE ALASKA PERMANENT FUND DISTRIBUTION PAYMENTS?

Opponents of the gift argument can be expected to argue that payments made to recipients of per capita distributions are similar to payments made to recipients under the Alaska Permanent Fund. The analogy is, if payments from the Alaska Permanent Fund to Alaskan recipients are taxable, then payments from a Native fund to its tribal members should be similarly taxable. However, as discussed below, a key distinction between the two programs exists and must be given due consideration.

In 1976, Alaska voters established The Alaska Permanent Fund.

The Alaska Permanent Fund Corporation, [is] a government instrumentality of the State of Alaska created . . . by [state statute] to manage and invest the assets of the Alaska Permanent Fund and other funds designated by law, by and through its Board of Trustees who, under [state statute], are responsible for managing the affairs of the Corporation . . .

¹⁹⁰

The purpose of the fund is to “provide a means of conserving a portion of the state’s revenue from mineral resources to benefit all generations of Alaskans.”¹⁹¹ To begin, recipients of Alaska Permanent Fund payment are subject to express performance obligations and qualification requirements.¹⁹²

190. ALASKA PERMANENT FUND CORPORATION BYLAWS 1 (Feb. 25, 2011), http://www.apfc.org/_amiReportsArchive/2011_02_Bylaws.pdf; see also ALASKA STAT. ANN. § 37.13, 37.13.040 (West, Westlaw through 2016 2d Reg. Sess. of the 29th Leg.).

191. ALASKA STAT. ANN. § 37.13.020 (West, Westlaw through 2016 2d Reg. Sess. of the 29th Leg.). The statute provides:

The legislature finds with respect to the fund that

(1) the fund should provide a means of conserving a portion of the state’s revenue from mineral resources to benefit all generations of Alaskans;

(2) the fund’s goal should be to maintain safety of principal while maximizing total return;

(3) the fund should be used as a savings device managed to allow the maximum use of disposable income from the fund for purposes designated by law.

Id.

192. For example, to qualify for a 2015 Permanent Fund Dividend you must be able to answer yes to all of the following statements:

I was a resident of Alaska during all of calendar year 2015;

The Alaska Administrative Code contains explicit procedures to qualify for the payment.¹⁹³ Eligible individuals must submit an application within a prescribed time period. In addition, strict requirements must be satisfied, including “residency,” an “intent to remain,” and a limited “allowable absence.”¹⁹⁴ Moreover, individuals may lose the right to a payment if they engage in criminal activities that lead to a “felony conviction” or a “misdemeanor conviction.”¹⁹⁵

In contrast, per-cap distribution requirements do not impose performance obligations on its members’ eligibility to receive a distribution payment. The only criteria to receive a per capita payment is satisfying the enrollment requirement for the tribe. “Among tribal nations in the U.S., many different enrollment requirements exist. These criteria include blood quantum, lineal descendancy, and residency. Enrollment requirements may be viewed as reflecting particular ideas of kinship and identity, while they also confer a citizenship status that comes with legal rights.”¹⁹⁶ The determination

On the date I apply for the 2016 Permanent Fund Dividend, I have the intent to remain an Alaska resident indefinitely;

I have not claimed residency in any other state or country or obtained a benefit as a result of a claim of residency in another state or country at any time since December 31, 2014;

I was not:

Sentenced as a result of a felony conviction during 2015;

Incarcerated at any time during 2015 as the result of a felony conviction; or

Incarcerated at any time during 2015 as the result of a misdemeanor conviction in Alaska if convicted of a prior felony or two or more prior misdemeanors since January 1, 1997;

If absent from Alaska for more than 180 days, I was absent on an allowable absence; and

I was physically present in Alaska for at least 72 consecutive hours at some time during 2014 or 2015. Eligibility Requirements.

ALASKA DEP’T OF REVENUE, PERMANENT FUND DIVIDEND DIV., <http://pfd.alaska.gov/Eligibility/Requirements> (last visited May 17, 2016).

193. ALASKA STAT. ANN. § 43.23.005 (West, Westlaw through 2016 2d Reg. Sess. of the 29th Leg.).

194. ALASKA STAT. ANN. § 43.23.005(a) (West, Westlaw through 2016 2d Reg. Sess. of the 29th Leg.).

195. ALASKA STAT. ANN. § 43.23.005(d) (West, Westlaw through 2016 2d Reg. Sess. of the 29th Leg.).

196. Jessica Bardill, *Tribal Sovereignty and Enrollment Determinations*, NAT’L CONG. OF AM. INDIANS, <http://genetics.ncai.org/tribal-sovereignty-and-enrollment-determinations.cfm> (last visited Sept. 12, 2015).

of tribal membership and the underlying enrollment requirement is an inherent right exercised by Native nations.

Unlike Alaska fund recipients, Native Americans are not restricted geographically, do not have to declare any intent to reside within a geographic location, nor disclose criminal offenses. The absence of qualification requirements and performance obligations required of Native members is a substantial and material distinction existing between per capita payments from the Alaska Fund Payment.

Additionally, the Court of Appeals for the Ninth Circuit had occasion to examine whether the Alaska fund payments constitutes a gift for income tax purposes. In *Griesen v. United States*,¹⁹⁷ the taxpayers challenged the inclusion of dividend payments from the Alaska Permanent Fund in gross income. The taxpayer advanced the argument that “the dividends are excludable as gifts.”¹⁹⁸ In support of their gift argument the taxpayers advanced the theory “that a distribution which is in the nature of excess wealth, no longer needed by the donor, and therefore passed on [to] the donee, is excludable from gross income.”¹⁹⁹

The taxpayers advanced the argument that the taxpayers, and not the state, owned the state’s natural resources and that any return by the state to the taxpayers was a return of the taxpayer’s property. The *Griesen* court rejected this assertion. The *Griesen* court examined the Alaska state constitution and held that “[i]n adopting their constitution, the people of the State of Alaska have very clearly constituted the *state* as owner of the natural resources which give rise to the fund in question.”²⁰⁰ The Ninth Circuit Court of Appeals held that dividend payments from the Alaska Permanent fund were not gifts, and therefore were required to be included in the taxpayer’s income.

In a subsequent letter, Alaska Representative Vic Kohring wrote to the Office of the Attorney General asking “whether the State of Alaska could declare the annual dividend a gift and thereby avoid the federal income tax liability.”²⁰¹ The Alaska Attorney General responded “that [Alaska fund] payments are not gifts, but are income subject to federal income taxation, and there is nothing the [Alaska state] legislature could do to change this outcome”²⁰² to the issue of what constitutes a gift.

197. *Griesen v. United States*, 831 F.2d 916 (9th Cir. 1987).

198. *Id.* at 918.

199. *Id.* at 920 n. 4.

200. *Id.* at 918.

201. Letter from Bruce M. Botelho, Alaska Attorney Gen., to Vic Kohring, Alaska State Legislator (Dec. 8, 1997), http://law.alaska.gov/pdf/opinions/opinions_1997/97-035_663980177.pdf.

202. *Id.*

Unlike the Alaskan Fund, where the State of Alaska is under a legal obligation to pay recipients,²⁰³ there is no comparable legal duty imposed on a Native tribe to make a payment to its members. The declaration of a per capita payment by a Native nation is not a mandatory act, it is a discretionary act. The discretion to make a per capita payment falls exclusively within each Tribe's right to self-governance.²⁰⁴

F. ARE PER CAPITA PAYMENTS SIMILAR TO UNEMPLOYMENT COMPENSATION?

Opponents of the gift argument may also argue that the per capita payment is similar to unemployment compensation and therefore should be includable in income. The theory of unemployment compensation payments is that such payments are substitutes for income. The tax court noted that “[t]he legislative history of section 85 indicates that Congress considered unemployment compensation benefits as a substitute for taxable wages.”²⁰⁵

In contrast to unemployment compensation payments, per capita payments are not a substitute for income. Unemployment compensation is meant to insure against an interruption of income and provide a measure of financial security to the recipient in the event a stream of income is interrupted. Per capita payments do not insure against a stream of income. Rather, per capita payments are dependent on two variables, the net income of the gaming operation and the intention of the Native tribe to make a distribution.

Moreover, unemployment compensation payments are based on eligibility criteria.²⁰⁶ Again, other than satisfying the tribal membership requirement, there is no other eligibility criteria to receiving a per capita payment.

V. CONCLUSION

Early in the history of the federal income tax jurisprudence the Supreme Court stated:

203. ALASKA STAT. ANN. §§ 43.23.005-43.23.095 (West, Westlaw through 2016 2d Reg. Sess. of the 29th Leg.).

204. See Gabriel S. Galanda, *Tribal Per Capitas and Self-Termination*, INDIAN COUNTRY TODAY MEDIA NETWORK (Aug. 13, 2014), <http://indiancountrytodaymedianetwork.com/2014/08/13/tribal-capitas-and-self-termination> (discussing a 2006 proposed amendment to IGRA “that would have required federal oversight” of per capita payments and curbed “the improper use of tribal per capita dollars.”).

205. *Brown v. Comm’r*, 57 T.C.M. (CCH) 1557 (T.C. 1989) (citing H.R. Rep. No. 95-1445 (1978)).

206. See, e.g., 820 ILL. COMP. STAT. ANN. 405/500 (West, Westlaw through P.A. 99-906 of the 2016 Reg. Sess.) (Illinois eligibility requirements); CAL. UNEMP. INS. CODE § 1253 (West, Westlaw through 2016 Reg. Sess. laws) (California eligibility requirements).

If the sum of money under consideration was a gift and not compensation, it is exempt from taxation and cannot be made taxable by resort to any form of subclassification. If it be in fact a gift, that is an end of the matter; and inquiry whether it is a gift of one sort or another is irrelevant.²⁰⁷

This principle continues to ring true today. The challenge for courts, taxpayers, and the IRS is in determining whether a transfer of property constitutes income or a gift. In this regard, the question asked is whether per capita payments constitute gifts for federal income tax purposes? Regrettably, the Income Tax Code and the underlying regulations do not define a "gift" for income tax purposes. Therefore, to answer this question one must seek guidance in the Supreme Court's analysis in *Duberstein v. Commissioner*. As the Supreme Court eloquently noted a gift "proceeds from a 'detached and disinterested generosity,' . . . 'out of affection, respect, admiration, charity or like impulses.'" The final determinant, is the intention of the transferor. "Since 1988, tribes have historically used gaming profit to support a variety of social and economic programs and services, including health care, housing development, educational programs, elderly care, vocational training, environmental services, loans, scholarships, and business development."²⁰⁸

In discerning the intention of the transferor when making a per capita payment, it is essential to note the following factors: the tribes do not make per capita payment to its member in exchange for goods or services; the per capita payments do not represent compensation for any service, fee, or a commission; the recipients did not engage in any activity giving rise to a claim for compensation; the per capita payments do not represent income derived from a trade or business activity, nor did the recipients engage in any activity that can be construed to be a trade or business.

In addition, the per capita payments do not constitute a prize or award; the per capita payment is not given by the tribe in recognition of some achievement as would be in the case of a Pulitzer Prize winner or Nobel Prize winner; the per capita payment is not a statutory fringe benefit because fringe benefits apply only within an employer-employee context, and the nation-member relationship does not create an employer-employee relationship.

Moreover, the absence of a quid-pro-quo, an exchange, a returning performance obligation, or an expectation or any return whatsoever, leads to the undeniable assertion, that per capita payments are gifts. When viewed from the perspective of transferor, the incontrovertible truth is that a per capita payment is a gift. There is no exchange of goods or services. Additionally,

207. *Bogardus v. Comm'r*, 302 U.S. 34, 40 (1937).

208. *Meister et al.*, *supra* note 12, at 385.

there is no expectation of a future benefit to the tribe, nor a performance obligation required of the donee-tribal member.

Lacking any indicia of an expectation of a return or profit, or an expectation of a quid-pro-quo, a reasonable person is led to the likely conclusion that the intent of the tribe, as transferor of property, is to make a gift of property to its member. As such, per capita payments qualify as gifts and are therefore, excludable from gross income.

In the final analysis, if Congress is concerned with an excessive exclusion, Congress can limit the amount of the exclusion either by dollar amount, as a percentage of AGI, or by index, as it has done in the case of unemployment compensation.