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WHEN INDIAN LAW AND TAX LAW COLLIDE: HOW PULL-TAB GAMES GOT TO THE SUPREME COURT

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I. INTRODUCTION

Indian law and the Internal Revenue Code (hereinafter the Code) rarely collide. Very few legal scholars with expertise in one area like to spend time in the other one. At first glance, it seems as though these two areas of the law seem to have almost nothing in common. Still, American Indian tribes are subject to the provisions of the Code, and like other taxpayers, they occasionally have disagreements with the Internal Revenue Service (hereinafter IRS) with respect to what the Code says. With Federal Indian law entering the equation, the already complicated provisions of the Code can become even less clear. These two areas of law do collide occasionally, and the results can cause some head scratching among those familiar with both areas. That is exactly what happened in the two cases that are at the center of this Note.

In a span of three weeks in April, 2000, two U.S. Circuit Courts came to completely opposite conclusions with respect to the same factual situations. In both cases, a federally recognized Indian tribe was suing the government for the refund of excise taxes paid on the sales of “pull-tab” games, which are commonly sold by tribes and non-profit organizations as a means of fundraising. Both cases brought together various statutes from the Indian Gaming Regulatory Act¹ (the IGRA) and the Code, as well as other treaties and canons of construction.

The first decision, *Chickasaw Nation v. United States*,² decided on April 5th in the Tenth Circuit, held that the tribe was not exempt from paying excise taxes on these games.³ The second decision, *Little Six, Inc. v. United States*,⁴ decided on April 24th by the Federal Circuit, held that the tribe was exempt from these excise taxes. These results were contradictory in spite of the fact that the factual situations were virtually identical and involved the same statutes. The complexity of the statutes makes the issue a cloudy one and resulted in the contradictory outcomes. The Supreme Court has now decided to review the matter. It granted a petition for certiorari in the *Chickasaw Nation* case,⁵ but a date for the oral arguments has not yet been set.

This Note will explore the reasons why two identical cases can turn out with completely different results. To do so, consideration will be given to the statutes involved and the varying interpretations of these statutes. Another important consideration is the policy behind these statutes, especially the IGRA. Part II will describe what the pull-tab games are, the statutes at issue, the conflicting cases, and the statutory interpretation issue. Part III will describe how the tenets of Indian Law can affect the analysis. Part IV will contain an analysis of the statutes and compare it to how the courts analyzed them. Part IV will also explore how issues and policies

¹25 U.S.C. §§ 2701-21 (2000).

²208 F.3d 871 (10th Cir. 2000).

³Actually, *Chickasaw Nation* represents two cases, itself and a companion case, *Choctaw Nation of Oklahoma v. United States*, 210 F.3d 389 (10th Cir. 2000). *Choctaw Nation*, which again involved the same factual scenario and issues as *Chickasaw Nation*, was decided on the same day by the same panel of judges. The brief opinion in *Choctaw Nation* stated that it affirmed summary judgment to the government based on its opinion in *Chickasaw Nation*. *Chickasaw Nation of Oklahoma*, 210 F.3d at 389.

⁴210 F.3d 1361 (Fed. Cir. 2000).

⁵69 U.S.L.W. 46224 (U.S. Jan. 22, 2001) (No. 00-507).

more specific to Indian law should be weighed in the analysis of the statute. Finally, the Note will conclude that the decision in *Little Six, Inc.* is the correct one.

II. THE BACKGROUND OF *CHICKASAW NATION* AND *LITTLE SIX*

A. What Are These “Pull-Tab” Games?

The pull-tab games that became the center of this controversy are a relatively common and simple form of gambling. Anyone who has been to a church festival or a bingo hall has probably seen them all over the place. The game itself is simply a ticket containing four or five windows with tabs on the back of the ticket.⁶ Players pull off the tabs to reveal a combination of symbols. If the symbols on the back of the card match a group of symbols on the front, the player wins a prize. The concept is similar to that of instant scratch-off tickets sold by a number of state lottery agencies. The cards are sold in a series of 24,000 tickets, and the number of winning tickets are arranged so that once the entire box is sold, the seller makes a profit.⁷

The tribes involved in *Chickasaw Nation* and *Little Six, Inc.* sell these games on their reservations, including in gaming centers and convenience stores. Players can then redeem their prizes immediately at the point of sale or claim them later.⁸

B. The Statutes Involved

1. Internal Revenue Code § 4401

Section 4401(a) of the Code imposes an excise tax on all types of wagers. That statute reads:

(1) State authorized wagers – There shall be imposed on any wager authorized under the law of the State in which accepted an excise tax equal to 0.25 percent of the amount of such wager.

(2) Unauthorized wagers – There shall be imposed on any such wager not described in paragraph (1) an excise tax equal to 2 percent of the amount of such wager.⁹

However, § 4402(3) grants an exemption from the tax imposed in § 4401 to a “state-conducted lottery.” It states that no tax shall be imposed by this subchapter:

On any wager placed in a sweepstakes, wagering pool, or lottery which is conducted by an agency of a state acting under authority of State law, but only if such wager is placed with the State agency conducting such sweepstakes, wagering pool, or lottery, or with its authorized employees or agents.¹⁰

⁶See *Chickasaw Nation*, 208 F.3d at 874 (describing how the pull-tab games work).

⁷See *id.* at 877.

⁸See *id.*

⁹I.R.C. § 4401(a) (2000).

¹⁰*Id.* § 4402(3) (2000).

It seems understandable that Congress would want to exempt state lotteries from being liable for the excise tax since the profits from these lotteries go to fund public projects, such as schools.¹¹

Additionally, § 4411 imposes an occupational tax on each person who is liable for the tax imposed by § 4401.¹² The language and other details of the statute are not particularly important to the controversies in *Chickasaw Nation* and *Little Six, Inc.*; the statute just raised the stakes as far as the amount of money involved in the cases.

Sections 4401, 4402(3), and 4411 are all in Chapter 35¹³ of the Internal Revenue Code, which is entitled “Taxes on Wagering.” Chapter 35’s reference in § 2719(d)(1) of the IGRA results in confusion because nothing in Chapter 35 particularly relates to the rest of the language of § 2719(d)(1). To find out why this is the case, it is necessary to look at § 2719(d)(1) of the IGRA.

2. The Indian Gaming Regulatory Act

The Indian Gaming Regulatory Act¹⁴ was enacted by Congress in 1988. The purpose of the IGRA, according to the legislation, was “to promote tribal economic development, tribal self-sufficiency, and strong tribal government.”¹⁵ However, most commentators at the time agreed that the real purpose of the legislation was to quell states’ fear of competition from both regulated and unregulated Indian gaming.¹⁶ That fear was greatly fueled by the Supreme Court’s decision in *California v. Cabazon Band of Mission Indians*.¹⁷

In fact, the IGRA was enacted largely, if not entirely, as a reaction “to a series of federal court decisions, culminating in” *Cabazon Band of Mission Indians*.¹⁸ In *Cabazon Band*, the State of California tried to apply its gambling regulations to tribal gaming facilities consisting of bingo halls and card clubs.¹⁹ In analyzing the case, the Court noted that there is an overall federal interest in “encouraging tribal self-

¹¹For example, Article XV, Section 6 of the Ohio Constitution requires that all profits from the Ohio Lottery be used to fund public schools. Other states have similar requirements. For example, California requires that 34 percent of total lottery revenues be allocated to the benefit of public education. See CAL. GOV’T CODE § 8880.4(a)(2) (West 2000).

¹²See I.R.C. § 4411(a) (2000).

¹³I.R.C. §§ 4401-24 (2000).

¹⁴25 U.S.C. §§ 2701-21.

¹⁵See 25 U.S.C. § 2702(1).

¹⁶Kathryn R.L. Rand & Steven A. Light, *Virtue or Vice? How IGRA Shapes the Politics of Native American Gaming, Sovereignty, and Identity*, 4 VA. J. SOC. POL’Y & L. 381, 400 (1997).

¹⁷480 U.S. 202 (1987).

¹⁸Rand & Light, *supra* note 16, at 382.

¹⁹*Cabazon Band of Mission Indians*, 480 U.S. at 204-05. The dispute arose because the bingo and card games operated by the tribe allegedly violated California laws which limited prizes and required that profits be kept in special accounts and used for charitable purposes. The tribes admitted that the games violated the prize limits but claimed that the state did not have the authority to enforce these gambling laws within the reservations. *Id.* at 206.

sufficiency and economic development,"²⁰ and asserted that the tribes' interests were identical.²¹ The Court determined that federal and tribal interests pre-empted California's authority to regulate Indian gaming operations.²² Essentially, the Court stated that even if a state were to only allow minor forms of gambling within its borders, any tribe in that state could conduct any form of gambling, including casino games and slot machines, as long as operations were conducted on Indian lands under tribal sovereignty.²³ Naturally, states were concerned with a lack of control over Indian gaming within its borders. This concern provided the impetus for Congress to enact the IGRA.

The IGRA allocates jurisdictional responsibility for regulating Indian gaming according to the types of gaming involved. The more "high-stakes" the games are, the more control states have over their regulation. The IGRA establishes three classes of gaming. Class I gaming includes gaming associated with traditional Indian ceremonies and is subject to exclusive tribal jurisdiction on tribal lands.²⁴ Class II gaming includes bingo and nonbanking card games, such as poker, that meet certain state provisions,²⁵ and are allowed on tribal lands in states that permit such types of gaming for any purpose by any person.²⁶ The tribes may regulate Class II gaming with oversight from the National Indian Gaming Commission.²⁷ Class III gaming includes all types of gaming not included in Class I or Class II.²⁸ These are typically the high-stakes casino games such as slot machines, roulette, and blackjack. Tribes must have a tribal-state compact in order to operate Class III gaming.²⁹ The pull-tab games at issue in these cases were classified as Class II games.³⁰

The specific provision of the IGRA that became a central issue in *Chickasaw Nation* and *Little Six, Inc.* is § 2719(d)(1), which requires that the reporting and withholding of taxes under certain provisions of the Code should be applied to Indian gaming in the same manner as those provisions apply to state gaming operations. Section 2719(d)(1) states:

The provisions of the Internal Revenue Code of 1986 (including sections 1441, 3402(q), 6041, and 6050I, and Chapter 35 of such Code) concerning the reporting and withholding of taxes with respect to the winnings from gaming or wagering operations shall apply to Indian gaming operations

²⁰*Id.* at 216.

²¹*Id.* at 219.

²²*Id.* at 221-22.

²³*Rand & Light, supra* note 16, at 210-14.

²⁴*See* 25 U.S.C. § 2710(a)(1).

²⁵*Id.* § 2703(7)(A).

²⁶*Id.* § 2710(b)(1)(A).

²⁷*Id.* § 2706(b). The Commission was established in the IGRA as an agency to administer the provisions of the IGRA. It is in the Department of the Interior. *See id.* § 2704.

²⁸25 U.S.C. § 2703(8).

²⁹*Id.* § 2710(d)(1)(C).

³⁰*See Chickasaw Nation*, 208 F.3d at 881; *Little Six, Inc.*, 210 F.3d at 1364.

conducted pursuant to this chapter, or under a Tribal-State compact entered into under section 2710(d)(3) of this title that is in effect, in the same manner as such provisions apply to State gaming and wagering operations.³¹

The problem is that the statute aims to apply certain provisions of the Code concerning “the reporting and withholding of taxes with respect to the winnings from gaming or wagering operations” to Indian gaming operations in the same manner as those provisions apply to State gaming and wagering operations.³² Those provisions are to include some sections referenced in the parenthetical phrase inserted in the statute. However, included in the parenthetical is a reference to Chapter 35 of the Code, which is a chapter imposing excise and occupational taxes. It could be argued that Congress meant to apply the taxes imposed in Chapter 35 to the tribes in the same manner as they are applied to state gaming operations. Under that interpretation, the tribes would be exempt from the taxes imposed by Chapter 35 because § 4402(3) exempts state gaming operations from these taxes.³³ On the other hand, it could be argued that Congress only intended that this statute apply to the reporting and withholding requirements of the Code, as the language outside the parenthetical in § 2719(d)(1) would indicate. Under that interpretation, since Chapter 35 does not deal with reporting and withholding requirements, it would not apply to the tribes in the same manner as it is to the states. Therefore, the tribes would not be exempt from the taxes in Chapter 35. The parenthetical was probably inserted in an effort to make the statute more understandable. However, it did the opposite, leading to the confusion which culminated in the disagreements in *Chickasaw Nation* and *Little Six, Inc.*

C. *The Cases at the Center of This Controversy*

1. The Basic Factual Background

The factual backgrounds for these cases are virtually identical. Both cases involved tribes who were selling the pull-tab games on their reservations. The Chickasaw Nation (the Nation), and presumably Little Six, Inc., though the opinion in its case does not mention it, withheld income taxes from the winnings of players in accordance with § 3402(q)³⁴ of the Code. The Nation also filed informational returns with the IRS concerning these winnings.³⁵ Neither tribe, however, paid the wagering excise taxes under § 4401 or the related occupational tax under § 4411.³⁶

³¹25 U.S.C. § 2719(d)(1).

³²*Id.*

³³*See* I.R.C. § 4402(3).

³⁴*See Chickasaw Nation*, 208 F.3d at 874. Under § 3402(q)(3)(B) of the Code, a state agency conducting a lottery or wagering activity is to withhold an amount equal to 28 percent of any payment over \$5,000 made to the winner of a state lottery. The result is that the agency (and the IRS) does not need to go to the trouble of processing withholding paperwork for a player who has won a small prize.

³⁵*Chickasaw Nation*, 208 F.3d at 874.

³⁶*See id.*

The IRS conducted an audit of both tribes and determined that they were both liable for these taxes.³⁷ The tribes paid the assessment under protest and filed suit for a refund.³⁸

2. The First Decision – *Chickasaw Nation v. United States*

The Chickasaw Nation is a tribe with its principal place of business in Oklahoma.³⁹ The IRS determined that the Nation owed about \$45,000 in wagering and occupational taxes related to its sales of the pull-tab games for the period from August 1991 to August 1994.⁴⁰ After the government was granted summary judgment in the District Court,⁴¹ the Nation raised four grounds for appeal: (1) The pull-tabs do not constitute a “taxable wager” under § 4421 of the Code; (2) the tribe is not a “person” subject to federal wagering excise taxes; (3) the IGRA demonstrated a Congressional intent not to subject Indian gaming to federal wagering excise taxes; and (4) “the self-government guarantee of the 1855 treaty between the United States and the Nation precludes the imposition of these taxes.”⁴²

First, the Court had to determine whether the pull-tab games could be considered a “lottery” under § 4421(2)(A) of the Code. That section defines “lottery” as:

(2)Lottery – The term “lottery” includes the numbers game, policy, and similar types of wagering. The term does not include –

(A) Any game of a type in which usually

(i) The wagers are placed

(ii) The winners are determined, and

(iii) The distribution of prizes or other property is made, in the presence of all persons placing wagers in such game, and

(B) Any drawing conducted by an organization exempt from tax under sections 501 and 521, if no part of the net proceeds derived from such drawing inures to the benefit of any private shareholder or individual.⁴³

The Court noted that the word “includes” in the statutory definition signals an intent to include within the definition various types of gaming not specifically mentioned in the statute, and then turned to the dictionary definitions of the word “lottery” for assistance.⁴⁴ Black’s Law Dictionary states that the “[e]ssential elements of a lottery are consideration, prize and chance and any scheme or device by which a person for a consideration is permitted to receive a prize or nothing as may be determined predominantly by chance.”⁴⁵ Using this definition, the Court concluded that the pull-tab system does constitute a lottery. The system utilized by the Nation is a scheme

³⁷See *Chickasaw Nation*, 208 F.3d at 874; *Little Six, Inc.*, 210 F.3d at 1363.

³⁸See *id.*

³⁹See *Chickasaw Nation*, 208 F.3d at 874.

⁴⁰See *id.*

⁴¹1998 WL 975690 (E.D. Okla. 1998).

⁴²See *Chickasaw Nation*, 208 F.3d at 875.

⁴³I.R.C. § 4421(2).

⁴⁴See *Chickasaw Nation*, 208 F.3d at 876.

⁴⁵BLACK’S LAW DICTIONARY 947 (6th ed. 1990).

by which prizes are randomly distributed to the winners who have paid for a chance to win them.⁴⁶ The Court disagreed with the Nation's argument that each individual pull-tab should be viewed as a separate game. That argument would place the pull-tabs in the statutory exclusion of § 4421(2) because the wager would be placed when the player buys the ticket, the winners would be determined when the player pulls the tabs off of the back of the ticket, and the prize would be distributed in the presence of all persons placing wagers, as the player would be the only player of that game, so the prize would be distributed in his presence. The Court instead adopted the District Court's conclusion that when each customer purchases a pull-tab, "he is competing against every other person who purchases a pull-tab from the same series."⁴⁷ This is because "the tickets are purchased and resold by the Nation in series of 24,000 tickets, with a specific number of winning tickets randomly distributed throughout the series."⁴⁸ Prizes for a particular series "are not awarded all at one time or in the same location."⁴⁹ Accordingly, the Court found that the pull-tab games are not within the statutory exclusion to the definition of "lottery" in § 4421(2).

The next argument centered on whether the tribe was a "person" subject to the taxes imposed by §§ 4401 and 4411. Section 7701(a)(1) of the Code states that "[t]he term 'person' shall be construed to mean and include an individual, trust, estate, partnership, association, company or corporation."⁵⁰ Again, the Court noted that because of the use of the word "include" in the definition, Congress did not mean for this list to be exhaustive.⁵¹ The Court then cited a number of cases that concluded that the word "person," as defined in the Code, encompasses legal entities not specifically listed in the statutory definition.⁵² Based on that reasoning, the court concluded that § 7701(a)(1) "unambiguously encompasses all legal entities that are the subject of rights and duties and that Indian tribes are such legal entities."⁵³

The next argument concerned the purpose stated in the IGRA.⁵⁴ The Nation contended "that the imposition of federal wagering excise taxes and the accompanying ... occupational taxes on its pull-tab games is contrary to both the spirit and letter of the IGRA." The Nation argued that a purpose of the Act was to "maximize tribal gaming revenues."⁵⁵ The Court disagreed, stating that while

⁴⁶See *Chickasaw Nation*, 208 F.3d at 877.

⁴⁷*Id.*

⁴⁸*Id.*

⁴⁹*Id.*

⁵⁰I.R.C. § 7701(a)(1) (2000).

⁵¹See *Chickasaw Nation*, 208 F.3d at 880.

⁵²In fact, the Eighth Circuit has specifically held that the word "person" as it is used in §§ 6421 and 6675 of the Code encompasses Indian tribes. See *Flandreau Santee Sioux Tribe v. United States*, 197 F.3d 949 (8th Cir. 1999).

⁵³*Chickasaw Nation*, 208 F.3d at 880.

⁵⁴25 U.S.C. § 2702, which stated the purpose of the IGRA, included language indicating a purpose "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."

⁵⁵See *Chickasaw Nation*, 208 F.3d at 881.

“Congress was interested in promoting tribal economic development and self-sufficiency,⁵⁶ there is no mention of the phrase “maximizing tribal gaming revenues” anywhere in the IGRA.⁵⁷

Then the Court discussed the language of § 2719(d). The Nation argued that the statute showed Congress’ intent not to apply the Code provisions creating tax liability. This was because § 2719(d)(1) identifies as applicable only a specific type of code provision and omits others.⁵⁸ The Court rejected the argument, first because it believed that it was “clear that § 2719(d) does not expressly prohibit the imposition of federal wagering or ... occupational taxes on Indian gaming operations.”⁵⁹ The statute only provides that Indian gaming operations are required to report and withhold certain player winnings in the same manner as state gaming operations. Applying the language of the statute to the wagering taxes would be an inference from the reference to Chapter 35 made in the parenthetical in § 2719(d)(1), and the Court thought that it would be unreasonable to assume that Congress intended to create a tax exemption by way of a negative inference in § 2719(d)(1).⁶⁰

The Nation finally attempted to persuade the Court that its interpretation of § 2719(d) was correct based on a letter sent by Senator Daniel Inouye, one of the authors of the IGRA, to the Commissioner of the IRS.⁶¹ His letter stated that “Congress intended that the tax treatment of wagers conducted by Tribal governments be the same as that for wagers conducted by state governments under Chapter 35 of the Internal Revenue Code.”⁶² Therefore, since wagers conducted by state governments are exempted from the taxes by § 4402(3) of the Code,⁶³ the tribes should also be exempt. However, this letter was sent four years after the enactment of the statute, and the Court thought that the comments of one senator would have little value in interpreting the statute.⁶⁴ The Court also found that Senator Inouye’s interpretation was inconsistent with both the statute’s language and legislative history.⁶⁵ That is because the language of § 2719(d)(1) only speaks to the provisions of the Code concerning the reporting and withholding of taxes with respect to the winnings from gaming operations.⁶⁶ Additionally, the Court noted that the original language of the bill that became the IGRA included an explicit exemption for Indian gaming from the federal wagering tax. However, this exemption was deleted prior to

⁵⁶See 25 U.S.C. § 2702(1).

⁵⁷See *Chickasaw Nation*, 208 F.3d at 881.

⁵⁸See *id.* at 882.

⁵⁹*Id.*

⁶⁰*Id.* at 883.

⁶¹See *id.*

⁶²See *Chickasaw Nation*, 208 F.3d at 883.

⁶³See I.R.C. § 4402(3).

⁶⁴*Chickasaw Nation*, 208 F.3d at 883.

⁶⁵*Id.*

⁶⁶See 25 U.S.C. § 2719(d)(1).

the IGRA's passage.⁶⁷ Finally, the Court dismissed a claim from the Tribe that its treaty with the United States, signed in 1855, provided it with an exemption from the taxes at issue.⁶⁸

3. The Second Decision – *Little Six, Inc. v. United States*

Little Six, Inc., is actually a wholly owned corporation of the Shakopee Mdewakanton Sioux Community, based in South Dakota.⁶⁹ The audit conducted by the IRS resulted in an assessment of nearly \$175,000 in wagering and occupational taxes.⁷⁰ *Little Six* brought suit for a refund of taxes paid after the assessment, and the government was awarded summary judgment in the Court of Federal Claims.⁷¹ The line of reasoning in that decision was similar to that in *Chickasaw Nation*.

In the Court of Appeals for the Federal Circuit, the *Little Six, Inc.* Court's analysis began with a discussion of whether the pull-tab games were wagers subject to taxation in §§ 4401 and 4411. *Little Six* argued that these tax provisions only applied to wagers authorized under state law, and since their wagers were authorized under federal law,⁷² the provisions did not apply to their pull-tab games.⁷³ However, this argument failed because the IGRA authorizes pull-tab games as long as "such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization, or entity."⁷⁴ Because these types of wagers have to be authorized by the state in which the wagers take place, the wagers placed under the IGRA are state authorized under § 4401 of the Code.⁷⁵ Then came the discussion of § 2719(d)(1) of the IGRA.

The analysis began by concluding that § 2719(d)(1) applies Chapter 35 of the Code to Indian gaming in the same manner as it does to state gaming, because Chapter 35 is mentioned in the parenthetical in the statute.⁷⁶ Therefore, § 2719(d)(1) can be reasonably construed to provide an exemption to the wagering excise tax for wagers placed on lotteries and pull-tab games conducted by Indian tribes, because the Internal Revenue Code provides such an exemption to state gaming operations in § 4402(3) of the Code.⁷⁷

⁶⁷See *Chickasaw Nation*, 208 F.3d at 882-83.

⁶⁸See *id.* at 884. Article VII of that treaty granted certain aspects of self-government to the Nation, but the court disagreed with the Nation's argument that this right of self-government could be construed to give rise to an exemption from federal excise taxes. *Id.*

⁶⁹See *Little Six, Inc.*, 210 F.3d at 1362.

⁷⁰See *id.* at 1363.

⁷¹*Little Six, Inc. v. United States*, 43 Fed.Cl. 80 (1999).

⁷²The tribe's pull-tab wagers are authorized by another part of the IGRA, 25 U.S.C. § 2703(7)(A)(i), which defines "Class II" gaming to include pull-tabs. See *Little Six, Inc.*, 210 F.3d at 1363.

⁷³See *Little Six, Inc.*, 210 F.3d at 1363.

⁷⁴See 25 U.S.C. § 2710(b)(1)(A).

⁷⁵*Little Six, Inc.*, 210 F.3d at 1364.

⁷⁶*Id.* at 1365.

⁷⁷*Id.*

Although it is true that § 2719(d)(1) only applies to those provisions that concern “the reporting and withholding of taxes [from] winnings,” the Court noted that in construing the statute, it had to give effect and meaning to all of its terms.⁷⁸ The Court then noted that the statute also explicitly refers to § 6050I and Chapter 35 of the Code, which clearly do not relate to “winnings.”⁷⁹ Section 6050I relates to informational returns on cash transactions⁸⁰ and Chapter 35 relates to excise and occupational taxes on wagers.⁸¹ That, said the Court, would make the interpretation proposed by the government superfluous, something which the Court wished to avoid.⁸²

The Court’s analysis concluded that § 2719(d)(1) is ambiguous.⁸³ The Court seemed ready to turn to the Indian Canon of Construction to settle the issue in favor of Little Six. Before this could be done, though, the court dealt with the issue of the interpretation of tax exemptions. Normally, tax exemptions are interpreted strictly. However, the Supreme Court has noted that when the government is dealing with Indians, the rule is the opposite. Instead of construing the exemption narrowly, it is to be construed broadly.⁸⁴ Therefore, the tribe had both the Indian Canon and the Supreme Court’s tax exemption language working in its favor.

Finally, the Court relied on some of the IGRA’s legislative history to support its conclusion. It noted that according to § 2702 of the IGRA, one of the primary purposes of the IGRA was to promote tribal economic development and sufficiency.⁸⁵ The Court also stated that equal treatment of tribes and states with respect to exemptions from federal wagering taxes is consistent with legislative intent, and in accord with the concept of co-equal sovereignty.⁸⁶ With that, the Court concluded that the pull-tab games were exempt from the wagering taxes, and reversed the lower Court.⁸⁷

i. A Quick Note on the Government’s Petition for Rehearing

The result of *Little Six, Inc.* had to be a surprise to the government. Having won a case with the same facts only a few weeks before, it was reasonable to expect the same result. But that did not happen, so the government petitioned for a rehearing. The petitions for both a rehearing and a rehearing en banc were denied.⁸⁸

⁷⁸*Id.*

⁷⁹*Id.*

⁸⁰See I.R.C. § 6050I (2000).

⁸¹See I.R.C. §§ 4401-24.

⁸²*Little Six, Inc.*, 210 F.3d at 1365.

⁸³*Id.*

⁸⁴See *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985).

⁸⁵*Little Six, Inc.*, 210 F.3d at 1366.

⁸⁶*Id.* (The Court cited S. REP. No. 466, at 13 (1988) (“The Committee concluded that the compact process is a viable mechanism for setting various matters between two equal sovereigns.”)).

⁸⁷*Id.*

⁸⁸*Little Six, Inc. v. United States*, 229 F.3d 1383 (Fed. Cir. 2000).

Judge Dyk, who was joined by Judges Newman and Plager, wrote a lengthy dissent to the denial of the rehearing en banc. His first criticism was that he thought the *Little Six, Inc.* panel was too fast in finding the statute ambiguous and, therefore, resorting to the Indian Canon of Construction.⁸⁹ He admitted that he did not agree with the government's argument that the reference to Chapter 35 was intended to incorporate the definitions of "wagers" and "lotteries" in § 4421.⁹⁰ This case, he believed, presented a situation where it is impossible to give effect to all of the statute's language without rendering the statute self-contradictory.⁹¹ Instead of resorting to the canon, said Judge Dyk, the Court should have examined the statute's structure, purpose, and history to come up with a coherent interpretation.⁹²

Judge Dyk could not see how the parenthetical reference to Chapter 35 could be used to create the exemption.⁹³ It seemed unlikely to him that Congress would create a significant tax exemption through a parenthetical reference, especially when the reference is in a sentence which only discusses the reporting and withholding of taxes on winnings.⁹⁴

He also had a major disagreement with the *Little Six, Inc.* panel's interpretation of the IGRA's legislative history. As the *Chickasaw Nation* Court noted, early versions of § 2719(d)(1) would have exempted tribes from the wagering tax by inserting the word "taxation" right before the words "reporting and withholding" in the statute. Therefore, the statute would read: "Provisions of the Internal Revenue Code of 1954, as amended, concerning the taxation and the reporting and withholding of taxes pursuant to the operation of a gambling or wagering operation shall apply to the operations in accord with the Indian Gaming Regulatory Act the same as they apply to State operations."⁹⁵ That language, because it brings the word "taxation" into the statute, would clearly result in an exemption from the taxes in § 4401 of the Code. Section 4401 is certainly a provision dealing with taxation; it imposes a tax. However, the word "taxation" was removed in Committee.⁹⁶ The word "taxation" was replaced by the parenthetical phrase which contained the reference to Chapter 35 and other sections.

Finally, Judge Dyk could not agree with the purpose of § 2719(d)(1), as construed by the *Little Six, Inc.* panel.⁹⁷ Simply put, a desire to "promote tribal economic development and self-sufficiency" should not be extended to grant additional benefits to the tribes.⁹⁸ But the Court held that the statute did grant an

⁸⁹*Id.* at 1384.

⁹⁰*Id.*

⁹¹*Id.*

⁹²*Id.*

⁹³*Little Six, Inc.*, 229 F.3d at 1384.

⁹⁴*Id.* at 1384-85.

⁹⁵H.R. 1920, 99th Cong. § 4 (1986).

⁹⁶*See Little Six, Inc.*, 229 F.3d at 1385.

⁹⁷*Id.*

⁹⁸*Id.* at 1385-86.

additional benefit, and that benefit was an exemption from these wagering and occupational taxes.

The government has since filed a petition for certiorari with the U.S. Supreme Court. Because the Court granted the petition in *Chickasaw Nation*,⁹⁹ there seems to be no reason for the Court not to also grant this petition and consolidate the cases.

D. The Indian Canon of Construction and Relations with the Federal Government

The Indian Canon of Construction is necessary because Indian law is full of ambiguity. Specifically, the canon arose because of the ambiguous language used in treaties made between the United States government and tribes in the early days of the nation.¹⁰⁰ Most of the treaties between Indians and the federal government are over a hundred years old, so they do not speak in modern terms. The premise of the canon was articulated by Chief Justice John Marshall in *Worcester v. Georgia*¹⁰¹ when he stated that the “language used in treaties with the Indians should never be construed to their prejudice.”¹⁰² This idea has been extended to require that ambiguous statutes, executive orders, and regulations be resolved in favor of Indians.¹⁰³

The reasons for the canon are many, and in spite of its extension to other forms of law, a full understanding of the canon cannot be reached without looking at it in the context of the early treaties made between the federal government and the Indians. As white settlers moved to the west, treaties were used to remove the Indian tribes out of the path of advancement.¹⁰⁴ The Indians had little, if any, bargaining position, and the results of the negotiations were almost always unsatisfactory to them.¹⁰⁵ Additionally, many tribes had to deal with a language barrier at the treaty negotiations. The treaties were always written in English, which was a very unfamiliar language to most Indians, so it was almost a guarantee that semantic and interpretational problems would arise.¹⁰⁶

*Cherokee Nation v. Georgia*¹⁰⁷ is another important Indian law case authored by Chief Justice Marshall because it laid out a number of principles that are still at the

⁹⁹69 U.S.L.W. 3269 (U.S. Jan. 22, 2001) (No. 00-507).

¹⁰⁰See Erik M. Jensen, *American Indian Law Meets the Internal Revenue Code: Warbus v. Commissioner*, 74 N.D. L. REV. 691, 695 (1998).

¹⁰¹31 U.S. (6 Pet.) 515 (1832).

¹⁰²*Id.* at 582.

¹⁰³See Charles F. Wilkinson & John M. Volkman, *Judicial Review of Indian Treaty Abrogation: “As Long as Water Flows, or Grass Grows Upon the Earth” – How Long a Time Is That?*, 63 CAL. L. REV. 601, 615 (1974).

¹⁰⁴*Id.* at 609.

¹⁰⁵*Id.* at 610.

¹⁰⁶*Id.*

¹⁰⁷30 U.S. (5 Pet.) 1 (1831) (In *Cherokee Nation*, the tribe attempted to invoke original jurisdiction in the United States Supreme Court by describing itself as a foreign nation. The Court rejected that assertion, and Chief Justice Marshall set out those principles concerning the relationship between the Indians and the government in his opinion.).

core of the relationship between Indians and the federal government.¹⁰⁸ Marshall found that Indian tribes are “domestic dependent nations.”¹⁰⁹ The tribes “look to our government for protection,” resulting in a relationship between the government and the Indians “resembl[ing] that of a ward to his guardian.”¹¹⁰ The courts have since expanded this notion of the trust relationship set forth by Marshall, extending it to statutes, executive orders, and regulations.¹¹¹

The canon is now a well established principle of law, although many scholars, especially tax experts, are not aware of it.¹¹² This canon does not come up frequently in tax law, but when it does, some confusion in applying the canon in the context of tax law can take place; hence the conflicting results in *Chickasaw Nation* and *Little Six, Inc.*

III. AN OVERVIEW OF THE TAXABILITY OF INDIAN TRIBES AND PRIOR COLLISIONS BETWEEN THE IRC AND THE INDIAN CANON OF CONSTRUCTION

A. *The Taxability of Indian Tribes in General*

The taxation of Indian tribes under the Internal Revenue Code has traditionally been an issue that has puzzled both tax and Indian law scholars. The unique position of tribes in our society has contributed to this. Indian tribes are distinct, independent political entities and exert sovereignty over their land.¹¹³ In fact, because of this sovereign status, states cannot tax tribes or activities conducted on reservations.¹¹⁴ The tribes elect political officers who enact civil and criminal laws administered by tribal courts, and they hold title to tribal land.¹¹⁵ Tribes are subject to the ultimate sovereignty of the federal government, and tribal members are United States citizens.¹¹⁶ These qualities are similar to those inherent in states. Yet, Indian tribes are not states or subdivisions thereof, but rather “domestic dependent nations.”¹¹⁷ Tribes are distinguishable from state governments because “the right of tribal self-government is ultimately dependent on and subject to the broad power of Congress.”¹¹⁸ Therefore, unlike states, tribes are unable to claim rights against the federal government through the traditions and constitutional structures supporting the

¹⁰⁸Wilkinson & Volkman, *supra* note 103, at 613.

¹⁰⁹*Cherokee Nation*, 30 U.S. (5 Pet.) at 17.

¹¹⁰*Id.*

¹¹¹Wilkinson & Volkman, *supra* note 103, at 614-15.

¹¹²Jensen, *supra* note 100.

¹¹³Wilkinson & Volkman, *supra* note 103, at 604.

¹¹⁴Ellen P. Aprill, *Tribal Bonds: Indian Sovereignty and the Tax Legislative Process*, 46 ADMIN. L. REV. 333, 334 (1994).

¹¹⁵Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 197 (1984).

¹¹⁶*Id.*

¹¹⁷*See Cherokee Nation*, 30 U.S. (5 Pet.) at 15-18.

¹¹⁸*White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980).

federalist system.¹¹⁹ The status of tribes does not conveniently fit into the Constitution's traditional power allocation rules.¹²⁰

As a result, the treatment of Indian tribes in tax law has been rather ineffective and inconsistent.¹²¹ Before the Tribal Tax Act of 1982, the Internal Revenue Service was in charge of determining the tax treatment of tribal governments.¹²² Revenue Ruling 67-284¹²³ declared that "[i]ncome tax statutes do not tax Indian tribes. The tribe is not a taxable entity."¹²⁴ This ruling was interesting because it gave no analysis or basis for its conclusion, nor did it cite any statutory authority.¹²⁵ That ruling, however, dealt primarily with the federal income tax treatment of income paid to or on behalf of enrolled members of Tribes.¹²⁶ Why the Service made such a broad statement about the taxability of tribes is unknown.

Subsequent litigation, unlike Revenue Ruling 67-284, drew on parallels between tribal governments and state and local governments.¹²⁷ After all, tribal governments do have inherent powers and attributes of sovereignty,¹²⁸ just as states do. But unlike the states, the federal government has taken on a special responsibility toward tribal governments. The federal government has developed a fiduciary obligation to the tribal governments and has announced a policy of encouraging economic development and self-sufficiency for tribes and their members.¹²⁹ And Congress is free to use any available means, including the tax code, to assist in furthering these policies.

The IRS, however, refused to treat the tribes as political subdivisions, thereby refusing to extend a variety of tax preferences enjoyed by state and local governments that were not enjoyed by the tribes. In Revenue Ruling 68-231,¹³⁰ the IRS concluded that the interest on debt of tribal governments was not eligible for the

¹¹⁹Newton, *supra* note 115, at 197.

¹²⁰*Id.* at 196.

¹²¹Aprill, *supra* note 114, at 334.

¹²²*Id.* at 337.

¹²³1967-2 C.B. 55.

¹²⁴*Id.* at 58.

¹²⁵Aprill, *supra* note 114, at 337. The ruling also did not support the conclusion with a policy analysis. The IRS did not even indicate what kind of entity the tribal government was, it just concluded that the tribe is not a taxable entity. *See id.*

¹²⁶*See* 1967-2 C.B. at 56. The ruling went on to state that amounts paid to tribal council members or officers are subject to income tax, and that tribal income not otherwise exempt from Federal Income tax is includable in the gross income of the Indian tribal member when distributed or constructively received by him. *Id.*

¹²⁷*See* Aprill, *supra* note 114, at 338.

¹²⁸*See id.* at 334.

¹²⁹*See id.* at 334-35.

¹³⁰1968-1 C.B. 48.

exclusion from income tax provided by § 103 of the Code.¹³¹ The ruling stated that a tribe “is not a division of the State, and since it exercises its governing powers by virtue of Federal, rather than State authority, the bonds in question are not issued on behalf the State within the meaning of the regulations under section 103(a).”¹³²

Another tax dilemma arises in the treatment of business corporations owned by tribes. Little Six, Inc. is actually a wholly owned corporation of a tribe in South Dakota,¹³³ but that was not the difference between the *Chickasaw Nation* and *Little Six, Inc.* results. Granted, a literal reading of the Code would tax tribal corporations the same as any other corporation, but Revenue Ruling 81-295¹³⁴ stated that the corporation is coextensive with the tribe itself, so it shared the exempt status of the tribe for income earned on the reservation.¹³⁵ The IRS applied a policy analysis in this ruling, stating that “the political entity embodied in the concept of an Indian tribe has been recognized.” The IRS then cited *Mescalero Apache Tribe v. Jones*,¹³⁶ to support the proposition that no income tax liability has been asserted against a tribe with respect to tribal income from activities carried on within the boundaries of the reservation.¹³⁷

In 1982, Congress finally weighed in on the matter by passing the Indian Tribal Governmental Tax Status Act, which is frequently referred to as the “Tribal Tax Act” and codified as § 7871 of the Internal Revenue Code.¹³⁸ Essentially, the Tribal Tax Act treats tribal governments in the same way in which state governments are treated under certain provisions of the Code. Most significantly, it grants tribes the benefits of § 103¹³⁹ as long as the proceeds from the debt obligations issued by the tribal government are to be used for essential government functions.¹⁴⁰ Also

¹³¹See I.R.C. § 103(c)(1) (2000). This section allows the holder of a bond issued by a state or local government to exclude interest earned on that bond from gross income on his or her tax return. The benefit for the government is that it can pay a lower interest rate on the debt than a taxable entity would while giving the same net return to the investor. Thus, the government’s cost of capital is reduced.

¹³²1968-1 C.B. at 49-50.

¹³³See *Little Six, Inc.*, 210 F.3d at 1362.

¹³⁴1981-2 C.B. 15.

¹³⁵*Id.* at 16 (In this ruling, the IRS concluded that a federally chartered tribal corporation was not taxable on income derived from the corporation’s income-producing activities, including a catfish hatchery and an annual tribal fair.).

¹³⁶411 U.S. 145 (1973) (holding that a provision in the Indian Reorganization Act barred a use tax that the state sought to impose on personal property purchased out of state and installed as a permanent improvement on the reservation).

¹³⁷See 1981-2 C.B. at 16.

¹³⁸Pub. L. No. 100-203, ch. 80, 96 Stat. 2607 (1982).

¹³⁹See I.R.C. § 7871(a)(4) (2000).

¹⁴⁰See I.R.C. § 7871(c). This restriction is a major difference between a state’s ability to raise money with the benefits of § 103 and a tribe’s ability to raise money with the benefits of § 103. Section 7871(c) does not cover “passive activity bonds,” (PABs) which are issued by many states or their agencies for use by or on behalf of private businesses. State and local governments frequently use PABs for economic development; for example, a regional sewer

included is an exemption from a number of excise taxes.¹⁴¹ Not included in this list are the taxes imposed under Chapter 35 of the Code. Of course, if Congress did include that chapter, *Chickasaw Nation* and *Little Six, Inc.* would have been very easy cases because § 7871 would clearly exempt the tribes from the taxes imposed by Chapter 35.

Why did § 7871 not include Chapter 35? It was not necessary at that point in time. Section 7871 was enacted in 1982, but the IGRA was not enacted until 1988. The IGRA was enacted in large part, if not entirely, as a reaction to the Supreme Court's decision in *Cabazon Band*, decided in 1987. Additionally, Indian gaming was a relatively small industry when § 7871 was enacted. The first reservation bingo hall was opened by the Seminole Tribe of Florida in 1979,¹⁴² so the industry was young and apparently not a concern of Congress at the time the Tribal Tax Act was passed. So what may not have seemed necessary in 1982 was considered important enough to warrant a comprehensive congressional act just six years later.

But why does all of this matter? Section 2719(d)(1) of the IGRA requires that certain provisions of the Internal Revenue Code apply to Indian gaming operations in the same manner as they do to state gaming operations.¹⁴³ In effect, the statute extended the reach of the Tribal Tax Act to other provisions of the Internal Revenue Code which deal with the tax provisions of gambling activities. The dispute in *Chickasaw Nation* and *Little Six, Inc.* was how many of those provisions were covered by § 2719(d)(1) of the IGRA.

B. Warbus v. Commissioner and Its Possible Effects on Tribal Taxation

In *Warbus v. Commissioner*,¹⁴⁴ an individual Indian taxpayer claimed an exemption from tax on debt discharge income because the income was derived from an Indian fishing-rights-related activity.¹⁴⁵ Income from an Indian fishing-rights-related activity is expressly exempted from taxation under § 7873(a) of the Code.¹⁴⁶ The taxpayer had borrowed money to buy a fishing boat, which he operated in fishing-rights-related activities of his nation. After falling behind on his loan payments, the taxpayer's boat was repossessed and the Bureau of Indian Affairs

district can issue PABs to build a sewage plant that will then be privately managed. Original versions of the bill that became § 7871(c) did not include this restriction, but the change was made when objections were voiced by Representative Gibbons of Florida, who was apparently concerned that tribes would use PABs to fund the construction of tribal bingo halls. See Aprill, *supra* note 114, at 341-47.

¹⁴¹See I.R.C. § 7871(a)(2) (2000). The tribes were treated as a state for the purposes of any exemption from excise taxes imposed by Chapter 31 (relating to tax on special fuels), Chapter 32 (relating to manufacturers excise taxes), Subchapter B of Chapter 33 (relating to communications excise tax), and subchapter 36 (relating to tax on the use of certain highway vehicles).

¹⁴²Cynthia A. De Silva, *Wagering the Wager War: Tribal Sovereignty, Tribal Gaming, and California's Proposition 5 and Chapter 409*, 30 MCGEORGE L. REV. 1025, 1048 (1999).

¹⁴³See 25 U.S.C. 2719(d)(1).

¹⁴⁴110 T.C. 279 (1998).

¹⁴⁵*Id.* at 280.

¹⁴⁶See I.R.C. § 7873(a) (2000).

(BIA), which had guaranteed the loan, paid the lenders the shortage.¹⁴⁷ As a result of this transaction, the taxpayer had income from the discharge of indebtedness. Such income is normally includable in a taxpayer's gross income.¹⁴⁸ The taxpayer claimed an exemption from the inclusion of this income because it was derived by an Indian from the exercise of fishing rights.

The Tax Court disagreed with *Warbus*. It found that the income from the discharge of debt was not "directly related" to the harvesting, processing, transporting, or selling of fish in the exercise of recognized fishing rights of an Indian tribe, as the statute requires.¹⁴⁹ Instead, the court found that this income was derived from the freeing of his assets from obligations by the BIA.¹⁵⁰ The Tax Court seemed to put strong emphasis on the important tax concept that if Congress intends to exempt certain income, it must do so expressly.¹⁵¹ The statute did not expressly include a discharge of indebtedness from the loan used to purchase a boat used in a fishing rights-related activity, so the Tax Court did not find the income to be excludable. Interestingly, the Indian Canon of Construction (hereinafter Canon) was never mentioned in that decision, although there seemed to be some ambiguity in the statute.

While the decision did not generate a large amount of attention, it did catch the eye of Professor Erik M. Jensen, who wrote an article on the case soon after it was decided.¹⁵² He believed that the case was wrongly decided for two reasons. First, there seemed to be no awareness of Indian law principles.¹⁵³ This probably was not the Tax Court's fault. After all, there is no particular reason for Tax Court judges to be aware of Indian law canon.¹⁵⁴ It did not help that none of the briefs, not even the one for *Warbus*, contained any hint of the existence of the Canon.¹⁵⁵ Even so, this cannot be an excuse, because the Canon is a part of the law and judges are obligated to follow it.¹⁵⁶ However, judges can and do avoid application of the Canon simply by purporting to find no ambiguity in the language that is being construed, even though the language may be inherently ambiguous.¹⁵⁷ That did not happen in *Warbus*, but it is always unacceptable to ignore the Canon, even if the court is not made aware of them.

¹⁴⁷*See Warbus*, 110 T.C. at 280-81.

¹⁴⁸*See* I.R.C. § 61(a)(12) (2000) (explicitly stating that income from the discharge of indebtedness is includable in a taxpayer's gross income).

¹⁴⁹*Warbus*, 110 T.C. at 283.

¹⁵⁰*Id.* at 284.

¹⁵¹*Id.* at 283.

¹⁵²Jensen, *supra* note 100.

¹⁵³*Id.* at 692.

¹⁵⁴*Id.* at 697.

¹⁵⁵*Id.*

¹⁵⁶*Id.* at 696.

¹⁵⁷Jensen, *supra* note 100, at 697.

Second, Professor Jensen argued that the court did not properly read § 7873, which resulted in an improper interpretation of the statute.¹⁵⁸ Namely, the court's interpretation of the word "activity" in § 7873 was inconsistent with its use elsewhere in the Code.¹⁵⁹ Additionally, Professor Jensen did not feel that it would strain the statutory language to consider the debt-discharge income attributable to the foreclosure on a fishing boat as being directly related to a fishing rights-related activity.¹⁶⁰ This is because income can be attributable to an "activity" even though a particular taxpayer's efforts in the activity are minimal or nonexistent.¹⁶¹ The details and analysis of § 7873 are not important for the analysis of *Chickasaw Nation* and *Little Six, Inc.* However, the *Warbus* case and Professor Jensen's analysis of it are important because they demonstrate some of the interpretational mistakes that seem to have been made by the court in *Chickasaw Nation*.

C. Why Courts Often Have Trouble When Tax Law and Indian Law Collide

Already mentioned is one of the main reasons why the courts often have trouble synthesizing the Code and the Canon – few tax scholars and practitioners know much about Indian law, and few Indian law experts know much about tax law. In *Warbus*, it seemed that little effort was made to get the necessary Indian law issues on the table – even by Warbus, the person who would benefit from their application.¹⁶² In fact, the Canon is not even mentioned in the opinion. That was in spite of a long discussion about just what a "directly-related fishing activity" is (or as it turned out, what is not). If Warbus had argued that the statute was ambiguous, perhaps this would have created enough of a problem that the court would have felt obliged to consider the Canon and rule in his favor. Professor Jensen thinks that the use of the Canon should have made Warbus a sure winner in the case.¹⁶³

IV. WHAT'S THE RIGHT ANSWER IN *CHICKASAW NATION* AND *LITTLE SIX*?

A. A Closer Look at Section 2719(d)(1) of the IGRA

Clearly, the interpretation of § 2719(d)(1) was the major area of disagreement between the *Chickasaw Nation* and *Little Six, Inc.* courts. This statute was what both tribes used to claim an exemption. Again, the text of the statute reads:

The provisions of the Internal Revenue Code of 1986 (including sections 1441, 3402(q), 6041, and 6050I, and Chapter 35 of such Code) concerning the reporting and withholding of taxes with respect to the winnings from gaming or wagering operations shall apply to Indian gaming operations conducted pursuant to this chapter, or under a Tribal-State compact entered into under section 2710(d)(3) of this title that is in effect, in the

¹⁵⁸*Id.* at 692.

¹⁵⁹*Id.* at 702.

¹⁶⁰*Id.* at 705.

¹⁶¹*Id.* at 704-05.

¹⁶²Jensen, *supra* note 100, at 697.

¹⁶³*Id.* at 695.

same manner as such provisions apply to State gaming and wagering operations.¹⁶⁴

So, the statute requires that certain provisions of the Internal Revenue Code, “including” those which are set out in the parenthetical, concerning the “reporting and withholding of taxes with respect to the winnings from gaming or wagering operations,” are to apply to Indian gaming operations in the same manner as they apply to state gaming and wagering operations.

In analyzing § 2719(d)(1), a good starting point is to look at the sections listed in the statute’s parenthetical to determine what taxes and/or requirements those sections impose. Already discussed is the fact that Chapter 35 deals with taxes on wagering, and is the home of § 4401, which imposes the wagering excise tax, and § 4402, which grants the exemption for state-conducted lotteries.¹⁶⁵ Chapter 35 also includes the occupational tax in § 4411, which is paid by those liable for the tax imposed in § 4401.¹⁶⁶ Overall, Chapter 35 covers § 4401 to § 4424. However, nothing in that chapter mentions the winnings of players. The chapter imposes the excise tax,¹⁶⁷ the occupational tax imposed on those who pay the excise tax,¹⁶⁸ miscellaneous provisions which deal with the definitions of “wager” and “lottery,”¹⁶⁹ the applicability of state laws,¹⁷⁰ and disclosure provisions.¹⁷¹ Just by reading Chapter 35, the problem in § 2719(d)(1) becomes obvious: it talks about the “reporting and withholding taxes with respect to the winnings from gaming or wagering operations,” but the parenthetical’s reference to Chapter 35 does not seem to fit there. This is because Chapter 35 has nothing to do with the winnings from gaming or wagering operations. The reference to Chapter 35 seems unnecessary, at least when looking at the language outside the parenthetical. So perhaps looking at the other sections in the parenthetical in § 2719(d)(1) of the IGRA may provide a better idea as to what Congress was attempting to do in that statute.

Section 1441 of the Code is titled “Withholding on tax of nonresident aliens.”¹⁷² Essentially, this section requires persons having the control of the disposal or payment of any items of income to any nonresident alien or foreign partnership to withhold a tax of either thirty or fourteen percent (depending upon the type of income) of the disbursement.¹⁷³ Some gambling winnings, however, are exempted from this withholding.¹⁷⁴

¹⁶⁴25 U.S.C. § 2719(d)(1).

¹⁶⁵*See* I.R.C. § 4402(3).

¹⁶⁶*See id.* § 4411.

¹⁶⁷*See id.* §§ 4401-05.

¹⁶⁸*See id.* §§ 4411-14.

¹⁶⁹*See id.* § 4421.

¹⁷⁰*See* I.R.C. § 4422.

¹⁷¹*See id.* §§ 4423-24.

¹⁷²*See id.* § 1441.

¹⁷³*See id.* § 1441(a).

¹⁷⁴*See id.* § 1441(c)(11).

The inclusion of this section seems to make sense in the statute. It clearly gives instructions as to the withholding of taxes (or, in this case, the exception) from gambling winnings.

Section 3402(q) also relates to the withholding of certain gambling winnings. It requires any person making a payment of gambling winnings to withhold a twenty-eight percent tax from such payment.¹⁷⁵ Again, there are exceptions,¹⁷⁶ including § 3402(q)(3)(B), which states that the winnings from state conducted lotteries are subject to withholding only to the extent that they exceed \$5,000.¹⁷⁷ Obviously, the reference to this section in the parenthetical makes sense, because it deals with the withholding of gambling winnings. The statute even contains language specific to state-conducted lotteries. Therefore, that language, as a result of § 2719(d)(1) of the IGRA, will control the manner in which the statute is supposed to be applied to Indian gaming.

Section 6041 of the Code requires all persons in a trade or business who make payments to another person of \$600 or more to prepare a return stating the amount of any gains, profits, and income of the recipients of such payments.¹⁷⁸ It seems fairly easy to figure out that the purpose of this statute is to make sure that persons who receive large amounts of money are properly reporting them as income on their tax returns at the end of the year. This would include big winners in gambling, state-conducted or otherwise. Clearly, this would be a reporting requirement for the winnings of gamblers at Indian-run establishments. Therefore, the inclusion of this code section in the parenthetical in § 2719(d)(1) seems logical.

Finally, § 6050I requires anyone engaged in a trade or business who receives more than \$10,000 in one or more related transactions to file an informational return with the IRS concerning certain details behind such transactions.¹⁷⁹ That information includes data about the person from whom the cash was received, the amount of cash received, and the date and nature of the transaction.¹⁸⁰ The statute does have exceptions, but they only involve financial institutions and transactions occurring outside the United States.¹⁸¹ The purpose of this rule should be fairly obvious. It can detect money laundering schemes¹⁸² and identify parties with large cash incomes who may be underreporting income by spending large amounts of cash.¹⁸³ But, like Chapter 35 of the Code, what is lacking in § 6050I is a reference to winnings from gambling, be it state-conducted or not. Again, it is hard to see the connection between the inclusion of § 6050I of the Code in the § 2719(d)(1) parenthetical and

¹⁷⁵See I.R.C. § 3402(q)(1) (2000).

¹⁷⁶See *id.* § 3402(q)(2).

¹⁷⁷See *id.* § 3402(q)(3)(B).

¹⁷⁸See *id.* § 6041(a).

¹⁷⁹See *id.* § 6050I(a).

¹⁸⁰See I.R.C. § 6050I(b).

¹⁸¹See *id.* § 6050I(c).

¹⁸²See *Bickham Lincoln-Mercury, Inc. v. U.S.*, 168 F.3d 790 (5th Cir. 1999).

¹⁸³See *U.S. v. Casablanca Motors, Inc.*, 863 F. Supp. 50 (D. P.R. 1994).

the language outside the parenthetical. Not surprisingly, the *Little Six, Inc.* court also made reference to this section in concluding that § 2719(d)(1) is ambiguous.¹⁸⁴

It should be kept in mind that the exemption granted in § 2719(d)(1) applies to *all* forms of Indian gaming. It is hard to imagine anyone spending \$10,000 in just pull-tabs. Therefore, the inclusion of § 6050I in the IGRA was apparently placed there to exempt the operators of Indian casinos from having to prepare returns for big-money gamblers.

But what is interesting in the context of § 2719(d)(1) is that § 6050I does not create an exception for state-conducted lotteries, and there is probably no reason to do it. Since people buy lottery tickets in amounts of far less than \$10,000, and since the sales are made in cash, tracking down anyone who spends \$10,000 in a year would be almost impossible. On the other hand, a lot of money can change hands in a short amount of time at a casino. One can cash a check for \$10,000 worth of chips right on the spot.¹⁸⁵ An Indian casino, save for this provision, would have to report large transactions like this. But the relation to state gaming operations is mysterious. The *Little Six, Inc.* court thought that the reference to § 6050I, as well as the reference to Chapter 35, was superfluous because neither of them relate to “winnings.”¹⁸⁶

What is left after looking at the parenthetical in § 2719(d)(1)? Of the five sections (actually, four sections and one chapter) mentioned in the parenthetical, two of them have nothing to do with the reporting or withholding of winnings. Obviously, this is an unusual situation. Usually a parenthetical such as the one in § 2719(d)(1) is put there in order to clarify the statute. Here, the parenthetical only makes the statute more confusing. In fact, much of the language in the statute is superfluous. So it seems that the *Little Six, Inc.* court was right. The statute is ambiguous or at the very least, it is confusing and very poorly written.

This results in an all too familiar question: “What was Congress really trying to do?” Did it only want the provisions of the Code concerning the reporting and withholding of taxes with respect to the winnings from gaming to apply to the Indians in the same manner as they apply to state lotteries? That would seem to be the case if that parenthetical phrase was taken out. Taking out the parenthetical would make the statute fairly clear, at least as far as the taxes imposed by Chapter 35 are concerned. Since § 2719(d)(1) would only reach provisions of the Code related to the reporting and withholding of taxes with respect to the winnings from gaming, the taxes imposed by Chapter 35, which do not relate to any of those things, would not be affected by the statute. Therefore, the argument for an exemption similar to the one enjoyed by state-operated lotteries would be gone. As a result, the tribes would clearly be liable for these taxes.

But the parenthetical has to have been put in there for a reason. It could be that Congress wanted the provisions of the Code sections in the parenthetical to apply to Indian gaming in the same manner as they do to state lotteries. Since state lotteries

¹⁸⁴See *Little Six, Inc.*, 210 F.3d at 1365.

¹⁸⁵That brings to mind the famous debt-discharge case of *Zarin v. Commissioner*, 916 F.2d 110 (3d Cir. 1990), where the taxpayer, in one month, accumulated a debt to the casino of nearly \$3.5 million, which was mainly the result of bounced personal checks.

¹⁸⁶See *Little Six, Inc.*, 210 F.3d at 1365.

are exempted from Chapter 35's taxes,¹⁸⁷ the tribes would be exempt from these taxes, as well. But the question of why the language of the statute only mentions "the reporting and withholding of taxes with respect to winnings" is still not answered.

The legislative history does not help much, either. On one hand, the word "taxation" was removed from the original version of the statute, as Judge Dyk mentioned.¹⁸⁸ On the other hand, one of the statute's authors stated that Congress really meant to treat the taxation of wagers conducted by the Indians in the same manner as wagers conducted by states.¹⁸⁹ The fact that this was stated by one of the statute's drafters should entitle it to more weight than the *Chickasaw Nation* court was willing to give to it, in spite of the fact that it was made long after the fact and only represents the voice of one senator.¹⁹⁰ In the end, there is still no clear answer. The statute is ambiguous.

B. Further Analysis of the Ambiguous Statute

At this point, after concluding that the § 2719(d)(1) is ambiguous, it would seem easy to just use the Indian Canon of Construction to settle the matter in favor of the tribes. If this happens, the interpretation of the statute must be resolved in favor of the tribes, who would then get the exemption from the tax in § 4401. That is what the *Little Six* court did, much to the chagrin of Judge Dyk in his dissent on the petitions for rehearing.¹⁹¹ However, doing this would ignore another important tax concept. This is the rule that absent clear statutory guidance, a court will not imply tax exemptions.

The rule that tax exemptions are not granted by implication is applicable to taxing statutes affecting Indians as it is to all others.¹⁹² If Congress intends to exempt certain income, it must do so expressly.¹⁹³ Courts are particularly sensitive to interpreting statutes to include exemptions when the Indians in the case argue that it should be a matter of policy. If courts could create or imply tax exemptions based on policy, many of the federal Indian laws would have the unintended effect of

¹⁸⁷See I.R.C. § 4402(3).

¹⁸⁸See *Little Six, Inc.*, 229 F.3d at 1385.

¹⁸⁹See *Chickasaw Nation*, 208 F.3d at 883.

¹⁹⁰In their article, Wilkinson and Volkman discuss a hierarchy or reliability of legislative history. The hierarchy indicates that statements made by sponsors of legislation can "be persuasive on some occasions." Wilkinson, *supra* note 101, at 635. While this type of statement is usually made in debate, the statement by Senator Inuuye after the fact is still deserving of some weight. Of course, they point out in their hierarchy that a specific reference in the enactment itself is the most reliable indicator of legislative intent. The fact that there is a reference to Chapter 35 would seem to work in favor of the tribes. Of course, the other language of § 2719(d)(1) confuses the issue.

¹⁹¹See *Little Six, Inc.*, 229 F.3d at 1384.

¹⁹²*Agua Caliente Band of Mission Indians v. County of Riverside*, 442 F.2d 1184, 1187 (9th Cir. 1971).

¹⁹³See *Warbus*, 110 T.C. at 282-83.

exempting Indians from almost all taxation.¹⁹⁴ As the Court in *Confederated Tribes of the Warm Springs Reservation of Oregon v. Kurtz*¹⁹⁵ stated:

It is one thing to say that courts should construe treaties and statute dealing with Indians liberally, and quite another to say that, based on those same policy considerations which prompted the canon of liberal construction, courts themselves are free to create favorable rules.¹⁹⁶

The court went on to say that an exemption from a treaty or non-tax statute can be found only where there is “express exemptive language.”¹⁹⁷

This discussion illustrates what the real conflict in *Chickasaw Nation and Little Six, Inc.* really is (or should be). There is a statute, § 2719(d)(1) of the IGRA, which is ambiguous as to whether it grants the tribes an exemption from the wagering taxes levied by § 4401 of the Internal Revenue Code, as well as the occupational tax in § 4411. On one side, the Indian Canon of Construction says that since the statute is ambiguous, it must be interpreted in favor of the Indians, so the exemption in this case should be granted. On the other side, there is a rule of tax law which says that tax exemptions must be clearly granted, which would mean that the exemption should not be granted here because there is no “express exemptive language,” as the *Warm Springs Reservation of Oregon* court put it. Quite simply, the question is which of these two rules should prevail.

The *Warm Springs Reservation of Oregon* court, while not really dealing with that question because it did not think that the statutes were ambiguous,¹⁹⁸ seemed to lean towards favoring the exemption rule. While it did briefly mention the Indian Canon of Construction, it spent a considerably longer amount of time, and cited more cases, discussing the exemption rule. It also repeatedly used the phrase “express exemptive language” while trying to find a provision to justify an exemption.

So then, did the *Little Six, Inc.* court freely create a favorable rule, as the *Warm Springs Reservation of Oregon* court would put it, or did it simply construe an ambiguous statute in favor of the Indians?

It is more likely that it did the latter. It did not create an exemption to the tax laws. Congress was clearly trying to create some type of exemptions in § 2719(d)(1). The problem is that the language used – or maybe more exactly, a parenthetical trying to explain the language that was used – made it unclear just what Congress was trying to exempt. Such poor drafting is certainly not the fault of the

¹⁹⁴United States v. Anderson, 625 F.2d 910, 917 (9th Cir. 1980).

¹⁹⁵691 F.2d 878 (9th Cir. 1982). In *Warm Springs Reservation of Oregon*, a tribe was suing the government for the return of excise taxes paid from the use of motor vehicles and manufacturing. *Id.* at 879. The tribe claimed that a number of relevant statutes were ambiguous and that they should be construed in favor of the tribes under the Indian Canon of Construction to find an exemption. *Id.* at 880-81. The court found no ambiguity in the statutes, so the tribe was denied an exemption. *Id.* at 881. The *Warm Springs Reservation of Oregon*, court also spent a good deal of time discussing the reasons why the court could not imply an exemption. *See id.* at 880-83.

¹⁹⁶*Id.* at 882-83, quoting Fry v. United States, 557 F.2d 646, 649 (9th Cir. 1977).

¹⁹⁷*See Warm Springs Reservation of Oregon*, 691 F.2d at 882-83.

¹⁹⁸*See id.* at 881.

Indians, so why should they bear the burden? That is what the Indian Canon of Construction does – it ensures that the law errs on the side of the protection of Indians when the language used by a treaty, statute, or regulation is unclear. The *Little Six, Inc.* court recognized the significance of the Canon, while the *Chickasaw Nation* court apparently did not.

That is not to say that the *Little Six, Inc.* analysis is perfect. Judge Dyk raised some valid questions when he dissented from the Federal Circuit's denial of the petitions for rehearing. Still, his analysis does support the assertion that § 2719(d)(1) is ambiguous. He acknowledges that one cannot give effect to all the language of the statute without rendering the statute self-contradictory.¹⁹⁹ While he was right that the *Little Six, Inc.* court should have engaged in more analysis of the statute's structure, purpose, and history to produce an interpretation that makes the statute coherent,²⁰⁰ it seems that even doing so would not produce a clear answer. If, after doing more work than the *Little Six, Inc.* court did, the statute's meaning was still unclear, as it appears to be, then the Canon should be used to resolve the matter in favor of the Indians.

C. Where Did Chickasaw Nation Go Wrong?

So, now that the analysis indicates that the *Little Six, Inc.* decision is right, it should be noted where the *Chickasaw Nation* court seemed to err in its analysis. First, it seems that the court in *Chickasaw Nation* made many of the same mistakes in its decision that Professor Jensen thinks the Tax Court made in *Warbus*.

A very important factor is that there must be concerns in the precedential value of each of these decisions. In the introduction to his paper, Professor Jensen stated a concern that the *Warbus* decision could become extremely bad precedent, as it was a published decision of the Tax Court.²⁰¹ Specifically, he worried that the decision could come to stand for the proposition that the Tax Court could ignore Indian law principles in tax disputes that involve Indian tribes or Indian tribal members.²⁰² The same thing almost happened with *Chickasaw Nation*. Section 7873 of the Internal Revenue Code, the section which was in dispute in *Warbus*, had not been the subject of prior judicial decisions, so the erroneous decision in *Warbus* could have an enormous effect in developing an understanding of that section.²⁰³ Similarly, § 2719(d)(1) of the IGRA had not been the subject of judicial scrutiny before *Chickasaw Nation* and *Little Six, Inc.* Had both courts come to the same conclusion on the meaning of the statute, that understanding would have been firmly established. And if *Little Six, Inc.* had followed the interpretation of *Chickasaw Nation*, the interpretation against the tribes would have two decisions in its favor. This could be particularly troubling because, like § 7873 in *Warbus*, § 2719(d)(1) is specifically geared toward the tax consequences of Indian activity. This should be obvious because § 2719(d)(1) is in Title 25 of the United States Code, which is the body of Federal Indian law. And a case involving § 2719(d)(1) will never come up

¹⁹⁹See *Little Six, Inc.*, 229 F.3d at 1384.

²⁰⁰See *id.*

²⁰¹Jensen, *supra* note 100, at 692.

²⁰²*Id.*

²⁰³*Id.* at 692.

outside the context of Indian law, so there would probably be fewer opportunities for courts to take a look at this statute and analyze the errors of *Chickasaw Nation*.

Additionally, both *Warbus* and *Chickasaw Nation* demonstrate how judges can all but disregard the Indian Canon of Construction when its application seems to be inconvenient. Judges have, on a number of occasions, circumvented the Canon by simply declaring that the statute is unambiguous.²⁰⁴ Yet they have to acknowledge the Canon; it is a part of the law.²⁰⁵ But of course, if the statute is not ambiguous, then the Canon is not a concern. How the *Chickasaw Nation* court found no ambiguity in the statute is still difficult to understand. The analysis above describes how and why § 2719(d)(1) is ambiguous. The *Chickasaw Nation* opinion couldn't explain what the language of the statute means, although it purported to do so. Because the court thought it knew what the statute meant, it did not concern itself with the Canon.

For example, rather than break down the statute into smaller pieces, the *Chickasaw Nation* court looked at the statute in a very broad sense.²⁰⁶ It spent most of its time concentrating on policy-driven arguments, which are important in their own way. But the policy of the IGRA is in § 2702; the statute at issue in the case was § 2719(d)(1). Before looking at the somewhat fuzzy policy objectives, the Court should have spent more time analyzing the statute itself to try to determine what the statute meant.

Particularly odd is the Court's handling of the reference to Chapter 35 in the parenthetical of § 2719(d)(1). It calls the statute's reference to Chapter 35 "somewhat cryptic,"²⁰⁷ but discards that problem by claiming that the most reasonable conclusion is that the reference to Chapter 35 was to incorporate its definitions of the terms "wager" and "lottery."²⁰⁸ It is true that Chapter 35 does contain definitions for those terms, but they are both contained in one section, § 4421. Section 4421(1) defines "wager" and § 4421(2) defines "lottery." The bulk of the remaining portions of Chapter 35 deal with the wagering excise tax and the related occupational tax.²⁰⁹ So, if Congress was really just trying to incorporate those two terms, why didn't it just say "§ 4421" instead of "Chapter 35?" The Court did not address that, and it probably does not have a good answer. And besides, while § 4421, does define "wager" and "lottery", those terms, at least in the context of § 4421, still have nothing to do with "the reporting and withholding of taxes with respect to the winnings from gaming operations."²¹⁰ So even if Congress was just trying to incorporate those definitions, a reference to § 4421 in place of "Chapter 35" would still be difficult to explain.

²⁰⁴*Id.* at 697.

²⁰⁵*Id.*

²⁰⁶*Chickasaw Nation*, 208 F.3d at 881-82.

²⁰⁷*Id.* at 883.

²⁰⁸*Id.*

²⁰⁹*See* I.R.C. §§ 4401-14 (2000).

²¹⁰25 U.S.C. § 2719(d)(1) (2000).

In fact, later in the same paragraph as this Chapter 35 explanation, the Court seems to unwittingly acknowledge that the § 2719(d)(1) is ambiguous. This passage near the end of the opinion seems to acknowledge this ambiguity:

In any event, we are unwilling to assume, based solely upon the inclusion of this parenthetical reference to Chapter 35, that Congress intended to provide tribes with the exemption from federal wagering excise taxes enjoyed by the states. Such an assumption would fly directly in the face of § 2719(d)'s express reference to "the reporting and withholding of taxes with respect to the winnings from gaming or wagering operations."²¹¹

That passage, along with the reference to Chapter 35's inclusion in the parenthetical being "somewhat cryptic,"²¹² makes it clear that the Court really had no idea what the reference to Chapter 35 was doing in the parenthetical. It sees the conflict between the reference to Chapter 35 and the language outside the parenthetical. But instead of taking this ambiguity and investigating it further, the Court simply made up its mind that, whatever all of this language meant, it could not have meant an exemption to the excise taxes in Chapter 35. The Court simply stated that if Congress intended to provide tribes with an exemption from the federal wagering excise taxes, it clearly knew how to draft such an exemption.²¹³ By doing this, the Canon was kept out of play. Additionally, the Court did not consider other sections mentioned in the parenthetical, namely § 6050I, and failed to analyze its somewhat mysterious inclusion therein, as did the *Little Six, Inc.* Court.²¹⁴

But before going any farther, it is important to consider the original question posed in this section. That is the one about the conflict between the Indian Canon of Construction and the reluctance of courts to imply a tax exemption from ambiguous statutes. This is bound to come up again in the courts, so the question should be addressed. Which one should prevail? The Indian Canon of Construction should prevail.

Unquestionably, the history behind the Indian Canon of Construction has to be a factor here. By not giving Indians the benefit of the doubt on an ambiguous statute, it seems that courts would be ignoring the principles behind the government's relationship with Indians. The language used by the Supreme Court in a case where it had to construe ambiguous language in the context of Indian law and taxation, *Squire v. Capoeman*,²¹⁵ probably states it best: "To tax respondent under these circumstances would, in the words of the court below, be 'at the least, a sorry breach

²¹¹*Chickasaw Nation*, 208 F.3d at 883.

²¹²*Id.*

²¹³*See id.* at 884.

²¹⁴*See Little Six, Inc.*, 210 F.3d at 1365.

²¹⁵351 U.S. 1 (1956). This case involved the taxation of an individual Indian. The IRS claimed that the taxpayer owed capital gains taxes from the sale of timber on land acquired from the government pursuant to the General Allotment Act of 1887. The Court used the Indian Canon of Construction to conclude that the transfer of the land "free of all charge or incumbrance whatsoever" included capital gains from the sale of timber on the land. *Id.* at 4.

of faith with these Indians.’”²¹⁶ That faith with which the government should conduct its affairs with Indians is kept in check, in part, by the Indian Canon of Construction. This Canon was a part of American jurisprudence long before the Internal Revenue Code came into being, and should not be ignored in tax cases.

D. Other Policy Concerns Which Support an Exemption

Section 7871 of the Code forces the IRS to treat tribal governments in the same manner as it does state governments under certain sections of the Code.²¹⁷ Why would Congress want to do this? States have a number of essential government functions that have to be carried out, and of course, the taxpayers of the states are ultimately the people who pay for these services. The exemptions from many tax provisions that are enjoyed by state governments are a way to save them money. The less money that states have to pay to the federal government, the less they have to take from their citizens in the form of taxes.

The same is true for tribal governments. Indian tribes exert sovereignty over their land, and like all governments, regulate conduct within the governmental (in their case, reservation) boundaries.²¹⁸ In enacting § 7871, Congress recognized this and granted some (but obviously not all) of the tax advantages enjoyed by states to tribal governments. The same policy applies as the one that justifies the provisions that are favorable to state governments.

So why do tribes sell pull-tabs and open casinos? It’s the same reason that states have lotteries: they are usually cash cows.²¹⁹ As an example, in 1999, the Ohio Lottery had sales of approximately \$2.145 billion, with prize expenses, commissions, and operating expenses totaling approximately \$1.483 billion.²²⁰ That is a profit of about \$662 million dollars, all of it free of tax from the federal government. Why should it be tax-free? In 1999, \$696 million was transferred to fund education, as required by the Ohio Constitution.²²¹ Since its inception in 1974, the Lottery has provided over \$9.7 billion in support of the state’s public education system.²²²

Tribal governments are using the profits from their casinos and lotteries, including pull-tab games, for many of the same purposes. For example, the Oneida Tribe in New York operates the Turning Stone Casino.²²³ It has used gaming revenues to purchase additional land, increasing the size of the reservation from

²¹⁶*Squire*, 351 U.S. at 10.

²¹⁷*See* I.R.C. § 7871(a).

²¹⁸*Wilkinson & Volkman*, *supra* note 103, at 604.

²¹⁹Although, as Rand and Light point out, not all Indian gaming operations are successful. It depends on a number of market variables, such as population density. However, games such as the pull-tabs are set up so that the tribe will make money as it gets through each box of tickets. Still, these are not the most lucrative gaming operation; the casinos are. *See* Rand & Light, *supra* note 16, at 404-05.

²²⁰Ohio Lottery Commission, *Where the Money Goes*, at <http://www.ohiolottery.com/where/where.html> (last visited Jan. 13, 2001).

²²¹OHIO CONST., art. XV, § 6.

²²²Ohio Lottery Commission, *supra* note 220.

²²³*See* Rand & Light, *supra* note 16, at 403.

thirty-two acres to nearly 4,000 acres.²²⁴ It has also built a council house, health services center, senior center, new roads, and a burial ground.²²⁵ More in line with Ohio's use of lottery money, the tribe has also established scholarship and job training programs.²²⁶ From this, can be seen that states and tribes use the proceeds from lotteries and other types of gambling for many, if not most, of the same purposes.

Essentially, this makes it fair to treat states and tribes in a similar manner under any provision of the Internal Revenue Code. It is a case of horizontal equity: similarly situated taxpayers should be treated in a similar manner by the tax laws. While there are differences between states and tribes, they are very similarly situated in the case of their gambling operations. Both tribes and states run these operations because they are profitable. Both use the proceeds for similar purposes, which ultimately serve the interests of the people within the boundaries of the state or reservation.

V. CONCLUSION

As mentioned earlier, a petition for certiorari was granted on January 22, 2001 by the Supreme Court in the *Chickasaw Nation* case. Hopefully, the Court will make a careful analysis of all of the statutes involved, especially § 2719(d)(1) of the IGRA. Also, it should not forget about the Indian Canon of Construction and the policies which make it only fair to treat tribal governments in the same manner as state governments. With this in mind, hopefully the Court will find that § 2719(d)(1) should be construed to allow an exemption from the excise and occupational taxes for these tribes.

Whatever the Court decides, Congress could eventually put an end to this mess by amending § 2719(d)(1) to make it clear whether these wagers are exempt. However, a review of legislation introduced since these decisions came out reveals that no one has proposed an amendment to § 2719(d)(1). That is not surprising, since this is far from a hot-button issue for most Americans. It is an issue that is unlikely to receive much attention in the near future, as both political parties will be concentrating on introducing legislation dealing with the main topics of last year's election. Still, it is better for tax issues to be resolved in places other than the courts.

VI. POSTSCRIPT: THE SUPREME COURT'S DECISION

The Supreme Court ultimately decided this issue in *Chickasaw Nation v. United States*²²⁷ and in a 7-2 decision, ruled for the government.

Justice Breyer wrote for the majority. After reviewing the language of the statutes involved, the opinion agreed with the Tribes that the reference to Chapter 35 was surplusage, but that the reference to Chapter 35 cannot be given independent operative effect without "seriously rewriting the language of the rest of the statute."²²⁸ The opinion also emphasized the rule that when Congress enacts a tax

²²⁴*See id.*

²²⁵*See id.*

²²⁶*See id.*

²²⁷122 S.Ct. 528 (2001).

²²⁸*Id.* at 532.

exemption, it usually does so explicitly.²²⁹ In this case, the Court stated that the “more plausible role” of the hypothetical was to provide an illustrative list of examples, and that the reference to Chapter 35 was simply a bad example which may have been included inadvertently.²³⁰ Again, the bad example did not warrant rewriting of the remainder of the statute’s language, nor did it mean that the statute was ambiguous, that is, “capable of being understood in two or more possible ways.”²³¹ Instead, common sense suggests that this cross-reference is simply a drafting mistake, a failure to delete an inappropriate cross-reference in the bill that Congress later enacted into law.²³²

The Court also discussed the legislative history of § 2719(d), specifically the deletion of the word “taxation” from the language of the statute. The Court stated that the Tribes’ interpretation of the statute would bring the word “taxation” back into the language of the statute, even though it was deleted.²³³

Finally, the Indian Canon of Construction was considered, and ultimately discarded, by the Court. Accepting as conclusive the Indian Canon “would produce an interpretation that we conclude would conflict with the intent embodied in the statute Congress wrote,” so the Court refused to apply the canon in this case.²³⁴ The opinion also pointed out the canon that tax exemptions should be clearly expressed, and refused to compare the strength of the canons since the Indian Canon of Construction was inapplicable in this case.²³⁵

Justice O’Connor, who was joined by Justice Souter, wrote the dissenting opinion. Her argument was that even though there was some drafting error in the statute,²³⁶ there is simply no way to tell whether the error was the inclusion of “Chapter 35” in the parenthetical or the removal of the word “taxation” in the statute.²³⁷ She added that there is no generally accepted canon of statutory construction favoring language outside of parentheses to language within them.²³⁸ As a result, it becomes necessary to turn to other canons of statutory construction.²³⁹ She also noted the policy behind IGRA, which is to aid in tribes raising revenue, and noted that it would seem logical that Congress would have intended the Nations to receive more, not less, revenue from gaming.²⁴⁰ Because “[t]his Court has repeatedly

²²⁹*Id.* at 533.

²³⁰*Id.*

²³¹*Id.*

²³²*Chickasaw Nation*, 122 S. Ct. at 533.

²³³*Id.* at 534.

²³⁴*Id.* at 535.

²³⁵*Id.* at 535-36.

²³⁶*Id.* at 536.

²³⁷*Chickasaw Nation*, 122 S. Ct. at 536.

²³⁸*Id.* at 537.

²³⁹*Id.* at 538.

²⁴⁰*Id.* at 537-38.

held that, when these two canons conflict, the Indian canon predominates,”²⁴¹ the Court should rule in favor of the Indians. She concluded by stating that this case “provides a persuasive case for application of the Indian canon” because the Court is only being asked to use the Indian canon as a tiebreaker between two equally plausible (or implausible) constructions of a troubled statute.²⁴²

Justice O’Connor’s opinion does well in explaining why the statute cannot be unambiguous. It would seem unnecessary that the Supreme Court would have to decide a case over excise taxes where the statute is unambiguous. It would also seem likely that if the statute was unambiguous, the Court would be unanimous in its decision. But, of course, this is not how the majority saw the issue, and without an ambiguous statute, the Indian Canon is not particularly useful.

Now the wishes of the Tribes are in the hands of Congress. If it really did intend to provide a tax exemption in this case, it needs to amend § 2719(d) to make this clear. Justice O’Connor pointed out that such a result would comport with the stated purpose of IGRA, which is to “provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic self-sufficiency, and strong tribal governments.”²⁴³ Hopefully, if this was indeed the intent of Congress, it will remember this policy and quickly act to fix the statute.

JOHN BURGESS

²⁴¹*Id.*

²⁴²*Chickasaw Nation*, 122 S. Ct. at 539.

²⁴³*See* 25 U.S.C. § 2702(1).