DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

OFFICE OF
CHIEF COUNSEL

April 8, 2002

Number: **200229008**
Release Date: 7/19/2002
CC:TEGE:EOEG:EO2

UILC: 7871.00-00

INTERNAL REVENUE SERVICE NATIONAL OFFICE FIELD SERVICE ADVICE

MEMORANDUM FOR ASSOCIATE CHIEF COUNSEL

FROM: Assistant Chief Counsel
(Exempt Organizations and Government Entities)
CC:TEGE:EOEG:EO2

SUBJECT: Indian Tribal Governments: Legal Status and Discovery Questions

This Chief Counsel Advice responds to your memorandum dated December 12, 2001. In accordance with I.R.C. § 6110(k)(3), this Chief Counsel Advice should not be cited as precedent.

LEGEND

Tribe A =

Tribe B =

Date w =

X Partnership =

Y =

Z =

m percent =

$n =

$p =

ISSUES

1. What is the legal status of Tribe B and its Tribal Council?

2. What informal procedures should be followed to contact Tribe B, its Tribal Council, and/or members of Tribe B prior to serving subpoenas for testimony and/or records?

3. Does the United States Tax Court have the power to enforce a subpoena served on Tribe B, its Tribal Council, and/or the members of Tribe B, in a case where Tribe B is not a party but a participant in the transaction?

4. If the Tax Court has such power, on whom should a subpoena for testimony and/or records be served, and how should service be made if Tribe B, its Tribal Council, and/or member of Tribe B will not voluntarily accept service?

5. Other than a Tax Court subpoena, what, if any, procedures are available for obtaining testimony and/or documents from Tribe B, its Tribal Council, and/or members of Tribe B?

6. Can we employ letters rogatory to seek, through the Tribal Court, information from Tribe B, the Tribal Council, and/or members of Tribe B?

7. Can a subpoena for documents, served on Tribe B's attorney's and accountants (who are not members of Tribe B) be enforced?

CONCLUSIONS

1. Tribe B is recognized as an Indian tribe with a government-to-government relationship with the United States by virtue of being included on the list of tribal entities published by the Secretary of the Interior in the Federal Register. See 65 Fed. Reg. 13298 (2000). Further, Tribe B and its Tribal Council are included in the list of Indian tribal governments provided in Rev. Proc. 2001-15, 2001-5 I.R.B. 465, which is an official list of Indian tribal governments that are to be treated as states for certain federal tax purposes, pursuant to sections 7701(a)(40) and 7871(a) of the Code.

2. Prescribed protocol and procedures should be followed when contacting Tribe B or its representatives. Formal discovery procedures should be used only after the Internal Revenue Service (Service) has made reasonable informal efforts to obtain needed information voluntarily pursuant to Tax Court Rules.

3. Although far from a certainty, we think that the Tax Court can enforce a subpoena pursuant to the provisions of section 7456.

4. Service on Tribal leader(s) should follow prescribed protocol. If the Tribe, its Council, or any member will not accept service, a Service representative is not

precluded from carrying out official government business to the extent permitted by law.

5. An alternative is to request a hearing before the Tribal Court utilizing interagency cooperation with T:ITG. Time constraints probably render this method unacceptable to the field attorneys.

6. While it may be possible under section 28 U.S.C. § 1781 (b) for the Tax Court to transmit a letter rogatory directly to Tribe B's Tribal Court, there is little point in attempting to do so when the same information can be gathered through subpoena or an informal meeting with Tribe B. We think that time constraints also probably render this method unacceptable to the field attorneys.

7. We think that the Tax Court can enforce a subpoena pursuant to the provisions of section 7456 since the attorneys and accountants are not members of Tribe B, and their actions were not undertaken as Tribal officials, but rather as independent contractors acting on the Tribe's behalf. Even if tribal sovereign immunity is extended to outside counsel and outside accountants, we think that the Tax Court can enforce a subpoena for the reasons set forth in Issue 3.

FACTS

On Date w, X Partnership was formed as a limited partnership by an Agreement between Tribe A as the first limited partner, Y as the second limited partner, and Z as the general partner. Under the Partnership Agreement, Tribe A held m percent interest in the Partnership, for which it contributed $n. The general partner, Z , is the parent of the second limited partner, Y. X is a limited partner in another partnership, so that X Partnership is apparently a third-tier partnership.

Subsequently, X's Partnership Agreement was amended and Tribe B was substituted for Tribe A as the first limited partner of X Partnership, with the same m percent share. From 1984 to 1990, Tribe B received approximately $p as its distributive share of X Partnership's gross income. Tribe B's involvement in X Partnership is limited to use of the Tribe's name as a nontaxable entity. Payments received by Tribe B as its distributive share derive from a lease stripping arrangement, under which a parent partnership of Y and Z sold the right to certain lease payments to an unrelated party. Most of the taxable income from the transaction was allocated to Tribe A, and then to Tribe B after it was substituted as first limited partner in the X Partnership Agreement.

Tribe A and Tribe B are federally recognized Indian tribes, included on the list of recognized tribal entities published by the Secretary of the Interior and on the Internal Revenue Service's list of Indian tribal governments that are to be treated as states for federal tax purposes. See 65 Fed. Reg. 13298 (2000) and Rev. Proc. 2001-15, 2001-5 I.R.B. 465, respectively. Tribal Council is the governing body of Tribe B.

LAW AND ANALYSIS

Issue 1

What is the legal status of Tribe B and its Tribal Council?

Sovereignty

Indian tribes possess inherent sovereignty except where limited by treaty or statute, or by implication as a necessary result of their dependent status. Indian tribes are viewed as having certain inherent powers, including the power to tax and administer justice, whether or not they choose to take action to exercise those powers. A written constitution or other governing document is not a prerequisite for the exercise of inherent sovereign powers. See United States v. Mazurie, 419 U.S. 544 (1975); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982); United States v. Wheeler, 435 U.S. 313 (1978); Kerr-McGee Corp. v. Navajo Tribe of Indians, 471 U.S. 195 (1985); Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134 (1980); Iron Crow v. Oglala Sioux Tribe of the Pine Ridge Reservation, South Dakota, 231 F.2d 89 (8th Cir. 1956); and Powers of Indian Tribes, 55 I.D. 14 (1934); 1 Op. Sol. on Indian Affairs, 445 (U.S.D.I. 1979).

The Department of the Interior publishes a list of "recognized" Indian tribes. Tribal entities on this list have a "government-to-government" relationship with the United States and are eligible for programs administered by the Bureau of Indian Affairs. See 65 Fed. Reg. 13298. That is, listed tribes are acknowledged by the federal government to be "distinct, independent political communities qualified to exercise powers of self government through original tribal sovereignty", rather than through delegation of power from the federal government. See Felix S. Cohen, Handbook of Federal Indian Law, Chapter 4, § A, page 232 (1982 Edition), citing Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832) and United States v. Wheeler, 435 U.S. 313, 323-24 (1978). Tribe B is on the list, and therefore, has a government-to-government relationship with the United States. Absent the limitations described above, tribes on the Department of Interior list, such as Tribe B, retain the right to exercise a wide variety of powers, including the power to tax, the power of eminent domain, police powers, and jurisdiction over tribal lands, through their Tribal Councils, the Tribal governing body.

Not Subject to Federal Income Tax

The Indian Tribal Government Tax Status Act of 1982 (Title II of Pub. L. No. 97-473, 96 Stat 2605, reprinted in 1983-1 C.B. 510, 511, as amended by Pub. L. No. 98-21, 97 Stat. 65, reprinted in 1983-2 C.B. 309, 315) added provisions to the Internal Revenue Code governing the tax status of Indian tribal governments. For two years beginning in 1983, Indian tribal governments were to be treated as states for some federal tax purposes. Section 1065 of the Tax Reform Act of 1984, Pub. L. No. 98-369, 98 Stat. 494, reprinted in 1984-3 (Vol. 1) C.B. 556, made

permanent the rules treating Indian tribal governments (or subdivisions thereof) as states (or political subdivisions thereof) for specified federal tax purposes. See Rev. Proc. 86-17, 1986-1 C.B. 550.

Section 7701(a)(40)(A) of the Code defines the term "Indian tribal government" as the governing body of any tribe, band, community, village, or group of Indians, or (if applicable) Alaska Natives, which is determined by the Secretary after consultation with the Secretary of the Interior, to exercise governmental functions.

Section 7871(a) of the Code treats an Indian tribal government as a state for certain specified tax purposes. In the legislative history to section 7871(a), Congress indicated that this provision of the Code will not apply to any Indian tribal government unless it is recognized by the Treasury Department, after consultation with the Interior Department, as exercising sovereign powers. The legislative history provides that sovereign powers include the power to tax, the power of eminent domain, and police powers (such as control over zoning, police protection, and fire protection). H.R. Conf. Rep. No. 984, 97th Cong., 2d Sess. 15 (1982), reprinted in 1983-1 C.B. 522.

Rev. Proc. 2001-15, 2001-5 I.R.B. 465, provides a list of Indian tribal governments recognized by the Department of the Interior (in 65 Fed. Reg. 13298) and treated as states for certain federal tax purposes, pursuant to sections 7701(a)(40) and 7871(a) of the Code. Tribe B is included in Rev. Proc. 2001-15, and is therefore, an Indian tribal government (this includes Tribal Council), and is entitled to be treated as a state for federal tax purposes. Section 7871 specifies the federal tax provisions for which Tribe B will be treated as a state.

Issue 2

What informal procedures should be followed to contact Tribe B, its Tribal Council, and/or members of the Tribe prior to serving a subpoena for testimony and/or records?

The United States has a unique legal relationship with Indian tribal governments. United States v. Maser, 419 U.S. 544 , 557 (1975). Executive Order No. 13175, 65 Fed. Reg. 67249 (Nov. 9, 2000), titled Consultation and Coordination With Indian Tribal Governments, states in pertinent part:

> Sec. 2. Fundamental Principles. In . . . implementing policies that have tribal implications, agencies shall be guided by the following fundamental principles:
>
> (a) The United States has a unique legal relationship with Indian tribal governments . . . [and] has enacted numerous [laws] . . . that establish and define a trust relationship with Indian tribes.

> (b) [T]he United States . . . has recognized the right of Indian tribes to . . . exercise inherent sovereign powers over their members and territory. The United States continues to work with Indian tribes on a government-to-government basis . . . concerning [issues of] Indian tribal self-government . . . and other rights.
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> Sec. 3. Policymaking Criteria. In addition to adhering to the fundamental principles set forth [above] . . . agencies shall adhere to the extent permitted by law . . . [to] the following criteria when . . . implementing policies that have tribal implications:
>
> (a) Agencies shall respect Indian tribal self-government and sovereignty . . . and strive to meet the responsibilities that arise from the unique legal relationship between the Federal Government and Indian tribal governments.

The following general protocol and procedures should be followed when contacting or subpoenaing Tribe B or its representatives. The contact should be diplomatic in tone and should express the Service's desire to meet with the leaders of the Tribe to discuss, on a government-to-government basis, the issue(s) of concern. In priority order, service would begin with the Tribal Chairman or President, then seeking information from the Tribal Counsel Members. The recommended approach is "our government would appreciate assistance and cooperation from your government." The following steps should be considered whenever contacting or visiting a tribal entity:

1. The Service employee should contact the recognized leader(s), via phone or mail, and set up an appointment for a specified time to meet. The tribal leader(s) should be informed of the purpose of the appointment. The Service employee should express a willingness to repeat the information to the Tribal Council or other tribal representative if requested.

2. If another federal agency is currently working with Tribe B, determine the scope of the other agency's involvement and elevate that information to Service management. Interagency cooperation may resolve conflicts and avoid misunderstandings as long as this cooperation is balanced with the Tribe's confidentially and privacy concerns.

3. The Service employee should thank the tribal leader(s) and/or designee for the their cooperation.

T:ITG has strong relationships with some of the tribes nationally and, as such, serves as a "point of contact" with the tribal governments. This does not necessarily mean documents will be presented on the basis of this relationship, but

rather could serve as an alternative in gathering documents voluntarily. In the event the Service employee (or process server) is denied entry on Tribal land or refused the opportunity to discuss the issue, it is important to recognize that the unique legal relationship between the federal government and Indian tribal governments is not intended to prevent the Service representative from carrying out official government business to the extent that is practical and permitted by law. See IRC § 7602; Treas. Reg. § 301.7602-1.

It should be noted that informal consultation or communication between the parties is required prior to using formal discovery or requests for admissions. T.C. Rules 70(a)(1) and 90(a) (stating in part that "the Court expects the parties to attempt to attain the objectives of discovery through informal consultation or communication before utilizing the discovery procedures provided" in the Rules); Branerton Corp. v. Commissioner, 61 T.C. 691, 692 (1974) ("Rule 70(a)(1) means exactly what it says . . . [t]he bedrock of Tax Court practice has been the stipulation process . . . [and] essential to that process is the voluntary exchange of necessary facts, documents, and other data between the parties as an aid to the more expeditious trial of cases as well as for settlement purposes."); Odend'hal v. Commissioner, 75 T.C. 400, 404 (1980); Bozo v. Commissioner, T.C. Memo. 1995-228.

Issue 3

Does the United States Tax Court have the power to enforce a subpoena served on Tribe B, its Tribal Council, and/or the members of the Tribe, in a case where the Tribe is not a party but a participant in the transaction?

Generally speaking, Indian tribes are immune from suit. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978); Puyallup Tribe, Inc. v. Washington Game Dept., 433 U.S. 165, 172 (1977); United States v. United States Fidelity & Guaranty Co., 309 U.S. 506, 512 (1940); Sekaquaptewa v. MacDonald, 591 F.2d 1289, 1291 (9th Cir. 1979); Hamilton v. Nakai, 453 F.2d 152, 158 (9th Cir. 1971). Tribal sovereignty, however, is subject to the superior and plenary control of Congress. Additionally, Congress can waive that immunity but such waiver must be unequivocally expressed. Santa Clara Pueblo v. Martinez, 436 U.S. at 58. Tribal sovereign immunity does not extend to individual members of a tribe. Puyallup Tribe, Inc., 433 U.S. at 171-72; Romanella v. Hayward, 933 F. Supp. 163, 167-68 (D. Conn. 1996). Tribal immunity, however, does extend to tribal officials when acting in their official capacity and within their scope of authority. Davis v. Littell, 398 F.2d 83, 84-85 (9th Cir. 1968); Niagara Mohawk Power Corp. v. Tonawanda Band of Seneca Indians, 862 F. Supp. 995, 1002 (W.D. N.Y. 1994).

As previously stated, tribal sovereignty doesn't extend to prevent the federal government from exercising its superior sovereign powers. Quileute Indian Tribe v. Babbitt, 18 F.3d 1456, 1459 (9th Cir. 1994); United States v. White Mountain Apache Tribe, 784 F.2d 917, 920 (9th Cir. 1986). The federal government can sue

and override a tribe's sovereign immunity, just as it can sue and override state sovereign immunity. United States v. Yakima Tribal Court, 806 F.2d 853, 861 (9th Cir. 1986). States and Indian tribes can't assert sovereign immunity against the federal government. United States v. Red Lake Band of Chippewa Indians, 827 F.2d 380, 383 (8th Cir. 1987). Tribal sovereignty is dependent on and subordinate to the federal government. Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 154 (1980); United States v. Wheeler, 435 U.S. 313, 323 (1978).

There is little authority addressing the issue of whether Indian Tribes can be compelled to testify or produce documents as a non-party fact witness in civil litigation involving the federal government pursuant to a subpoena. Catskill Development, L.L.C. v. Park Place Entertainment Corp., 2002 U.S. Dist. LEXIS 3166, at *19-20 (S.D. N.Y. 2002). The Second Circuit has not addressed non-party subpoenas and sovereign immunity issues in the tribal context. Id. at *22. Nonetheless, we think that the Tax Court can enforce a subpoena pursuant to the provisions of section 7456.

Section 7456(a), which sets out the subpoena power of the Tax Court, provides that::

> [f]or the efficient administration of the functions vested in the Tax Court or any division thereof, any judge or special trial judge of the Tax Court, the clerk of the court or his deputies, as such, or any other employee of the Tax Court designated in writing for the purpose by the chief judge, may administer oaths, and any judge or special trial judge of the Tax Court may examine witnesses and require, by subpoena ordered by the Tax Court or any division thereof and signed by the judge or special trial judge (or by the clerk of the Tax Court or by any other employee of the Tax Court when acting as deputy clerk)--
>
> (1) the attendance and testimony of witnesses, and the production of all necessary returns, books, papers, documents, correspondence, and other evidence, from any place in the United States at any designated place of hearing, or
>
> (2) the taking of a deposition before any designated individual competent to administer oaths under this title. In the case of a deposition the testimony shall be reduced to writing by the individual taking the deposition or under his direction and shall then be subscribed by the deponent.

Section 7456(c) sets out the powers of the Tax Court to enforce compliance. That section provides that:

> [t]he Tax Court and each division thereof shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as--
>
> (1) misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
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> (2) misbehavior of any of its officers in their official transactions; or
>
> (3) disobedience or resistance to its lawful writ, process, order, rule, decree, or command.
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> It shall have such assistance in the carrying out of its lawful writ, process, order, rule, decree, or command as is available to a court of the United States. The United States marshal for any district in which the Tax Court is sitting shall, when requested by the chief judge of the Tax Court, attend any session of the Tax Court in such district.

Section 7456 is a federal statute of general application. Federal statutes that are generally applicable throughout the United States apply with the same force to Indians on reservations. United States v. Farris, 624 F.2d 890, 893 (9th Cir. 1980). A federal statute of general applicability that is silent concerning the issue of applicability to Indian tribes will not apply to them if: (1) the law touches exclusive rights of self-governance in purely intramural matters; (2) the application of the law to the tribe would abrogate rights guaranteed by Indian treaties; or (3) there is proof by legislative history or some other means that Congress intended the law not to apply to Indians on their reservations. EEOC v. Karuk Tribe Housing Authority, 260 F.3d 1071, 1078-1079 (9th Cir. 2001). This three step analysis, first articulated in Farris, 624 F.2d at 893, has been consistently followed by the courts. See Donovan v. Coeur d' Alene Tribal Farm, 751 F.2d 1113, 1115-18 (9th Cir. 1985). The Second Circuit has adopted this analysis. See Reich v. Mashantucket Sand & Gravel, 95 F.3d 174, 176-77 (2nd Cir. 1996) (federal laws of general applicability are presumed to apply to American Indians); see also United States v. White, 237 F.3d 170, 173 (2d Cir. 2001) (adopting the Ninth Circuit's three-step analysis to determine whether federal laws of general applicability apply to Indians).

Section 7456 does not touch upon exclusive rights of self-governance in purely intramural matters, would not abrogate rights guaranteed by Indian treaties,[1] nor is there proof by legislative history or some other means that Congress intended the law not to apply to Indians on their reservations. In addressing sovereign immunity as applied to non-party subpoenas (in criminal litigation), some courts have sought to balance the sovereign interests of the United States and the

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[1]We understand there are no treaties exclusively between Tribe B and the United States.

Tribe. See United States v. Velarde, 40 F. Supp. 2d 1314, 1317 (D. N.M. 1999), remanded, 214 F.3d 1204 (10th Cir. 2000). The Second Circuit has declined to use such a balancing test. See Catskill Development, L.L.C, 2002 U.S. Dist. LEXIS 3166, at *27.

The request for Chief Counsel Advice from Associate Area Counsel (SL), Atlanta, cites to EEOC v. Karuk Tribe Housing Authority, 260 F.3d 1071 (9th Cir. 2001), EEOC v. Cherokee Nation, 871 F.2d 937 (10th Cir. 1989), and Reich v. Great Lakes Indian Fish & Wildlife Commission, 4 F.3d 490 (7th Cir. 1993) for recent cases where federal courts have refused a subpoena issued by another federal agency against a tribe. We will briefly discuss those cases.

In EEOC v. Karuk Tribe Housing Authority, the Ninth Circuit had to decide whether the district court properly enforced an administrative subpoena issued to an Indian tribe in connection with an age-discrimination investigation. In that case, a member of the Karuk Tribe and an employee of the Karuk Tribe Housing Authority, filed an administrative complaint with the Equal Employment Opportunity Commission (EEOC), alleging that he had been terminated because of his age. The EEOC opened an investigation and issued a subpoena to the Tribe. The Tribe refused to comply on the grounds that the Age Discrimination in Employment Act (ADEA), does not apply to Indian tribes, and that the Tribe enjoys sovereign immunity from the EEOC investigation. The Ninth Circuit held that because the ADEA did not apply to the Tribe's employment relationship with the complainant, the Tribe need not comply with the subpoena. The court explained that the dispute involves a strictly internal matter, i.e., a dispute between an Indian applicant and an Indian tribal employer, and that the ADEA does not apply to complainant's employment relationship with the Karuk Tribe Housing Authority because it touches on "purely internal matters" related to the tribe's self-governance.

As a threshold matter in the case, the Ninth Circuit had to first address the Tribe's contention of whether it enjoyed sovereign immunity from the EEOC's inquiry and thus, from the lawsuit. The Ninth Circuit stated that Indian tribes do not enjoy sovereign immunity from suits brought by the federal government which included federal agencies such as the EEOC. EEOC v. Karuk Tribe Housing Authority, 260 F.3d at 1075. The Ninth Circuit also explained that a federal statute of general applicability that is silent concerning the issue of applicability to Indian tribes will not apply to them if: (1) the law touches exclusive rights of self-governance in purely intramural matters; (2) the application of the law to the tribe would abrogate rights guaranteed by Indian treaties; or (3) there is proof by legislative history or some other means that Congress intended the law not to apply to Indians on their reservations. It is in these three situations where Congress must expressly apply a statute to Indians before a court will hold that it reaches them. Id. at 1078-1079.

EEOC v. Cherokee Nation, involved another ADEA case where a subpoena was issued as part of an EEOC investigation. The Tenth Circuit held that ADEA

was not applicable because its enforcement would directly interfere with the Cherokee Nation's treaty-protected right of self-government. The court noted that it has been extremely reluctant to find congressional abrogation of treaty rights absent explicit statutory language. The Tenth Circuit stated that unequivocal Supreme Court precedent dictates that in cases where ambiguity exists such as that posed by the ADEA's silence with respect to Indians, and there is no clear indication of congressional intent to abrogate Indian sovereignty rights as manifested by the legislative history or the existence of a comprehensive statutory plan, the court is to apply the special canons of construction to the benefit of Indian interests. EEOC v. Cherokee Nation, 871 F.2d at 939.

In Reich v. Great Lakes Indian, the Department of Labor requested the district court to enforce a subpoena directed against the Great Lakes Indian Fish and Wildlife Commission, seeking evidence that the Commission was violating the Fair Labor Standards Act, which requires employers to pay employees one and a half times their regular wages for work in excess of forty hours a week. The district judge refused to enforce the subpoena on the ground that the Commission is not subject to the Act. The Department of Labor appealed. The Seventh Circuit agreed with the district court, stating their desire to make federal law bear as lightly on Indian tribal prerogatives as the leeways of statutory interpretation allow. Reich v. Great Lakes Indian, 4 F.3d at 496.

These three cases involve questions of regulatory jurisdiction which were properly addressed at the subpoena-enforcement stage. These cases are distinguishable from the Tribe B situation in that these cases involve agencies seeking to have administrative subpoenas enforced in areas that involve a tribe's internal matters, i.e., purely "intramural affairs" and not in the context of the federal government seeking to enforce its own tax laws.

We think there are strong policy reasons which would support enforcing a subpoena against Tribe B. Obtaining information from Indian tribes concerning tax shelters devised to evade federal income taxes is necessary to protect the national fisc. The Tribe B's treasury is not directly implicated by the request for information. The Service informed the Tribe that it is not in any way seeking to assert any income to them, citing Rev. Rul. 94-16.[2] We understand that the Tribe was advised that the Service was interested in interviewing the persons identified in order to obtain the Tribe's position concerning its relationship with a certain partnership and any documents that the Tribe may have or know of that is in another's possession. Where the information sought is not critical to tribal self-government or tribal self-

[2] Neither an unincorporated Indian tribe nor a corporation organized under section 17 of the Indian Reorganization Act of 1934 is subject to federal income tax on its income, regardless of the location of the activities that produced the income. Rev. Rul. 94-16, 1994-1 C.B. 19.

sufficiency, some courts have held that Federal law outweighs a tribe's sovereign immunity. See Velarde, 40 F. Supp. 2d at 1317.

Issue 4

If the Tax Court has the power to enforce a subpoena served on Tribe B, on whom should a subpoena for testimony and/or records be served, and how should service be made if the Tribe, its Tribal Council, and/or member of the Tribe will not voluntarily accept service?

T.C. Rule 147 sets out the rules of the Tax Court with respect to subpoenas. T.C. Rule 147 provides in pertinent part that:

> (c) A subpoena may be served by a United States marshal, or by a deputy marshal, or by any other person who is not a party and is not less than 18 years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person.
>
> (e) Failure by any person without adequate excuse to obey a subpoena served upon any such person may be deemed a contempt of the Court.

Service should follow the protocol set forth in issue 1, beginning with either the Tribal Chairman or President, Tribal Counsel Members, and then the Tribe's counsel. Hopefully, the subpoena will be accepted. If the Tribal official refuses to accept it, we recommend that the person serving the subpoena explain the purpose of the subpoena and place the subpoena in a convenient location so that the official can have easy access to it. See In Re Subpoena of Michael J. Barnicle, 800 F. Supp. 1021, 1023 (D. N.H. 1992) (process server placing summons on the porch near the Barnicle's door was actual notice of the subpoena and sufficient notice to hold Barnicle in contempt). You should note though that when entering a Tribal reservation, the power to exercise tribal civil authority can include the power to exclude nonmembers from tribal land. See Babbitt Ford, Inc. v. Navajo Indian Tribe, 710 F.2d 587, 592 (9th Cir. 1983); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 142 (1982); Nevada v. Hicks, 533 U.S. 353 (2001).

Issue 5

Other than a Tax Court subpoena, what, if any, procedures are available for obtaining testimony and/or documents from Tribe B, its Tribal Council, and/or members of the Tribe?

An alternative to the issuance of a subpoena would be to request a hearing before Tribe B's Tribal Court. As noted above, interagency cooperation should be utilized by having any hearing arranged and coordinated through T:ITG, given their existing relationship with Tribe B. Time constraints probably render this method unacceptable to the field attorneys.

Issue 6

Can we employ letters rogatory to seek, through the Tribal Court, information from Tribe B, the Tribal Council, and/or members of the Tribe?

Letters rogatory are typically utilized in those cases where a foreign corporation or individual is a party to a lawsuit in a United States federal court. See generally International Soc. for Krishna Consciousness, Inc. v. Lee, 105 F.R.D. 435, 437-445 (S.D. N.Y. 1984). Addressing transmittal of a letter rogatory or request, section 1781 of Title 28 provides that:

> (a) The Department of State has power through suitable channels to . . . receive a letter rogatory issued by a tribunal in the United States [and] to transmit it to the foreign or international tribunal to whom it is addressed.
>
> (b) This section does not preclude the transmittal of a letter rogatory or request directly from a tribunal in the United States to the foreign or international tribunal.

Execution of a letter rogatory is based on the principles of international comity and is therefore, discretionary with the issuing American court. See In re Anschuetz & Co., GmbH, 754 F.2d 602 (5th Cir. 1985), vacated, 483 U.S. 1002; see generally Daimler-Benz Aktiengesellschaft v. U. S. District Court for Western District of Oklahoma, 805 F2d 340 (10th Cir. 1986) (Hague Convention has no application to production of evidence in the United States by a party subject to jurisdiction of district court and discovery takes place in this country, even though the evidence may be located in another country).[3] Addressing assistance to foreign and international tribunals and to litigants before such tribunals, section 1782 of Title 28 provides that:

> (a) The district court of the district in which a person resides . . . may order [a party] to give. . .[oral] testimony or. . .to produce a document . . . for use in a proceeding in a foreign . . . tribunal. The order may be made pursuant to a . . . request made by a foreign . . . tribunal or upon the application of any interested person . . . .

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[3] The Hague Service Convention governs delivery of letters rogatory among signatories to a multilateral treaty. See generally Laino v. Cuprum S.A. de C.V., 663 N.Y.S.2d 275, 278 (N.Y. App. Div. 1997). To our knowledge Tribe B is not a signatory to any such treaty, so no issues are raised under the Hague Service Convention. T.C. Rule 81(e)(2) addresses the taking of foreign depositions through a letter rogatory.

The goals of section 1782 are to encourage foreign countries to provide similar means of assistance to courts of the United States. Lancaster Factoring Company Limited v. Mangone, 90 F.3d 38, 41 (2d Cir. 1996). The principal requirement of section 1782 is that the requested discovery be for use in a legal proceeding. In re Letters Rogatory Issued by the Director of Inspection of the Government of India, 385 F.2d 1017, 1021 (2d Cir. 1967). If there is no proceeding pending, section 1782 does not authorize the district court to order discovery unless such proceeding is imminent. In re Request for International Judicial Assistance (Letter Rogatory) for the Federative Republic of Brazil, 936 F.2d 702, 706 (2d Cir. 1991). A prohibition of disclosure under foreign law does not undermine a federal district court's power to order such disclosure by the party properly before it. United States v. First National City Bank, 396 F.2d 897, 900-01 (2d Cir. 1968). The fact that documents are situated in a foreign country does not bar their discovery. Marc Rich & Co. v. United States, 707 F.2d 663, 667 (2d Cir. 1983). District courts have wide discretion when considering applications under section 1782. In re Application of Euromepa, S.A., 155 F.R.D. 80 (S.D. N.Y. 1994). To obtain an order under section 1782, it must be shown that (1) the person from whom discovery is sought resides in the district, (2) discovery must be for use in a proceeding before a foreign tribunal, and (3) application can be made either by foreign or international tribunal or any interested person. In re Merck & Co., 197 F.R.D. 267, (M.D. N.C. 2000). The Service is not regarded as tribunal, but the Tax Court is. In re Letters Rogatory Issued by the Director of Inspection of the Government of India, 385 F.2d at 1021.

Under sections 1781 and 1782, foreign courts are encouraged to provide similar means of assistance as that which the courts of the United States have supplied in rendering assistance to their courts. It may be possible under section 1781 (b) for the Tax Court to transmit a letter rogatory directly to Tribe B's Tribal Court requesting assistance in producing testimony, statements, or production of documents. There is little point, however, in attempting to use letters rogatory when the same information can be gathered through subpoena or an informal meeting with Tribe B. We think that time constraints also probably render this method unacceptable to the field attorneys.

Issue 7

Can a subpoena for documents, served on Tribe B's attorneys and accountants (who are not members of the Tribe) be enforced?

Generally, a tribe attorney has sovereign immunity when representing the tribe and is acting within the scope of his or her authority. Catskill Development, L.L.C., 2002 U.S. Dist. LEXIS 3166, at *36-37. Tribal employees (attorneys and accountants) are not completely immune from suit unless they are a tribal official acting in a representative capacity and within the scope of their authority. Wallett v. Anderson, 198 F.R.D. 20 (D. Conn. 2000). Tribal immunity only extends to tribal officials when acting in their official capacity and within their scope of authority. Davis v. Littell, 398 F.2d 83 at 84-85. Employee immunity defense is appropriate

when tribal employees are tribal officials acting in a representative capacity and within the scope of their authority. Romanella v. Hayward, 933 F. Supp. at 167; Hardin v. White Mountain Apache Tribe, 779 F.2d 476, 478 (9th Cir. 1985). In determining whether an officer of a Tribe can claim absolute privilege, the question is whether the position encompasses public duties, official in character. See generally Davis v. Littell, 398 F.2d at 85. The defense is lost where a tribal official acts beyond the scope of his/her authority. See e.g., Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians of Florida, 177 F.3d 1212, 1225 (11th Cir. 1999); cf. Drumm v. Brown, 2000 Conn. Super. LEXIS 83, at *7 (Conn. Super. Ct. 2000) (there is no federal law that gives tribal employees the protection of a tribe's sovereign immunity).

Though it is well established that a tribe's attorney will generally be granted immunity provided they act as the tribe's representative within the scope of their authority, it has been held that tribal attorneys may qualify as tribal officials only if their actions are "clearly related to the tribe's internal governance." Stock West Corporation v. Taylor, 942 F.2d 655, 664-65 (9th Cir. 1991), aff'd in part and vacated in part, 964 F.2d 912 (1992). In Stock West, the court of appeals reversed a district court's finding that granted a tribe attorney immunity on the grounds he was a tribal official. Id. at 664. In support of immunity the tribe attorney relied on the holdings of Davis v. Littell and Hardin v. White Mountain Apache Tribe where immunity was extended. In distinguishing those cases, the court noted those tribal officials were involved in actions clearly tied to their duties relating to the internal governance of the tribe, and that "[n]one of these cases even involved dealings with (off-reservation) third parties on behalf of the tribe, much less dealings with a non-Indian third party as a member of the state bar." Id. at 665.

We believe that this is the case here. We understand that the attorneys and accountants are not members of Tribe B, and their actions were not undertaken as Tribal officials, but rather as independent contractors acting on the Tribe's behalf providing legal and accounting services. The federal district court within the Second Circuit recently held tribal sovereign immunity was properly extended to outside counsel and quashed the subpoena to the tribe's attorney. Catskill Development, L.L.C. v. Park Place Entertainment Corp., 2002 U.S. Dist. LEXIS 3166, at *39 (S.D. N.Y. 2002). In distinguishing Catskill, it is noted the court found the subpoenas called for voluminous amount of documents and were overly broad. Id. By contrast, the information sought from the attorneys and accountants here pertains only to the Tribe's dealing with one partnership and should not be too voluminous or overbroad.

A subpoena can be served on a corporations's attorneys and accountants who are not employees of the corporation, but rather independent contractors of the corporation providing legal and accounting services with knowledge of transactions entered into by the corporation officers. Even if tribal sovereign immunity is

extended to outside counsel and outside accountants, we think that the Tax Court can enforce a subpoena for the reasons set forth in Issue 3.

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

[redacted]

[redacted]

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse effect on privileges, such as the attorney client privilege. If disclosure becomes necessary, please contact this office for our views.

Please call if you have any further questions.

Assistant Chief Counsel
(Exempt Organizations and
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Chief
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