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The federal government has engaged in various programs designed to effect the self-sufficiency of Indians by means of granting certain property rights in land. In this article the authors, Mr. Fiske and Mr. Wilson examine the impact of the federal income tax laws on such programs. The authors discuss the application of the federal tax to Indian income and suggest that, in some cases, the tax burden may represent an obstacle to Indian self-sufficiency.

FEDERAL TAXATION OF INDIAN INCOME FROM RESTRICTED INDIAN LANDS

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INTRODUCTION

THE American Indians, often having been deprived of the most productive of their ancestral lands and forced for decades to eke out substandard living from marginal lands, in many individual instances now may be on the verge of land-based financial independence. Yet, as they seek that goal, they face an increasing tax burden upon their limited resources which may contribute significantly to further denial of their rightful place in the national economy. Ironically, it is an agency of their trustee, the United States, with

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the duty to foster their interests, which raises this obstacle to their aspirations.

No responsible person argues that Indians always and in every circumstance should be free of responsibility to contribute to the support of the national government. Nor do reasonable people insist upon current favoritism or special treatment simply to offset prior injustice. As Indians individually achieve an economic level comparable to that of most other Americans, then it is to be expected that they will be taxed appropriately by the United States. Even now their income earned from salaried employment, professional or occupational endeavors, and investments other than in their restricted lands is subject to federal tax by the same standards applicable to others.

But, by long-standing federal policy, prescribed by congressional legislation, Indians are entitled to unique treatment in certain circumstances. That policy is to afford them protection under the trusteeship or "guardian/ward" concept of their relationship with the nation,[1] and to aid them in achieving financial self-sufficiency. As to income derived by Indians from restricted Indian land, there appears to be a conflict between the federal policy and laws pertaining to Indians and general federal income tax law. It may be more accurate to say that the confict is due to interpretation of the tax laws by the Internal Revenue Service. It is submitted that such interpretation is both illogical and inconsistent with federal Indian law.

This article deals exclusively with federal income taxation of the proceeds realized by an Indian from restricted Indian lands. As a citizen,[2] an Indian may privately acquire

1. For a discussion of this relationship, *see* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW, ch. 5, ch. 8, §§ 8 & 9 (1941); U.S. DEPARTMENT OF THE INTERRIOR FEDERAL INDIAN LAW, ch. II, ch. VIII, §§ H & I (1958). *See also*, Makah Indian Tribe v. Clallam County, 73 Wash. 2d 677, 440 P.2d 442 (1968).

2. *See, e.g.*, Act of June 2, 1924, ch. 233, 43 Stat. 253, incorporated into 8 U.S.C. § 1401(a)(2) (1970). Citizenship also has been acquired by various Indians and tribes by specific treaties and statutes, such as the General Allotment Act of February 8, 1887, ch. 119, 24 Stat. 388, 25 U.S.C. ch. 9 (1970). *See also* F. COHEN, *supra* note 1, at ch. 8, § 2; U.S. DEPARTMENT OF THE INTERIOR, *supra* note 1, at ch. VIII, § B.

and utilize land in the same fashion and with the same independence as any other person. That land is not restricted "Indian land", and income from it is subject to taxation under the Internal Revenue Code. But land held by or for particular tribes or tribal organizations, or which is owned by individual Indians as a result of direct allotments from the United States which has not been released from restricted status, is considered restricted. Such restricted land cannot be sold, encumbered, leased or otherwise disposed of without the approval of the United States and then only pursuant to special laws and regulations designed for the protection of Indian interests.[3]

HISTORICAL BACKGROUND

The early national policy relating to Indians was to destroy their historical tribal organizations and concepts of communal interest in land. To this end, under the provisions of the General Allotment Act of 1887[4] each Indian, or Indian family, was to be given a specific tract of land, so that the Indians would become independent landholders and individually self-supporting in the ideal of the white man's culture. Indians were allotted tracts of from 40 acres to 160 acres, depending upon the character of the land and the circumstances of the allottees.

Under the General Allotment Act, the United States retained title in allotted tracts in trust for the allottees for a period of twenty-five years, with further provision for indefinite administrative extension of the trust status. Generally, the trust status of allotted lands has been extended to date and beyond by executive orders.[5] When the trust status of an allotted tract is removed according to law, it is then held in unrestricted fee by the allottee or his successors.[6]

3. *See* F. COHEN, *supra* note 1, at ch. 11, §§ 4-6, ch. 15, §§ 18-20; U.S. DEPARTMENT OF THE INTERIOR, *supra* note 1, at ch. IX.

4. Act of February 8, 1887, ch. 119, 24 Stat. 388, codified at 25 U.S.C. ch. 9 (1970).

5. Exec. Order No. 10,191, 15 Fed. Reg. 8889 (1950); 25 U.S.C. § 348 (1970).

6. 25 U.S.C. § 349 (1970).

The national policy was reversed forty years ago by the enactment of the Indian Reorganization Act of June 18, 1934,[7] which abolished the allotment system. Under the Indian Reorganization Act, the integrity of Indian tribal organization is fostered, and Indian lands are preserved in tribal ownership under tribal administration, subject to supervision and restrictions under federal law and regulations.[8] The abolition of the allotment system and the substitution of tribal ownership did not extinguish allotments which had been previously made. Consequently, there exist today both unpatented allotted lands and lands in tribal ownership, each type being subject to trust supervision by the United States and restrictions upon alienation. Both categories are considered to be "restricted land" or "Indian land".

To incorporate previously allotted but unpatented lands into the communal or tribal ownership concept, various mechanisms have been utilized. A common example of these devices is the "exchange assignment."[9] However, the termination of the allotment system did not put an end to individual rights in tribal lands. Although a tribe retains ownership of its land, individual Indians may be granted possessory rights or similar interests by the tribe.[10] In addition, various other conventional types of interests may be had with respect to tribal lands by both Indians and non-Indians, e.g, grazing or timber cutting permits, leases and licenses.[11] Thus, today

7. 48 Stat. 984, *as amended*, 25 U.S.C. §§ 461-69 (1970).

8. *E.g.*, 25 C.F.R. ch. I subch. K-Q (1973).

9. For example, THE LAND CODE OF THE COLORADO RIVER INDIAN TRIBES (1940) provided:

> Any member of the tribe who owns any restricted or unrestricted land or any interest therein may, with approval of the Secretary of the Interior, voluntarily transfer his interest in such land to the tribe in exchange for an assignment of the same or other land of equal value. If the assignee prefers, he may receive, in lieu of a specific tract of land, a proportionate share in a larger grazing unit. Assignments made under this section shall be known as "exchange assignments."

10. *See, e.g.*, United States v. Critzer, 498 F.2d 1160 (4th Cir. 1974) which dealt with tax on income earned by a Cherokee by use of tribal land. The court used the term "possessory holding" which was described as the right to use and occupy a parcel of undivided land under Tribal and Bureau of Indian Affairs regulations. THE LAND CODE OF THE COLORADO RIVER INDIAN TRIBES (1956) provides for a "Standard Assignment" which grants to a tribal member exclusive rights to use of a tract and all agricultural income derived from it by him.

11. *See* Stevens v. Comm'r, 452 F.2d 741 (9th Cir. 1971).

restricted Indian lands are held in various forms—unpatented allotments, possessory interests, leases, permits and licenses.

In addition to restrictions upon Indian land, some reference should be made to the legal status of the individual Indian himself. In a limited sense he may be referred to as "incompetent" or "non-competent", that being a reference to his legal entitlement to manage his own affairs.[12] Most frequently it is further limited to his legal capacity to encumber, alienate or dispose of his real property. In that sense the term describes the legal restrictions imposed upon an Indian in dealing with restricted land.[13]

TAXATION OF AN INDIAN TRIBE

Indian tribes have a unique position in the political and governmental framework of the United States. Chief Justice Marshall, in an early Supreme Court case, recognized that Indian tribes were considered distinct political bodies.[14] Later the Supreme Court described the status of tribes in the following language:

> [T]hey were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as nations, not as possessed of the full attributes of sovereignty but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided.[15]

The preservation of the tribe as a distinct political entity by the decisions of the Supreme Court has been summarized by the U. S. Department of Interior as follows:

> The whole course of judicial decision on the nature of Indian tribal powers is marked by adherence to three fundamental principles: (1) An

12. F. COHEN, *supra* note 1, at ch. 8, § 8.; U.S. DEPARTMENT OF THE INTERIOR, *supra* note 1, at ch. VIII, § H.
13. *See* 25 U.S.C. § 349 (1970).
14. Worcester v. Georgia, 31 U.S. 515 (1832).
15. United States v. Kagama, 118 U.S. 375, 381-82 (1886).

> Indian tribe possessed, in the first instance, all the powers of any sovereign State. (2) Conquest rendered the tribe subject to the legislative power of the United States and, in substance, terminated the external powers of sovereignty of the tribe *e.g.,* its power to enter into treaties with foreign nations, but did not by itself terminate the internal sovereignty of the tribe, *i.e.,* its powers of local self-government. (3) These internal powers were, of course, subject to qualification by treaties and by express legislation of Congress, but, save as thus expressly qualified, many powers of internal sovereignty have remained in the Indian tribes and in their duly constituted organs of government.[16]

Thus, the quasi-sovereignty of Indian tribes is an extension of their original sovereignty. A consequence of such sovereignty is exemption from taxation by the national government. A tribe is not a taxable entity, and, therefore, the federal taxing statutes do not apply to Indian tribes.[17]

TAXATION OF INDIVIDUAL INDIANS

It once appeared that there might be individual immunity of Indians from application of the federal income tax laws,[18] particularly as to any income earned from restricted Indian land.[19] However, in spite of the rules of construction (i) that tax exemptions for Indians are to be liberally construed for their benefit, and (ii) that general laws enacted by Congress do not apply to Indians unless they are so worded as to clearly show an intent to include Indians in their operation,[20] it has now been conclusively determined that individual Indians are subject to general federal income tax laws.[21]

16. U.S. DEPARTMENT OF THE INTERIOR, *supra* note 1, at 398.
17. Rev. Rul. 67-284, 1967-2 CUM. BULL. 55.
18. United States v. Homeratha, 40 F.2d 305 (W.D. Okla. 1930).
19. Chouteau v. Comm'r, 38 F.2d 976 (10th Cir. 1930), *aff'd,* 283 U.S. 691 (1931).
20. *See, e.g.,* Elk v. Wilkins, 112 U.S. 94 (1884); Carpenter v. Shaw, 280 U.S. 363 (1930); Choate v. Trapp, 224 U.S. 665 (1912); Chouteau v. Comm'r, *supra* note 19.
21. Choteau v. Burnet, 283 U.S. 691 (1931); Superintendent of Five Civilized Tribes v. Comm'r, 295 U.S. 418 (1935); Squire v. Capoeman, 351 U.S. 1 (1956); Holt v. Comm'r, 364 F.2d 38 (8th Cir. 1966).

Section 61 of the Internal Revenue Code[22] imposes an income tax on the income of every individual from whatever source derived. It is this section and its precursors that the Commissioner of Internal Revenue (Commissioner) and the Internal Revenue Service have utilized in order to tax the income from the restricted land of an individual Indian.

PRE-*Capoeman* DECISIONS

The judicial foundation for the federal taxation of income of individual Indians was a trilogy of cases before the Tenth Circuit Court of Appeals which were argued and submitted together.[23] Each case proved to be significantly different on its facts although they all involved income from Osage headright interests in minerals.[24]

Mary Blackbird was a member of the Osage Tribe. The principal part of her income for the tax years in question was her headright revenue. She and the other taxpayers maintained that they were not liable for the taxes assessed nor even subject to the income tax statute. The court of appeals agreed in her case, saying:

> As to Mary Blackbird, we are disposed to yield our assent to the soundness of the contention. She is a restricted full-blood Osage. Her property is under the supervising control of the United States. She is its ward, and we cannot agree that because the income statute, (citations omitted), subjects "the net income of every individual" to the tax, this is alone sufficient to make the Acts applicable to her. Such a holding would be contrary to the almost unbroken policy of Congress in dealing with its Indian wards and their affairs. Whenever they and their interests

22. 26 U.S.C. § 61 (1970).
23. Chouteau v. Comm'r, *supra* note 19. Blackbird v. Comm'r and Pettit v. Comm'r were companion cases consolidated for hearing by the court.
24. The oil, gas and coal in the allotted lands of tribal members were reserved for a period of years for the tribe, which granted leases for the extraction of the minerals. The royalties therefrom were placed in the United States Treasury to the credit of the tribe and distributed to the individual members according to the tribal roll on a pro-rata basis. The particular allotment act applicable to the tribe provided that all property interests of intestate deceased members descended according to the laws of Oklahoma. The headrights or pro-rata shares were considered to be property interests. *Id.*

> have been the subject affected by legislation they have been named and their interests specifically dealt with.[25]

The court further noted that:

> The mineral reserves under the lands are held in trust by the United States for the tribe and its members, and are being developed under its control and direction as an instrumentality for the best interests and advancement of the members of the tribe who are still recognized as dependents on Governmental care; and it seems unreasonable to hold that a general tax statute should be applied to them when they are not named nor intention in some way expressed that it applies to them.[26]

Amarillis Pettit was not an Indian, but from her children, who were members of the Tribe, she had inherited lands allotted to them under the Osage Allotment Act. The revenue involved in her case was her headright income. The court denied her claim of tax immunity, saying:

> [she] took [her] lands without any restrictions on its disposition. The United States has no control over her interests and she is in no sense its ward. She receives her share of the royalties and bonuses on the mineral deposits in accordance with the terms of the Act, but it is not held and paid to her on the part of the Government for her protection as its dependent ward.[27]

Henry Choteau, or Chouteau, was a member of the Osage Tribe. However, he had been granted a certificate of competency by the Secretary of the Interior. Again, the revenue involved was headright income from oil and gas operations. As to him, the court also rejected the claim of tax immunity, saying:

> His certificate of competency bestowed upon him unrestricted management of his affairs and gave him

25. Chouteau v. Comm'r, *supra* note 19, at 977.
26. *Id.* at 978.
27. *Id.* at 979.

> full power to use and dispose of his property according to his own judgment. Thereafter his pro-rata share in the mineral production was paid to him not as a ward of the Government. It was paid to him under the terms of the Act, but was not a Governmental instrumentality and means to gradually bring him to a state of competency and independence. By provision of the Act it was determined that he was competent to have exclusive management of his own affairs when the certificate was issued to him. He obtained it at his request and with the Government's consent and approval, and thereupon he assumed the same burdens that the law imposes on every other individual property owner. We think his civil status thus fixed brought him within the terms of the income tax statutes.[28]

The three holdings clearly showed the court's concern at that time for the *status of the individual involved.* If such person was a non-Indian or in the emancipated legal status of a non-Indian, then he was subjected to taxation the same as non-Indians. If, however, the individual was a personally restricted Indian the tax law was not applicable, absent a showing of contrary Congressional intent.

Shortly after *Chouteau,* another significant Indian taxation case, *United States v. Homeratha,*[29] was considered by the U.S. District Court in Oklahoma. Homeratha, a noncompetent Indian, had been given allotted acreage by his mother, who was also a noncompetent Indian. The sole question presented was whether or not tax was payable on income from the land. The court cited the then general rule promulgated in *Chouteau* as to Mary Blackbird.[30] However, the key issue in the court's view was whether the land retained its restricted character upon its transfer. The court ruled that it did and, since the land was also owned by and was in the possession of a non-competent Indian, the income derived therefrom was not subject to taxation. From the decision, it would appear that the court adopted a two-pronged test in that both the status of the Indian and that of the land were considered.

28. *Id.* at 979-80.
29. United States v. Homeratha, *supra* note 18.
30. Chouteau v. Comm'r, *supra* note 19.

However, a careful reading of the decision shows that the court considered the restriction on the land as being only applicable to a similarly restricted Indian. Thus, the court really held that Homeratha ". . . a noncompetent Indian, being a ward of the government, is not subject to the income tax law."[31]

The following year, the *Chouteau* case itself, the companion case to Mary Blackbird, was reviewed by the Supreme Court.[32] The Court affirmed the lower court's decision, holding that Chouteau, having received his certificate of competency, was not exempt from taxation.[33] It has been argued that the Supreme Court's decision "completely undermined the one-year-old Blackbird holding with respect to the effect of general legislation upon Indian tribes."[34] However, while the Supreme Court's language seemingly cast doubt on the exemption of Indians from federal taxation, the facts of *Choteau* were so basically different from the Blackbird situation that it can be argued that the decisions are not inconsistent. In addition, it is to be noted that the Supreme Court did not mention *Blackbird*. Therefore, at that time it could be still argued that noncompetent Indians were not subject to federal taxation.

In *Choteau* the Supreme Court almost summarily held that the income tax laws were applicable to such a member of the Osage Tribe. It reached this conclusion on the generality of those laws and the absence of any express exemption of Indians. It then dealt at greater length with the question of the treatment of the income itself.

The Supreme Court in reviewing the applicable Indian legislation and treaties recognized the policy to emancipate the Indians from their status as wards and to prepare them

31. United States v. Homeratha, *supra* note 18, at 306.
32. Choteau v. Burnet, *supra* note 21. Note that in the decision of the court of appeals the case is identified as *Chouteau v. Comm'r.* Reference in this article to *Choteau* is to the Supreme Court decision.
33. The Supreme Court stated in its opinion that "nothing in this case turns on his ownership" of his allotted land, although it then proceeded to discuss the principles and procedures of the allotment plan in reaching its decision. *Id.* at 692.
34. J. WHITE, TAXING THOSE THEY FOUND HERE 54 (1972).

for the gradual release of their property to their own individual management. That plan, according to the decision, involved not only advantages but also the burden of paying taxes. Upon being issued a certificate of competency, an Osage was said to be subject to a tax upon his allotment. In spite of a statement in the opinion that the case did not turn on ownership of the allotted lands, the Court seemed to give considerable weight to the fact that the Indian's allotted lands had been freed of restrictions.

The Court also noted that the share of income received by the individual from the tribal oil and gas leases was payable to him without restriction upon his use of the funds so paid. That, together with the fact that the individual had received his certificate of competency, completed the portrait of the Indian as being legally indistinguishable for income tax purposes from any other citizen.

In its conclusion the Court rejected the arguments that the distribution of the tribal income to its members was a gift not subject to income taxation, and that because tribal income held by the tribe was not subject to state taxation it should not be subject to federal taxation. The Court based its decision on the latter argument on the fact that the income had actually been distributed to the individuals and was no longer held by the tribe.

In evaluating or distinguishing this case, particularly with regard to *Blackbird,* it should be kept in mind that the Indian was himself emancipated, and it was not income from his own allotted or assigned lands which was subject to taxation, but only his share of the distribution of income of the tribe.

Somewhat later the Tenth Circuit Court of Appeals entered three opinions which greatly diminished the idea that the tax exemption it had found earlier in *Chouteau,* as to Mary Blackbird, was based upon an Indian's personal status.[35] *Bagby v. United States* involved income from allotted

35. Bagby v. United States, 60 F.2d 80 (10th Cir. 1932); Pitman v. Comm'r, 64 F.2d 740 (10th Cir. 1933); Superintendent of Five Civilized Tribes v. Comm'r, 75 F.2d 183 (10th Cir. 1935). The latter case is also known as the *Sandy Fox* case.

lands of a 1/16 Indian-blood minor enrolled in the Creek Tribe. The particular allotment act applicable to that tribe provided that restricted lands which passed into the ownership of non-Indians or less than half-blood Indians did so free of restrictions.[36] The court interpreted the statute as placing such an individual as Bagby in the same tax category as non-Indians insofar as income from this type of land was concerned. The court, however, did not change its earlier position that the income from restricted lands, at least initially, retained the same restricted character as the land from which it was derived. But it did acknowledge that the restricted character of land could be changed, and stated:

> Of course, the royalties and bonus received were not the land itself, but the tax here in question is in substance a tax on the land (citation omitted) which section 4 of the Act subjects "to taxation and all other civil burdens as though it were the property of other persons than allottees of the Five Civilized Tribes."[37]

In *Pitman v. Comm'r*[38] the court of appeals based tax immunity upon the status of the land rather than that of the Indian. The taxpayer was a full-blood Creek Indian deriving income from both restricted and unrestricted lands. In analyzing the applicable allotment statute, the court held the former nontaxable and the latter taxable.

The *Sandy Fox* case,[39] the third in this series of decisions, was destined to become the next major Supreme Court decision on taxation of Indians. It involved funds derived from the restricted allotment of an Indian. The income from the land in excess of the needs of the individual Indian was invested by the government, and the proceeds from the investment were collected and held in trust under direction of the Secretary of the Interior. Those proceeds (in later cases and discussions termed "reinvestment income") were determined by the court of appeals to be subject to federal

36. Act of May 27, 1908, ch. 199, 35 Stat. 312.
37. Bagby v. United States, *supra* note 35, at 81.
38. Pitman v. Comm'r, *supra* note 35.
39. The *Sandy Fox* case, *supra* note 35.

income tax. Upon reviewing precedential cases, including *Blackbird* and *Chouteau,* the court came to the conclusion that an Indian is an individual embraced within the term "every individual" as used in the tax statute, and that any exemption from taxation is based upon the nature of property giving rise to it and not from the blood or race of the individual. The dissenting judge, who had written the *Blackbird* opinion, felt that the *Sandy Fox* decision completely abrogated *Blackbird.* It seems clear that *Sandy Fox* represented a change from the position of the court of appeals enunciated in *Blackbird* that general legislation could not be applied to Indians absent a showing of specific congressional intent to have it apply. In *Sandy Fox,* it was stated:

> The whole question is one of statutory construction. Congress has the power to tax the income of an Indian from any source, just as it has the power to exempt all his property from state taxes. What did Congress intend? The Supreme Court has held it did not intend to exempt Indians as such from federal taxes; that it did not intend to exempt restricted property as such from state taxes; that property acquired for investment is not a federal instrumentality in the sense the original allotment is. While the question is not free from doubt, we are of the opinion that, as construed by the Supreme Court, the intent of Congress was to subject the income from investments of surplus funds, as well as the investments themselves, to taxation.
>
> This view is supported by the administrative and legislative history. . . .[40]

The court then reasoned that Congress had intended to include Indians within the all-inclusive net of taxation, by its silence on the matter of Indian exemption while re-enacting general tax legislation. Of course, as every student of the law knows, the silence of Congress is not necessarily determinative of its intent. Perhaps the court was influenced by an inability to justify a distinction between a moneyed Indian and a moneyed non-Indian. This possibility is highlighted by the following statement of the court:

40. Superintendent of Five Civilized Tribes v. Comm'r, *supra* note 35, at 186.

> Congress is therefore familiar with the distinction between income from the original heritage of the Indian and other income. There is, moreover, a reason for the distinction. The income from the allotments of many or most of the Indians is barely sufficient to support them; but oil was discovered upon the allotments of some, and those received an income much larger than their needs; when that surplus was invested and in turn produced income, there is reason in requiring such wealthy Indians to contribute to the cost of the government whose services they enjoy.[41]

The *Sandy Fox* decision was affirmed by the Supreme Court.[42] Although the Court stated that "inalienability and nontaxability go hand in hand; and that it is not lightly to be assumed that Congress intended to tax the ward for the benefit of the guardian,"[43] the opinion indicated that general taxing statutes apply unless some exemption can be plainly derived "from agreements with the [Indians] or some Act of Congress dealing with their affairs."[44] In reviewing the pertinent authorities pertaining to the Creek Indians, the Supreme Court could find no such exemption for the type of income involved. It even supported the dicta of the court of appeals, stating: "The taxpayer here is a citizen of the United States, and wardship with limited power over his property does not without more, render him immune from the common burden."[45]

Immediately following the Supreme Court decision in *Sandy Fox,* and as a consequence of it, it was assumed by most that restricted Indians were subject to the federal income tax similar to their non-Indian counterparts.[46] However, the significance of this case, and a limiting feature of it, is that it determined the taxability of reinvestment income rather than income derived directly from land.

41. *Id.* at 186.
42. Superintendent of Five Civilized Tribes v. Comm'r, *supra* note 21.
43. *Id.* at 420.
44. *Id.* at 420.
45. *Id.* at 421.
46. On March 11, 1938, by Misc. Circular No. 3240 of the Office of Indian Affairs, United States Department of the Interior, John Collier, the Commissioner of Indian Affairs, issued instructions to all Indian agency superintendents as follows:

Squire v. Capoeman: A TOUCHSTONE

The next major decision in the development of the law with respect to the federal taxation of individual Indians was the Supreme Court's decision in *Squire v. Capoeman*.[47] It is, perhaps, the most important recent case on the subject. The Supreme Court's opinion put its earlier decisions in *Sandy Fox* and *Choteau* in perspective and properly limited their scope.[48]

Capoeman dealt with land which had been allotted pursuant to the General Allotment Act of 1887 and a treaty with the Quinaielt Tribe. The taxpayers, husband and wife, were born on the reservation and were full-blood, noncompetent Quinaielt Indians. They had lived on the reservation all their lives, with the exception of the time spent by the husband in military service during World War II. The husband had received a "trust patent" (allotment certificate) for the subject land, and the restrictions governing the land had never been released. In 1943, the Bureau of Indian Affairs, on behalf of the husband, contracted for the sale of standing timber on his allotted land and received the payments due for it. Four years later, the District Collector of Internal Revenue demanded that the taxpayers file a tax return for 1943. A return was filed reporting the timber sale as long-term capital gain. The tax was paid, and, thereafter, the tax-

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> The Supreme Court of the United States in the case of Superintendent of Five Civilized Tribes v. Commissioner of Internal Revenue (295 U.S. 418), held that the income of Indians is subject to the Federal income tax unless specifically exempted by treaty or act of Congress.
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> Unless, therefore, there is specific exemption either by treaty or act of Congress the Indians should file returns as well as other citizens when their income is sufficient to bring them under the terms of the Federal Income Tax Law.

See also, Strom v. Comm'r, 6 T.C. 621 (1946), *aff'd. mem.*, 158 F.2d 520 (9th Cir. 1947) (involving income from Indian fishing rights); Jones v. Taunah, 186 F.2d 445 (10th Cir. 1951), *cert. denied*, 341 U.S. 904 (1951); Rev. Rul. 54-456, 1954-2 CUM. BULL. 49. *But cf.* Rhodes v. U.S., 51-1 USTC ¶9209 (N.D. Okla. 1950) (including a refund action under the Act of January 29, 1942, ch. 24, 56 Stat. 21, allowing refunds of taxes collected with respect to restricted lands prior to 1931); Nicodemus v. United States, 132 F. Supp. 608 (D. Idaho 1965) following the opinion of the Ninth Circuit in Squire v. Capoeman, 220 F.2d 349, (9th Cir. 1955), *aff'g.* 110 F. Supp. 924 (1953).

47. 351 U.S. 1 (1956). *See also* the lower court decisions cited note 46 *supra*.
48. Superintendent of Five Civilized Tribes v. Comm'r, *supra* note 21; Choteau v. Burnet, *supra* note 21. The *Capoeman* Court limited *Sandy Fox*, at 9 of its opinion and *Choteau* at n.19 of its opinion.

payers sought a refund of the taxes contending that the proceeds from the sale of timber from allotted land were exempt from taxation. The lower courts upheld the taxpayers' contention, and the Supreme Court granted certiorari because of the apparent conflict between decisions of the Ninth and Tenth Circuits.[49]

The Supreme Court held the proceeds not taxable. What is most important is the reasoning of the Supreme Court, because courts, Indian taxpayers, the Bureau of Indian Affairs, and the Internal Revenue Service cite the case as authority for both taxability and nontaxability of Indian income.

The government maintained that the Supreme Court should treat the controversy as an ordinary tax case because Indians generally are subject to income tax, and there was no exemption applicable to the factual situation under any relevant statutes or treaties. As authority for its proposition, it argued the general applicability of the taxing statute and that the tax was upon the income derived from the land and not upon the land itself. As to the latter argument, the government apparently took the position that the restricted status of the land was immaterial. The Supreme Court cast aside these contentions when Chief Justice Warren stated:

> We agree with the Government that Indians are citizens and that in ordinary affairs of life, *not governed by treaties or remedial legislation,* they are subject to the payment of income taxes as are other citizens. We also agree that, to be valid, exemptions to tax laws should be clearly expressed. But we cannot agree that taxability of respondents in these circumstances is unaffected by the treaty, the trust patent or the Allotment Act. (Emphasis added).[50]

It is to be noted that the Internal Revenue Service and some courts have overlooked the above-emphasized phrase and begin with the proposition that Indians, in general, are subject

49. The Ninth Circuit Court of Appeals affirmed the decision of the district court in *Capoeman* noting that it conflicted with the decision of the Tenth Circuit Court of Appeals in *Jones v. Taunah, supra* note 46.
50. Squire v. Capoeman, *supra* note 47, at 6.

to federal taxation. Furthermore, although the Supreme Court restated its opinion that tax exemptions must be "clearly expressed" it found an exemption in this case in quite nonspecific statutory provisions.

The Court pointed out that the General Allotment Act provided that title to allotted lands ultimately would pass "free of all charge or encumbrance whatsoever," and this the Court stated, "might well be sufficient to include taxation."[51] However, the decision held that a later amendment to the Act, which stated that upon issuance of a final patent all restrictions as to taxation shall be removed was a clear indication by Congress that until the lifting of restrictions, an Indian allotment was "free from all taxes, both those in being and those which might in the future be enacted."[52]

The *Capoeman* opinion cited, with apparent approval, an opinion of the Attorney General promulgated in 1925 to the effect that there could not be imputed to Congress, under the broad language of the taxing statutes, an intent to impose a tax for the benefit of the government on income derived from the restricted property of Indian wards.[53] It is significant, although seemingly contrary to its language in *Sandy Fox,* that the Supreme Court very liberally and affirmatively construed Indian laws and treaties to find a Congressional intent to exempt Indian income from taxation. The Court previously had reviewed such authorities in *Sandy Fox,* but its position

51. *Id.* at 6-7.

52. *Id.* at 8. The amendment to the General Allotment Act referred to by the Court antedated the enactment of the federal income tax laws, but the Court felt that was irrelevant.

53. *Id.* at 8. *See also* 34 Op. Att'y Gen. 439 (1925) which provided in part that the Attorney General was:

> [U]nable, by implication, to impute to Congress under the broad language of our Internal Revenue Acts an intent to impose a tax for the benefit of the Federal Government on income derived from the restricted property of these wards of the nation; property the management and control of which rests largely in the hands of officers of the government charged by law with the responsibility and duty of protecting the interests and welfare of these dependent people. In other words, it is not lightly to be assumed that Congress intended to tax the ward for the benefit of the guardian. *Id.* at 445.

See also F. COHEN, *supra* note 1, at 265.

there was that an express exemption was necessary as distinguished from one created by implication. The *Capoeman* opinion distinguished *Sandy Fox,* on the fact that it involved only "reinvestment income." The Court in *Capoeman* felt that it was necessary to preserve the land trust and income derived *directly* therefrom in order to accomplish the purpose of the allotment system, which was to protect the Indians' interest and prepare them to take their place as independent, qualified members of society. The real difference between *Sandy Fox* and *Capoeman* seems to be what implications of congressional intent the Court was willing to find, those favorable to the Indians or those consistent with the position of the taxing authorities.

It must be recognized that the Supreme Court in *Capoeman* was considering allotted land, and that it found specific authority indicating that income from allotted land was free from taxation. The Internal Revenue Service has sought to use this factual basis of the *Capoeman* case as its delimiting factor in claiming that income derived from restricted but unallotted land is subject to individual taxation.

Another possibly significant factor in the factual context of *Capoeman* is that the land involved ". . . was forest land, covered by coniferous trees from one hundred years to several hundred years old. *It was not adaptable to agricultural purposes, and was of little value after the timber was cut."* (emphasis added).[54] If it was truly thought that the land was worthless once the timber was cut, that fact might have particular significance because the Supreme Court was concerned with safeguarding the benefit of the allotment to the Indian. A different result might be had if the income from Indian land is a recurring type, such as agricultural development, and not derived from a wasting enterprise. One cannot be certain how the legal difference might be postured, but a nonwasting source of income might make it easier for the Supreme Court or lower courts to find no tax exemption in-

54. Squire v. Capoeman, *supra* note 47, at 4. *See also* the Court's concern with economic value, Squire v. Capoeman, *supra* note 47, at 10.

asmuch as the income would not represent the loss, destruction or even diminution of the value of the land.[55]

POST *Capoeman* DEVELOPMENTS

The Internal Revenue Service characteristically views very narrowly the exemption established by *Capoeman*. As is its practice, that agency acknowledges a claim to an exception to the general tax laws only if the circumstances precisely fit the type of factual situation involved in the particular judicial decision which validated the exemption. Consequently, the Internal Revenue Service recognizes individual Indian immunity only as to personal income from *allotted* and *restricted* land. Although it is correct in not permitting application of the exemption to income from allotted land which is now *free of restrictions*, it seems illogical not to recognize it as to income from *unallotted* and *restricted* land. It is submitted that it should be the existence of the restricted trust status, rather than the status as allotted land, that is determinative. This is particularly important inasmuch as the allotment system was abolished by the Indian Reorganization Act in 1934.[56]

The position of the Internal Revenue Service with regard to income derived from unallotted and restricted tribal lands is contained in Revenue Ruling 58-320.[57] The ruling is premised upon the situation of an Indian cultivating unallotted Indian tribal lands which were assigned to him by the tribe for a nominal fee. The agency concludes that the Indian's income is subject to taxation, basing its decision on its determination that there was no specific exemption provision in any treaty or agreement with the Indian tribe involved or in any act of Congress dealing with its affairs.

A more comprehensive position of the Internal Revenue Service is stated in Revenue Ruling 67-284.[58] It asserts that

55. The Government took this position in its brief to the appellate court, at least tacitly, in United States v. Critzer, *supra* note 10. However, the court did not choose to deal with the issue.
56. 25 U.S.C. § 461 *et seq.*
57. Rev. Rul. 58-320, 1958-1 CUM. BULL. 24. *See also* Rev. Rul. 56-342, 1956-2 CUM. BULL. 20.
58. Rev. Rul. 67-284, 1967-2 CUM. BULL. 55. *See also* Rev. Rul. 54-456, 1954-2 CUM. BULL. 49; Rev. Rul. 59-349, 1959-2 CUM. BULL. 16; Rev. Rul. 63-244,

since there is no provision in the Internal Revenue Code which exempts an individual from federal income taxation solely on the ground that he is an Indian, *a fortiori,* the exemption of Indians from the payment of tax must be *plainly* derived from treaties or agreements with the Indian tribes concerned, or some act of Congress dealing with Indian affairs. The ruling, on the basis of *Capoeman*, sets forth the test of the sole exemption which the Internal Revenue Service feels compelled to recognize. The test involves five elements, each of which must exist before an exemption will be deemed to apply. They are:

1. The land in question is held in trust by the United States Government;
2. Such land is restricted *and allotted* and is held for an individual non-competent Indian, and not for the tribe;
3. The income is "derived directly" from the land;
4. The statute, treaty or other authority involved evinces congressional intent that the allotment be used as a means of protecting the Indian until such time as he becomes competent; and
5. The authority in question contains language indicating clear congressional intent that the land, until conveyed in fee simple to the allottee, is not to be subject to taxation.

A problem with the Internal Revenue Service's reasoning is that many of the treaties, agreements, and legislative acts were established long before the enactment of the laws pertaining to federal income taxation. To the extent of legislation subsequent to the enactment of the income tax laws, with the possible exception of the Indian Reorganization Act, the Indians have been dealt with on a more or less piecemeal basis. Thus, rather than deal with exemptions on an *ad hoc*

1963-2 CUM. BULL. 21; Rev. Rul. 56-342, 1956-2 CUM. BULL. 20; Rev. Rul. 62-16, 1962-1 CUM. BULL. 7; Rev. Rul. 57-407, 1957-2 CUM. BULL. 45; Rev. Rul. 57-523, 1957-2 CUM. BULL. 51; Rev. Rul. 58-341, 1958-2 CUM. BULL. 400; Rev. Rul. 59-354, 1959-2 CUM. BULL. 24; Rev. Rul. 58-320, 1958-1 CUM. BULL. 24.

basis, Congress could be considered to have let stand the exemptions considered by many to have already existed, at least as to noncompetent Indians and restricted lands. Additionally, the Indian Reorganization Act was protective legislation designed to safeguard the Indians from the diminution of their lands which was occurring under the allotment program. The abolition of the allotment system should not be considered as imposing a burden on the fruits of land which is even more restricted than allotted land.

One of the first cases to apply *Capoeman* was *Big Eagle v. United States*.[59] It involved a factual situation comparable to *Blackbird*.[60] While the opinion is not surprising in terms of its result, it makes several points which are important to consider. Of major significance in *Big Eagle* is the negation of the principal that "tax exemptions must be clearly expressed and cannot be granted by implication," and, the application of the principle that "statutes affecting Indians must be liberally construed, with all doubtful expressions being resolved in their favor."[61] While specifically rejecting the Internal Revenue Service's insistence upon strict interpretation of tax exemption for an Indian, the court recognized that tax exemption may have an effect on how or whether a restricted Indian may achieve competency and independence. Referring to the congressional policy behind both the General Allotment Act and Osage Allotment Act, the court stated:

> Parallel congressional purposes are apparent but the basic purpose is the one alluded to in *Capoeman* and that is to protect the property so that it will adequately serve the needs of the ward and finally bring him to a state of competency and independence. *This chance is encouraged, if not guaranteed, by tax exemption.* (emphasis added).[62]

In spite of the policy basis for the court's decision, the Internal Revenue Service has sought to strictly limit the impact of the decision.[63]

59. 300 F.2d 765 (Ct. Cl. 1962). A companion case, Red Eagle v. United States, 300 F.2d 772 (Ct. Cl. 1962) adopted the rationale of *Big Eagle v. United States* by reference.
60. Chouteau v. Comm'r, *supra* note 19.
61. Big Eagle v. United States, *supra* note 59, at 769.
62. *Id.* at 771-72.
63. Rev. Rul. 70-116, 70-1 CUM. BULL. 11.

In *United States v. Hallam,*[64] in its quest for the application of its strict construction doctrine, the Government argued that a taxpayer could not rely upon the *Capoeman* case if a specific allotment act was involved. The court soundly overruled that proposition saying:

> We find no merit in the contention that the General Allotment Act is not applicable to the Quapaws or that members of that tribe should be treated differently than the members of any other tribe of Indians who were included within its provisions. . . .
>
> . . . .
>
> It is quite clear to us, considering the provisions of the General Allotment Act and the special statutes affecting the Quapaws, that Congress intended that so long as they continued in their status as wards of the United States, their allotted lands should be treated in the same manner as those of all other Indians encompassed by the General Allotment Act, and that when a Quapaw allottee was determined to be competent and capable of managing his or her affairs, that person should have a title free from any "charge or incumbrance." Squire v. Capoeman, supra, is not distinguishable in principle.[65]

It is submitted that this case stands for a broad application of *Capoeman.*

After enactment of the Indian Reorganization Act, Indians were afforded greater opportunity to govern themselves. Constitutional and corporate forms of governmental structures were provided for by the Act. An interesting question relating to the taxation of salaries and wages then arose inasmuch as the officers or officials of tribal governments began to receive a salary from the tribes or communities for the services which they rendered. In *Walker v. Comm'r,*[66] the Tax Court held that Freeman Walker,

64. 304 F.2d 620 (10th Cir. 1962).
65. *Id.* at 622-23.
66. 37 T.C. 962 (1962). The Tax Court's decision was based on the protectionist Indian policy rather than the tax laws. The Tax Court held that the sums paid to Walker were not wages inasmuch as he was not an ordinary employed citizen. It felt that "the amount paid to Walker was in reality a distribution to him, as one of the beneficiaries of the trusteed tribal funds

a noncompetent full-blood Indian, was not subject to tax on his salary paid from tribal funds for his services as treasurer of the tribal community. *Walker* was appealed by the Government, and the Court of Appeals for the Ninth Circuit reversed, saying no exemption could be found for this type of income.[67] The appellate court based its decision on the theory that even "If under the law, the income of an organization is exempt from taxation, it does not follow that the income received by an employee as compensation for service rendered to such organization is also exempt from taxation."[68] Thus, absent an exemption prescribed in a treaty or congressional act, such income is taxable.

It is to be noted that the court of appeals in *Walker* limited the application of *Capoeman.* The taxpayer argued that the income was not taxable as it was derived from tribal lands, citing *Capoeman,* but the court rejected the argument saying that the lower court had not made such a finding, without which *Capoeman* was inapposite. Therefore, the apparent lesson is that *Capoeman* is applicable only to situations *directly* involving land. This proposition is supported by the court's statement that "If it is desirable that the income of an Indian be exempt from taxation under the circumstances existing here, such exemption should be provided by an Act of Congress and not by a court."[69] Conversely, it has been at least tacitly stated that if Congress creates an exception to an Indian's exemption from taxation such exception is to be narrowly construed.[70]

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which the Government held for the use of him and the other members of his tribe." *Id.* at 971-72. The court's policy orientation was summed up when the court stated:

> Bearing in mind the Government's historic and carefully developed undertaking to advance the training and competency of its Indian wards, and also keeping in mind the established principle that general Acts of Congress do not apply to Indians unless so worded as to clearly manifest an intention to include Indians in their operation—we regard the statement of the Supreme Court in Squire v. Capoeman, supra, to be here apposite: "It is unreasonable to infer that, in enacting the income tax law, Congress intended to limit or undermine the Government's undertaking." *Id.* at 972.

67. Comm'r v. Walker, 326 F.2d 261 (9th Cir. 1964). *See also* Rev. Rul. 67-284, 1967-2 CUM. BULL. 55.
68. Comm'r v. Walker, *supra* note 67, at 264.
69. *Id.* at 264.
70. United States v. Daney, 370 F.2d 791 (10th Cir. 1966), *aff'g* 247 F. Supp. 533.

The question of just what land affords income tax immunity remains incompletely resolved. *Holt v. Comm'r*[71] dealt with a noncompetent Sioux who held a grazing permit covering tribal land, and the question before the court was the taxability of income arising from his cattle operation conducted on that tribal land. Under the permit, the taxpayer paid an "agreed consideration" to the tribe, but the decision does not indicate whether it was nominal or real. The court of appeals, after reviewing the concepts and precedents which have been discussed above, held that the income was subject to federal tax. The court was obviously influenced by the fact that non-Indians had similar permits and would be subject to taxation on income earned by their use. The court also found significance in the fact that an Indian has a specific personal interest in allotted land (the income from which is tax-exempt) but that no individual Indian has any title or enforceable interest in tribal property covered by a permit to him. According to the court, since the individual Indian taxpayer could have no title nor enforceable right in the tribal property, the exemption dictated by *Capoeman* was not available. Thus, an Indian with a *greater* personal interest in restricted property has the benefit of a tax exemption which is not available to him if he has a *lesser* or *no* personal interest in it. Considering the whole purpose of the aborted allotment system and its replacement by tribal ownership, each designed to assist Indians to achieve economic independence, the logic of the distinction for tax purposes is difficult to grasp.

The next significant development was the very important decision of *Stevens v. Comm'r*,[72] which dealt with a very extensive farming and ranching enterprise of a noncompetent Gros Ventre Indian of the Fort Belknap Indian Reservation. The land involved various parcels of restricted Indian land on the reservation, consisting generally of the following types:

71. Holt v. Comm'r, *supra* note 21.

72. 452 F.2d 741 (9th Cir. 1971) *aff'g and rev'g* 52 T.C. 330 (1969); Supplemental Opinion 54 T.C. 351 (1970). *See also* J. WHITE, *supra* note 34, at 63-83 which contains an extensive analysis of the Tax Court opinion in *Stevens*.

1. Direct allotments to the Indian,
2. Gifts to the Indian from his mother of allotments made to her,
3. Purchased or exchanged allotments from other Indians,
4. Grazing permits granted to the Indian by the tribe, covering both tribal lands and numerous tracts of other tribal members,
5. Oral leases from other tribal members, and
6. Hay cutting permits covering both tribal lands and tracts of other tribal members.

Primarily on the basis of *Holt,* the Tax Court held that the income from the direct and gift allotment parcels (Nos. 1 and 2) was not taxable, but the income from the purchased or exchanged allotments and nonallotted parcels (Nos. 3-6) was taxable after finding no exemption stated in the various acts affecting the tribe and reservation. The parcels subject to the permits and leases (Nos. 4-6) constituted the bulk of the land utilized by the Indian, but the decision of the Tax Court as to these lands was not appealed, and they were expressly not considered by the court of appeals.

The taxpayer appealed that portion of the Tax Court's judgment holding that income from the purchased and exchanged allotment lands (No. 3) was not exempt from taxation. The Government appealed from that portion of the judgment holding that income from all allotment lands acquired by the Indian by direct allotment and by gift (Nos. 1 and 2) were exempt from taxation. The court of appeals resolved all issues in favor of the taxpayer. Although there was extensive analysis in the decisions of both the Tax Court and the court of appeals concerning the source and nature of the allotments, the import of the court of appeals decision is that income of a noncompetent Indian from allotted and restricted lands is tax exempt irrespective of the means of transfer or disposition of such interests between the Government and noncompetent Indians or between noncompetent Indians.

Perhaps the greatest contribution to the case law on the subject was made by the court in *Stevens* when it recognized that "Federal policy toward particular Indian tribes is often manifested through a combination of general laws, special acts, treaties, and executive orders. All must be construed in *pari materia* in ascertaining Congressional intent."[73] It is arguable that such phraseology in the context of a tax case stands for the proposition that tax exemption can be drawn from the manifested general policy of the Government toward Indians. This becomes important in that the decision rebuts the Internal Revenue Service position of strict interpretation of exemptions from the tax laws. Additionally, the case clearly stands for a broad interpretation of the scope of Indian exemptions from taxation.[74]

The *Stevens* opinion of the court of appeals quotes favorably from a letter from the Solicitor of the Department of the Interior to the Solicitor General of the United States, which is very pertinent to the income tax question in the context of the conversion from the allotment system to that of tribal ownership. In that letter the Solicitor stated:

> "Many Indians have purchased trust lands, or *exchanged their allotments* or interests in allotments for trust lands which were then taken in trust for them by the United States, with knowledge that the income derived from that land to the former beneficial owner was not subject to encumbrance (and therefore not taxable). Since the Indians were not informed that they were giving up a right which would not be included in the purchased tract, it is natural that they would assume in making an exchange that the purchased tract was subject to the same nonencumbrance provisions as those they held under the General Allotment Act. The Federal Government has encouraged such purchases and exchanges in carrying out relocation and other econo-

73. Stevens v. Comm'r, *supra* note 72, at 744 citing Kirkwood v. Arenas, 243 F.2d 863 (9th Cir. 1957) as authority for the proposition.

74. Stevens v. Comm'r, supra note 72, at 747, 749 supports this proposition. The court's recognition of the *Capoeman* reliance on language of earlier cases to the effect that doubtful expressions are resolved in favor of the Indians and that treaties should never be construed to the prejudice of the Indians lends credence to the position taken here.

> mic programs and particularly in dealing with the heirship land problem which has been growing increasingly difficult to administer as interests in trust lands become more fractionated. Had this question arisen and been settled in accordance with the present assertion of the Internal Revenue Service soon after the Act of June 18, 1934, was enacted, certainly the implication which has been conveyed to Indians across the country could have been avoided." (emphasis added).[75]

The pertinence of the foregoing is highlighted by the position of the Internal Revenue Service that allotted restricted land provides the immunity but that unallotted restricted land does not.

There is ominous dictum in the Tax Court's *Stevens* opinion relating to Revenue Ruling 62-16,[76] which represents the Internal Revenue Service's recognition that income of an Indian from the sale or exchange of cattle and other livestock raised on restricted allotted lands is exempt from federal income taxation. Although non-taxability of such income was conceded by the Internal Revenue Service, and the issue was not before the Tax Court, the court nonetheless indicated that it might not agree with the Internal Revenue Service position and might treat such income as taxable.[77] It suggested that proceeds from the sale of cattle might be treated differently than that from the sale of timber.

The last case to be discussed here perhaps presents the ultimate extension in the Internal Revenue Service strict interpretation position. *United States v. Critzer*[78] involved the prosecution of an Eastern Cherokee Indian for criminal tax fraud. The taxpayer had failed to report a portion of her income derived from the operation of a motel and restaurant and the lease of two gift shops and some apartments. The businesses were located on land in which the taxpayer had a "possessory holding." The lower court found the taxpayer guilty of wilfully attempting to evade federal income taxes

75. *Id.* at 748.
76. Rev. Rul. 62-16, 1962-1 CUM. BULL 7.
77. Stevens v. Comm'r, 52 T.C. 330, 339.
78. United States v. Critzer, *supra* note 10.

for the years 1967-1970 in violation of 26 U.S.C. § 7201, fined her $10,000 and sentenced her to three years of imprisonment which was suspended upon condition of her satisfaction of her civil tax liability. The court of appeals avoided the issue of whether the income was taxable. Rather, the court felt that such an issue was more properly the subject of a civil suit and left the taxpayer faced with another possible lawsuit. However, the court did reverse her criminal conviction.

The basis of the court's decision was that as a matter of law wilful intent to evade taxation was missing in that the taxability of the income involved was "so uncertain that even coordinate branches of the United States Government plausibly reach directly opposing conclusions."[79] The court had reference to the fact that the government brief on appeal included a statement of the Department of the Interior, on behalf of the Indian taxpayer, stating:

> "[W]hile the issue is not free of all doubt, there has been no definitive court holding, the Department of the Interior for legal and policy reasons believes that these possessory holdings are tax exempt to the same extent as trust and restricted allotments found on most Indian reservations. . . .
>
> Interior also believes that income from businesses conducted on tax exempt land, such as motels and restaurants, should be included in the principle of *Squire v. Capoeman* . . ."[80]

Although the Department of Interior's statement was drafted with the obviously narrow context of the case in mind, it is to be noted that the last sentence of the above-quoted portion of the statement stands alone as a separate and distinct paragraph of the statement.[81] Thus, the Department of the Interior, which is vested with the responsibility for the administration of Indian trust and restricted lands and the enforcement of the laws with respect to the Indians, clearly advocates that the laws dictate a broad exemption from federal income taxation for Indians.

79. *Id.* at 1162
80. *Id.* The Interior Department's statement was confined to the taxpayer and her holdings as a member of the Eastern Cherokee Reservation.
81. *Id.*

CONCLUSION

It is submitted that in its method of adherence to the *Capoeman* decision, and in setting forth in Revenue Ruling 67-284 its five tests for the exemption, the Internal Revenue Service is perverting the meaning of *Capoeman.* Although it is not specifically stated in the *Capoeman* decision, it would appear that there was a judicial assumption that income from restricted reservation land is not taxable, and it was the acquisition by an individual Indian of new, vested rights in the form of an allotment which raised the question of taxation of income. It further is submitted that the Supreme Court was only holding that the exemption *remained* notwithstanding the allotment, while the land was still restricted. The Court seemed to say that the land and the Indians were moving toward total emancipation, at which time there would be full subjection to the tax laws, but that the exemption had not been terminated at the way-station of the allotment status.

The Internal Revenue Service takes the position that the granting of an allotment created the tax exemption in the first instance, which exemption did not exist either before the allotment or after its restrictions are removed. If that is so, then the land, insofar as its income is concerned, passes from a taxable status to a non-taxable status and back to a taxable status. That is illogical when viewed against the background of general Indian policy and law which commenced with maximum protection and supervision of the Indians, then proceeded, through an intermediate step, toward total emancipation. It is likely that the Supreme Court in *Capoeman* analyzed and discussed the allotment aspects and authorities to demonstrate that the exemption *still existed,* but the Internal Revenue Service is interpreting that analysis as supporting the notion of a *creation* of a new exemption. Although the Internal Revenue Service in its revenue rulings and positions before the courts argues technical constructions of the laws and the cases, it really appears to be taking the arbitrary stand that it will not recognize any exemption unless there is an express and specific statutory provision or Supreme Court decision for it.

In the development of the law it appears that there is a conflict between the federal tax policy and the federal Indian policy. It has been resolved with regard to income from allotted and restricted land, reinvestment income, and shares upon distribution of tribal income. It probably has been determined with regard to income from formal leases of tribal lands to Indians, since certiorari was denied in the *Holt* case. It has not been determined with regard to income from assigned tribal land, and a very strong argument exists that such income should be treated the same as income from allotted and restricted land. The concepts at least under general Indian law, are the same.

It is noted that in Revenue Ruling 67-284, in discussing the exemption for income from allotted and restricted land, it is stated that the exemption does not cease, "when restricted allotted land is voluntarily exchanged for restricted allotted land of like value, when such exchange is authorized by the Secretary of the Interior."[82] Although the interest acquired by an Indian by an exchange assignment, or other mechanism designed to return allotted land to tribal ownership, is not "allotted land" the situation referred to in the ruling and such an exchange are very comparable.

The point is that if an exemption exists for restricted land which has been allotted to an individual Indian then reasonably under law, policy, and logic the same exemption should exist for restricted land which has been merely assigned to him by his tribe, or in which he has been granted possessory or user rights. The allotment system was replaced by the tribal ownership system because the former permitted ultimate loss by Indians of their land. The substitution was merely to provide a better tool for their use in achieving economic well-being. The fact that an individual Indian now receives his interest by grant from his tribe rather than from the United States should make no difference insofar as the tax exemption is concerned, particularly since the grant from the tribe is of a considerably lesser legal estate than that of an allotment which has been unavailable since 1934.

82. Rev. Rul. 67-284, 1967-2 CUM. BULL. 55, 57.