

JURISDICTION: OKLAHOMA TAX COMMISSION - DECISION
CITE: 86-06-12-01 / NON-PRECEDENTIAL
ID: P-85-090 / P-85-091
DATE: JUNE 12, 1986
DISPOSITION: DENIED
TAX TYPE: SALES / CIGARETTE EXCISE
APPEAL: NO APPEAL TAKEN

ORDER

This matter coming on before the Oklahoma Tax Commission pursuant to regular assignment on the agenda. The Commission, having reviewed the facts and authorities presented therein, and being fully advised in the premises, finds and orders that the Findings, Conclusions and Recommendations of the Administrative Law Judge, filed herein on the 22nd of May, 1986, marked as Exhibit A, attached hereto and hereby incorporated by reference as though fully set out herein, by and the same are hereby adopted as the Order of the Commission.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

NOW on this 22nd day of May, 1986, the above styled cause comes on for consideration, pursuant to assignment regularly made by the Oklahoma Tax Commission to ALJ, Presiding Administrative Law Judge. Hearing was had, at which hearing, Protestants, PROTESTANT 1 and PROTESTANT 2, appeared in person and by attorneys, ATTORNEY 1 and ATTORNEY 2. The Sales and Use Tax Division and the Alcohol and Tobacco Division of the Oklahoma Tax Commission appeared by attorney, OTC ATTORNEY. Protestants, PROTESTANT 1 and PROTESTANT 2, testified in their own behalf. Exhibits, not herein itemized, were offered and received into evidence. The attorneys presented their respective arguments, and the case was submitted for a decision.

STATEMENT OF FACTS

The parties have stipulated to the following facts:

(1) On April 8, 1984, PROTESTANT 1, PARTNER and PROTESTANT 2, Protestants herein, as partners of the COMPANY, a general partnership, leased two tracts of land in CITY, Oklahoma, in order to operate the TOBACCO STORE OF TRIBE B, from which cigarettes and tobacco products are sold which do not bear Oklahoma cigarette excise tax stamps. The lease has not been approved by the District Court of COUNTY.

(2) Tract I is owned by OWNER 1, a one-half (1/2) TRIBE A Indian by blood. Said tract is described as follows:

LEGAL DESCRIPTION

(3) Tract II is owned by OWNER 2, a one-half (1/2) TRIBE A Indian by blood. Said tract is described as follows:

LEGAL DESCRIPTION

(4) The Protestants are not TRIBE A Indians by blood nor are they members of the TRIBE A.

(5) On April 12, 1985, the Alcohol and Tobacco Division issued proposed assessments to Protestants for cigarette excise taxes, penalty and interest due on the sale of cigarettes from April 1, 1984 through February 28, 1985, in the amount of Two Hundred Eighty-Two Thousand Five Hundred Thirty-Six Dollars and Two Cents (\$282,536.02). Said assessments include cigarette excise tax in the amount of Six Thousand Five Hundred Sixty-One Dollars (\$6,561.00) for the months of April and May, 1984, and an amount of Ninety-Eight Thousand Four Hundred Fifteen Dollars and One Cent (\$98,415.01) for the period of June 1, 1984 through November 30, 1984, inclusive.

(6) On April 12, 1985, the Sales and Use Tax Division issued proposed assessments to Protestants of sales taxes, penalty and interest due on the sale of said cigarettes from April 1, 1984 through February 28, 1984, in the amount of Forty-One Thousand Fifty-Five Dollars and Seventy-Two Cents (\$41,055.72). Said assessments include sales taxes, penalty and interest in the amount of Two Thousand Forty-Two Dollars and Thirteen Cents (\$2,024.13) for the months of April and May, 1984, and an amount of Thirty Thousand Six Hundred Thirty-One Dollars and Sixty-Nine Cents (\$30,631.69) for the period of June 1, 1984 through November 30, 1984, inclusive.

The factual issue remaining is the extent and duration of the involvement of Protestant, PROTESTANT 2, in the TOBACCO STORE OF TRIBE B operation. PARTNER withdrew from the partnership November 30, 1984. PROTESTANT 1 has been a participant, either as a partner or sole proprietor, during the entire assessment period, and is presently the sole proprietor of the TOBACCO STORE OF TRIBE B.

ISSUES AND CONTENTIONS

The issues are as follows:

(1) Whether Protestants herein, two of whom are members of TRIBE B of Indians and one of whom is a member of TRIBE C, and all of whom operated a business which sold cigarettes and tobacco products during a part or all of the assessment period on land owned by TRIBE A Indians, are personally liable for Oklahoma sales and tobacco taxes on the goods they sold.

(2) Also to be determined is the effective date of the withdrawal of PROTESTANT 2 as a partner in the COMPANY, which operated the TOBACCO STORE OF TRIBE B.

The Protestants contend that because the lands involved are Indian Country as defined in 18 U.S.C. Section 1151(c), the Federal government has exclusive jurisdiction over this land, sharing it only with the Indian tribe having jurisdiction. To support this contention, Protestants rely on the United States Constitution, Article I, Section 8, Clause 3 and Article II, Section 2, Clause 2 and Article VI, Clause 2. Protestants also contend that 25 U.S.C. §1321 - §1326 gives exclusive jurisdiction to the United States over Indian Country unless the State, by an act of its Legislature and approval of the Indian tribe involved, assumes that jurisdiction. Protestants contend that Oklahoma has not done this.

Protestants also contend that they have paid taxes to the appropriate sovereign. During part of the assessment period, Protestants paid taxes on sales of cigarettes to the TRIBE B Tribe of Indians. Upon assertion of its primary sovereignty, Protestants then paid taxes on sales of cigarettes to the TRIBE A Nation. Protestant, PROTESTANT 1, now sole proprietor of the TOBACCO STORE OF TRIBE B, currently pays taxes to the TRIBE A Nation for the sale of cigarettes.

Protestants contend that the TOBACCO STORE OF TRIBE B was operated by them as a partnership until December 17, 1984 when the partnership was dissolved. Since that time the business has been operated by PROTESTANT 1, as sole proprietor, and PROTESTANT 2 and PARTNER no longer have an interest in such business. Protestants contend that the effective date of PARTNER'S withdrawal as a partner was November of 1984 and the Division has not contended otherwise. There has been conflicting testimony, however, as to the effective date of the withdrawal of PROTESTANT 2.

PROTESTANT 2 testified that he withdrew from the partnership before any cigarettes were sold. Cigarettes were sold beginning the last four days of April. Both PROTESTANT 2 and PROTESTANT 1 testified that PROTESTANT 2 received no money from the partnership, nor had he sold any cigarettes or received money for the time he spent helping with construction.

The Division contends that the Protestants have ignored a large body of law pertaining to state taxation of Indian lands. Although the Division concedes that the civil and taxing laws of the states have, under certain circumstances, been preempted by federal laws which pertain to Indian tribes, the Division contends that it is clear that there is a difference with regard to the presumption employed when dealing with off reservation land as opposed to on reservation land. The Division contends that the allotment on which the TOBACCO STORE OF TRIBE B is located is not reservation land.

The Division relies on United States Supreme Court cases First Agricultural National Bank of Brookshire County v. State Tax Commission, 392 U.S. 339 (1968) and California State Board of Equalization v. Chemehuevi Tribe of Indians, 106 S.Ct. 289 (1985) to contend that sales and cigarette taxes, which by their terms must be passed on to the purchaser, impose the legal incidence of the tax upon the purchaser. Therefore, the Division contends that the Protestants, as vendors, are not being taxed by the State, but are merely tax collectors for the State. 68 O.S.A. §321 and 68 O.S.A. §1355 et seq. do not exempt any retailer from collecting a tax from a non-exempt purchaser, the Division contends. The Division points out that even the

State of Oklahoma, its agencies and instrumentalities, must collect sales tax on retail sales with limited specific exemptions.

The Division relies on Oklahoma Cigarette Code provision 68 O.S.A. §302 and Oklahoma Sales Tax Code provision 68 O.S.A. §1361 to show that Protestants are the proper parties to pay cigarette and sales taxes to the State. The Division also contends that Indians on Indian lands may be validly required to collect and remit state taxes. To support this contention, the Division relies on Stagner v. Wyoming State Tax Commission, 682 P.2d 326 (1984); Ute Indian Tribe v. State Tax Commission of Utah, 574 F.2d 1007 (10th Cir. 1978) and Washington v. Confederated Tribes of Colville, 447 U.S. 134 (1980).

APPLICABLE LAW

68 O.S.A. §1355 (1981) specifically exempted from sales tax:

“(B) Sale of cigarettes and such tobacco products on which the tax levied in Articles 3 and 4 of this Code, Sections 301 et seq. and 401 et seq. of Title 68 of the Oklahoma Statutes, has been paid;”

68 O.S.A. §1355 was amended in 1984 to become operative April 21, 1984. In the amended version of 68 O.S.A. §1355, the exemption for sales tax on cigarettes is no longer listed, and therefore, sales tax on cigarettes is levied by statute as of April 21, 1984.

68 O.S.A. §1361 is entitled “Consumer to Pay Tax - Vendor to Collect Tax - Penalties for Failure to Collect”, and states as follows:

“(A) The tax levied by this article shall be paid by the consumer or user to the vendor as trustee for and on account of this state. Each and every vendor in this state shall collect from the consumer or user the full amount of the tax levied by this article, or an amount equal as nearly as possible or practicable to the average equivalent thereof. Every person required to collect any tax imposed by this article, and in the case of a corporation, each principal officer thereof, shall be personally liable for said tax.” (Emphasis Added)

Sales tax is imposed by the State on the consumer of the cigarettes and not the vendor, it being the vendor’s duty to collect and remit the tax. It was recognized by the Oklahoma Supreme Court in State ex. rel. May v. Seneca-Cayuga Tribe, 711 P.2d 77 (Okla. 1985) that sales tax on bingo games conducted by Indians on Indian lands could be collected by the State from the Tribe for sales made to non-members. At page 89, the Oklahoma Supreme Court stated as follows:

“After balancing the States regulatory interest, the tribal stake in self government and the federal policies in legislation, we are led to conclude that State residuary jurisdiction may be exercised only to the extent that tribal

activity in Indian Country takes on a form that necessarily affects non-Indians and Indians who are non-members of the self governing tribal unit.”

Protestants offered no evidence to show which portion of their business was done with Indians and which was done with non-Indians. During closing argument, Protestant’s attorney mentioned that Protestants display a sign in the TOBACCO STORE OF TRIBE B which reads “Sales to Indians Only”. This sign, however, was not introduced into evidence nor was whether and how a customer’s Indian status is determined. Protestants have not sustained their burden of proof in this matter and, therefore, the proceeds of all of the cigarette sales must be held subject to sales tax.

68 O.S.A. §302 levies an excise tax upon the sale, use, gift, possession or consumption of cigarettes. Said Section requires a vendor of cigarettes to purchase stamps from the Oklahoma Tax Commission and to affix these stamps to the cigarettes sold. As with the sales tax imposed on other goods, the additional excise tax imposed upon cigarettes is levied upon the user or consumer of the cigarettes, said Section stating as follows:

“The impact of the tax levied by the provisions of this article is hereby declared to be on the vendee, user, consumer, or possessor of cigarettes in this state, and, when said tax is paid by any other person, such payment shall be considered as an advance payment and shall thereafter be added to the price of the cigarettes and recovered from the ultimate consumer or user.”

The Oklahoma Statutes provide no exemption from either sales or cigarette excise tax for Indians, either individually or as a group. There being no statutory exemption for Indian tribes themselves, it stands to reason that non-Indian purchasers upon whom the incidence of the tax falls, would certainly not be exempt from taxes merely because they purchase their tobacco products from an Indian Smokeshop.

In Oklahoma Tax Commission v. United States, 319 U.S. 598, 87 L.Ed. 1612, 63 S.Ct. 1284 (1943), the Supreme Court emphasized that tax exemptions must be stated in plain words, and held that a state estate tax on members of the Five Civilized Tribes was not prohibited by Congress. It is noted that the land on which the Protestants conduct their business is a TRIBE A allotment.

Nor does the federal law exempt Indians or Indian tribes from sales tax or excise tax on cigarettes. Title 18 U.S.C. 2341(a) et seq. sets forth the federal criminal law regarding the trafficking of contraband cigarettes wherein Congress clearly expressed its intent to assist the states in enforcing their cigarette tax laws. Title 18 U.S.C.A. §2342(a) provides as follows:

“It shall be unlawful for any person knowingly to ship, transport, receive, possess, sell, distribute, or purchase contraband cigarettes.”

Title 18 U.S.C.A. §2341 (2) defines contraband cigarettes as:

“...a quantity in excess of 60,000 cigarettes, which bear no evidence of the payment of applicable State cigarette taxes in the State where such cigarettes are found, if such State requires a stamp, impression, or other indication to be placed on packages or other containers of cigarettes to evidence payment of cigarette taxes, and which are in the possession of any person other than...”

The Statute then sets out those entities which are exempt from the application of the prohibition. Neither individual Indians nor Indian tribes are mentioned as exempt. The refusal of Congress to recognize Indians and Indian tribes as exempt from the application of the above federal law is clear recognition of the State’s authority to regulate and tax cigarettes which are sold by Indians.

The United States Supreme Court has held that a state or territory may tax railroad rights of way through a reservation, Maricopa & P.R.R. v. Arizona Terr., 156 U.S. 347 (1895); Utah & N. Ry. v. Fisher, 116 U.S. 28 (1885); a state may tax as personal property, cattle grazing on reservation land, Thomas v. Gayy, 169 U.S. 264 (1898); Montana Catholic Missions v. Missoula County, 200 U.S. 118 (1906); Wagner v. Evans, 170 U.S. 588 (1898); and a state may impose property taxes on the leasehold interest of non-Indian lessees of tribal land, Mescalero Apache Tribe v. O’Chesky, 625 F.2d 967 (10th Cir. 1980); Ft. Mojave Tribe v. County of San Bernardino, 543 F.2d 1253 (9th Cir. 1976), cert. denied, 430 U.S. 983 (1977).

The Supreme Court has also held that a state may collect state cigarette excise and sales taxes on purchases from Indians or Indian tribes to non-exempt purchasers; California State Board of Equalization, *supra*, Washington v. Confederated Tribes of Colville, 447 U.S. 134 (1980); Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976). In Washington v. Confederated Tribes v. Confederated Tribes of Colville, *supra*, the Supreme Court ruled upon an Indian challenge to the State of Washington’s imposition and collection of various taxes, including a cigarette stamp tax. In upholding the state cigarette tax on on-reservation purchases by non-members of the Tribe, the Court stated at 2079-80:

“In Moe v. Salish and Kootenai Tribes, 425 U.S. 463, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976), we considered a state taxing scheme remarkably similar to the cigarette and sales taxes at issue in the present cases. Montana there sought to impose a cigarette tax on sales by smoke shops operated by tribal members and located on leased trust lands within the reservation, and sought to require the smoke shop operators to collect the tax. We upheld the tax, insofar as sales to non-Indians were concerned, because its legal incidence fell on the non-Indian purchaser.”

A large part of the hearing was devoted to the determination of the effective withdrawal date of PROTESTANT 2. Since two years have lapsed since the withdrawal of PROTESTANT 2, much conflicting testimony was introduced by both sides in this matter. PROTESTANT 1, the party who is liable for taxes for which PROTESTANT 2 is found not to be liable, testified that PROTESTANT 2’s name was not on the bank account opened by the partnership in late April, nor did PROTESTANT 2 sell any cigarettes. PROTESTANT 1 also testified that PROTESTANT 2 withdrew as a partner two to three weeks before the partners formalized

PROTESTANT 2's withdrawal in writing. Upon cross examination, when asked whether PROTESTANT 2's withdrawal was around the first of May, PROTESTANT 1 replied, "That is approximately correct."

The Division introduced into evidence the Tax Application that went before the Tribal Council on May 15, 1984. This application illustrates that PROTESTANT 2's withdrawal had effectively been made before it was formalized in writing since PROTESTANT 2's name is not on the application as a partner. The undersigned also takes notice of Division's Exhibit Number 10, the deposition of PARTNER in a related case. In said deposition, PARTNER stated that the partnership arrangement itself was not formalized in writing at the time of PROTESTANT 2's withdrawal. He also stated that they believed PROTESTANT 2's withdrawal to be after the May 17th raid, and that, "PROTESTANT 2 would have to answer that, what date he did it". PROTESTANT 2 testified in the cause herein that he had told PROTESTANT 1 he was withdrawing a couple of weeks before he was able to tell PARTNER directly.

The Division contends that the effective withdrawal date of PROTESTANT 2 as a partner in the TOBACCO STORE OF TRIBE B was May 21, 1984, the date that PROTESTANT 2 withdrew in writing and that PROTESTANT 2 should be held jointly and severally liable for taxes until May 30, 1984. To support this contention, the Division relies on the fact that the writing does not state that it was to have taken effect at an earlier date. The Division introduced PROTESTANT 1's deposition in a related case involving the TOBACCO STORE OF TRIBE B to impeach PROTESTANT 1's testimony in the cause herein. In the deposition in the related case, PROTESTANT 1 had stated that PROTESTANT 2 withdrew "when the raids started", the first raid being on May 9, 1984. Upon re-direct examination, PROTESTANT 1 stated that he was referring to PROTESTANT 2's written withdrawal in the deposition.

As previously stated, PROTESTANT 1 is the party who will be liable for taxes for which PROTESTANT 2 is not liable, and therefore, PROTESTANT 1's testimony is convincing. He stated that PROTESTANT 2 withdrew two to three weeks before the withdrawal was put into writing. Since the writing occurred on May 21, 1984, that would place PROTESTANT 2's effective withdrawal date in the week of May 1 - May 7. When asked if PROTESTANT 2 withdrew around the first of May, PROTESTANT 1 replied, "That is approximately correct." The undersigned finds May 1, 1984 to be the date that is the most likely date suggested by either party to be the actual withdrawal date of PROTESTANT 2.

CONCLUSIONS

In view of the above and foregoing findings of fact and law applicable thereto, the undersigned concludes as follows:

- (1) That the Oklahoma Tax Commission has jurisdiction in this matter.
- (2) That the Oklahoma Statutes provide no exemption from either state sales tax or from state excise tax on cigarettes for Indians, either individually or as a group.

(3) That Congress, in listing groups exempt from purchasing state excise tax stamps for cigarettes, made no mention of either Indians or Indian tribes, thereby expressing the intent that Indians and Indian tribes be treated as all other non-exempt vendors of cigarettes.

(4) That the taxes herein are not imposed on Protestant vendors who are trustees for the State of Oklahoma; but on the consumer or user.

(5) That there being no dispute as to the withdrawal date of PARTNER as a partner, PARTNER is not liable for any sales tax or cigarette excise tax after November 30, 1984. However, PARTNER is jointly and severally liable for taxes plus interest and penalty until that date.

(6) That PROTESTANT 2 withdrew from the partnership on or around May 1, 1984, and is jointly and severally liable for taxes on cigarettes sold prior to that date.

(7) PROTESTANT 1, being either a partner or sole proprietor of the TOBACCO STORE OF TRIBE B for the entire assessment period, is jointly and severally liable for the entire amount of taxes, penalty and interest due.

DISPOSITION

In view of the above and foregoing findings of fact and conclusion of law, it is THE ORDER OF the Oklahoma Tax Commission that the above styled protest be denied.

OKLAHOMA TAX COMMISSION

CAVEAT: This decision was NOT deemed precedential by the Commission. This means that the legal conclusions are generally applicable or are limited in time and/or effect. Non-precedential decisions are not considered binding upon the Commission. Thus, similar issues may be determined on a case-by-case basis.