

JURISDICTION: OKLAHOMA TAX COMMISSION - DECISION
CITE: 87-04-30-63 / NON-PRECEDENTIAL
ID: P-85-303
DATE: APRIL 30, 1987
DISPOSITION: DENIED
TAX TYPE: CIGARETTE EXCISE
APPEAL: DISMISSED / S.CT. 68,913
DECISION NOT PUBLISHED

ORDER

This matter comes on before the Oklahoma Tax Commission pursuant to regular assignment on the agenda. The Commission, having reviewed the files and being fully advised in the premises, finds and orders that the Application for Oral Argument Before the Tax Commission En Banc be denied. The Commission further finds and orders that the Findings, Conclusions and Recommendations of the Administrative Law Judge, filed herein on the 11th day of February, 1987, marked as Exhibit A, attached hereto and incorporated by reference as though fully set out herein, be and the same are hereby adopted as the Order of the Commission.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

NOW on this 11th day of February, 1987, the above styled cause comes on for consideration pursuant to assignment regularly made to ALJ, Administrative Law Judge, by the Oklahoma Tax Commission. A hearing was had, at which hearing Protestant appeared and was represented by ATTORNEY, attorney-at-law. The Alcohol and Tobacco Division of the Oklahoma Tax Commission, hereinafter Division, appeared and was represented by OTC ATTORNEY, attorney-at-law.

Opening statements were made by the respective parties, and exhibits, not herein itemized, were received into evidence. PROTESTANT testified in his own behalf. Upon submission of additional briefs, this case was submitted for a decision.

STATEMENT OF FACTS

1. On November 17, 1984, Protestant, PROTESTANT, began selling cigarettes to the general public at BUSINESS ADDRESS.
2. The cigarettes sold by Protestant did not have State cigarette excise stamps affixed to the packages, nor were State cigarette excise taxes paid on the cigarettes that were sold.
3. On October 28, 1985, the Oklahoma Tax Commission hand delivered an assessment of unpaid cigarette taxes to Protestant at his place of business in the assessed amount of Two Hundred Forty-One Thousand Nine Hundred Forty-Seven Dollars and No Cents (\$241,947.00) for the period November 1, 1984 through August 31, 1985, inclusive.

4. Protestant timely filed his protest on November 18, 1985, wherein the basis of the protest was the lack of jurisdiction of the Oklahoma Tax Commission to tax the cigarette sales made.

5. Protestant is a member of the INDIAN Nation.

6. During the assessment period, Protestant made no inquiry from his customers as to whether they were members of his Tribe.

7. The land from which the cigarettes were sold was the allotment of Protestant's grandfather, now deceased, from the INDIAN Nation, and is listed on the county tax rolls as exempt from ad valorem taxes because of Indian ownership.

8. As tribal allotments, the land in question is "Indian Country" under 18 U.S.C. § 1151(c).

9. Protestant agrees that the amount of the assessment is correct.

ISSUE

Whether cigarettes sold within the State of Oklahoma on tax exempt Indian land are subject to the State Cigarette Stamp Tax, 68 O.S. 1981, § 301 et seq.

CONTENTIONS OF PROTESTANT

Protestant contends that the sale of cigarettes by Indians on Indian land are not subject to the State Cigarette Stamp Tax because the State does not have jurisdiction in this case to assess the tax since any sale which takes place on Indian Land is not taxable by the State and the authority to assess such a tax is preempted by federal law.

CONTENTIONS OF THE DIVISION

The Division contends that the State has jurisdiction to assess the taxes discussed herein under authority of existing case law.

APPLICABLE LAW

The excise tax imposed by the State of Oklahoma is a tax on the ultimate consumer. Title 68 O.S. 1981, § 302 provides in pertinent part:

§ 302. Stamp excise tax upon sale, use, gift, possession or consumption of cigarettes

* * *

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 provisions of this section shall in no way affect the method of collection of such tax on cigarettes as now provided for by existing law.

Exemption from payment of this tax is provided for in 68 O.S. 1981, § 321, which provides:

§ 321. Exemption from tax

All cigarettes sold to veterans hospitals and state operated domiciliary homes for veterans located in the State of Oklahoma, for distribution or sale to disabled ex-servicemen or disabled ex-servicewomen interned in, or inmates of, such hospitals, or residents of such homes, and all sales to the United States are hereby exempted from the stamp excise tax levied by this Article.

A. Tax Application to Non-Indian Purchasers

It is well settled that non-Indians cannot avoid state taxation by conducting business on Indian land. In the case of Thomas v. Gay, 169 U.S. 264, 18 S.Ct. 340 (1898), the non-Indian appellants contended that the county was without jurisdiction to impose its taxes upon appellants' cattle that grazed on the Osage reservation located within the county. In refuting this contention, the Supreme Court answered in the following language:

As to that portion of the argument which claims that, even if the Indians were not interested in any way in the property taxed, the territorial authorities would have no right to tax the property of others than Indians located upon these reservations, it is sufficient to cite the cases of Railway Co. v. Fisher, 116 U.S. 28, 6 Sup.Ct. 246, and Maricopa & P.R. Co. v. Arizona, 156 U.S. 347, 15 Sup.Ct. 391, in which it was held that the property of railway companies traversing Indian reservations are subject to taxation by the states and territories in which such reservations are located.

Id., 18 S.Ct., at 343. The Court also dispensed with appellants' argument that the county taxes seriously affected the value of the leases to the Indians by stating that the tax on appellants'

cattle was “too remote and indirect to be deemed a tax upon the lands or privileges of the Indians.” Id. See Oklahoma Tax Commission v. Texas Co., 336 U.S. 342, 69 S.Ct. 561 (1949).

As to the sale of cigarettes to non-Indians on Indian land, the U.S. Supreme Court has consistently applied the reasoning of Thomas v. Gay in holding that the states have jurisdiction to tax sales to non-Indians. California State Bd. of Equalization v. Chemehuevi Indian Tribe, 106 S.Ct. 289 (1985). In Chemehuevi, the Court held that where the legal incidence of the sales tax fell on the non-Indian consumer, the State had the right to require the vendor to collect the tax. Chemehuevi, 106 S.Ct. at 240. Clearly, the taxing provisions of 68 O.S. 1981, § 302 imposes a tax on the consumer.

B. Tax Application to Non-Tribal Member Purchasers

The law in Oklahoma is that the State may exercise authority over Indians and their activity outside Indian Country. However, within Indian Country, State jurisdiction is limited by two tests established by the United States Supreme Court. In Williams v. Lee, 358 U.S. 217, 74 S.Ct. 269, 3 L.Ed.2d 251 (1959), the Court held that Indian Country can be amenable to State law if the law does not impose an infringement upon tribal self-government and the State law is not preempted by federal action. Williams v. Lee, 358 U.S. at 223, 79 S.Ct. at 272, 3 L.Ed.2d at 254. (See also State ex rel. May v. Seneca-Cayuga Tribe, 711 P.2d 77, 84 (Oct. 1985)

The infringement test allows State jurisdiction in cases not involving tribal self-government. With respect to non-tribal member purchasers, the United State Supreme Court, in Washington v. Confederated Tribes of Colville, 447 U.S. 134, 100 S.Ct. 2069 (1980), found that the State’s taxing statute created no infringement on tribal self-government. In Colville, the Court stated:

Nor would the imposition of Washington’s tax on [non-tribal members] contravene the principle of tribal self-government, for the simple reason that non-members are not constituents of the governing Tribe. For most practical purposes those Indians stand on the same footing as non-Indians resident on the reservation. * * * We find, therefore, that the State’s interest in taxing these purchasers outweighs any tribal interest that may exist in preventing the State from imposing its taxes.

Colville, 447 U.S. at 160-161, 100 S.Ct. at 2085.

In Colville, the Court also addressed the Federal preemption issue with respect to State taxation of non-tribal members. The Court stated:

Federal statutes, even given the broadest reading to which they are reasonably susceptible, cannot be said to pre-empt Washington’s power to impose its taxes on Indians not members of the Tribe. We do not so read the Major Crimes Act, 18 U.S.C. § 1153, which at most provides for federal-court jurisdiction over crimes committed on another Tribe’s reservation. Cf. United

States v. Antelope, 430 U.S. 641, 646-647, n. 7, 97 S.Ct. 1395, 1398-1399, 51 L.Ed.2d 701 (1977). Similarly, the mere fact that non-members resident on the reservation come within the definition of “Indian” for purposes of the Indian Reorganization Act of 1934, 48 Stat. 988, 25 U.S.C. § 479, does not demonstrate a congressional intent to exempt such Indians from state taxation.

Colville, 447 U.S. at 160-161, 100 S.Ct. at 2085.

From the above analysis, no bar can be found which would prohibit the State from imposing its cigarette tax on non-tribal members.

C. Tax Application to Tribal-Member Purchasers

The issue now presented is whether this State may require the seller in this case to collect and remit the cigarette tax on sales to tribal members on tribal land. The Division contends that, absent federal law exempting an Indian’s income or property from state taxation, the Indian is amenable to State taxation. The Division’s argument is based on the view that the Indian Tribes in Oklahoma have been assimilated into the mainstream of rights and responsibilities held by all citizens of the State.

A comprehensive discussion of the extent of this State’s authority over Indian activities on Indian land is found in the Oklahoma Supreme Court decision in State, ex rel. May v. Seneca-Cayuga Tribe, 711 P.2d 77 (Okl. 1985). In that decision, the Court stated that it did not regard state police power (regulation of bingo games in Indian Country) as a per se infringement on the exercise of tribal self-government. However, after balancing the State’s regulatory interest, the tribal stake in self-government and the federal policies and legislation, the Court concluded that State residuary jurisdiction may be exercised only to the extent that the 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. Seneca-Cayuga, 711 P.2d at 91-92.

To the extent that the activity conducted by Protestant is substantially directed to the general public, the State may regulate its effect thereon. However, it has not been held in Oklahoma or by the U.S. Supreme Court that the State may regulate commerce carried on in Indian Country between or among tribal members. The State’s interest in state revenues and regulating the miniscule extent of intra-tribal commerce in this case is still outweighed by the tribal stake in self-government and federal policies.

Based on the decision in Seneca-Cayuga, this Administrative Law Judge concludes that the State may require Protestant to collect cigarette tax to the extent that his sales are to non-Indians and Indians who are non-members of the self-governing unit of which Protestant is a member. As to the assessment herein considered, it appears from the record that the Protestant did not require identification from his purchasers regarding tribal membership, and as such, the assessed tax, interest and penalty is entirely proper, absent a showing of the purchaser’s identity. In the future, the Protestant is directed to maintain sufficient records regarding the identity of his

purchasers to allow the Oklahoma Tax Commission to properly audit the books and records of the Protestant.

CONCLUSIONS OF LAW

In view of the above and foregoing factual situation and applicable law thereto, the undersigned Administrative Law Judge concludes as follows:

(1) The Oklahoma Tax Commission has jurisdiction in this matter under 68 O.S. 1981 § 207.

(2) The impact of the cigarette stamp tax is on the vendee, user, consumer, or possessor of cigarettes under 68 O.S. 1981, § 302.

(3) The collection of the cigarette tax on the sale of cigarettes to non-Indians or to Indians who are non-members of the tribal unit of the seller is not exempt under 68 O.S. 1981, § 321, nor any other principle of law.

(4) State regulation of commercial activity conducted in Indian Country is permissible only if, and to the extent that, the activity is shown to affect non-Indians and Indians who are non-members of the self-governing unit. State ex. rel. May v. Seneca-Cayuga Tribe, 711 P.2d 77 (Okla. 1985).

(5) The assessment herein protested is valid to the extent that the cigarette tax is due from Protestant on the sale of cigarettes to non-Indians and Indians who are non-members of the tribe of which the seller is a member.

(6) Notwithstanding paragraphs (4) and (5) above, the assessment herein protested is also valid with respect to cigarette tax imposed on Indians who are members of the tribe absent a showing of the identity of the purchaser.

(7) In the future, the Protestant is directed to require tribal membership identification from the purchaser in order for such sales to be exempt.

(8) The Cigarette Stamp Tax protest of PROTESTANT d/b/a SMOKE SHOP should be denied.

DISPOSITION

It is the ORDER of the OKLAHOMA TAX COMMISSION that the protest of PROTESTANT d/b/a SMOKE SHOP 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.