

**JURIS:** OKLAHOMA TAX COMMISSION - DECISION  
**CITE:** 2001-02-13-008 / NOT PRECEDENTIAL  
**ID:** P9400218  
**DATE:** 02-13-01  
**DISPOSITION:** DENIED  
**TAX TYPE:** INCOME  
**APPEAL:** NO APPEAL TAKEN

### FINDINGS OF FACT AND CONCLUSIONS OF LAW STIPULATION OF FACTS

The parties stipulate to the following:

1. CLAIMANT is a member of the Osage Nation and is an Oklahoma citizen and resident. CLAIMANT is 1/4 degree of Osage Indian blood. Her total degree of Indian blood is 3/4.
2. CLAIMANT has been employed by the Indian Health Service, a federal agency, during the relevant times at issue in this case.
3. CLAIMANT resides at 000 ANONYMOUS STREET, ANYTOWN, Osage County, Oklahoma.
4. The home in which CLAIMANT resides is located in a sub-division built and owned by the Osage Tribal Housing Authority. Although the real property is not "trust" or "restricted" land, whether or not it is "Indian country" is in dispute in this case.
5. CLAIMANT's place of employment is the Pawhuska Indian Health Center located on land purchased by the Osage Nation from the Cherokee Nation pursuant to 17 Stat. 228, Act of June 5, 1872. This tract of land was reserved from allotment pursuant to 34 Stat. 539, Act of June 28, 1906. Title to the land upon which the health clinic is located has never been conveyed out of its trust status. Her place of employment is therefore "Indian country".
6. CLAIMANT filed a Form 511X for the year 1992 on March 24, 1994. The Division processed this return as an original return. This return was filed by CLAIMANT jointly with her husband. CLAIMANT claimed a refund of income tax withheld from her wages in the amount of \$227.00 under the ruling of the United States Supreme Court in *Oklahoma Tax Commission v. Sac and Fox Nation*, 113 S.Ct. 1985 (1993). CLAIMANT also filed a joint return on Form 511 for the year 1993 on March 24, 1994. CLAIMANT claimed a refund of income tax withheld in the amount of \$295.00 for 1993.

7. The Division reviewed the returns filed by CLAIMANT for the years 1992 and 1993. By letter of July 28, 1994, CLAIMANT's 1992 return was adjusted to deny the refund claimed and calculated a balance due of \$11.00. By letter of July 29, 1994, the Division billed CLAIMANT for the tax, penalty and interest in the amount of \$13.67. The Division also issued an assessment letter on July 29, 1994, to CLAIMANT regarding her 1993 return. The Division denied the refund claimed for 1993 and assessed additional taxes and interest in the amount of \$376.58, and concluded that she was not entitled to exemption from state income tax as a tribal member.

8. CLAIMANT timely protested the denial of her claim for refund and assessment of additional income tax by letter of August 25, 1994.

### **ADDITIONAL FINDINGS OF FACT**

9. During the years in question CLAIMANT lived within the State of Oklahoma. Claimant did not live on a formal Indian reservation or on tribal lands reserved or set apart by the United States for the use, occupancy or benefit of the Tribe. Claimant did not live on an Indian allotment, either restricted or held in trust by the United States.

10. Claimant lived in a home constructed and owned by the Housing Authority of the Osage Tribe of Indians in Oklahoma, a state agency created pursuant to 63 O.S. § 1057. The property was acquired by that agency in fee simple from the previous owner, the town of ANYTOWN, without restrictions.

11. There is no evidence that Claimant resided on lands that had been set aside by the federal Government for the use of Indians as Indian land, and which were under federal superintendence.

### **STIPULATION OF LEGAL ISSUE**

Whether CLAIMANT lived on "Indian country" and is thereby entitled to exemption from the payment of state income taxes on her earnings under the authority of *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973).

### **CONTENTIONS**

Based on documentation and briefs submitted in support of her refund claim, Claimant contends that she is a member of the Osage Nation, is employed by the Indian Health Service of the Public Health Service, a federal agency, on trust land, and lives on Indian country on land within the exterior boundaries of the Osage Reservation and within a dependent Indian community.

The Division acknowledges that Claimant has established her tribal membership and tribal employment, but contends that Claimant failed to meet the Indian country residency requirement.

**CONCLUSIONS OF LAW**

1. The Oklahoma Tax Commission has jurisdiction of this protest. 68 O.S. § 207.
2. Every resident individual having gross income for the taxable year in an amount sufficient to require the filing of a federal income tax return must file an Oklahoma income tax return and remit tax upon the taxable income. 68 O.S. § 2355 and § 2368. A resident individual is a natural person who is domiciled in the state, and any other natural person who spends in the aggregate more than seven (7) months of the taxable year within this state. 68 O.S. § 2353.
3. The established rule of law is that a state is without jurisdiction to subject a tribal member residing and working on Indian country, which is within the jurisdiction of the member's tribe, to a state income tax. *McClanahan v. State Tax Comm. of Arizona*, 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973); *Oklahoma Tax Commission v. Sac and Fox Nation*, 508 U.S. 114, 113 S.Ct. 1985, 124 L.Ed.2d 30 (1993); *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450, 115 S.Ct. 2214, 132 L.Ed.2d 400 (1995). However, Oklahoma may tax the income (including wages from tribal employment) of all persons, Indian and non-Indian alike, residing in the State outside Indian country. *Chickasaw Nation*, 115 S.Ct. at 2217.
4. "Indian country" includes formal and informal reservations, dependent Indian communities, and Indian allotments, whether restricted or held in trust by the United States, the Indian titles to which have not been extinguished. 18 U.S.C. § 1151; *Sac and Fox*, 508 U.S. at 123. Formal Indian reservations have not existed in Oklahoma for many years. For purposes of Section 1151, however, the Supreme Court has recognized "informal" reservations, which include lands held in trust for a tribe by the United States, *Oklahoma Tax Commission v. Citizen Band of Potawatomi Tribe of Okla.*, 498 U.S. 505 (1991), and those portions of a tribe's original reservation which were neither allotted to individual Indians nor ceded to the United States as surplus land, but were retained by the tribe for use as tribal lands. See, *Sac and Fox*, *supra*.
5. Pursuant to *Oklahoma Administrative Code* 710:1-5-47, the burden of proof in all proceedings, unless otherwise provided by law, is on the taxpayer to show in what respect the action or proposed action of the Tax Commission is incorrect.
6. Claimant is a member of the Osage Tribe.
7. Claimant is employed by the Pawhuska Indian Health Service and works in a location owned by the Osage Nation on land held in trust by the United States.

8. Claimant has failed to meet her burden of proof in that she has not produced evidence to establish that her place of residence is on a formal or informal reservation, trust or allotted land. Claimant argues that her residence in ANYTOWN is located within the exterior boundaries of the Osage Reservation, which has never been disestablished by Congress, and thus is in Indian county. The standard rules for interpretation of surplus land cases are considered when deciding whether Congress intended in a land act to eliminate a reservation entirely or whether it intended to maintain the reservation status of some or all of the non-ceded land. *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010 (8<sup>th</sup> Cir. 1999). Statutory language provides the most probative evidence of congressional intent; however, the historical context surrounding the Act's passage and to a lesser extent the subsequent treatment of the area in question and the pattern of settlement are also relevant considerations. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 344, 118 S.Ct. 789, 798, 139 L.Ed.2d 773, citing *Hagen v. Utah*, 510 U.S. 399, 411, 114 S.Ct. 958, 965, 127 L.Ed.2d 252.

While all of Osage County was originally set aside as a reservation, it does not remain so today. Prior to the Osage Allotment Act of June 28, 1906, 34 Stat. 539, the Osage reservation was held by the United States in trust for the Osage Tribe. The reservation was conterminous with present day Osage County. Under the Act, all land which belonged to the Tribes was to be equally divided among the tribal members.<sup>1</sup>

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<sup>1</sup> The Act of June 28, 1906, 34 Stat., 539, provides in part as follows:

Sec. 2

That all lands belonging to the Osage tribe of Indians in Oklahoma Territory, except as herein provided, shall be divided among the members of said tribe, giving to each his or her fair share thereof in acres, as follows:

First. Each member of said tribe, as shown by the roll of membership made up as herein provided, shall be permitted to select one hundred and sixty acres of land as a first selection; . . .

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Third. After each member has selected his or her first selection as herein provided, he or she shall be permitted to make a second selection of one hundred and sixty acres of land in the manner herein provided for the first selection.

Fourth. After each member has selected his or her second selection of one hundred and sixty acres of land as herein provided, he or she shall be permitted to make a third selection of one hundred and sixty acres of land in the manner herein provided for the first and second selections: Provided, That all selections herein provided for shall conform to the existing public surveys in tracts of not less than forty acres, or a legal subdivision of a less amount, designated a "lot". Each member of said tribe shall be permitted to designate which of his three selections shall be a homestead, and his certificate of allotment and deed shall designate the same as a homestead, and the same shall be inalienable and nontaxable until otherwise provided by act of Congress. The other two selections of each member, together with his share of the remaining lands allotted to the member, shall be known as surplus land, and shall be inalienable for twenty-five years, except as hereinafter provided.

Fifth. After each member has selected his or her first, second, and third selections of one hundred and sixty acres of land, as herein provided, the remaining lands of said tribe in Oklahoma Territory, except as herein provided, shall be divided as equally as practicable among said members by a commission to be appointed to supervise the selection and division of said Osage lands.

The lands were allotted directly to the 2,229 tribal members. All mineral rights were reserved to the Osage Tribe. *Id.* at § 2, Seventh, 34 Stat. 539. The Act provided that mineral royalties be placed in the United States Treasury and held in trust for a period of 25 years to the credit of individual members of the tribe. *Id.* at § 4, Second, 34 Stat. 539. The trust period was subsequently extended indefinitely until otherwise provided by Congress. Act of Oct. 21, 1978, 92 Stat. 1660. Although, the mineral estate remains fully reserved, the 1906 Osage Allotment Agreement severed the mineral estate from the surface estate. A certificate of competency, upon request of an adult member could be issued by the Secretary of Interior authorizing the member to sell any lands except the homestead. Act of June 28, 1906, at § 2, Seventh, 34 Stat. 539. The surplus lands became alienable and subject to state taxation upon issuance of a certificate of competency. *Id.* By Act of March 3, 1909, 35 Stat. 778, the Secretary of the Interior was empowered to sell the surplus lands of any Osage tribal member, provided that the sales were subject to the reserved mineral interests.

All of the reservation land with the exception of certain land reserved from selection was allotted to the individual Osage tribal members pursuant to the Act of 1906; a substantial amount of that land, the restrictions having been removed, is now owned by non-Indians. Most of the people living in Osage County are non-Indian. Osage County is no longer under federal protection, except for those areas which continue to be held in trust, are restricted, or are dependant Indian communities. Osage County is a political subdivision of the State of Oklahoma and governmental services are provided by state, county and various city governments. The Osage Housing Authority and also the land owned by the Authority is subject to state jurisdiction. *Eaves v. State*, 795 P.2d 1060, *reh den.*, 800 P.2d 251 (Okl.Cr. 1990). The mere fact that one's residence is located within what was once part of an Indian tribe's original treaty lands, does not by such fact alone mean that one lives in "Indian country" as that term is defined and used in 18 U.S.C. § 1151. The term "Indian country" does not automatically include all lands located within the original boundaries of a former or reduced Indian reservation. *See, e.g., South Dakota v. Yankton Sioux Tribe, supra; see also, Yankton Sioux Tribe v. Gaffey, supra.*

9. Moreover, the Claimant has not shown that her residence is in a dependent Indian community. The term "dependent Indian communities", contained in 18 U.S.C. § 1151, refers to a limited category of Indian lands that are neither reservations or allotments, and that satisfy two requirements. They must have been set aside by the Federal Government for the use of the Indians as Indian land and they must be under federal superintendence. *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520, 118 S.Ct. 948, 140 L.Ed.2d 30 (1998). Neither of these requirements is satisfied in this matter.

10. The fact that property is owned by a tribal housing authority, established pursuant to state law, does not in and of itself establish the property as a dependent Indian community. *See, Eaves v. State, supra; see also, U.S. v. Adair*, 111 F.3d 770 (10th Cir. 1997).

11. Accordingly, Claimant's income was fully taxable by the State of Oklahoma. The income tax claim for refund for 1992 and 1993 was properly denied.

### **WAIVER OF INTEREST AND PENALTY**

The facts of this case demonstrate that Claimant's claim of exclusion was based upon a good faith misunderstanding of the law regarding whether Claimant's income was subject to taxation by the State. Therefore, the interest and penalty may be waived by the Commission pursuant to 68 O.S. Supp. 1997, § 220.

### **DISPOSITION**

It is the DETERMINATION of the OKLAHOMA TAX COMMISSION, based upon the specific facts and circumstances of this case, that the income tax claim for refund be denied. It is further DETERMINED that all penalty and interest assessed and accruing be waived by the Tax Commission.

**OKLAHOMA TAX COMMISSION**

**CAVEAT:** This decision was **NOT** deemed precedential by the Commission. This means that the legal conclusions are not 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.