

JURISDICTION: OKLAHOMA TAX COMMISSION - DECISION
CITE: 2001-04-10-009 / NOT PRECEDENTIAL
ID: N9600016
DATE: 04-10-01
DISPOSITION: DENIED
TAX TYPE: INCOME
APPEAL: NO APPEAL TAKEN

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Claimant is a member of the Osage Tribe.
2. CLAIMANT received income from employment by the U.S. Department of the Interior, Bureau of Indian Affairs, Osage Agency for tax years 1990 through 1993 ("tribal income") and reported and remitted income tax to the State of Oklahoma on such income.
3. CLAIMANT AND SPOUSE filed amended joint income tax returns for tax years 1990 through 1993 claiming a refund of taxes remitted on her tribal income.
4. By letter dated June 23, 1995, the Audit Division denied Claimants' refund request for the reason that they failed to submit evidence that her residence is on Indian country.
5. By letter received June 28, 1995, Claimants protested the Division's denial.
6. A deed dated March 14, 1973, indicates that Claimant acquired property from MR. AND MRS. XYZ. This property was conveyed to the Housing Authority of the Osage Tribe and thereafter by deed filed January 17, 1985, the property was conveyed by the Housing Authority to CLAIMANT AND SPOUSE.
7. During the period in question, Claimant resided within the State of Oklahoma. The property where Claimant resided was owned in fee simple, without restriction. It was not held in trust and was not an Indian allotment. It was not located within a formal Indian reservation or on lands set apart or reserved for the use and protection of an Indian tribe or its members.
8. There is no evidence that taxpayer 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.

ISSUE

Whether Claimants have met their burden of proving that the income received by Claimant, which is the subject of the refund claim, is not taxable by the State of Oklahoma.

CONTENTIONS

Based on documentation submitted in support of her refund claim, Claimant contends that she is a Restricted Osage Mineral Estate Annuitant and tribal member employed by the Department of the Interior, Bureau of Indian Affairs, Osage Agency, Pawhuska, Oklahoma, residing within the boundaries of the Osage Reservation.

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. Claimant is a member of the Osage Tribe. Claimant's Wage and Tax Statements for 1990 through 1993 indicate that she worked for the Bureau of Indian Affairs. Additionally, Claimant provided documentation showing that her place of employment is on land held in trust by the Osage Tribe. Claimant has failed to meet her burden of proof in that she has not produced any evidence to establish that her place of residence is on a formal or informal reservation, trust or allotted land. Claimant contends that all of Osage Country is a reservation and thus is "Indian country". 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.¹

¹The 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; . . .

* * *

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.

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. 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.* The Secretary of the Interior, by Act of March 3, 1909, 35 Stat. 778, was empowered to sell the surplus lands of any Osage tribal member, provided that the sales were subject to the reserved mineral interests.

Claimant relies on the fact that she owns a fractional share of a mineral interest reserved and held in trust for the Osage tribe. Claimant contends that because the mineral rights underlie Osage County, that all of Osage County is a reservation and thus Indian country. However, while the mineral estate remains fully reserved, the 1906 Osage Allotment Agreement severed the mineral estate from the surface estate. Therefore, the mineral estate has no bearing on the outcome of this matter.

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-Indians. 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 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*, 522 U.S. 329, 118 S.Ct. 789, 791, 139 L.Ed.2d 773; *see also, Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010 (8th Cir. 1999).

6. Moreover, the Claimant has not shown that her residence is in a dependent Indian

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.

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. Therefore, the income tax claim for refunds for 1990 through 1993 should be denied.

DETERMINATION

It is the recommendation of the OKLAHOMA TAX COMMISSION, based upon the specific facts and circumstances of this case, that the income tax claim for refund of CLAIMANT be denied.

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.