JURISDICTION: **OKLAHOMA TAX COMMISSION - DECISION**
CITE: **2001-10-02-010 / NOT PRECEDENTIAL**
ID: **N0000017**
DATE: **10-02-01**
DISPOSITION: **DENIED**
TAX TYPE: **INCOME**
APPEAL: **NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Taxpayer protests the imposition by the State of Oklahoma of income taxes on wages she earned in "Indian country." The parties hereto appear by counsel. By agreement of the parties, the case has been submitted on the briefs and submissions of counsel. The Hearing Examiner also takes notice of the stipulations and submissions of the parties in a prior case before the Commission involving the same parties and the same facts and issues except for the tax years involved, *In re Jo Ann O'Bregon*, No. N-98-054 (Okl. Tax Comn. 1999), *aff'd*, 20 P.3d 175 (Okla. Civ. App. Div. 1 2001). Upon consideration thereof, and the files and records of the Oklahoma Tax Commission, the undersigned makes the following findings of fact, conclusions of law and recommendation as to the final disposition of said protest.

FINDINGS OF FACT

1. Taxpayer is a member of the Kaw Nation of Oklahoma[1], a federally-recognized Indian tribe.

2. During the tax years 1998 and 1999, taxpayer was employed by the Tribe on lands held in trust for the Kaw Nation by the United States. During the same period of time, taxpayer resided in Ponca City, Oklahoma, in a Mutual Help Home of the Housing Authority of the Kaw Tribe of Indians of Oklahoma. Both the home and the land upon which it was situated were owned by said housing authority in fee simple, without restrictions against alienation. The property was not held in trust by the United States for an individual Indian, or for an Indian tribe.

3. The property where taxpayer resided was located within the exterior boundaries of the Kaw Nation's "service area," which is a geographical district encompassed within Kay County, Oklahoma. Within that service area the Kaw Nation administers various federal and tribal health, social, welfare and economic services and programs, many of which are subject to federal regulations.

[1] Formerly known as the Kaw Tribe of Indians of Oklahoma.

4. The Housing Authority of the Kaw Tribe of Indians of Oklahoma also functions within the same geographical area, and operates pursuant to the provisions and authority of the Oklahoma Housing Authorities Act, 63 O.S. 1981, §1057, and Kaw Resolution Number 20-77.[2] Funding for the home ownership programs and Mutual Help Homes constructed and administered by the Housing Authority is provided by the United States government (Department of Housing and Urban Development).

5. On taxpayer's original Oklahoma income tax returns for the years in question, taxpayer excluded the income from her employment on tribal trust lands, contending such income to be exempt from taxation by the State. The Tax Commission's Audit Division disallowed the claimed exclusion and, on June 30, 2000, proposed the assessment of taxes thereon for the years 1998 and 1999, in the total amount of $3,276.00, plus interest thereon through that date in the amount of $332.29 and penalty totaling $327.60.

CONCLUSIONS OF LAW

1. The State is precluded from taxing the income of a member of a federally-recognized Indian tribe who both earns that income and lives within "Indian country" occupied by or subject to the governmental jurisdiction of the member's tribe. *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164 (1973*); Oklahoma Tax Commission v. Sac and Fox Nation*, 508 U.S. 114 (1993); *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U. S. 450, 115 S. Ct. 2214 (1995). Oklahoma, however, 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.

2. As defined by federal law and decisions of the U.S. Supreme Court, "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,

[2] In the prior case, the parties also purported to stipulate, as a "fact", that the housing authority was also created by the laws of the Kaw Nation, and is both a governmental subdivision and agency of that tribal government. Although a mixed question, the legal nature of the housing authority and whether it is a governmental agency, is primarily a question of law. Accordingly, the Commission is not bound by the parties' stipulation in that regard. *See, First Nat. Bank v. City Guaranty Bank of Hobart*, 51 P.2d 573, 577 (Okla. 1935). In addition, and contrary to this stipulation, taxpayer submitted a copy of correspondence from the Kaw Nation to the Tribe's attorney, dated *September 25, 1996*, asking the attorney to draft a Tribal Ordinance *creating* a Housing Act. No evidence was submitted that that was ever done.

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*. The term "dependent Indian communities" refers to a limited category of Indian lands that are neither reservations nor allotments, and that satisfy two requirements_first, they must have been set aside by the Federal Government for the use of the Indians_as Indian land; second, they must be under federal superintendence. *Alaska v. Native Village of Venetie Tribal Government*, ___ U.S. ___, 118 S. Ct. 948 (1998).

3. Taxpayer did not live on a formal or informal Indian reservation, or on an Indian allotment. The question then becomes whether the taxpayer lived in a "dependent Indian community" by virtue of living in a home owned by the Housing Authority of the Kaw Tribe of Indians of Oklahoma.

4. An Indian Housing Authority created pursuant to the provisions of the Oklahoma Housing Authorities Act is controlled by the tribe and requires a tribal resolution before it can legally function. 63 O.S. 1981, §1057. However, it is an agency of the State of Oklahoma, and subject to the State's jurisdiction. *Housing Authority of the Choctaw Nation v. Craytor*, 600 P.2d 314 (Okla. 1979); *Eaves v. State*, 795 P.2d 1060, *reh. den*., 800 P.2d 251 (Okla. Cr. 1990). Although the housing authority is administered by the tribe with direction and funding by the federal government (HUD), housing projects and Mutual Help Homes owned and constructed by such Indian housing authorities do not of themselves constitute "dependent Indian communities." *U.S. v. Adair*, 111 F. 3d 770 (10th Cir. 1997). Likewise, the various health, social, educational, welfare and financial programs, to a large degree administered by the Tribe within its own service area, are merely forms of general federal aid; and are not sufficient to support a finding of Indian country. *Native Village of Venetie Tribal Government*, 118 S.Ct. at 956. Only Congress can create Indian country, *Id.,* and a tribe's unilateral efforts to do so have no effect. *See, Buzzard v. Oklahoma Tax Com'n*, 992 F.2d 1073 (10th Cir.), *cert. denied*, 510 U.S. 994, 114 S. Ct. 555 (1993). Taxpayer did not live in a dependent Indian community.

5. In the taxpayer's prior protest, the Commission held that taxpayer did not live in Indian country. That determination was affirmed on appeal. *In re O'Bregon*, 20 P.3d 175 (Okla. Civ. App. Div. 1 2001). Taxpayer stipulates that since that case there have been no substantial changes in material facts, and suggests no reason why the final decision of the appellate court in that case is not controlling in this one.

6. Taxpayer's income was fully taxable by the State of Oklahoma. The disallowance of the claimed exclusion of her income was proper, and the proposed assessments were correct.

WAIVER OF PENALTY AND INTEREST

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

DISPOSITION

The foregoing protest should be denied, and the proposed assessment of deficient taxes should be adjudged due and owing. The penalty and interest assessed or accruing to the date of the Commission's order herein, and for a period of 30 days thereafter, should be waived.

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.