

JURISDICTION: OKLAHOMA TAX COMMISSION - DECISION
CITE: 2001-10-18-017 / NOT PRECEDENTIAL
ID: N9600100 / N9700023 / N9800029
DATE: 10-18-01
DISPOSITION: SUSTAINED IN PART / DENIED IN PART
TAX TYPE: INCOME
APPEAL: NO APPEAL TAKEN

FINDINGS OF FACT AND CONCLUSIONS OF LAW

NOW on this 17th day of July, 2001, the above-styled and numbered cause comes on for consideration pursuant to 710:1-5-38 of the *Oklahoma Administrative Code*. Pursuant to request of Claimant, Case No. N-97-023 was submitted on the information contained in the file. Hearings were held in Case Nos. N-96-100 and N-98-029. Notice of the hearing in Case No. N-96-100 was mailed to Claimant at her last known address, yet she did not appear. Claimant filed a written response dated September 4, 1998, in Case No. N-98-029 but did not appear. At the conclusion of the hearings, these matters were submitted for decision.

FINDINGS OF FACT

1. Claimant is a member of the Sac and Fox Tribe.

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2. Claimant received income from employment by the Sac and Fox Nation of Oklahoma for tax years 1988 through 1991 ("tribal income").
3. The Division audited and adjusted Claimant's 1990 state income tax return. The return originally claimed a refund of withheld taxes in the amount of \$284.00. The Division adjusted the amount of tax due, pursuant to Rate Schedules, from \$1,262.00 as reported to \$1,680.00, resulting in a balance due of \$137.00.
4. The Division did not issue a proposed assessment but instead forwarded a copy of the adjusted return with the notification to wait for a billing to remit payment.
5. Claimant forwarded a letter dated August 27, 1991, that contained the notation "Second Demand 2-9-93" to the Division, which was received February 12, 1993. In the letter, Claimant requested a refund of income taxes for tax years 1984 through 1990 based on the fact that she was a member of and employed by the Sac and Fox Nation.

6. There was no evidence in the file that the Division had received this refund request before February 12, 1993.

7. The Division, by letter dated May 21, 1993, acknowledged Claimant's request and forwarded Forms 511X for Claimant to file a refund claim.

8. On June 18, 1993, Claimant filed amended income tax returns for tax years 1988 and 1989; on June 16, 1993, she filed an amended income tax return for tax year 1990; and on June 18, 1993, she filed an amended income tax return for tax year 1991. Each year a refund of taxes remitted on her tribal income was claimed, in the following amounts:

1988	\$ 945.00
1989	\$ 1,089.00
1990	\$ 1,546.00
1991	\$ 605.00

9. By letter dated April 26, 1996, the Audit Division denied Claimant's refund requests for the reason that she failed to submit evidence that her principal place of residence is on Indian country.

10. Claimant provided an affidavit from THE Acting Executive Director of the Housing Authority of the Sac and Fox Nation. THE ACTING EXECUTIVE DIRECTOR averred that Claimant signed a Mutual Help and Occupancy Agreement on February 24, 1984, that the Agreement was canceled on December 27, 1989, and that the Mutual Help home is situated on tribal trust property.

11. A letter accompanying the affidavit contained a handwritten notation signed by Claimant that "home was transferred to my mother in 1989 w/whom I resided."

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12. Claimant received income from employment by the Sac and Fox Nation of Oklahoma for tax years 1994 and 1995.

13. Claimant filed income tax returns for tax years 1994 and 1995 excluding her tribal income. A refund in the amount of \$67.00 was claimed on the 1995 income tax return of Claimant.

14. A notice was sent to Claimant by the Account Maintenance Division on April 6, 1996, notifying her that the refund of \$67.00 for the 1995 tax year had been applied to the income tax liability for the 1990 tax year.

15. Claimant filed a timely protest to the income tax refund intercept.

16. By letters dated September 30, 1997, the Audit Division disallowed Claimant's exclusions for tribal income for 1994 and 1995 for not meeting all the requirements for exclusion of tribal income and issued proposed assessments of additional income tax for those years.

17. For the 1994 tax year the amount in controversy is \$2,692.10, consisting of \$1,967.00 tax and interest through September 30, 1997, in the amount of \$725.10. For the 1995 tax year the amount in controversy is \$2,703.83, consisting of \$2,218.00 tax and interest through September 30, 1997, in the amount of \$485.83.

18. By letter dated October 19, 1997, Claimant protested the Division's denial.

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19. By letter dated January 20, 1998, the Division assessed income tax, interest and penalty against Claimant for the 1993 tax year.

20. The assessment is based on information made available by the Internal Revenue Service to the Tax Commission which indicated that Claimant had income from Oklahoma sources sufficient to require the filing of a state income tax return and that the records of the Division show that Claimant did not file and report such income on an Oklahoma state income tax return for the 1993 tax year.

21. For tax year 1993, the total amount in controversy is \$3,200.33, consisting of \$1,764.00 tax, interest through January 17, 1998, in the amount of \$995.33, and penalty in the amount of \$441.00.

22. By letter dated March 16, 1998, Claimant protested the Division's assessment.

ISSUES

I. Whether Claimant has met her burden of proving that the income earned, which is the subject of the refund claim, is not taxable by the State of Oklahoma.

II. Whether Claimant's refund claim for tax year 1993 is barred by the statute of limitations.

III. Whether Claimant filed a timely protest to the proposed assessment of income tax for the 1993 tax year.

CONTENTIONS

Based on documentation submitted in support of her refund claim, Claimant contends that she is a member of the Sac and Fox Tribe, lives and works on land subject to the jurisdiction of the Tribe and is not subject to state income taxes.

The Division acknowledges that Claimant has established her tribal membership and that she met the Indian country employment requirements for all years except tax year 1993. Moreover, Division contends that Claimant failed to meet the Indian country residency requirements for all years at issue. Additionally, Division contends that Claimant's refund claim for 1988 is barred by Section 2373 of Title 68 and that Claimant failed to file a timely protest to the Division's proposed assessment of income tax for tax year 1993.

CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission has jurisdiction of this protest. 68 O.S. § 207.
2. Section 223(a) of the Uniform Tax Procedure Code, 68 O.S. 1991, § 202 *et seq.*, provides:

No assessment of any tax levied under the provisions of any state tax law except as provided in the following paragraphs of this section, shall be made after the expiration of three (3) years from the date the return was required to be filed or the date the return was filed, whichever period expires the later, and no proceedings by tax warrant or in court without the previous assessment for the collection of such tax shall be begun after the expiration of such period. No assessment shall be required if a report or return, signed by the taxpayer, was filed and the liability evidenced by the report or return has not been paid.

3. Here, the Division is attempting to collect the tax resulting from its adjustments to the 1990 tax return without the previous assessment of the tax. The Division's action is in direct violation of the above-cited statutory provision.

4. Claimant did not file a timely protest to the proposed income tax assessment for tax year 1993. Therefore, the proposed assessments are final and absolute and the Tax Commission is without jurisdiction to consider the protest. 68 O.S. 1991, § 221(e). See, *Matter of Request of Hamm Production Co.*, 652 P.2d 283 (Okl. 1982).

5. 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.

6. 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.

7. "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. The term "Indian country" does not automatically indicate all land located within the original boundaries of a former or reduced Indian reservation. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 118 S.Ct. 789, 139 L.Ed.2d 773 (1998).

8. 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 has not produced evidence to establish for the years 1993, 1994 and 1995 that she resided on a formal or informal reservation or an Indian allotment. Neither did Claimant establish she lived 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.

9. Claimant's wages from her employment by the Tribe during the time she worked and lived on tribal trust land were exempt from taxation by the State. Of the years claimed, this includes 1988, 1989, 1990 and 1991. As to the years 1988 through 1991, taxes may be refunded if a timely claim was made therefor. The assessments for 1993, 1994 and 1995 were properly issued because Claimant has not shown that she lived in Indian country during that time.

10. Oklahoma law permits an income taxpayer to give notice of an overpayment and claim a refund of any portion of income taxes voluntarily reported and paid during the three-year period immediately preceding the notice to the Oklahoma Tax Commission of a refund claim. 68 O.S. 1991, § 2373. Consequently, a claim for refund must be filed within three years from the due date of the original tax return. *Strelecki, et al. v. Oklahoma Tax Commission*, 872 P.2d 910, 923-924 (Okl. 1993). A refund claim filed after the three-year period is barred. *Id.* at 911 n.b.

11. In the present case, the record reflects that Claimant failed to file a claim for refund of the income taxes paid on the tribal income received in 1988 within three (3) years of the payment of the taxes on such income. Accordingly, Claimant's refund claim for tax year 1988 is barred under the provisions of Section 2373. The claim for refund for 1989, 1990 and 1991 should be allowed.

WAIVER OF INTEREST

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 may be waived by the Commission pursuant to 68 O.S. Supp. 1997, § 220.

DISPOSITION

It is the recommendation of the undersigned Administrative Law Judge, based upon the specific facts and circumstances of this case, that in Case No. N-96-100 the refund claims for 1989, 1990 and 1991 should be allowed and paid, that the remaining income tax claim for refund for tax year 1988 of CLAIMANT be denied; that in Case No. N-97-023, the income tax protest of PROTESTANT to the proposed assessments be denied; and that in Case No. N-98-029 the income tax protest of PROTESTANT be dismissed in accordance with 710:1-5-46 of the *Oklahoma Administrative Code*. It is further recommended that all penalty and interest assessed or accruing to the date of the Commission's order herein, and for a period of thirty (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.