JURISDICTION: **OKLAHOMA TAX COMMISSION - DECISION**
CITE: **2002-04-17-005 / NOT PRECEDENTIAL**
ID: **N9600114**
DATE: **04-17-02**
DISPOSITION: **DENIED**
TAX TYPE: **INCOME**
APPEAL: **NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

NOW on this 7th day of March, 2002, the above-styled and numbered cause comes on for consideration pursuant to 710:1-5-38 of the Oklahoma Administrative Code. Claimants represent themselves in this matter. The Audit Division is represented by AN Assistant General Counsel, General Counsel's Office of the Tax Commission. A hearing was held in this matter, and upon submission of additional documentation in support of the protest, the case was submitted for decision.

FINDINGS OF FACT

1. Claimant B is a member of the Comanche Tribe of Oklahoma, a federally recognized Indian tribe.

2. During the years 1989 through 1994, Claimant B received income from employment by the Comanche Indian Tribe on tribal trust land ("tribal income").

3. On April 15, 1993, Claimants filed an Oklahoma individual income tax return (Form 511EZ) for 1992, excluding her tribal income. A refund of tax in the amount of $576.00 was claimed on the tax return of Claimants.

4. The Division adjusted Claimants' 1992 income tax return (Form 511EZ). By letter dated August 6, 1993, Claimants were advised of the adjusted tax due of $125.00 and notified to wait for a billing to remit payment.

5. The Tax Commission issued and caused to be filed against Claimants Tax Warrant ITI99999999 for the 1992 tax year in the amount of $167.20.

6. Claimants filed amended joint income tax returns for tax years 1989 through 1992 [1] (Form 511X) excluding her tribal income and claiming a refund of taxes in the amounts of $530.00, $559.00, $686.00 and $576.00, respectively.

[1] Note that the 1992 Form 511X does not deviate in any substantive way from the 1992 Form 511EZ previously filed by Claimants.

7. Claimants filed a joint income tax return for 1994, excluding all of her tribal income. The Wage and Tax Statement submitted for 1994 indicates that no state income tax was withheld from her wages.

8. By letter dated April 26, 1996, the Division denied the refund requests for 1989, 1990, 1991 and 1992 for the reason that Claimants failed to submit evidence that their principal place of residence was on Indian country.

9. By letter dated May 24, 1996, Claimants protested the Division's denial.

10. On March 17, 1997, the Audit Division issued an assessment for the 1993 tax year, which informed Claimants that their 1993 income tax return was compared with information received from the Internal Revenue Service. As a result of the comparison, Oklahoma Tax Commission records indicate that Claimants owed additional tax in the aggregate amount of $1,141.67, consisting of income tax in the amount of $767.00, penalty in the amount of $38.35 and interest in the amount of $336.32.

11. By letter dated April 1, 1997, Claimants protested the proposed assessment for tax year 1993 and stated that tax amendments had been filed for all the years 1989 through 1994, including 1993.

12. During the time in question, Claimants lived within the State of Oklahoma, on property owned by the Housing Authority of the Comanche Indian Tribe of Oklahoma, an agency created pursuant to the Oklahoma Housing Authorities Act, 63 O.S. § 1051, et seq. The property is situated on a portion of land that was formerly a Comanche individual Indian allotment. The restrictions on the land in question were removed and thereafter the property was owned by the Housing Authority in fee simple, without restrictions. It was not located within a formal Indian reservation, or on lands either reserved or retained by an Indian tribe or otherwise set apart by the United States for the use, occupancy, protection or benefit of an Indian tribe or its members. The land had not been set aside by the Federal Government for the use of Indians as Indian lands and was not under federal superintendence as such.

ISSUE

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

CONTENTIONS

Claimants contend that CLAIMANT B is a member of and employed by the Comanche Tribe, works on Comanche trust land and that they reside in a dependent Indian community in mutual help housing owned by the Housing Authority of the Comanche Indian Tribe of Oklahoma, all within the jurisdictional service area of the Comanche Tribe. In support of the contention that Claimants live in a dependent Indian community, Claimants contend that the United States government through Housing Urban Development (HUD) regulations control virtually every legal consideration regarding the residential property until the Mutual Help and Occupancy agreement is no longer in effect; that Claimants are dependent on tribal service, i.e., social services, supplemental nutritional assistance, educational needs and medical care; that the Comanche tribal members residing in the area regard themselves as one tribal community and that the "MHO [agreement] signed by claimants and the Comanche Housing Authority, represented the ensurance of adequate housing for themselves and protection of their heirs."

The Division acknowledges that Claimant has established her tribal membership and tribal employment, but contends that the Indian country residency requirement has not been met. Specifically, the Division contends that the deed submitted by Claimants does not contain language that the land is held in trust or allotted land and that the land on which the Mutual Help Home is situated is owned in fee by the Housing Authority of the Comanche Indian Tribe of Oklahoma, a state agency. Further, the Division contends that Claimants have not presented sufficient evidence that the Mutual Help Home is a dependent Indian community.

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 1992 tax return without the previous assessment of the tax. The Division's action is in direct violation of the above-cited statutory provision. Therefore, the adjustment and related tax warrant for 1992 should be withdrawn and any payments previously applied toward the adjusted amount should be credited to Claimants' account.

4. 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.

5. 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.

6. "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.

7. 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). Claimants argue that they live in a dependent Indian community.

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 (Okl. 1979); Eaves v. State, 795 P.2d 1060, reh den., 800 P.2d

251 (Okl.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 findings of Indian country. Native Village of Venetie Tribal Government, 118 S.Ct. at 956. Claimants did not live in a dependent Indian community.

Claimants did not live on a formal or informal reservation, within a dependent Indian community, or on an Indian allotment. 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 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. South Dakota v. Yankton Sioux Tribe, 118 S.Ct. 789 (1998). Therefore, the income tax claim for refund for 1989 through 1992 should be denied and the deficiency assessment for 1993 should be upheld.

WAIVER OF INTEREST AND PENALTY

The facts of this case demonstrate that the 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 protest to the denial of the income tax claim for refund of Claimants for tax years 1989 through 1992 and the protest to the proposed assessment for 1993 be denied and that the adjustment and related tax warrant for the 1992 tax year be withdrawn and any payments applied toward the adjusted amount should be credited to Claimants' account. It is further DETERMINED that all penalty and all 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.