JURISDICTION: **OKLAHOMA TAX COMMISSION - DECISION**
CITE: **2002-07-16-005 / NOT PRECEDENTIAL**
ID: **N0000009**
DATE: **07-16-02**
DISPOSITION: **SUSTAINED IN PART / DENIED IN PART**
TAX TYPE: **INCOME**
APPEAL: **NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Taxpayer is a member of the Apache Tribe of Oklahoma, a federally recognized Indian tribe. During the tax years in question, taxpayer lived on an individual trust allotment, part of the original allotment of Comanche allottee No. 1603. The land was originally an allotment of the lands of the former Kiowa, Comanche and Apache Reservation in Oklahoma.

2. During the tax year 1996, taxpayer was employed by the Apache Tribe of Oklahoma, on land held in trust for that tribe by the United States of America. On taxpayers' original joint Oklahoma income tax return for that year, taxpayers excluded the wages PROTESTANT had received from the Tribe, claiming such income to be exempt from taxation by the State. On October 29, 1999, the Commission's Audit Division disallowed the claimed exclusion, and proposed the assessment of additional taxes against the taxpayers in the amount of $507.00, plus penalty and interest totaling $243.85 to that date.

3. During the tax years 1997 and 1998, PROTESTANT was employed by a bank owned and operated by the Delaware Tribe of Western Oklahoma, on land held in trust for that tribe by the United States of America. The Delaware Tribe of Western Oklahoma is another federally recognized Indian tribe. The Apache tribe and the Delaware Tribe did not share the same reservation.

4. On taxpayers' joint Oklahoma income tax returns for 1997 and 1998, taxpayers excluded the income PROTESTANT had received from the Delaware Tribe, also claiming that income to be exempt from taxation by the State. On October 29, 1999, the Audit Division disallowed those claimed exclusions also, and proposed an assessment for 1997 in the amount of $434.00 tax, $100.24 interest to that date and $43.40 penalty. On the same date the Division proposed an assessment for 1998 in the amount of $1,563.00 tax, $126.54 interest to date, and $156.30 penalty.

Taxpayers protest all three proposed assessments.

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 governed by 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. Informal reservations 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.

3. The proposed assessment for 1996 is erroneous, and the protest thereto should be sustained. The Division disallowed the claimed exclusion because taxpayers lived on land originally allotted to a Comanche, and PROTESTANT is an Apache. Although the Apache and Comanche Tribes of Oklahoma are separate and independent Indian tribes, the reservation that was allotted to individual Kiowas, Comanches and Apaches was shared by the three tribes, who exercised concurrent jurisdiction over it. Being an allotment of a shared reservation, PROTESTANT 's residence may be deemed to be under the jurisdiction of the tribe of which is a member.

4. However, the rule in McClanahan does not apply to taxation of nonmembers, even where they are Indians. Duro v. Reina, 495 U.S. 676, 686-87 (1990). Income earned by Native Americans while living and working on reservations of tribes of which they are not members is taxable by the State. New Mexico Taxation and Revenue Dept. v. Greaves, 864 P.2d 324 (N.M.1993). See also, LaRock v. Wisconsin Dept. of Revenue, 621 N.W. 2d 907 (Wis. 2001) (Duro v. Reina not overturned in the taxing context by subsequent federal legislation; Indian not exempt from state income tax while living and working on land of tribe of which she was not a member); and Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134 (1980) (For most practical purposes, nonmember Indians resident on another tribe's reservation stand on the same footing as non-Indians residing on the reservation.)

5. The land where PROTESTANT was employed by the Delaware Tribe, was not under the jurisdiction of her own tribe. Since she did not derive her income during 1997 and 1998 on Indian country under the jurisdiction of her own tribe, that income was fully taxable by the State of Oklahoma. The protest to the proposed assessments for those two years should be denied.

WAIVER OF PENALTY AND INTEREST

The facts of this case demonstrate that taxpayers' claim of exclusion was based upon a good faith misunderstanding of the law regarding whether PROTESTANT'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

Taxpayers' protest to the proposed assessment for 1996 should be sustained. Their protest to the proposed assessment for 1997 and 1998 should be denied, and the additional taxes assessed for those years should be adjudged due and owing. However, all penalty and interest assessed or accruing as to those years, to the date of the Commission's order herein and for a period of thirty 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.