JURISDICTION: **OKLAHOMA TAX COMMISSION - DECISION**
CITE: **2002-07-23-004 / NOT PRECEDENTIAL**
ID: **N0200001**
DATE: **07-23-02**
DISPOSITION: **DENIED**
TAX TYPE: **INCOME**
APPEAL: **NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-named taxpayers protest the proposed assessment of income taxes on income received from employment in "Indian country." After a hearing, and upon consideration of said protest, the files and records of the Oklahoma Tax Commission, and the evidence adduced in regard hereto, 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 Otoe-Missouria Tribe of Indians of Oklahoma, a federally recognized Indian tribe. Taxpayer's spouse is a member of the Ponca Tribe of Indians of Oklahoma, another federally recognized Indian tribe.

2. During the years in questions, both taxpayers were employed by their respective tribes, on land held in trust for each tribe by the United States of America. At the same time, taxpayers resided in Oklahoma on a restricted trust allotment of the Ponca Tribe.

3. On taxpayers' original joint Oklahoma income tax returns for 1998, 1999 and 2000, taxpayers excluded the income each had received from his or her tribe, claiming such income to be exempt from state taxation. The resulting returns requested a refund of all state income taxes withheld from taxpayers' wages. Without audit or examination of the returns, checks were issued for the claimed refunds.

4. After examination of taxpayers' returns, the Commission's Audit Division disallowed the claimed exclusion of PROTESTANT's income and recalculated taxpayers' income tax liability accordingly. On November 15, 2001, the Division proposed an assessment of the resulting tax deficiency for 1998 in the amount of $481.00, plus $186.39 interest thereon to that date, and $48.10 penalty. On January 15, 2002, the Division proposed assessments of deficient tax totaling $1,324.00 for 1999 and 2000, plus $226.95 interest thereon to that date, and $132.40 penalty. Taxpayers protest.

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. Section 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*.

3. 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.)

4. In this case, although PROTESTANT earned his income on Indian country under the jurisdiction of his own tribe, he did not live there. Taxpayers' residence was on another tribe's Indian country, the Poncas. As to the tribe where he resided, PROTESTANT "stood on the same footing as a non-Indian." *Collville, supra*. His income, therefore, was fully taxable by the State of Oklahoma. The proposed assessments were correct.

5. Taxpayers also question whether the State can assess these taxes almost three years after the returns were filed, and whether the acceptance of their returns and the issuance of the refunds estops the State from demanding the money back. Both questions are governed by statute. Tit. 68, Okla. Stat. Section 223 provides a statute of limitations against the State from assessing any tax "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." All of these assessments were proposed within the three year period from the date the returns were due. As to the second question, tit. 68 Okla. Stat. Section 2385.17 provides that "The making of any refund shall not be a conclusive finding of the tax due by any individual but shall be made subject to the future audit of his return and the determination of his liability." The proposed assessments were not barred either by the statute of limitations or by the prior refunds.

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, Section 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.