**JURISDICTION:** **OKLAHOMA TAX COMMISSION - DECISION**
**CITE:** **2003-11-13-04 / NOT PRECEDENTIAL**
**ID:** **N0300009**
**DATE:** **11-13-03**
**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 the per capita distributions received from an Indian tribe. Taxpayers appear in person and by counsel. After a hearing, and upon consideration of said protest, the files and records of the Oklahoma Tax Commission, and the evidence and testimony 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 Morongo Band of Cahuilla Mission Indians of the Morongo Reservation, California,[1] a federally-recognized Indian tribe. The tribe, its reservation, and all its operations are located in the State of California. Taxpayers are residents of Oklahoma.

2. The tribe owns and operates a gaming establishment on its California reservation, and distributes the profits from that enterprise to the tribe=s members on a per capita basis. Under the terms of the Indian Gaming Regulatory Act, 25 U.S.C. ∋2701 *et seq*. ("IGRA"), and the Internal Revenue Code, such per capita payments are subject to federal taxation and the tribe must withhold federal income tax from those payments. 25 U.S.C. ∋2710(b)(3)(D); 26 U.S.C. ∋3402(r). The tribe did so in this case, but did not withhold any state income tax. The per capita payments to TAXPAYER totaled $143,171 in the year 2000, and over $229,500 in 2001.

3. Taxpayers, husband and wife, excluded those distributions on their joint Oklahoma income tax returns for 2000 and 2001, claiming the distributions to be income from an out of state business activity.[2]

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[1] Also known as the Morongo Band of Mission Indians

[2] Taxpayers initially claimed such income to be excludable on their 2000 return as income earned by a reservation Indian from sources located on the reservation. Taxpayers no longer make that claim.

4. Taxpayers are not actively engaged in any business activity either inside or outside of Oklahoma, and did not file any schedule or form relating to profits or losses from a business with either their state or federal income tax returns.

5. The Audit Division disallowed taxpayers' claimed exclusion, and on January 6, 2003, proposed to assess additional income taxes for the 2000 tax year in the amount of $8,560.00, plus penalty of $856.00 and interest through that date of $2,219.74. On March 26, 2003, the Division proposed the assessment of $12,768.00 in additional tax for 2001, plus $1,276.80 penalty and interest to date of $1,810.26. Taxpayers protest.

## CONCLUSIONS OF LAW

1. Title 68 Okla. Stat. ∋2358(A)(4)(c) provides that the net income or loss from a non-unitary business activity shall be allocated to the state in which such activity is conducted. Taxpayers argue that, since the gaming facility is owned by the tribe, and TAXPAYER is a tribal member, TAXPAYER is therefore an owner of the business. As an owner, taxpayers contend, her distribution of the casino's net profits constitutes income from an out of state business activity, and is not taxable by Oklahoma pursuant to ∋2358(A)(4)(c).

2. Taxpayers misunderstand the nature of an individual member's rights in tribal property. According to a leading authority on Indian law:

> It is clearly established that where legal or equitable title to real or personal property is vested in the tribe it is not vested in the individual members thereof,. . . *The right of the individual Indian is, in effect, a right of participation similar in some respects to the rights of a stockholder in the property of a corporation*.

FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 183 (1988). (Emphasis added.) The individual tribal member has only an intangible right to share in tribal property. *Id*., at 184. In a case similar to this one, also involving per capita distributions by the Morongo Band, the California State Board of Equalization reached the same conclusion: "[W]e believe that payments from the tribe to its members, which payments are not compensation for services, must be regarded as income from an intangible sourced to the residence of the tribal member." *In the Matter of the Appeal of Samuel L. Flores*, 2001-SBE-004, Calif. St. Bd. Of Equal. (6/21/2001).

3. The per capita distributions of tribal property to TAXPAYER were not made as a result of any business activity or ownership on her part, but were made by virtue of her intangible rights as a member of the tribe. In Oklahoma, as in California, income from intangible rights is allocable to the state of the taxpayer's domicile. 68 O.S. 2001, ∋2358(A)(4)(b). In this case, Oklahoma.

## DISPOSITION

The protest of TAXPAYERS to the proposed assessment of additional income tax, penalty and interest for the years 2000 and 2001, should be denied.

**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.