JURISDICTION:	OKLAHOMA TAX COMMISSION
CITE:	2004-03-16-04
ID:	CR-98-001
DATE:	MARCH 16, 2004
DISPOSITION:	PARTIAL DISMISSAL
TAX TYPE:	GROSS PRODUCTION
APPEAL:	AFFIRMED
CITE:	2006 OK CIV APP 21, 130 P.3d 767

MOTION TO DISMISS

Upon review of the file and records, including the record of the proceedings held on May 1, 1998, to consider the *Motion to Dismiss*, the undersigned finds:

FINDINGS OF FACT

1. On October 31, 1997, Claimant filed a refund request for "Oklahoma gross production taxes and petroleum excise taxes withheld from [Claimant's] oil and gas runs" for the period of January 1989 through December 1994.

2. By letter dated February 4, 1998, the Division notified Claimant of its decision to disallow the claim. The reason stated for the disallowance is "that oil and gas produced from restricted allotted lands of members of the Five Civilized Tribes of Okla. is subject to Gross Production and Petroleum Excise Taxes. Congressional Act of May 10, 1928, C. 517, 45 Stat. 495. §3."

3. Claimant, by letter dated February 9, 1998, protested the denial of his claim for refund and demanded a hearing.

4. On April 1, 1998, the Division filed a *Motion to Dismiss* on the grounds and for the reason that Claimant's claim raises a federal constitutional issue and seeks to have the Congressional Act of May 10, 1928, C 517, 45 Stat. 495 §3 declared unconstitutional under the Fifth Amendment to the Constitution of the United States, which is outside the scope of authority of the Administrative Law Judge.

5. Claimant filed a *Response to Motion to Dismiss* stating that the Congressional Act of May 10, 1928, had previously been declared unconstitutional as applied to Indian allottees by the Oklahoma Supreme Court citing *Carter Oil Co. v. Oklahoma Tax Commission*, 166 Okla. 1, 25 P.2d 1092 (Okla. 1933) and that the opinion in *Carter* is applicable to the facts in this case. Additionally, Claimant alleges that the Division, in 1988, granted a claim for refund by a full-blood Creek Indian on gross production and petroleum excise taxes on production from allotted, restricted lands and therefore its denial in the instant matter is contrary to the position taken in that case.

CONCLUSIONS OF LAW

WHEREFORE, premises considered the undersigned concludes as a matter of law:

1. The Tax Commission is vested with jurisdiction to consider the *Motion to Dismiss.* 68 O.S. § 207 and *Oklahoma Administrative Code 710:1-5-46*.

2. In cases of overpayment, duplicate payment, or payment made in error on account of the production being derived from lands which are exempt from taxation, such as; restricted Indian lands, lands owned by the United States, the state, counties, cities, towns or school districts, the Commission is authorized to refund such overpayment, duplicate, or erroneously paid gross production taxes where an application for such refund is made within three (3) years from the date of the payment thereof. 68 O.S. 1991, § 1008.

3. The refund provisions set forth in Section 1008 of Title 68 apply to petroleum excise tax. 68 O.S. 1991, § 1106.[1]

4. The refund claim must be filed with the Tax Commission within three years from the date of payment of the tax. 68 O.S. 1991, § 1008. On October 31, 1997, Claimant filed its gross production and petroleum excise tax refund claim for the period of January 1989 through December 1994. The evidence in the file indicates that a portion of the refund claim is barred by the limitation period set forth in Section 1008 of Title 68. Therefore, the portion of the refund claim that relates to gross production and petroleum excise taxes paid prior to October 31, 1994, is barred pursuant to Section 1008 of Title 68.

5. For the remaining periods and amounts not barred by statute, sufficient cause has not been shown to dismiss that portion of Claimant's refund claim.

DISPOSITION

THEREFORE, the refund claim for gross production and petroleum excise tax of CLAIMANT, made for taxes paid prior to October 31, 1994, is barred by the statute of limitations and IS therefore dismissed. The refund claim made for taxes paid after October 31, 1994, is not barred and WILL be set for further proceedings.

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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.

[1] This section provides:

The provisions of the gross production tax law in respect to refunds of such tax on the production derived from restricted Indian lands and lands owned by the United States, the state, counties, cities, towns and school districts, and therefore exempt from taxation, shall apply to petroleum excise tax on such exempt interest in said production from said lands.