JURISDICTION: **OKLAHOMA TAX COMMISSION DECISION**
CITE: **2006-05-04-024 / PRECEDENTIAL**
ID: **N-01-016**
DATE: **MAY 4, 2006**
DISPOSITION: **DENIED**
TAX TYPE: **INCOME TAX**
APPEAL: **NO APPEAL TAKEN**

HEARING EXAMINER'S REPORT

The above-named taxpayer protests 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 Sac and Fox Nation of Oklahoma, a federally recognized Indian tribe.

2. During the tax year 1998, taxpayer worked for the Tribe on tribal trust lands. At the same time taxpayer resided in a home owned by the Housing Authority of the Sac and Fox Nation, an agency of the Sac and Fox Nation. The home was not located on a formal Indian reservation or on tribal lands reserved or set apart by the United States for the use, occupancy or benefit of the Tribe. It was not located on an Indian allotment, either restricted or held in trust by the United States, or on lands that had been set aside by the Federal Government for the use of Indians as Indian land, and which were under federal superintendence.

3. On taxpayer's original Oklahoma income tax return for 1998, taxpayer excluded the income from his employment with the tribe, claiming such income to be exempt from state taxation. The resulting return claimed a refund of all state income taxes withheld from taxpayer's wages. Without examination or audit of the return, the Tax Commission issued a check for the claimed refund.

4. After examination of taxpayer's return, the Tax Commission's Audit Division disallowed the claimed exclusion of taxpayer's income, and recalculated taxpayer's tax liability accordingly. On July 16, 2001, the Division proposed the assessment of the resulting tax deficiency, in the amount of $413.00, plus interest thereon to that date of $139.39, and penalty in the amount of $41.30. Taxpayer protests.

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. 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. Taxpayer did not live on a formal or informal reservation, or on an Indian allotment. Neither did taxpayer reside within a dependent Indian, community. The term "dependent Indian communities" contained within 18 U.S.C. §1151 refers to a limited category of Indian lands that are neither reservations nor allotments, and that satisfy two requirements—first, they must have been set aside by the Federal Government for the use of the Indians as Indian land; second, they must be under federal superintendence. *Alaska v. Native Village of Venetie Tribal Government*, ___ *U.S.* ___ 118 S.Ct. 948 (1998). Neither of these requirements is satisfied in this case. The fact that property is owned by an Indian housing authority, created pursuant to state law, does not establish the property or the surrounding area as a dependent Indian community. *See, Eaves v. State*, 795 P.2d 1060, *reh. denied*, 800 P.2d 251 (Okl. Cr. 1990), *denial of habeas corpus aff'd sub nom. Eaves v. Champion*, 113 F.3d 1246 (10th Cir. 1997), *cert. denied*, 118 S.Ct. 1168 (1998); *see also, U.S. v. Adair*, 111 F.3d 770 (10th Cir. 1997).

4. Neither does the fact that the property may be owned by the Tribe or a tribal agency convert the property to the status of "Indian country." Only Congress can create Indian country, *Native Village of Venetie, supra*; mere ownership by a tribe or tribal agency is insufficient. *See, e.g., Buzzard v. Oklahoma Tax Com'n*, 992 F.2d 1073 (10th Cir.), *cert. denied*, 114 S.Ct. 555 (1993).

5. Accordingly, taxpayer's income was fully taxable by the State of Oklahoma. The proposed assessment was correct. Although the requested refund was erroneously issued, the making of any refund is not a conclusive finding of the tax due by any individual, but is made subject to the future audit of the return and the determination of the taxpayer's liability. 68 O.S. 1991, §2385.17.

WAIVER OF PENALTY AND INTEREST

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

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.