

**JURISDICTION:** OKLAHOMA TAX COMMISSION - DECISION  
**CITE:** 2007-09-11-04 / NON-PRECEDENTIAL  
**ID:** P-06-223-K  
**DATE:** SEPTEMBER 11, 2007  
**DISPOSITION:** DENIED  
**TAX TYPE:** INCOME  
**APPEAL:** NO APPEAL TAKEN

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

Protestants, HUSBAND AND WIFE, appear pro se. The Audit Division of the Tax Commission ("Division") is represented by OTC ATTORNEY, Assistant General Counsel, Office of the General Counsel, Oklahoma Tax Commission.

### STATEMENT OF THE CASE

Protestants filed their 2005 resident joint Oklahoma income tax return, Form 511, reporting an Indian employment exclusion of \$37,167.00 and claiming a refund of \$1,812.00. Upon audit of the return, the Division requested that Protestants provide additional information in order to process the return; namely, federal form 8845 and if applicable form 3800 to substantiate the claim to the Indian employment exclusion. The Division thereafter adjusted Protestants' 2005 income tax return by disallowing the Indian employment exclusion and by letter dated June 7, 2006, assessed additional income tax against Protestants for the 2005 tax year in the amount of \$731.00. Protestants timely protested the proposed assessment by letter dated July 17, 2006.

On December 20, 2006, the Division referred its file to the Office of the Administrative Law Judges ("ALJ's Office") for further proceedings pursuant to the Uniform Tax Procedure Code<sup>1</sup> and the Rules of Practice and Procedure Before the Oklahoma Tax Commission<sup>2</sup>. The case was docketed as Case No. P-06-223-K and assigned to ALJ, Administrative Law Judge.<sup>3</sup>

A pre-hearing conference was scheduled for February 13, 2007, by *Prehearing Conference Notice* issued January 16, 2007.<sup>4</sup> A *Report in Lieu of Prehearing Conference* was filed wherein the parties requested additional time in order for Protestants to seek the services of an attorney prior to proceeding to a hearing. After several continuances, a hearing was scheduled for May 17, 2007, by *Notice of Hearing* issued April 19, 2007.<sup>5</sup>

A closed hearing was held as scheduled.<sup>6</sup> Protestant, HUSBAND appeared, gave his statement and offered Exhibit 1<sup>7</sup> into evidence. The Division objected to certain documents

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<sup>1</sup> 68 O.S. 2001, § 201 et seq.

<sup>2</sup> Rules 710:1-5-20 through 710:1-5-47 of the *Oklahoma Administrative Code* ("OAC")

<sup>3</sup> OAC, 710:1-5-22(b).

<sup>4</sup> OAC, 710:1-5-28.

<sup>5</sup> OAC, 710:1-5-29.

<sup>6</sup> Protestant, HUSBAND, invoked his right to confidentiality pursuant to 68 O.S. 2001, § 205.

contained in the Exhibit. A ruling on the objection was reserved in order to allow the undersigned time to review the objected to documents. After review, the objection is denied. An exception to this ruling is allowed.

The Division presented its case through a statement by counsel and the offering of Division's Exhibits A through E. Division's Exhibits A through E were admitted into evidence without objection. The record was thereafter closed and the protest was submitted for decision.<sup>8</sup>

### FINDINGS OF FACT

Upon review of the file and records, including the recording of the hearing and the Exhibits received into evidence, the undersigned finds:

1. Protestants filed their 2005 resident joint Oklahoma income tax return, Form 511, reporting an Indian employment exclusion of \$37,167.00 and claiming a refund of \$1,812.00. Division's Exhibit A.

2. Protestants reported their address on the return as HOME ADDRESS. Division's Exhibit A. The owner of this property is the Housing Authority of the Cheyenne-Arapaho Tribes of Oklahoma.<sup>9</sup>

3. Protestants filed a Schedule 511-C with the return reporting an Indian employment exclusion of \$37,167.00, but failed to file a federal form 8845. Division's Exhibit A.

4. A W-2 attached to the return shows that Protestant, HUSBAND was employed by the Cheyenne and Arapaho Tribe and received wages, tips, or other compensation of \$37,167.00 from the Tribe during the 2005 tax year. Division's Exhibit A.

5. Upon audit of the return, the Division requested that Protestants provide additional information in order to process the return; namely, federal form 8845 and if applicable form 3800 to substantiate the claim to the Indian employment exclusion.<sup>10</sup>

6. The Division thereafter adjusted Protestants' 2005 income tax return by disallowing the Indian employment exclusion and by letter dated June 7, 2006, assessed additional income tax against Protestants for the 2005 tax year in the amount of \$731.00. Division's Exhibit C.

7. Protestants timely protested the proposed assessment by letter dated July 17, 2006. Division's Exhibit D.

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<sup>7</sup> Consists of several documents.

<sup>8</sup> OAC, 710:1-5-39(a).

<sup>9</sup> Property search of the records of the COUNTY Assessors, <http://COUNTY.oklahoma.usassessor.com>.

<sup>10</sup> The Division's letter to Protestants was part of the audit package received by the ALJ's Office. Official notice of the letter is taken. OAC, 710:1-5-36.

**ISSUE**

The issue presented for decision is whether Protestants reside on land that falls within the legal definition of “Indian Country”.

**CONCLUSIONS OF LAW**

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

1. Jurisdiction of the parties and subject matter of this action is vested in the Tax Commission. 68 O.S. Supp. 2002, § 221(D).

2. The outcome of this proceeding is governed by the provisions of the Oklahoma Income Tax Act (“Act”).<sup>11</sup> Oklahoma income tax is imposed upon the Oklahoma taxable income of every resident individual. 68 O.S. 2001, § 2355(A). *See, OAC, 710:50-3-1.*<sup>12</sup> The starting point for determining the “Oklahoma adjusted gross income” of an individual taxpayer is the “taxable income” with respect to any taxpayer as defined in the Internal Revenue Code as it applies to such taxpayer. 68 O.S. 2001, §§ 2358(A) and 2353(10). *See, Ok. Const. Art. 10, § 12*<sup>13</sup>. *See also, General Accessory Manufacturing Company v. Oklahoma Tax Commission*, 2005 OK CIV APP 75, ¶ 9, 122 P.3d 476. A taxpayer's “taxable income” is subject to the adjustments provided in § 2358 of the Act, as amended, to arrive at Oklahoma adjusted gross income for individuals. 68 O.S. 2001, §§ 2358(A) and 2353(11) and (13). *See, Getty Oil Co. v. Oklahoma Tax Commission*, 1977 OK 19, 563 P.2d 627. Section 2358 provides in pertinent part:

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<sup>11</sup> 68 O.S. 2001, § 2351 et seq.

<sup>12</sup> This rule provides: “[a]ll taxpayers must file Oklahoma Income Tax Returns. ‘Taxpayer’ means any person subject to income tax imposed by Oklahoma Statutes, or whose income is in whole or in part, subject to income tax imposed by any provision of the Oklahoma Statutes.”

<sup>13</sup> This section provides:

The Legislature shall have power to provide for the levy and collection of license, franchise, gross revenue, excise, income, collateral and direct inheritance, legacy, and succession taxes; also graduated income taxes, graduated collateral and direct inheritance taxes, graduated legacy and succession taxes; also stamp, registration, production or other specific taxes.

In the exercise of the powers provided for in this section, and notwithstanding any other provision of this Constitution, the Legislature may, with or without exceptions, modifications, or adjustments, define the amount on, in respect to, or by which any such tax or taxes are imposed or measured (a) by reference to any provisions of the laws (including administrative regulations, determinations, and interpretations) of the United States, as such laws may be or become effective at any time or from time to time; (b) by reference to any amount or amounts finally ascertained in determining amounts subject to taxation by the United States; or (c) by reference to any amount or amounts of tax finally ascertained to be payable to the United States.

Amended by State Question No. 444, Legislative Referendum No. 160, adopted at election held Aug. 27, 1968. Amendment proposed by Laws 1967, p. 689, S.J.R. No. 30.

A. The taxable income of any taxpayer shall be adjusted to arrive at Oklahoma taxable income for corporations and Oklahoma adjusted gross income for individuals, as follows:

\* \* \* \* \*

2. There shall be deducted amounts included in such income that the state is prohibited from taxing because of the provisions of the Federal Constitution, the State Constitution, federal laws or laws of Oklahoma.

\* \* \* \* \*

8. In taxable years beginning after December 31, 1995, all qualified wages equal to the federal income tax credit set forth in 26 U.S.C.A., Section 45A, shall be deducted from taxable income. The deduction allowed pursuant to this paragraph shall only be permitted for the tax years in which the federal credit pursuant to 26 U.S.C.A., Section 45A, is allowed. For purposes of this paragraph, ‘qualified wages’ means those wages used to calculate the federal credit pursuant to 26 U.S.C.A., Section 45A.

3. Tax exemptions, deductions and credits depend entirely upon legislative grace and are strictly construed against the exemption, deduction or credit. *TPQ Investment Corporation v. Oklahoma Tax Commission*, 1998 OK 13, ¶ 8, 954 P.2d 139, 141. See, *Getty*, supra at 630-631.

4. The Indian Employment Credit is “[a] nonrefundable credit \* \* \* available to employers for the first \$20,000.00 of certain wages and health insurance costs paid or incurred in a tax year that begins before 2006 for qualified full – or part-time employees who are enrolled members of an Indian tribe or their spouses” (emphasis added). 2005 U.S. Master Tax Guide ¶ 1340 (2004, CCH Incorporated). “The credit is calculated on Form 8845 (Indian Employment Credit) and is claimed as one of the components of the general business credit.” *Id.* See, I.R.C. § 45A.

5. 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. *McCanahan v. State Tax Commission of Arizona*, 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973); *Oklahoma Tax Commission v. Sac and Fox Nation*, 508 U.S. 114, 113 S.Ct. 1985, 124 L.Ed.2d 30 (1993); *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450, 115 S.Ct. 2214, 132 L.Ed.2d 400 (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.

6. 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; OAC, 710:55-15-2(a)(1). Formal Indian reservations have not existed in Oklahoma for many years. For purposes of § 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, 111 S.Ct. 905, 112 L.Ed.2d 1112 (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*; OAC, 710:50-15-2(a)(2).

7. The term “dependent Indian communities” contained within § 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*, 522 U.S. 520, 118 S.Ct. 948, 140 L.Ed.2d 30 (1998); OAC, 710:50-15-2(a)(3).

8. 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*, 1990 OK CR 42, 795 P.2d 1060, *reh. denied*, 1990 OK CR 59, 800 P.2d 251, *denial of habeas corpus aff’d sub nom. Eaves v. Champion*, 113 F.3d 1246 (10<sup>th</sup> Cir. 1997), *cert denied*, 522 U.S. 1149, 118 S.Ct. 1168, 140 L.Ed.2d 178 (1998); *see also, U.S. v. Adair*, 111 F.3d 770 (10<sup>th</sup> Cir 1997). 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”. *See, OAC, 710:50-15-2(c)(4) and (5)*. Only Congress can create Indian country, *Native Village of Venetie, supra*; mere ownership by a tribe or tribal agency is insufficient, *see, e.g., United Keetoowah Band of Cherokee Indians v. Oklahoma Tax Commission*, 992 F.2d 1073 (10<sup>th</sup> Cir.), *cert denied*, 510 U.S. 994, 114 S.Ct. 555, 126 L.Ed.2d 456 (1993).

9. In all proceedings before the Tax Commission, the taxpayer bears the burden of proof to show the action of the Tax Commission is incorrect, and in what respect. OAC, 710:1-5-47. *See, Enterprise Management Consultants, Inc. v. Oklahoma Tax Commission*, 1988 OK 91, 768 P.2d 359.

10. Here, Protestants failed to come forward with evidence to prove they are entitled to the Indian employment exclusion allowed by § 2358(A)(8). Further, Protestants failed to show that they reside in “Indian Country” as that term is defined. Accordingly, Protestants’ protest to the Division’s adjustment to their 2005 income tax return and proposed assessment should be and the same is hereby denied.

### DISPOSITION

THEREFORE, based on the above and foregoing findings and conclusions, it is ORDERED that the protest of Protestants, HUSBAND AND WIFE, be denied. It is further ORDERED that the amount in controversy, inclusive of any additional accrued and accruing interest, be fixed as the deficiency due and owing.

OKLAHOMA TAX COMMISSION

CAVEAT: This decision was NOT deemed precedential by the Commission. This means that the legal conclusions are 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.