JURISDICTION: **OKLAHOMA TAX COMMISSION - DECISION**
CITE: **2008-03-20-05 / NON-PRECEDENTIAL**
ID: **P-07-080-H**
DATE: **MARCH 20, 2008**
DISPOSITION: **DENIED**
TAX TYPE: **INCOME**
APPEAL: **NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

HUSBAND AND WIFE ("Protestants") appear by and through REPRESENTATIVE, ACCOUNTING FIRM.[1] The Individual Audit Section of the Compliance Division f/k/a Audit Division ("Division"), Oklahoma Tax Commission appears through OTC ATTORNEY, Assistant General Counsel, Office of General Counsel, Oklahoma Tax Commission.

PROCEDURAL HISTORY

On May 15, 2007, the protest file was received by this office for further proceedings consistent with the Uniform Tax Procedure Code[2] and the Rules of Practice and Procedure Before the Oklahoma Tax Commission.[3] On May 17, 2007, a letter was mailed to the Protestants stating that this matter had been assigned to ALJ, Administrative Law Judge, and docketed as Case Number P-07-080-H. The letter also advised the Protestants a Notice of Prehearing Conference would be sent by mail and enclosed a copy of the *Rules of Practice and Procedure Before the Oklahoma Tax Commission.* On May 30, 2007, the Notice of Prehearing Conference ("PHC") was mailed to the last known address of the Protestants, setting the PHC for June 26, 2007, at 10:30 a.m.[4]

On June 25, 2007, the parties requested a continuance of the PHC because of WIFE'S health. On June 27, 2007, the Division contacted OSI to cancel all collection activity on the Protestants' account because of the pending protest. On June 27, 2007, the parties were advised by mail the PHC had been reset for August 2, 2007, at 1:30 p.m. On August 2, 2007, the PHC was held by teleconference. On August 3, 2007, the parties were advised by mail to file a status report on or before September 7, 2007.

On August 3, 2007, the Status Report was filed by the Division clarifying some of the issues discussed during the PHC. On August 14, 2007, an Order was issued consolidating the protests for the 2003, 2005, and 2006 tax years.

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[1] On June 21, 2007, the Protestants granted a Power of Attorney to REPRESENTATIVE.

[2] OKLA. STAT. ANN. tit. 68, § 201 et seq. (West 2001).

[3] OKLA. ADMIN. CODE §§ 710:1-5-20 through 710:1-5-47.

[4] OKLA. STAT. ANN. tit. 68, § 208 (West 2001). The notice was mailed to the Protestants at RURAL ADDRESS.

On August 16, 2007, the Division filed a "Request to Abate All Collection Activity" sent to OSI to cease all collection activity while the protest was pending. The Account Maintenance Division was also notified to cease collection activity through the Treasury Offset Program.

On August 17, 2007, the Division filed a *Motion to Dismiss* the protest for the 2005 Tax Year for "lack of jurisdiction." On August 20, 2007, the *Notice to Appear or Respond in Writing* was mailed to the Protestants, through REPRESENTATIVE; the Division's motion was set for hearing on September 12, 2007, at 1:30 p.m., to show cause why the protest for the 2005 Tax Year should not be dismissed. On September 6, 2007, the Protestants filed a written response to the Division's motion. The response addressed the merits of the case, but was not responsive to the Division's motion.

On September 12, 2007, at approximately 1:30 p.m. the hearing on the Division's *Motion to Dismiss* the protest for the 2005 tax year was held as scheduled. The Protestants did not appear at the hearing. The Division called one witness, AUDITOR, Auditor, Individual Audit Section of the Compliance Division f/k/a Audit Division, Oklahoma Tax Commission, who testified about the proposed assessment and as custodian of the Division's records. Division's Exhibits 1 through 3 were identified, offered, and admitted into evidence. Upon conclusion of the hearing, the record was closed and the Division's *Motion to Dismiss* was submitted for decision on September 12, 2007.[5]

On September 20, 2007, *Findings, Conclusions and Recommendations* were issued recommending that the Division's *Motion to Dismiss* the protest for the 2005 Tax Year for "lack of jurisdiction" should be granted. On September 25, 2007, an "Errata Sheet" was issued correcting the dates contained in first three (3) sentences on page three (3) of the *Findings, Conclusions and Recommendations.* On October 30, 2007, the Commission issued Order No. 2007-10-30-02, granting the Division's *Motion to Dismiss* the protest on the 2005 Tax Year for "lack of jurisdiction."

On October 31, 2007, a letter was mailed to the parties requesting they advise on or before November 29, 2007, how they wanted to proceed on the remaining years at issue. On November 1, 2007, the Division filed the Status Report the Protestants should advise of their decision on or before November 29, 2007. On November 27, 2007, the Protestants, through REPRESENTATIVE, filed the Status Report requesting additional time to retain counsel. On December 5, 2007, the parties were advised that an additional status report should be filed on or before December 27, 2007, and that counsel retained for the Protestants should file an "Entry of Appearance" as soon as possible.

On January 2, 2008, a letter was mailed to the parties noting an entry of appearance had not been received from any counsel retained to represent the Protestants and unless the Protestants contacted the undersigned on or before January 14, 2008, a Scheduling Order would issue setting the matter for hearing. On January 14, 2008, REPRESENTATIVE contacted this office by telephone requesting the matter be set for hearing. The Protestants did not retain counsel.

[5] OKLA. ADMIN. CODE § 710:1-5-39 (June 25, 1999).

On January 15, 2008, the parties were advised by letter this matter had been set for hearing on February 5, 2007, at 1:30 p.m., with a position letter or brief due on or before January 29, 2008. On January 17, 2008, the Brief of the Compliance Division was filed, with attachments thereto. The Protestants did not file a position letter or brief prior to hearing.[6]

On February 5, 2008, at approximately 1:30 p.m. the hearing was held as scheduled. The Protestants did not appear at the hearing. The Division called one witness, AUDITOR, Auditor, Individual Audit Section of the Compliance Division f/k/a Audit Division, Oklahoma Tax Commission, who testified about the procedures utilized in conducting the audits and as custodian of the Division's records. Division's Exhibits A through F were identified, offered, and admitted into evidence. Upon conclusion of the hearing, the record was closed and the case was submitted for decision on February 5, 2007.[7]

FINDINGS OF FACT

Upon review of the file and records, including the record of the proceedings, the exhibits received into evidence, and the brief, the undersigned finds:

1. On February 20, 2004, the Tax Commission received the Protestants' 2003 Return. The Protestants' address on the 2003 Return is RURAL ADDRESS. On Line Two (2), the Protestants claimed a Tribal Income Tax Exemption ("TTE"), reflecting a refund of $1,051.00. The 2003 Return was processed as filed and the Protestants received a refund for $1,051.00.[8]

2. On February 18, 2005, the Tax Commission received the Protestants' 2004 Return. The Protestants' address on the 2004 Return is RURAL ADDRESS. The Protestants claimed a TTE on the 2004 Return. The 2004 Return was processed as filed and the Protestants received a refund for $1,294.00.[9]

3. On April 17, 2007, the Tax Commission received the Protestants' 2006 Return. The address on the return is RURAL ADDRESS. The Protestants claimed a Line Two (2) TTE, but the 2006 Return was not processed as filed and the refund claimed ($1,216.00) was not issued.[10]

4. On August 31, 2006, the Division issued a proposed assessment against the Protestants for the 2003 Tax Year,[11] as follows, to-wit:

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[6] On February 14, 2008, a position letter was received from REPRESENTATIVE, with copies of exhibits admitted into evidence at hearing.

[7] OKLA. ADMIN. CODE § 710:1-5-39 (June 25, 1999).

[8] Division's Exhibit A-1.

[9] Division's Exhibit A-2.

[10] Division's Exhibit A-3.

[11] Division's Exhibit B-1.

Corrected Taxable Income-Method I	$35,652.00
Tax per Table	1,781.00
Total Tax as Adjusted	0.00
Less Tax Previously Reported or Assessed	0.00
Additional Tax Due	1,781.00
Interest @ 15% from 04/16/04 to 08/31/06	679.01
Tax & Interest if Paid Within 60 Days	$ 2,460.01
30 Day Delinquency @ 10%	178.10
Tax, Interest & Penalty if Paid After 60 Days	$ 2,638.11

5. On April 24, 2007, the Division issued a proposed assessment against the Protestants for the 2004 Tax Year,[12] as follows, to-wit:

Corrected Taxable Income-Method I	$39,146.00
Total Tax as Adjusted	1,962.00
Less Tax Previously Reported or Assessed	0.00
Additional Tax Due	1,962.00
Interest @ 15% from 04/15/05/ to 06/25/07	645.85
Tax and Interest if Paid Within 60 Days	$ 2,607.85
60 Day Delinquency Penalty @ 10%	196.20
Tax, Interest & Penalty if Paid After 60 Days	$ 2,804.05

6. On August 3, 2007, the Division issued a proposed assessment against the Protestants for the 2006 Tax Year,[13] as follows, to-wit:

Number of Exemptions	Reported (0)	Adjusted (2)
Line 02-Subtractions from FED AGI	42,833.00	0.00
Line 07-Oklahoma AGI	0.00	42,833.00
Line 09-Income after Adjustments	0.00	42,833.00
Line 11-Exemption Amount	0.00	2,000.00
Line 12-Deductions & Exemptions	3,000.00	5,000.00
Line 13-Oklahoma Taxable Income	0.00	37,833.00
Line 14-Oklahoma Income Tax	0.00	1,807.00
Line 19-Balance	0.00	1,807.00
Line 31-Overpayment of Income Tax	1,216.00	0.00
Line 35-Refund	1,216.00	0.00
Line 36-Income Tax Due	0.00	591.00
Line 40-Total Balance Due	0.00	591.00

7. HUSBAND holds a Certificate of Degree of Indian Blood ("CDIB") card with an effective date of January 21, 1991. The CDIB card indicates that HUSBAND was born on

[12] Division's Exhibit B-2.

[13] Division's Exhibit B-3.

July 21, 1951, and is 4/4 degree Indian blood of the TRIBE.[14] HUSBAND is a member of the NATION, with Membership Card #XXX, and address of RURAL ADDRESS.[15]

8. WIFE holds a CDIB card, with an effective date of August 13, 1997. The CDIB card indicates that WIFE was born on September 27, 1954, and is 4/4 Degree Indian Blood of the TRIBE.[16] WIFE did not provide the Division with a Membership Card for the NATION.[17]

9. On February 7, 2002, the Protestants purchased the property located at RURAL ADDRESS, from the Housing Authority of the NATION.[18] The Protestants have paid property taxes on the property to COUNTY since the purchase.[19]

10. The W-2's attached to the 2003, 2004, and 2006 Returns indicate that HUSBAND is employed by the Housing Authority of the NATION, EMPLOYER ADDRESS 1.[20]

11. The W-2's attached to the 2003, 2004, and 2006 Returns reflect that WIFE'S primary employer is The TRIBAL AGENCY, EMPLOYER ADDRESS 2.[21]

12. The Protestants timely filed protests to the proposed assessments for the 2003, 2004, and 2006 Tax Years, claiming that they were exempt from Oklahoma income tax by virtue of the TTE.[22]

CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission is vested with jurisdiction over the parties and subject matter of this proceeding.[23]

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[14] Division's Exhibit C-1.

[15] Division's Exhibit C-1.

[16] Division's Exhibit C-2.

[17] Testimony of AUDITOR.

[18] Division's Exhibit E. Special Warranty Deed filed with the COUNTY Clerk's Office February 11, 2002, in Book XXX, Page XXX.

[19] Testimony of AUDITOR.

[20] Division's Exhibit D-1.

[21] Division's Exhibit D-2.

[22] Division's Exhibit F.

[23] OKLA. STAT. ANN. tit. 68, § 221(D) (West Supp. 2008).

2. The State of Oklahoma 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.[24]

3. The State of Oklahoma may tax the income (including wages from tribal employment) of all persons, Indian and Non-Indian alike, residing in the State outside of "Indian Country."[25]

4. "Indian Country" includes formal[26] 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. [27]

5. "Informal" reservations means and includes land held in trust for a tribe by the United States 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.[28]

6. "Dependent Indian communities"[29] means and refers to a limited category of Indian lands that are neither reservations nor allotments, and that satisfy the following two (2) requirements:

(A) They have been set aside by the federal government for the use of the Indians as Indian land; and,

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[24] *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164, 93 S.Ct. 1257. *See Oklahoma Tax Com'n v. Sac and Fox Nation*, 508 U.S. 114, 113 S.Ct. 1985. *See also Oklahoma Tax Com'n v. Chickasaw Nation*, 515 U.S. 450, 115 S.Ct. 2214.

[25] *Oklahoma Tax Com'n v. Chickasaw Nation*, 515 U.S. 450, 115 S.Ct. 2214.

[26] Formal reservations no longer exist in the State of Oklahoma.

[27] 18 U.S.C.A. § 1151:

> Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

See Oklahoma Tax Com'n v. Sac and Fox Nation, 508 U.S. 114, 113 S.Ct. 1985. *See also* OKLA. ADMIN. CODE § 710:50-15-2(a)(1) (June 25, 2004).

[28] OKLA. ADMIN. CODE § 710:50-15-2(a)(2) (June 25, 2004). *See Sac and Fox, supra*. *See also Oklahoma Tax Com'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 111 S.Ct. 905.

[29] OKLA. ADMIN. CODE § 710:50-15-2(a)(3) (June 25, 2004).

(B) They are under federal superintendence.

7. Housing project owned by tribal housing authority was not "dependent Indian community" and thus was not "Indian country" over which state court lacked jurisdiction.[30]

8. A CDIB card serves as the Bureau of Indian Affairs ("BIA's") certification that an individual possesses a specific quantum of Indian blood. The BIA does not rely on whether the applicant is a member of an Indian tribe.[31]

9. The State of Oklahoma may tax income of Indian tribal members who work for the tribe, but reside in state outside of Indian Country.[32]

10. In all proceedings before the Tax Commission, the taxpayer has the burden of proof.[33] A proposed assessment is presumed correct and the taxpayer bears the burden of showing that it is incorrect and in what respects.[34]

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[30] *Eaves v. State*, 1990 OK CR 42, 795 P.2d 1060. *See Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520, 118 S.Ct. 948.

See also OKLA. STAT. ANN. tit. 63, § 1057 (West 2001):

> There is hereby created, with respect to each Indian tribe, band, or nation in the state, a public body corporate and politic, to function in the operating area of such Indian tribe, band, or nation to be known as the "housing authority" of said Indian tribe, band, or nation, which shall be an agency of the State of Oklahoma, possessing all powers, rights, and functions herein specified for city and county authorities created pursuant to this act: Provided that said Indian housing authority shall not transact any business nor exercise its powers hereunder until or unless the governing council of said tribe, band, or nation, as the case may be, by proper resolution, declares that there is a need for an authority to function for said tribe, band, or nation.
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> Except as otherwise provided in this act, all the provisions of law applicable to housing authorities created for cities and counties and the commissioners of such authorities shall be applicable to Indian housing authorities and the commissioners thereof, unless a different meaning clearly appears from the context. The Chief or other governing head of an Indian tribe, band, or nation is hereby authorized to exercise all appointing and other powers with respect to an Indian housing authority that are vested by this act in the mayor of a city relating to a city housing authority.

[31] *Davis v. U.S.*, 199 F. Supp.2nd 1164 (W.D. Okla. 2002).

[32] *Oklahoma Tax Com'n v. Chickasaw Nation*, 515 U.S. 450, 115 S.Ct. 2214.

[33] OKLA. ADMIN. CODE § 710:1-5-47 (June 25, 1999):

> In all administrative proceedings, unless otherwise provided by law, the burden of proof shall be upon the protestant to show in what respect the action or proposed action of the Tax Commission is incorrect. If, upon hearing, the protestant fails to prove a prima facie case, the Administrative Law Judge may recommend that the Commission deny the protest solely upon the grounds of failure to prove sufficient facts which would entitle the protestant to the requested relief.

OKLA. ADMIN. CODE § 710:1-5-77(b) (June 25, 1999), provides in pertinent part:

DISCUSSION

The Protestants' position is they can claim the TTE because they hold CDIB cards, live on Indian land purchased from the Housing Authority of the NATION, and work full-time for the NATION.

The Division's position is in order to succeed in their claim for a TTE, the Protestants must be able to prove they are a member of a federally-recognized Indian tribe; and they live and work on land held in trust by the United States for the tribe to which they are affiliated.

The income of an enrolled member of a federally recognized Indian tribe shall not be exempt from Oklahoma individual tax when the member resides in Oklahoma, but not within "Indian Country," regardless of the source of the income.

HUSBAND provided proof he is an enrolled member of the TRIBE, but WIFE could only produce a copy of her CDIB, which is insufficient to prove she is an enrolled member of the TRIBE.

The Protestants appear to work for the TRIBE, but no evidence was produced to show the Protestants also work within "Indian Country." The W-2's provided all have post office box numbers and not physical addresses. The Protestants' residence does not fall within the definition of "Indian Country" because it was purchased from the Housing Authority of the NATION. The residence is on unrestricted, non-trust property. These facts are evident from the copy of the Special Warranty Deed provided by the Protestants to support their claim.

The Protestants have failed to meet their burden of proof they are entitled to claim a TTE.

DISPOSITION

It is the ORDER of the OKLAHOMA TAX COMMISSION, based upon the facts and circumstances of this case, the protests to the proposed income tax assessments for the 2003, 2004, and 2006 Tax Years should be denied.

It is further the ORDER of the OKLAHOMA TAX COMMISSION, the income tax for the 2003, 2004, and 2006 Tax Years and penalty, inclusive of interest accrued and accruing, should be fixed as the amounts due and owing.

OKLAHOMA TAX COMMISSION

> . . . "preponderance of the evidence" means the evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; evidence which as a whole shows that the fact sought to be proved is more probable than not.

[34] *See Enterprise Management Consultants, Inc. v. State ex rel. Oklahoma Tax Com'n*, 1988 OK 91, 768 P.2d 359.

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.