

BEFORE THE ADMINISTRATIVE LAW JUDGE  
OKLAHOMA TAX COMMISSION  
STATE OF OKLAHOMA

FILED  
OKLAHOMA TAX COMMISSION  
APR 12 2022  
OFFICE OF ADMINISTRATIVE  
LAW JUDGES

IN THE MATTER OF THE INCOME TAX )  
PROTEST OF ALICIA STROBLE )

CASE NO. T-21-014-S

**FINDINGS, CONCLUSIONS AND RECOMMENDATION**

NOW, on this 12<sup>TH</sup> day of April, 2022, the above-styled and numbered cause comes on for consideration under assignment made by the Oklahoma Tax Commission to Ernest H. Short, Administrative Law Judge ("ALJ"). Alicia Stroble ("Protestant") is represented by Michael D. Parks. The Audit Services Division, formerly the Compliance Division ("Division"), of the Oklahoma Tax Commission ("Commission" or "OTC") appears through Kiersten Hamill, Assistant General Counsel, Office of General Counsel, Oklahoma Tax Commission.

**STATEMENT OF THE CASE**

The Division adjusted Protestant's Oklahoma Resident Income Tax Returns for the 2017, 2018 and 2019 tax years based on denial of Protestant's claims for the Exempt Tribal Income Exclusion ("Tribal Income Exemption"). The Division's adjustments resulted in amounts of tax due of [REDACTED] and [REDACTED] for the respective tax years, as indicated in Adjustment Letters L0238027072, L1311768896 and L1465974336 dated February 22, 2021. Protestant timely protested the proposed adjustments by letter dated April 12, 2021; the envelope is stamped "RECEIVED" by the Compliance Division on April 15, 2021.<sup>1</sup>

<sup>1</sup> The Amended Joint Stipulation of Facts indicates: "On April 12, 2021, the Division received the Protestant's timely protest[s] to the adjustment[s] to her 2017, [2018 and 2019] Return[s]. Joint Exhibit 3." See Amended Joint Stips. V. at 4, VI. at 9 and VII. at 4.

On May 13, 2021, the Office of Administrative Law Judges (“ALJ’s Office”) received the above-styled protest file for further proceedings consistent with the *Uniform Tax Procedure Code*<sup>2</sup> and the *Rules of Practice and Procedure Before the Office of Administrative Law Judges*.<sup>3</sup> By letter dated May 18, 2021, the parties were informed the protest was assigned to Ernest H. Short, Administrative Law Judge, and docketed as Case No. T-21-014-S.

At the request of the parties, a *Scheduling Order* was issued on August 16, 2021. The Parties filed a *Joint Stipulation of Issue and Facts*, listing Joint Exhibits 1-12 on November 30, 2021. On December 10, 2021, Protestant filed *Protestant’s Pre-Trial Brief* with Protestant’s Exhibits A-H attached thereto. On December 15, 2021, the Division filed *Division’s Prehearing Brief* with Division’s Exhibit 1 attached. Copies of Joint Exhibits 1-12 were filed on January 19, 2022.

After being rescheduled, an open hearing was held on January 21, 2022.<sup>4</sup> As a preliminary matter, Joint Exhibits 1-12, Protestant’s Exhibits 1-11, and Division’s Exhibit 1 were admitted without objection. Protestant appeared and testified regarding the reasons she claimed the Tribal Income Exemption on her Oklahoma Resident Income Tax Returns for the 2017, 2018 and 2019 tax years. Protestant called Ramolee Ozment, Auditor, Oklahoma Tax Commission, who testified regarding the reasons the Division denied Protestant’s claims for the Tribal Income Exemption. The Division examined its auditor by way of cross examination.

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<sup>2</sup> 68 O.S.2011, § 201, *et seq.*, as amended.

<sup>3</sup> Rules 710:1-5-20 through 710:1-5-49 of the *Oklahoma Administrative Code* (“OAC”) governing administrative proceedings related to tax protests.

<sup>4</sup> After discussion at the hearing, Protestant waived confidentiality. 68 O.S.2011, § 205.

On January 21, 2022, the record was closed and the case was submitted for decision. The record was reopened on April 6, 2022 to admit the Parties' *Amended Joint Stipulation of Issue and Facts*, after which the record was closed and the matter resubmitted for decision.

### FINDINGS OF FACT

Upon review of the file and records, including the digital recording of the hearing and the facts and exhibits to which the Parties stipulated as well as the facts and exhibits admitted without objection,<sup>5</sup> the undersigned finds:

1. Protestant timely protested the Division's disallowance of her claims of Exempt Tribal Income reported on line 10 of her 2017, 2018 and 2019 Forms 511-A. Amended Joint Stips. **V.** at 1-4, **VI.** at 6-10 and **VII.** at 1-5; Joint Exhibits 1, 3, 4 and 6.<sup>6</sup>

2. Protestant's protest applies only to income earned from the Muscogee (Creek) Nation for tax years 2017, 2018 and 2019. Amended Joint Stip. **IV**; *Protestant's Brief* at ¶ 19.

3. Protestant claimed the following amounts as Exempt Tribal Income on her Forms 511-A for the tax years 2017, 2018 and 2019 respectively: [REDACTED] [REDACTED] and [REDACTED]. Amended Joint Stips. **V.** at 1, **VI.** at 6 and **VII.** at 1; Joint Exhibits 1, 3, 4 and 6; *Protestant's Brief* at ¶¶ 16, 15 and 14.

4. By letters with ID Nos. L0238027072, L1311768896 and L1465974336 issued on February 22, 2021, the Division informed Protestant her 2017, 2018 and 2019 Returns had been adjusted because her claim of the "Exempt Tribal Income

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<sup>5</sup> As necessary, references to stipulated facts and exhibits, as well as those admitted without objection, are more fully described/explained in footnotes added by the undersigned.

<sup>6</sup> See also *Protestant's Brief* at ¶¶ 13-18.

Exclusion has been disallowed or adjusted. In order to qualify, all three requirements must be met: be a tribal member, live and work on Indian land to which the member belongs." Amended Joint Stips. **V.** at 2, **VI.** at 7 and **VII.** at 2; Joint Exhibits 2, 5, and 7; *Protestant's Brief* at ¶ 17.

5. The Division's disallowance of the Tribal Income Exemption from Protestant's Returns resulted in adjustments to Protestant's reported taxable income on Line 13 of Protestant's 2017, 2018 and 2019 Forms 511 from \$0.00 to [REDACTED] and [REDACTED] respectively. Amended Joint Stips. **V.** at 3, **VI.** at 8 and **VII.** at 3; Joint Exhibits 2, 5, and 7.

6. On April 12, 2021, the Division received Protestant's timely filed protest to the adjustments to her 2017, 2018 and 2019 Returns, as well as additional documentation submitted by Protestant. Amended Joint Stips. **V.** at 4, **VI.** at 9 and **VII.** at 4; Joint Exhibit 3. *But see supra* footnote 1.

7. After reviewing the additional documentation provided by Protestant, the Division denied the claimed Tribal Income Exemption and declined to reverse the adjustments to Protestant's Oklahoma Taxable Income for the 2017, 2018 and 2019 tax years. Amended Joint Stips. **V.** at 5, **VI.** at 10 and **VII.** at 5; Joint Exhibits 2, 5, 7.

8. "Protestant is an enrolled Citizen (member) of the Muscogee (Creek) Nation, a federally recognized Indian tribe." Amended Joint Stip. **I.**, Joint Exhibit 8.<sup>7</sup>

9. During tax years 2017, 2018 and 2019, Protestant was employed by the Muscogee (Creek) Nation. Amended Joint Stip. **III.**

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<sup>7</sup> See also Protestant's Exhibit. 2, Muscogee (Creek) Nation Citizenship Card and CDIB Card of Alicia Stroble.

10. All of the income Protestant claimed as exempt on her 2017, 2018 and 2019 returns pursuant to the Tribal Income Exemption “was earned from sources within ‘Indian Country’ under the jurisdiction of the tribe to which the member belongs.” Amended Joint Stip. **IV**. See also *Protestant’s Brief* at ¶ 20.

11. “During Tax Years 2017, 2018, and 2019, Protestant resided on a tract of land located within the geographical boundaries of Okmulgee County, Oklahoma (Joint Exhibit 9), more particularly described as follows:

Lot Fifty-seven (57) of Block One (1) QUAIL MEADOWS AMENDED, an Addition to the City of Okmulgee, Okmulgee County, State of Oklahoma, according to the Recorded Plat thereof.

The street address of the Protestant’s residence described in the preceding paragraph is 2310 Piney Point Avenue, Okmulgee, Oklahoma 74447.”

Amended Joint Stip. **II**; Joint Exhibit 9<sup>8</sup>.

### **ISSUE**

The Parties present the issue for determination as: “Whether Protestant qualifies for the Exempt Tribal Income Exclusion claimed on her 2017, 2018 and 2019 Oklahoma Individual Income Tax Return.” *Amended Joint Stipulation of Issue and Facts* at 1. The Division argues there are three requirements that must be met in order to claim the Tribal Income Exemption; the taxpayer must be an enrolled

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<sup>8</sup> Joint Exhibit 9 is a copy of a STATUTORY SPECIAL WARRANTY DEED wherein “**LaSalle Bank National Association, as Trustee for the C-BASS Trust 2006-CB9 C-BASS Mortgage Loan Asset-Backed Certificates, Series 2006-CB9 . . . sell[s] and convey[s] unto Alicia Stroble, a single person . . . the real property situated in Okmulgee County, Oklahoma, to wit:**

**Lot Fifty-seven (57) of Block One (1) QUAIL MEADOWS AMENDED, an Addition to the City of Okmulgee, Okmulgee County, State of Oklahoma, according to the Recorded Plat thereof.**

Property address: **2310 Piney Point Ave., Okmulgee, Oklahoma 74447.** (Bold in original.)

member of a federally recognized tribe, the income must be earned from sources within "Indian Country" under the jurisdiction of the tribe to which the member belongs, and the member must live within "Indian Country" under the jurisdiction of the tribe to which the member belongs. *Division's Brief* at 5-6, citing OAC § 710:50-15-2(b).

The Parties stipulate Protestant is an enrolled Citizen (member) of the Muscogee (Creek) Nation, a federally recognized Indian tribe, and was employed by the Muscogee (Creek) Nation during tax years 2017, 2018 and 2019. *Finding of Facts* 8 and 9, Amended Joint Stips. **I.** and **III.** Further, the Parties stipulate all of the income Protestant claimed as exempt on her 2017, 2018 and 2019 returns pursuant to the Tribal Income Exemption "was earned from sources within 'Indian Country' under the jurisdiction of the tribe to which the member belongs." *Finding of Fact* 10, Amended Joint Stip. **IV.**<sup>9</sup> As such, the determinative issue is: Whether Protestant was living within "Indian Country" under the jurisdiction of the Muscogee (Creek) Nation during the 2017, 2018 and 2019 tax years. See OAC 710:50-15-2(b)(1).<sup>10</sup>

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<sup>9</sup> In support of her argument that the income she seeks to deduct pursuant to the Tribal Income Exemption was earned from sources within Indian country, Protestant submitted Protestant's Exhibit 5 containing: 1) A letter dated October 12, 2021, from the Muscogee Nation Realty Manager, to Protestant indicating the address of 2501 Lvmhvike, Okmulgee, OK 74447 – MCN Mound Building "is located within the Muscogee (Creek) Nation reservation jurisdiction" and "is located on real trust property where title is held as "USA in Trust for the Creek Tribe of Oklahoma." 2) A Warranty Deed dated June 23, 1972 transferring real property "situated in Okmulgee County, State of Oklahoma" to the "United States of America in trust for the Creek Tribe of Oklahoma, in accordance with the provisions of the Act of June 26, 1936, 49 Stat. 1967; and 3) A Guardian's Deed dated September 8, 1972, confirming sale of the real property to the United States of America in Trust for the Creek Tribe of Oklahoma.

<sup>10</sup> See *Division's Brief* at 7:8-11, citing OAC § 710:50-15-2(c)(2) ("Protestant has failed to satisfy one of the requirements to claim the exclusion: Protestant has not provided proof that she lives in 'Indian Country' (restricted tribal land or tribal land held in trust by the United States). Therefore, Protestant is ineligible to take the exclusion.")

## CONCLUSIONS OF LAW

1. The Oklahoma Constitution vests the whole matter of taxation exclusively within the power of the Legislature as limited by the Constitution. *Adair v. Clay*, 1988 OK 77, 780 P.2d 650, 655, citing Okla. Const. Art. X § 12, *cert. denied*, 493 U.S. 1076, 110 S.Ct. 1125, 107 L.Ed.2d 1032 (1990).

2. Jurisdiction of the parties and subject matter of this proceeding is vested in the Oklahoma Tax Commission. 68 O.S.2011, § 221.<sup>11</sup>

3. In administrative proceedings before the Tax Commission, the burden of proof is on the taxpayer to show in what respect the action or proposed action of the Tax Commission is incorrect. OAC 710:1-5-47; *Enterprise Management Consultants, Inc. v. State ex rel. Okla. Tax Com'n*, 1988 OK 91, ¶ 5, n. 11, 768 P.2d 359, 362; *Geoffrey, Inc. v. Okla. Tax Com'n*, 2006 OK CIV APP 27, ¶ 25, 132 P.3d 632, 640. The burden of proof standard is preponderance of evidence. 2 Am.Jur.2d *Administrative Law* § 344. Each element of the claim must be supported by reliable, probative and substantial evidence of sufficient quality and quantity as to show the existence of the facts supporting the claim are more probable than their nonexistence. *Id.* Failure to provide evidence an adjustment to the action of the Tax Commission is warranted will result in denial of the protest. OAC 710:1-5-47.

4. Rules promulgated pursuant to the provisions of the Administrative Procedures Act<sup>12</sup> are presumed to be valid until declared otherwise by a district

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<sup>11</sup> To be clear, the Oklahoma Tax Commission has not asserted any jurisdiction over the Muscogee (Creek) Nation. Nor has Protestant asserted she paid income tax to the Nation on the income she seeks to exclude from income on which the Oklahoma Tax Commission based its assessment. The Nation is not a party to this action.

<sup>12</sup> 75 O.S.2011, § 250 *et seq.*, as amended.

court of this state or the Oklahoma Supreme Court. 75 O.S.2011, § 306(C). "Once administrative rules are promulgated and successive legislative sessions are convened with no action to reject a rule, the Legislature's silence is regarded as proof of the lawmakers' consent." *Cox v. State ex rel. Oklahoma Dep't of Human Servs.*, 2004 OK 17, ¶ 24, 87 P.3d 607, 616.

5. While an agency rule is presumed to be valid until declared otherwise by a district court of this state or the Supreme Court, that presumption refers to the burden of establishing its invalidity that is placed upon the complaining party. It does not allow an agency to enforce a rule it knows to be invalid, nor does it elevate administrative rules above statutes, merely because a court has yet to officially declare it invalid. Attorney General Opinion No. 2020-13, 2020 WL 7238260, at \*5 (Okla. A.G. Dec. 3, 2020) (Internal citations and quotation marks omitted.)<sup>13</sup>

6. The Oklahoma Income Tax Act<sup>14</sup> ("Act") governs the imposition of state income tax in Oklahoma. A taxpayer's income tax liability is determined under the law in effect when the income is received. *Wootten v. Okla. Tax Com'n*, 1935 OK 54, ¶ 10, 40 P.2d 672, 674.

7. In cases in which a taxpayer files a return and the Tax Commission determines the tax disclosed on the return is less than the tax disclosed by its examination, the Commission is required to issue a proposed assessment based on

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<sup>13</sup> Except where it declares a state statute unconstitutional, an Attorney General opinion such as this "is binding upon the state official affected by it and it is their duty to follow and not disregard those opinions." *Id.*, quoting *State ex rel. York v. Turpen*, 1984 OK 26, ¶ 5, 681 P.2d 763, 765. Attorney General Opinion No. 2020-13 was issued at the request of Oklahoma Superintendent of Public Instruction.

<sup>14</sup> 68 O.S.2011 § 2351 et seq., as amended.



its determination. 68 O.S.2011, §221(A). The Commission may assess, correct or adjust the return or report as a result of audit or investigation. 68 O.S.2011, §221(B).

8. To arrive at Oklahoma adjusted gross income for individuals, the Tax Commission is required to deduct amounts included in the taxable income of any taxpayer that "the state is prohibited from taxing because of the provisions of the Federal Constitution, the State Constitution, federal laws or laws of Oklahoma." 68 O.S. § 2358(A)(2).

9. The income of an enrolled member of a federally recognized Indian tribe shall be exempt from Oklahoma individual income tax when the member is living within "Indian Country" under the jurisdiction of the tribe to which the member belongs; and, the income is earned from sources within "Indian Country" under the jurisdiction of the tribe to which the member belongs. OAC 710:50-15-2(b)(1).

10. "Oklahoma may tax the income (including wages from tribal employment) of all persons, Indian and non-Indian alike, residing in the State outside Indian country." *Oklahoma Tax Com'n v Chickasaw Nation*, 515 U.S. 450, 453, 115 S.Ct. 2214, 2217, 132 L.Ed.2d 400 (1995); see also, *In re O'Bregon*, 2001 OK CIV APP 24, ¶ 4, 20 P.3d 175, 176.

11. Pursuant to OAC 710:50-15-2(a)(1), "Indian Country" means and includes formal and informal reservations, dependent Indian communities, and Indian allotments, the Indian titles to which have not been extinguished, whether restricted or held in trust by the United States. [See: 18 U.S.C. § 1151]."

12. The 18 U.S.C. § 1151 definition of "Indian country" encompasses three categories of land:

(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.

18 U.S.C. § 1151; *Hydro Res., Inc. v. U.S. E.P.A.*, 608 F.3d 1131, 1139 (10th Cir. 2010).

13. Pursuant to 18 U.S.C.A. § 1151(a), “the term ‘Indian country’ . . . 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.” “[S]ubsection (a), by its express terms, includes within the definition of Indian country *all* lands within the congressionally prescribed boundaries of a reservation, including private fee lands.” *Hydro Res., Inc.*, 608 F.3d at 1157 (10th Cir. 2010) (Italics original).

### **CONTENTIONS OF THE PARTIES**

The Division contends Protestant does not qualify for the Tribal Income Exemption claimed on her 2017, 2018 and 2019 Oklahoma Income Tax Returns because:

Protestant has not provided proof that she lives in “Indian Country” (restricted tribal land or tribal land held in trust by the United States). Therefore, Protestant is ineligible to take the exclusion. OAC § 710:50-15-2(c)(2).

*Division’s Brief* at 7. According to the Division, “Protestant has failed to provide a Warranty Deed or other document showing that she resides on restricted land or land held in trust.” *Id.* “Protestant has failed to show that her residence is on a

formal or an informal Indian reservation or an Indian allotment . . . or that she resides within a dependent Indian community.” *Id.*

Citing 18 U.S.C. § 1151(a), Protestant asserts: “‘Indian Country’ includes all fee lands within the boundaries of a tribe’s reservation, and is not limited to trust or restricted lands.” *Protestant’s Brief* at 15. Further, Protestant argues:

Because the definition of “Indian country” at 18 U.S.C. § 1151 (a) expressly includes all lands within the boundaries of a reservation, including fee lands, it is irrelevant whether the property upon which the Protestant resides is trust land, restricted lands, or fee land. The Commission need only inquire as to whether the Protestant resides within the boundaries of the Muscogee (Creek) Nation Reservation.

*Id.* at 18. Protestant contends she properly excluded the Tribal income from her 2017, 2018 and 2019 Oklahoma Income Tax Returns because she lives within the boundaries of the Muscogee (Creek) Nation Reservation, which Congress never disestablished and which qualifies as “Indian Country” under 18 U.S.C. § 1151(a).

## **DISCUSSION**

It is well established that a State does not have jurisdiction to subject a tribal member living on the reservation, and whose income is derived from reservation sources, to a state income tax absent an express authorization from Congress. *Oklahoma Tax Com’n v. Sac and Fox Nation*, 508 U.S. 114, 123, 113 S.Ct. 1985, 1990, 124 L.Ed.2d 30 (1993), citing *McClanahan v. Arizona State Tax Comm’n*, 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973) (“*McClanahan* presumption against state tax jurisdiction”). “To determine whether a tribal member is exempt from state income taxes under *McClanahan*, a court first must determine the residence of that tribal member.” *Sac and Fox Nation*, 508 U.S. at 124.

“The residence of a tribal member is a significant component of the *McClanahan* presumption against state tax jurisdiction.” *Id.* at 123. However, “a

tribal member need not live on a formal reservation to be outside the State's taxing jurisdiction; it is enough that the member live in 'Indian country.'" *Id.* "Congress has defined Indian country broadly to include formal and informal reservations, dependent Indian communities, and Indian allotments, whether restricted or held in trust by the United States." *Id.* citing 18 U.S.C. § 1151.

The Parties stipulate Protestant meets all the requirements to qualify for the Tribal Income Exemption except the residency requirement. *See, Finding of Facts* 8, 9 and 10; Amended Joint Stips. **I.**, **III.** and **IV.** As such, resolution of this matter requires only a determination of whether Protestant lived within "Indian country" under the jurisdiction of the Muscogee (Creek) Nation during the 2017, 2018 and 2019 tax years for which the Division determined Protestant did not qualify for the Tribal Income Exemption.

Prior to reaching the residency determination, various arguments made by the parties are addressed.

***McGirt v. Oklahoma*, 140 S.Ct. 2452, 207 L.Ed.2d 985 (2020):**

Most of the protests involving denial of the Tribal Income Exemption currently before the Office of Administrative Law Judges appear to have impetus from the Court's holding in *McGirt v. Oklahoma*, 140 S.Ct. 2452, 207 L.Ed.2d 985 (2020) that the land promised by treaty to the Creek Indians remains an Indian reservation for purposes of federal criminal law "because Congress has not said otherwise." *Id.* at 2459. In *McGirt*, the Court acknowledged Oklahoma's concerns that the Court's decision with regard to the definition of "Indian country" would have significant consequences for civil and regulatory law. *Id.* at 2480. The Court noted the issue before it was the statutory definition of "Indian country" as it applies to federal

criminal law under the Major Crimes Act (“MCA”). *Id.* The Court left concerns about reliance interest and other legal doctrines “for later proceedings crafted to account for them.” *Id.* at 2481, citing *Ramos v. Louisiana*, 590 U.S. \_\_\_, 140 S.Ct. 1390, 1047, 206 L.Ed.2d 583. Given concerns regarding potential implications of the *McGirt* decision for civil matters, the Commission determined a cautious approach is appropriate when considering arguments involving tax matters in “Indian country.” See, OTC Order No. 2021 12 08 04 (12-08-2021) (Non-Precedential) at 10-12.

On December 15, 2021, the Division filed *Division’s Prehearing Brief* in this matter, asserting in part: “*McGirt* has not been expanded to civil matters, including taxation.” *Division’s Brief* at 19. The Division states further: “In the absence of a determination by a court of competent jurisdiction expanding the *McGirt* holding, neither the Division nor the OTC have the authority to apply that decision to individual income tax.” *Id.* However, the importance of the *McGirt* decision to the instant matter is the Court’s analysis of whether Congress disestablished or diminished the Creek reservation. Noting the increased importance of the question, the Court stated in *McGirt*:

While Oklahoma state courts have rejected any suggestion that the lands in question remain a reservation, the Tenth Circuit has reached the opposite conclusion. *Murphy v. Royal*, 875 F.3d 896, 907-909, 966 (2017). We granted certiorari to settle the question. 519 U.S. \_\_\_, 138 S.Ct. 2026, 201 L.Ed.2d 27 (2018).

*McGirt* at 2460.

***Murphy v. Royal*, 875 F.3d 896 (Nov. 9, 2017), *aff’d sub nom. Sharp v. Murphy*, 140 S.Ct. 2412, 207 L.Ed.2d 1043 (July 9, 2020):**

To the extent any question remained after *McGirt* whether Congress had disestablished the Creek Nation Reservation or diminished the 1866 Reservation borders, those questions are addressed and resolved by the exhaustive analysis

presented in *Murphy v. Royal*, 875 F.3d 896 (Nov. 9, 2017), *aff'd sub nom. Sharp v. Murphy*, 140 S.Ct. 2412, 207 L.Ed.2d 1043 (July 9, 2020) (“The judgment of the United States Court of Appeals for the Tenth Circuit is affirmed for the reasons stated in *McGirt v. Oklahoma*, \_\_\_ U.S. \_\_\_, 140 S.Ct. 2452, \_\_\_ L.Ed.2d \_\_\_ (2020).”)

Like *McGirt*, the dispute in *Murphy* centered on “whether the crime occurred in Indian country, in particular on the Creek Reservation.” *Murphy* at 915. To assist its analysis, the Court presented a brief history of the Major Crimes Act prior to the 1948 Amendment to codify the definition of “Indian country.” *Murphy* at 915-916, citing Act of June 25, 1948, ch. 645, 62 Stat. 683, 757. One understanding of reservations accepted before the 1948 Amendment has continued: “[R]eservation status depends on the boundaries Congress draws, not on who owns the land inside the reservation’s boundaries.” *Id.* at 916, *citing, United States v. Celestine*, 215 U.S. 278, 285, 30 S.Ct. 93 (“[W]hen Congress has once established a reservation, all tracts included within it remain a part of the reservation until separated therefrom by Congress.”); *see also, Solem v. Bartlett*, 465 U.S. 463, 470 (1984) (“Once a block of land is set aside for an Indian Reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise.” (citing *Celestine*, 215 U.S. at 285, 30 S.Ct. 93)).

Within the definition of “Indian country” codified by the 1948 Amendment to 18 U.S.C. § 1151, “Congress included the boundaries-based concept of reservations that had developed in the case law under the Major Crimes Act.” *Murphy* at 916. Congress provided three broad definitional areas which qualified as Indian

country.<sup>15</sup> *Id.* “If an area qualifies under any of these definitions, it is Indian country.” *Id.* at 917, citing, *Sac and Fox Nation*, 508 U.S. at 123 (“Congress has defined Indian country broadly to include formal and informal reservations, dependent Indian communities, and Indian allotments, whether restricted or held in trust<sup>16</sup> by the United States.”); *Indian Country, U.S.A.*, 829 F.2d at 973 (“A formal designation of Indian lands as a ‘reservation’ is not required for them to have Indian country status.”).

Within 18 U.S.C. § 1151(a), “Congress provided that “Indian country” includes “*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.” *Murphy* at 917, quoting 18 U.S.C. § 1151(a) (italics added in *Murphy*). Under § 1151(a), all lands within the boundaries of an Indian reservation have Indian country status. Based on *Seymore v. Superintendent of Washington State Penitentiary*, 368 U.S. 351, 82 S.Ct. 424, 7

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<sup>15</sup> Under 18 U.S.C. § 1151, “Indian country” 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 *Murphy* at 916-917, quoting 18 U.S.C. § 1151 (paragraph breaks added in *Murphy*).

<sup>16</sup> “The intent of Congress, as elucidated by Supreme Court decisions, was to designate as Indian country *all lands set aside by whatever means* for the residence of tribal Indians under federal protection, *together with trust and restricted allotments.*” *Sac and Fox Nation* at 125, quoting F. Cohen, *Handbook of Federal Indian Law* 34 (1982 ed.) (Internal brackets omitted) (Italics added).

L.Ed.2d 346 (1962), the Supreme Court confirmed that under § 1151(a), all lands within the boundaries of a reservation have Indian country status, even particular parcels that are owned by non-Indians. See *Murphy* at 917, citing *Seymore* at 359; see also, *Hydro Res., Inc.*, 608 F.3d at 1157 (“In *Seymore*, the Court simply observed the obvious: subsection (a), by its express terms, includes within the definition of Indian country *all* lands within the congressionally prescribed boundaries of a reservation, including private fee lands.”) (Italics added in *Hydro Resources*).

**Application of 18 U.S.C. § 1151 definition of “Indian country” to civil matters:**

Subsequent to the 1948 Amendment, the Supreme Court consistently applied the § 1151 definition of “Indian country” to civil matters. As defined in 18 U.S.C. § 1151(a), the term “Indian country” includes: “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.” *Indian Country, U.S.A., Inc. v. State of Okl. ex rel. Oklahoma Tax Comm’n*, 829 F.2d 967, 973 (10th Cir. 1987), *cert. denied*, 487 U.S. 1218, 108 S.Ct. 2870, 101 L.Ed.2d 906 (1988). “Although section 1151 by its terms defines Indian country for purposes of determining federal criminal jurisdiction, the classification generally applies to questions of both civil and criminal jurisdiction.” *California v Cabazon Band of Mission Indians*, 480 U.S. 202, 107 S.Ct. 1083, 1087 n. 5, 94 L.Ed.2d 244 (1987); see also, *Buzzard v. Oklahoma Tax Com’n*, 992 F.2d 1073, 1076 (10<sup>th</sup> Cir. 1993) *cert. denied*, 114 S.Ct. 555 (1993) (“For purposes of both civil and criminal jurisdiction, the primary definition of Indian country is 18 U.S.C. § 1151.”); see also, *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520, 527, 118 S.Ct. 948, 952, 140 L.Ed.2d 30 (1998), citing *DeCoteau v. District County Court for*



*Tenth Judicial Dist.*, 420 U.S. 425, 427, n. 2, 95 S.Ct. 1082, 1084, n. 2, 43 L.Ed.2d 300 (1975). More specifically, the Court in *Sac and Fox Nation*, 508 U.S. at 123, cites to 18 U.S.C. § 1151 for the definition of “Indian country” when determining the residence requirement of a tribal member claiming exemption from Oklahoma’s state income tax.

Finally, the Oklahoma Tax Commission requires application of the 18 U.S.C. § 1151 definition of “Indian country” to civil tax matters, having incorporated that definition into its administrative regulations applicable to the Tribal Income Exemption. See OAC 710:50-15-2(a)(1).

**Application of OAC 710:50-15-2:**

Pursuant to the Administrative Procedures Act, the Tax Commission has authority to adopt rules. The Commission adopted Rule 710:50-15-2 in 2003 and amended the Rule in 2004. As authority for adopting Rule 710:50-15-2, Rule 710:50:1-1 states:

**“710:50-1-1. Purpose**

The provisions of this Chapter [50] have been promulgated for the purpose of compliance with the Oklahoma Administrative Procedures Act, 75 O.S. § 250.1 et seq, and to facilitate the administration, enforcement, and collection of taxes and other levies enacted by the Oklahoma Legislature with respect to income.”

Initially, OAC 710:50-15-2 was promulgated to exempt enrolled members of federally recognized Indian tribes from Oklahoma individual income tax when the income was compensation paid to an active member of the Armed Forces of the United States, “if the member resided within his tribe’s ‘Indian country’ at the time of entering the Armed Forces of the United States. . . .” OAC 710:50-15-2 (20 OK Reg

2811, eff 6-26-03 (emergency)). The 2003 version of OAC 710:50-15-2 did not provide a definition of "Indian country".

In 2004, OAC 710:50-15-2 was amended to expand the exemption from Oklahoma individual income tax to enrolled members of federally recognized Indian tribes, stating in relevant part:

**"710:50-15-2. Application of the Oklahoma Individual Income Tax to Native Americans**

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**"(b) Instances in which income is exempt.** The income of an enrolled member of a federally recognized Indian tribe shall be exempt from Oklahoma individual income tax when:

(1) The member is living within "Indian Country" under the jurisdiction of the tribe to which the member belongs; and, the income is earned from sources within "Indian Country" under the jurisdiction of the tribe to which the member belongs. . . ."

OAC 710:50-15-2(b)(1) (21 OK Reg 2571, eff 6-25-04) (emphasis original). The 2004 amendments to OAC 710:50-15-2 provide the following definition of "Indian country":

**"Indian Country"** means and includes formal and informal reservations, dependent Indian communities, and Indian allotments, the Indian titles to which have not been extinguished, whether restricted or held in trust by the United States. [See: 18 U.S.C. § 1151]

OAC 710:50-15-2(a)(1) (21 Okla. Reg. 2571, eff 6-25-04] (emphasis original).

**Whether Protestant provided evidence she lives in Indian Country:**

The Division relies on the clause, "whether restricted or held in trust by the United States" contained in OAC 710:50-15-2(a)(1), to assert Protestant does not qualify for the claimed Tribal Income Exclusion. *Division's Brief* at 6-7. The Division argues: "In the absence of a deed with qualifying language evidencing a tribal restriction, it is presumed that the taxpayer resides and/or works on fee land not

located in “Indian country.” *Id.* at 7. Citing OAC 710:50-15-2(c)(2), the Division concludes Protestant is ineligible to take the exclusion because “Protestant has not provided proof that she lives in “Indian Country” (restricted tribal land or tribal land held in trust by the United States).” *Id.*

Protestant relies on the definition of “Indian country” set forth in 18 U.S.C. § 1151(a) to assert she is not required to prove her residence during the relevant tax years was restricted tribal land or tribal land held in trust by the United States.

*Protestant’s Brief* at 18-19. Protestant argues:

Because the definition of “Indian country” at 18 U.S.C. 1151 (a) expressly includes all lands within the boundaries of a reservation, including fee lands, it is irrelevant whether the property upon which the Protestant resides is trust land, restricted lands, or fee land. The Commission need only inquire as to whether the Protestant resides within the boundaries of the Muscogee (Creek) Nation Reservation.

*Id.* at 18.

Pursuant to 68 O.S. § 2358(A)(2), the Tax Commission is required to deduct amounts included in the taxable income of any taxpayer that “the state is prohibited from taxing because of the provisions of the Federal Constitution, the State Constitution, federal laws or laws of Oklahoma.” *Id.* Absent explicit congressional direction to the contrary, it is presumed a State does not have jurisdiction to tax within Indian country, whether the particular territory consists of a formal or informal reservation, allotted lands, or dependent Indian communities. *Oklahoma Tax Com’n v. Sac and Fox Nation*, 508 U.S. 114, 128, 113 S.Ct. 1985, 1993, 124 L.Ed.2d 30 (1993). Although the definition of “Indian Country” provided by OAC 710:50-15-2(a)(1) includes the language upon which the Division premises its presumption against the Tribal Income Exemption claimed by Protestant, that

language does not appear in the definition of “Indian country” provided by 18 U.S.C. § 1151.

The phrase, “restricted or held in trust by the United States,” is used in *Sac and Fox Nation* to demonstrate Congressional intent that “Indian country” be defined broadly. *Id.* at 123. “Congress has defined Indian country broadly to include formal and informal reservations, dependent Indian communities, and Indian allotments, **whether** restricted or held in trust by the United States.” *Id.* citing 18 U.S.C. § 1151. (emphasis added). “The intent of Congress, as elucidated by Supreme Court decisions, was to designate as Indian country **all lands set aside by whatever means** for the residence of tribal Indians under federal protection, **together with** trust and restricted Indian allotments. *Id.* at 125, quoting F. Cohen, Federal Indian Law 34 (1982 ed.) (emphasis added). The connecting phrases **whether** and **together with** are intended to communicate **inclusiveness**. As a general rule, exemptions from tax laws should be clearly expressed; however, the tradition of Indian sovereignty requires that the rule be reversed when a State attempts to assert tax jurisdiction over an Indian tribe or tribal members living and working on land set aside for those members. *Sac and Fox Nation* at 124, citing *McClanahan*, 411 U.S. at 176, 93 S.Ct. at 1264.

Protestant asserts she lived in “Indian country” during the relevant tax years based on 18 U.S.C. § 1151(a), which states in relevant part, “Indian country” means:

(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding<sup>17</sup> the

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<sup>17</sup> The ordinary meaning of “notwithstanding” is “in spite of,” or “without prevention or obstruction from or by.” Webster’s Third New International Dictionary 1545 (1986); Black’s Law Dictionary 1091 (7th ed. 1999) (“Despite; in spite of”). In statutes, the word “shows which provision prevails in the event of a clash.” A. Scalia & B. Garner, Reading Law: The

issuance of any patent, and, including rights-of-way running through the reservation. . . .

*Id.* (Internal footnote added). The Parties stipulate that during the tax years 2017, 2018 and 2019, Protestant lived at 2310 Piney Point, Okmulgee, OK 74447. In support of her argument that she lived in Indian country, Protestant submitted Protestant's Exhibit 6, consisting of a Statutory Warranty Deed dated June 2, 2008, transferring "that certain tract of real property situated in Okmulgee County, Oklahoma" with the address of 2310 Piney Point Ave., Okmulgee, OK 74447 to Protestant.

### **CONCLUSION AND RECOMMENDATION**

Having reviewed the entire record in this matter, including the Division's file, the briefs of the Parties, the Joint Stipulation of Issue and Facts, Joint Exhibits 1-12, Protestant's Exhibits 1-11, Division Exhibit 1, the audio recording of the hearing, and the transcript of the hearing produced by Protestant's certified shorthand reporter, the undersigned concludes:

"Once a block of land is set aside for an Indian Reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise." *Solem v. Bartlett*, 465 U.S. 463, 470 (1984), citing *Celestine*, 215 U.S. at 285, 30 S.Ct. 93. Applying the required *Solem* framework to its analysis in *Murphy*, the Tenth Circuit concluded, and the Supreme Court affirmed, Congress has not disestablished the Creek Reservation. *Murphy* at 966. By its express terms, 18 U.S.C § 1151(a) includes within

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Interpretation of legal Texts 126-127 (2012). *N.L.R.B. v. SW Gen., Inc.*, 137 S. Ct. 929, 939, 197 L. Ed. 2d 263 (2017).

the definition of Indian country *all* lands within the congressionally prescribed boundaries of a reservation, including private fee lands. *Hydro Resources*, 608 F.3d at 1157 (emphasis in *Hydro Resources*), citing *Seymore* at 359; *see also, Murphy* at 917.

The Parties stipulate: 1) Protestant is an enrolled member of the Muscogee (Creek) Nation, 2) the Muscogee (Creek) Nation is a federally recognized Indian tribe, and 3) the income Protestant claimed as exempt tribal income for tax years 2017, 2018 and 2019 was earned from the Muscogee (Creek) Nation for employment within "Indian Country" under the jurisdiction of the Muscogee (Creek) Nation. Protestant demonstrated, by a preponderance of the evidence, she lived *within* the boundaries of the Muscogee (Creek) Nation reservation during the 2017, 2018 and 2019 tax years, *notwithstanding the issuance of any patent*. See 18 U.S.C. 1151(a) (emphasis added). As such, Protestant qualifies for the Exempt Tribal Income Exclusion provided by OAC 710:50-15-2(b)(1).

WHEREFORE, based on the specific facts and circumstances of this case, the undersigned recommends that Protestant's protest to the Division's denial of her claims of the Tribal Income Exemption for tax years 2017, 2018 and 2019 be granted.

OKLAHOMA TAX COMMISSION



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ERNEST H. SHORT  
ADMINISTRATIVE LAW JUDGE

**CERTIFICATE OF SERVICE**

This is to certify that true and correct copies of the above and foregoing *Findings, Conclusions and Recommendation* were delivered to Kiersten Hamill, Assistant General Counsel, Oklahoma Tax Commission, and mailed with proper postage prepaid, by the undersigned on this 12<sup>th</sup> day of April, 2022, to:

Michael D. Parks, Attorney  
10 E. Washington, Ste. 102  
P.O. Box 3220  
McAlester, OK 74502

A handwritten signature in black ink, appearing to read "Michael D. Parks", written over a horizontal line.

T-21-014-S/am