Opinion No. 65-113

June 25, 1965

BY: OPINION OF BOSTON E. WITT, Attorney General Jerry Wertheim, Assistant Attorney General

TO: Mr. Max M. Gonzales, Commissioner of Revenue, Bureau of Revenue, State of New Mexico, Santa Fe, New Mexico

QUESTION

QUESTIONS

1. Is income earned by individual Indians outside the reservations and pueblos subject to New Mexico income tax?

2. Is income earned by individual Indians on the reservations and in the pueblos subject to New Mexico income tax?

CONCLUSIONS

1. Yes.

2. Yes.

OPINION

*{*192}* ANALYSIS

"If liberty and equality . . . are chiefly to be found in democracy, they will be best attained when all persons alike share in the government to the utmost." Aristotle, **Polities Book II.**

Whether the income of an Indian is taxable with the provisions of New Mexico law depends largely upon his legal status in New Mexico. The Indian is a citizen of the United States. 43 Stat. 253 (1924; 8 U.S.C.A. § 3. Moreover the Fourteenth Amendment to the United States Constitution makes the Indian a citizen of New Mexico. Therefore he can vote and hold office in New Mexico. **Montoya v. Bolack,** 70 N.M. 196, 372 P.2d 387 (1962). As a citizen of New Mexico the Indian has the same legal rights and should have the same legal objections as any other citizen of the state. Absent any prohibition by the United States Constitution or federal laws, the Indian citizen is subject to New Mexico income tax law as is any other citizen. Sections 72-15-1, 72-15-3, 72-15-6, N.M.S.A., 1953 Compilation.

Neither the United States Constitution nor federal law precludes New Mexico from imposing a nondiscriminatory income tax on the income earned by any Indian in New Mexico simply because of the fact that such a person is an Indian. An Indian has no claim to an exemption from New Mexico income taxes unless Congress has specifically authorized such exemption. **Oklahoma Tax Comm. v. U.S.,** 319 U.S. 598, 606-08, 8 L. Ed. 1612, 63 S. Ct. (1943); **West v. Okla. Tax Comm.,** 334 U.S. 717 727, 92 L. Ed. 1676, 68 S. Ct. 1223 (1948). Search for such federal exemption indicates that no such exemption from New Mexico income tax has been authorized by Congress.

The New Mexico income tax is an exercise of the state's power of taxation without any elements of regulation connected. That New Mexico can exercise this power in an area where Congress has chosen to regulate is clear. See **Leahy v. State Treasurer,** 297 U.S. 420, 80 L.ed. 771, 56 S. Ct. 507 (1936); **Oklahoma Tax Comm. v. U.S.,** supra; **West v. Okla. Tax Comm.,** supra; **Northwestern Cement Co. v. Minn.** 358 U.S. 450, 3 L.ed.2d 421, 79 S. Ct. 357 (1959). New Mexico's power to tax income extends to the income of the Indians.

*{*193}* At one period of time states were precluded from taxing income of Indians in certain situations because of the instrumentality doctrine. The essence of this doctrine provided that the guardian-ward relationship between the federal government and the Indians made the Indians instrumentalities of the federal government for carrying out its policy. However, the Supreme Court has long since renounced this doctrine. See **Oklahoma Tax Comm. v. U.S.,** supra at 603. Therefore New Mexico is not prevented by the instrumentality doctrine from taxing the income of an Indian.

Outside the exterior boundaries of the reservation or pueblo, an Indian is subject to state jurisdiction to the same extent as a non-Indian. **Ward v. Race Horse,** 163 U.S. 504, 41 L.ed. 244, 16 S. Ct. 1076 (1896); **Tulee v. Washington,** 315 U.S. 681, 86 L.ed. 1115, 62 S. Ct. 862 (1942); **In Re Holy-Elk-Face,** 104 N.W.2d 308 (N.D. 1960); **State v. McCoy,** 387 P.2d 942 (Wash. 1963). Clearly New Mexico can impose its income tax on the income earned by an Indian outside the exterior boundaries of the reservation or pueblo. See **Leahy v. State Treasurer,** supra; **State Tax Commission v. Barnes,** 178 N.Y.S. 2nd 932 (1958); **Powless v. State Tax Commission,** 253 N.Y.S. 2d 439 (1964).

New Mexico's power to tax the income earned by an Indian on the reservation or in the pueblos depends upon whether the reservation or pueblo is a part of New Mexico. And, the reservation or pueblo is a part of New Mexico unless it is specifically excluded from the territory of New Mexico by treaty with the particular Indians. **Langford v. Monteith,** 102 U.S. 145, 27 L.ed, 53 (1880). The treaties with the Navajos do not exclude their reservation from the territory of New Mexico. 9 Stat. 974 (1849); 15 Stat. 667 (1868); **Montoya v. Bolack,** supra. Nor does the treaty with the Apaches exclude their reservations from the state of New Mexico. 10 Stat. 979 (1852). Moreover since no treaty was entered into with the Pueblo Indians, the pueblos appear to be part of New Mexico. Cf. **Tenorio v. Tenorio,** 44 N.M. 89, 98 P.2d 838 (1940).

The reservations and pueblos being a part of New Mexico, to what extent can New Mexico law penetrate the reservation or pueblo to effect the Indians residing there? Justice Frankfurter answered this question in **Kake Village v. Egan,** 396 U.S. 60, 7 L.ed.2d 573, 82 S. Ct. 562 (1962). After summarizing the United States Supreme Court decisions in the area, 369 U.S. 60, 72-75, he stated at 75:

"[E]ven on reservations state laws may be applied to Indians unless such application would interfere with reservation self-government or impair a right granted or reserved by federal law."

Research reveals no right granted or reserved by federal law to the Indians on reservations or in pueblos in New Mexico which would be impaired by the imposition of an income tax on income earned by the Indians on the reservations or in the pueblos.

Will then the imposition of the New Mexico income tax on income earned by Indians on the reservations or in the pueblos "interfere with reservation self-government?" Because the United States Supreme Court has not defined this phrase, one must resort to history for the definition. On this basis reservation self-government seemingly means governmental sovereignty of the Indians. **Helvering v. Gerhardt,** 304 U.S. 405, 82 L.ed. 1427, 58 S. Ct. 969 (1938) and **Graves v. N.Y. ex rel O'Keefe,** 306 U.S. 466, 83 L.ed. 927, 59 S. Ct. 595 (1939) supports this proposition. In **Gerhardt,** the Supreme Court sustained the federal income tax on income of employees of the Port of New York authority, a bi-state organization. It said at 420:

"Even though, to some unascertainable extent, the tax *{*194}* deprives the states of the advantage of paying less than the standard rate for the services which they engage, it does not curtail any of those functions which have been thought hitherto to be essential to their continued existence as states."

And in **Graves** the court upheld New York's taxation of the income of an employee of Home Owners' Loan Corporation, a federal governmental agency. It said at 487:

"So much of the burden of a non-discriminatory general tax upon the incomes of employees of a government, state or national, . . . is but the normal incident of the organization within the same territory of two governments, each processing the taxing power . . . The immunity is not one to be implied from the Constitution, because if allowed it would impose to an inadmissible extent a restriction on the taxing power which the Constitution has reserved to the state governments."

Analogously non - discriminatory taxation by New Mexico of the income earned by Indians on the reservations and in the pueblos would not interfere with the sovereignty of the Indians to such an extent as to be unlawful. "[It] is but the normal incident of the organization within the same territory of two governments. . . ."

Imposition of the New Mexico income tax on income earned by an Indian on the reservations or in the pueblos does not violate Art. I, sec. 8, cl. 3 of the United States

Constitution. This cause provides in part: "The Congress shall have power . . . To regulate commerce . . . among the several states, and with the Indian Tribe." No court has had occasion to determine what constitutes an impairment of Congress' authority to regulate commerce with the Indian Tribes. However the Supreme Court has considered Congress' power to regulate Commerce with the Indian Tribes as "not less than its power over commerce among the states." **Henley v. Kansas City S.R. Co.,** 187 U.S. 617, 619, 47 L.ed 333, 23 S. Ct. 214 (1903). Therefore the analogous case law determining what a state may tax when interstate commerce is involved should control the situation involving commerce with the Indian Tribes. The Supreme Court has decided that a state can tax the net income of a person engaged in exclusively interstate commerce without violating Art. I, sec. 8, cl. 3 of the United States Constitution. **Northwestern Cement Co. v. Minn.** 358 U.S. 450, 3 L.ed.2d 421, 79 S. Ct. 357 (1959). In **Northwestern Cement Co.,** the Supreme Court pronounced a test which can be applied as well in determining whether a state income tax impairs Congress' right to regulate commerce among the Indian Tribes as well as it can be applied to determine whether the state has impaired Congress' right to regulate commerce among the several states. The court said at 465:

"[T]he 'controlling question is whether the state has given anything for which it can ask return.' Since by 'the practical operation of [the] tax the state has erected its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred . . .' it is 'free to pursue its own fiscal policies, unembarrassed by the Constitution . . .'"

New Mexico does meet this test. It renders many benefits to the Indians on reservations and in pueblos for which it can exact a tax on the net income of these Indians. See appendix. Cf. **Oklahoma Tax Comm. v. United States,** supra at 609. Recognizing that equality of privilege and equality of obligation should be inseparable associates, (Justice Black in Oklahoma Tax Comm. v. U.S., supra at 610) New Mexico can lawfully impose its income tax on income earned by Indians on the reservations and in the pueblos.