

IN THE OREGON TAX COURT
MAGISTRATE DIVISION
Income Tax

JASON EDWARD MARKLEY,)	
)	
Plaintiff,)	No. 001139F
)	
v.)	
)	
DEPARTMENT OF REVENUE,)	
STATE OF OREGON,)	
)	
Defendant.)	DECISION

This appeal concerns Defendant's assessment of additional income tax for tax year 1999. Plaintiff asserts he is exempt from Oregon income tax pursuant to ORS 316.777.¹

STATEMENT OF FACTS

Plaintiff is an enrolled member of the Klamath Tribe. He lives in Chiloquin in Klamath County. He also earns his income in Klamath County. Plaintiff filed a 1999 Oregon personal income tax return, claiming an income exemption under ORS 316.777. Defendant denied the exemption in a Notice of Assessment dated October 6, 2000. Plaintiff appealed Defendant's decision.

COURT'S ANALYSIS

Oregon's ability to tax the income of tribal members is limited by ORS 316.777. The relevant part of that statute states that:

“Any income derived from sources within the boundaries of federally recognized Indian country in Oregon by any enrolled member of a federally recognized American Indian tribe residing in federally recognized Indian country in Oregon at the time the income is earned is exempt from tax under this chapter.” ORS 316.777(1).

¹ All references to Oregon Revised Statutes are to 1997.

Thus, there is a three part test that must be satisfied in order for an individual to be exempt from Oregon income tax under the statute. First, the income must be "derived from sources within the boundaries of federally recognized Indian country in Oregon." *Id.* Second, the individual must be an "enrolled member of a federally recognized American Indian tribe." *Id.* And third, the individual must "resid[e] in federally recognized Indian country in Oregon at the time the income is earned." *Id.* The parties agree that Plaintiff is an enrolled member of a federally recognized American Indian tribe. The only issue is whether he resided and earned income in Indian country.

Oregon defines Indian country as "any federally recognized Indian reservation or other land that has been set aside for the residence of tribal Indians under federal protection." OAR 150-316.777(2). There are three types of federally recognized Indian reservations: (1) reservation land; (2) dependant Indian communities; and (3) Indian allotments. 18 USC § 1151 (1994); *Spang v. Dept. of Rev.*, OTC-MD No. 982156C, WL 1567019 (Nov 4, 1999).

The Klamath tribe does not have a formal reservation recognized by Congress. 25 USC § 566(c) (1994); *see also Foreman v. Dept. of Rev.*, OTC-MD No. 001029C, WL 938972, at *3 (July 17, 2001) (citations omitted). Therefore, in order to be exempt from Oregon income taxes under ORS 316.777, Klamath County must be either a dependant Indian community or an Indian allotment.

An Indian allotment is a "parcel[] of land created out of a diminished Indian reservation and held in trust by the Federal Government for the benefit of individual Indians[.]" *Alaska v. Native Village of Venetie Tribal Government*, 522 US 520, 529, 118 S Ct 948, 140 L Ed 2d 30 (1998); *see also Foreman*, OTC-MD No. 001029C, at *3. All of Klamath County is not an allotment because it is not held in trust for the benefit of

the Klamath tribe. *Foreman*, OTC-MD No. 001029C, at *3. Therefore, in order to be exempt from Oregon income tax, Klamath County must be a dependant Indian community.

The term “dependant Indian community,” as found in 18 USC § 1151(b), is defined as:

“* * * 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.” *Venetie*, 522 US at 527.

A treaty created a reservation for the Klamath tribe in 1864. The treaty provided that the reservation “shall, until otherwise directed by the President of the United States, be set apart as a residence for said Indian, [and] held and regarded as an Indian reservation[.]” *Treaty with the Klamath, etc.*, Oct 14, 1864, 16 Stat. 707; see also *Kimball v. Callahan*, 590 F2d 768, 770 (9th Cir 1979).

The treaty was abolished in 1954 by the Klamath Termination Act in order to “terminate federal supervision over the trust and restricted property of the Klamath Tribe of Indians, to dispose of federally owned property acquired or withdrawn for the administration of the Indians’ affairs, and to terminate federal services furnished the Indians because of their status as Indians.” *Kimball*, 590 F2d at 770; see also 25 USC § 564 (1994) (overruled to the extent it is inconsistent with 25 USC § 566, the Klamath Restoration Act of 1986).

In 1986, Congress passed the Klamath Indian Tribe Restoration Act which, among other things, stated that members of the Klamath tribe residing in Klamath County shall be deemed to be residing in or near a reservation. 25 USC § 566(c). However, the Act also stated that “[a]ny member residing in Klamath County shall

continue to be eligible to receive any such Federal service **notwithstanding the establishment of a reservation for the tribe in the future.**" *Id.* (emphasis added). In restoring the Klamath Tribe to federal recognition, Congress did not satisfy the two-part test noted above required in order to be a "dependant Indian community." 18 USC § 1151. In restoring the Klamath tribe to federal recognition, the federal government did not set aside the land for Indian use. *Foreman*, OTC-MD No. 001029C, at *3 (citing *Venetie*, 522 US at 533). Nor did the federal government exert "its supervision over all of the *land* in Klamath County to the exclusion of the state of Oregon" although it did restore its "supervision over the Klamath *Tribe*." *Foreman*, OTC-MD No. 001029C, at *3. Because the requirements were not met, Klamath County is not a "dependant Indian community" within the meaning of 18 USC § 1151.

CONCLUSION

Plaintiff is an enrolled member of a federally recognized American Indian tribe. However, because Klamath County is not Indian country within the meaning of OAR 150-316.777(2), he neither resides nor earns his income in Indian country. Thus, Plaintiff's income is not exempt from Oregon income tax pursuant to ORS 316.777.

Now, therefore,

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IT IS THE DECISION OF THIS COURT that Plaintiff's appeal is denied.

Dated this _____ day of September, 2002.

SALLY L. KIMSEY
MAGISTRATE

IF YOU WANT TO APPEAL THIS DECISION, FILE A COMPLAINT IN THE REGULAR DIVISION OF THE OREGON TAX COURT, FOURTH FLOOR, 1241 STATE ST., SALEM, OR 97301-2563. YOUR COMPLAINT MUST BE SUBMITTED WITHIN 60 DAYS AFTER THE DATE OF THE DECISION OR THIS DECISION BECOMES FINAL AND CANNOT BE CHANGED.

THIS DOCUMENT WAS SIGNED BY MAGISTRATE SALLY L. KIMSEY ON SEPTEMBER 20, 2002. THE COURT FILED THIS DOCUMENT ON SEPTEMBER 20, 2002.