

**JURISDICTION:** OKLAHOMA TAX COMMISSION  
**CITE:** 2022-10-04-14 / PRECEDENTIAL  
**ID:** T-21-014-S  
**DATE:** OCTOBER 4, 2022  
**DISPOSITION:** DENIED  
**TAX TYPE:** INCOME  
**APPEAL:** APPEAL TIME PENDING

### **ORDER**

The above matter comes on for entry of a final order of disposition by the Oklahoma Tax Commission following an En Banc Hearing. Having fully reviewed and considered the matter, the Commission hereby VACATES the Findings of Fact, Conclusions of Law and Recommendation made and entered by the Administrative Law Judge on April 12, 2022. The Commission finds that the Taxpayer does not qualify for the Exempt Tribal Income Exclusion, and therefore denies the protest.

The attached Findings, Conclusions, and Order shall constitute the Final Order of the Commission. Further, the Order shall be identified as a Precedential Decision pursuant to OAC 710:1-3-72(c).

**SO ORDERED.**

### **FINDINGS, CONCLUSIONS AND ORDER**

On the 17<sup>th</sup> day of August, 2022, the above-styled and numbered cause came on for consideration before the Oklahoma Tax Commission through an En Banc Hearing before the Oklahoma Tax Commissioners. Chairman COMMISSIONER, Vice-Chairman COMMISSIONER, and Secretary-Member COMMISSIONER were present and heard arguments from the parties: the Audit Services Division (“Division”) of the Oklahoma Tax Commission, represented by and through GC, General Counsel, and AGC, Assistant

General Counsel, Office of the General Counsel, Oklahoma Tax Commission (“OTC”), and the Protestant, PROTESTANT, represented by her counsel, ATTORNEY.

### PROCEDURAL HISTORY

This case began as a protest of the Division’s adjustment of Protestant’s Oklahoma Resident Income Tax Returns for the 2017, 2018, and 2019 tax years, based on the Division’s denial of Protestant’s claims for the Exempt Tribal Income Exclusion. The adjustments resulted in tax due amounts of \$AMOUNT, \$AMOUNT, and \$AMOUNT 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, and received by the Division on April 15, 2021, within the 60-day statutory time to protest. Okla. Stat. tit. 68, § 221(C).

On May 13, 2021, the Office of Administrative Law Judges received the above-styled protest file for further proceedings consistent with the *Uniform Tax Procedure Code*<sup>1</sup> and the *Rules of Practice and Procedure Before the Office of Administrative Law Judges*.<sup>2</sup> The protest was assigned to ALJ, 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

---

<sup>1</sup> Okla. Stat. tit. 68, § 201, *et seq.*, as amended.

<sup>2</sup> Rules 710:1-5-20 through 710:1-5-49 of the Oklahoma Administrative Code governing administrative proceedings related to tax protests.

filed Division's Prehearing Brief with Division's Exhibit 1 attached. Copies of Joint Exhibits 1-12 were filed on January 19, 2022.

An administrative hearing was held on January 21, 2022. 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 for claiming the Exempt Tribal Income Exclusion on her Oklahoma Resident Income Tax Returns for the 2017, 2018, and 2019 tax years. Protestant called AUDITOR, Auditor, OTC, who testified regarding the reasons the Division denied Protestant's claims for the Exempt Tribal Income Exclusion. The Division examined its auditor by way of cross-examination.

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.

On April 12, 2022, the Administrative Law Judge issued his Findings, Conclusions and Recommendation ("FCRs"), finding that the Protestant demonstrated, by a preponderance of the evidence, she resided within the boundaries of the Muscogee (Creek) Nation Reservation during the 2017, 2018, and 2019 tax years, and therefore qualified for the Exempt Tribal Income Exclusion provided by Okla. Admin. Code § 710:50-15-2(b)(1). The Administrative Law Judge recommended the Commissioners grant Protestant's protest to the Division's denial of the Exempt Tribal Income Exclusion for tax years 2017, 2018, and 2019.

On April 27, 2022, the Division submitted its Application for En Banc Hearing before the Commissioners, citing errors by the Administrative Law Judge in the FCRs. On May 10, 2022, the Protestant submitted a Reply to Division's Application for En Banc

Hearing, objecting to the hearing. On May 31, 2022, the Commissioners granted the En Banc Hearing, setting it for July 27, 2022. It was later rescheduled for August 17, 2022, upon Protestant's unopposed Motion to Continue En Banc Hearing.

On August 17, 2022, the En Banc Hearing was held, and each party was given thirty minutes to present, followed by questions from the Commissioners. At the end of the hearing, the matter was considered submitted for decision.

**FINDINGS OF FACT**

1. Protestant is an enrolled citizen (member) of the Muscogee (Creek) Nation, a federally recognized Indian tribe. (Protestant Ex. 2; Joint Ex. 8.)

2. During tax years 2017, 2018, and 2019, Protestant resided on a tract of land located in COUNTY X County, Oklahoma, more particularly described as follows:

Lot NUMBER(##) of Block NUMBER (#) in ADDITION, AMENDED, an Addition to the City of CITY, COUNTY X County, State of Oklahoma, according to the Recorded Plat thereof.

The street address of the Protestant's residence described in the preceding paragraph is ADDRESS.

(Protestant Ex. 6; Joint Ex. 9.)

3. The warranty deed provided by Protestant demonstrates the property was acquired in 2008, from the BANK, as Trustee for the TRUST. (Protestant Ex. 6; Joint Ex. 9.)

4. Protestant was employed by the Muscogee (Creek) Nation during the 2017, 2018, and 2019 tax years. (Protestant Ex. 10; Joint Ex. 10-12.)

5. On December 17, 2020, Protestant filed a delinquent, original 2017 Oklahoma Individual Income Tax Return with the OTC, claiming \$AMOUNT in Exempt Tribal Income on Schedule 511-A, line 10. (Joint Ex. 1.)

6. On December 17, 2020, Protestant filed a delinquent, original 2018 Oklahoma Individual Income Tax Return with the OTC, claiming \$AMOUNT in Exempt Tribal Income on Schedule 511-A, line 10. (Joint Ex. 4.)
7. On April 15, 2020, Protestant filed a timely, original 2019 Oklahoma Individual Income Tax Return with the OTC, claiming \$AMOUNT in Exempt Tribal Income on Schedule 511-A, line 10. (Joint Ex. 6.)
8. On February 22, 2021, the Division issued three letters to Protestant (Letter IDs L0238027072, L1311768896, and L0238027072) stating that Protestant's 2017, 2018, and 2019 Returns had been adjusted because the "Exempt Tribal Income 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." (Protestant Ex. 9; Joint Ex. 2, 5, & 7.)
9. The Division's disallowance of the Exempt Tribal Income Exclusion 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 \$AMOUNT, \$AMOUNT, and \$AMOUNT, respectively. (Protestant Ex. 9; Joint Ex. 2, 5, & 7.)
10. On April 15, 2021, the Division received Protestant's protest to the adjustment of the 2017, 2018, and 2019 Returns, as well as additional documentation. (Protestant Ex. 9; Joint Ex. 3.)
11. Protestant timely protested the Division's disallowance of the claims of Exempt Tribal Income reported on line 10 of Protestant's 2017, 2018, and 2019 Forms 511-A. (Am. Joint Stips., 2 ¶ V.4, 3 ¶ VI.9, 4 ¶ VII.4.)

**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. Okla. Stat. tit. 68, § 221.<sup>3</sup>
3. In administrative proceedings before the OTC, the burden of proof is on the taxpayer to show in what respect the action or proposed action of the OTC is incorrect. Okla. Admin. Code § 710:1-5-47; *Enter. Mgmt. Consultants, Inc. v. State ex rel. Okla. Tax Comm'n*, 1988 OK 91, ¶ 5, n. 11, 768 P.2d 359, 362; *Geoffrey, Inc. v. Okla. Tax Comm'n*, 2006 OK CIV APP 27, ¶ 25, 132 P.3d 632, 640. The burden of proof standard is preponderance of the 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 to show the existence of the facts supporting the claim are more probable than their nonexistence. *Id.* Failure to provide evidence that an adjustment to the action of the OTC is warranted will result in denial of the protest. Okla. Admin. Code § 710:1-5-47.
4. Rules promulgated pursuant to the provisions of the Administrative Procedures Act<sup>4</sup> are presumed to be valid until declared otherwise by a district court of this state or the Supreme Court. Okla. Stat. tit. 75, § 306(C). "Rules and regulations enacted by

---

<sup>3</sup> To be clear, the OTC 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 OTC based its assessment. The Nation is not a party to this action.

<sup>4</sup> Okla. Stat. tit. 75, § 250 *et seq.*, as amended.

administrative agencies pursuant to the powers delegated to them have the force and effect of law and are presumed to be reasonable and valid.” *Toxic Waste Impact Grp., Inc. v. Leavitt*, 1988 OK 20, ¶ 12, 755 P.2d 626, 630.

5. The Oklahoma Tax Commission is statutorily obligated to administer the tax laws of Oklahoma as enacted by the Legislature. Okla. Stat. tit. 68, § 203. “The levying of taxes is purely statutory, and tax statutes must be administered as written.” *W. Auto Supply Co., v. Okla. Tax Comm’n*, 1958 OK 44, ¶ 15, 328 P.2d 414, 420 (citing 51 Am. Jur., 615, note 19).

6. The Oklahoma Income Tax Act<sup>5</sup> governs the imposition of state income tax in Oklahoma. Oklahoma income tax is imposed on every resident or non-resident individual as required by law. Okla. Stat. tit. 68, § 2355(A). A taxpayer’s income tax liability is determined under the law in effect when the income is received. *Wootten v. Okla. Tax Comm’n*, 1935 OK 54, ¶ 10, 40 P.2d 672, 674.

7. In cases in which a taxpayer files a return and the OTC determines the tax disclosed on the return is less than the tax determined by its examination, the OTC is required to issue a proposed assessment based on its determination. Okla. Stat. tit. 68, § 221(A). The OTC may assess, correct, or adjust the return or report as a result of audit or investigation. Okla. Stat. tit. 68, § 221(B).

8. “The income of an enrolled member of a federally recognized Indian tribe shall be exempt from Oklahoma individual income tax when... [t]he 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.” Okla. Admin. Code § 710:50-15-2(b)(1).

---

<sup>5</sup> Okla. Stat. tit. 68, § 2351 et seq., as amended.

9. “The income of an enrolled member of a federally recognized Indian tribe shall not be exempt from Oklahoma individual income tax when... [t]he member resides in Oklahoma, but not within ‘Indian Country’, regardless of the source of the income.”

Okla. Admin. Code § 710:50-15-2(c)(2).

10. “‘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]” Okla. Admin. Code § 710:50-15-2(a)(1).

11. “‘Informal reservations’ means and includes lands 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.” Okla. Admin. Code § 710:50-15-2(a)(2).

12. “This [U.S. Supreme] Court has repeatedly said that tax exemptions are not granted by implication. . . . It has applied that rule to taxing acts affecting Indians as to all others.” *Okla. Tax Comm’n v. United States*, 319 U.S. 598, 606, 63 S. Ct. 1284, 1288, 87 L. Ed. 1612 (1943). “An exemption cannot exist by implication and a doubt is fatal to the claim of exemption.” *Am. Airlines, Inc. v. Okla. Tax Comm’n*, 2014 OK 95, ¶ 30, 341 P.2d 56, 64, citing *Shields, supra*, 100 P. at 571.

### ISSUE

The issue is whether Protestant qualifies for the Exempt Tribal Income Exclusion claimed on Protestant’s 2017, 2018, and 2019 Oklahoma Individual Income Tax Returns. The Exempt Tribal Income Exclusion rule sets forth the requirements that must be met, including the applicable definition of Indian Country, in order to claim the Exclusion: an enrolled member of a federally recognized Indian tribe living within Indian Country



under the jurisdiction of the tribe to which the member belongs; and the member's income is earned from sources within Indian Country under the jurisdiction of the tribe to which the member belongs. Okla. Admin. Code § 710:50-15-2(b)(1).

The parties stipulated 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. (FCRs 4, ¶ 8 & 9; Am. Joint Stips. 1 ¶ I & III.) Further, the parties stipulated all of the income Protestant claimed as exempt on the 2017, 2018, and 2019 Returns pursuant to the Exempt Tribal Income Exclusion was earned from sources within Indian Country under the jurisdiction of the tribe to which the member belongs. (FCRs 5, ¶ 10; Am. Joint Stips. 2 ¶ IV.)

Therefore, 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 for purposes of the Exempt Tribal Income Exclusion. (FCRs 5.)

### **DISCUSSION AND ANALYSIS**

The Oklahoma Tax Commission is statutorily obligated to administer the tax laws of Oklahoma as enacted by the Legislature. Okla. Stat. tit. 68, § 203. "The levying of taxes is purely statutory, and tax statutes must be administered as written." *W. Auto Supply Co., v. Okla. Tax Comm'n*, 1958 OK 44, ¶ 15, 328 P.2d 414, 420 (citing 51 Am. Jur., 615, note 19). Oklahoma income tax is imposed on every resident or non-resident individual as required by law. Okla. Stat. tit. 68, § 2355(A). To implement the statutory requirements, the OTC has promulgated rules within the Oklahoma Administrative Code to facilitate the administration of statute as provided by the Legislature. Okla. Stat. tit. 75, § 250.2. "Rules and regulations enacted by administrative agencies pursuant to the powers

delegated to them have the force and effect of law and are presumed to be reasonable and valid.” *Toxic Waste Impact Grp., Inc. v. Leavitt*, 1988 OK 20, ¶ 12, 755 P.2d 626, 630.

Pertinent to this matter, the application of Oklahoma individual income tax to Native Americans, referred to as the Exempt Tribal Income Exclusion, is set forth in the OTC’s administrative rules. Okla. Admin. Code § 710:50-15-2 provides:

**(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;

Okla. Admin. Code § 710:50-15-2(b)(1) (bold in original). The rule was promulgated pursuant to the provisions of the Oklahoma Administrative Procedures Act in 2004, and therefore, is presumed valid until declared otherwise by a district court of this state or the Supreme Court. Okla. Stat. tit. 75, § 306(C). To date, such a declaration has not occurred, and the OTC has consistently applied the Exempt Tribal Income Exclusion set forth in Okla. Admin. Code § 710:50-15-2 since its promulgation.

In the present action, Protestant claimed the Exempt Tribal Income Exclusion for tax years 2017, 2018, and 2019. Both parties agree that the Protestant met two of the three requirements. Specifically, Protestant is an enrolled member of the Muscogee (Creek) Nation, which is a federally recognized Indian tribe, and Protestant’s income was earned from sources within Indian Country under the jurisdiction of the Muscogee (Creek) Nation. (Am. Joint Stips. 1 ¶ I, & 2 ¶ IV; Joint Ex. 8, 10, 11, & 12.)

However, Protestant’s claim was disallowed by the Division because Protestant did not live within Indian Country during the relevant tax years. (Joint Ex. 2, 5, & 7.) The Exempt Tribal Income Exclusion rule defines Indian Country as “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.” Okla. Admin. Code § 710:50-15-2(a)(1).<sup>6</sup> Protestant has not claimed to reside within a dependent Indian community or an Indian allotment. Therefore, to qualify for the Exclusion, Protestant must prove residence within a formal or informal reservation pursuant to Okla. Admin. Code § 710:50-15-2.

A formal reservation is federally owned land “reserved from sale” under federal law. *United States v. Celestine*, 215 U.S. 278, 285, 30 S. Ct. 93, 95, 54 L. Ed. 195 (1909). It is land validly set apart for use by the Indians, under the federal superintendence of the government. *United States v. McGowan*, 302 U.S. 535, 539, 58 S. Ct. 286, 288, 82 L. Ed. 410 (1938). An informal reservation is defined by the Exempt Tribal Income Exclusion rule as “lands 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.” Okla. Admin. Code § 710:50-15-2(a)(2).

The warranty deed provided by Protestant demonstrates the land is not a formal reservation owned by the federal government. Protestant acquired fee title to the property in 2008, from a non-tribal grantor, the BANK, as Trustee for the TRUST. (Joint Ex. 9.) Further, the deed does not indicate the land is held by the Muscogee (Creek)

---

<sup>6</sup> The inclusion of formal and informal reservations in the administrative rule comes directly from a U.S. Supreme Court case wherein the Court included informal reservations in the definition of Indian Country, which is mirrored by the OTC administrative rule.

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.

*Okla. Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 123, 113 S. Ct. 1985, 1991, 124 L. Ed. 2d 30 (1993).

Nation or the federal government in trust for the Muscogee (Creek) Nation, nor is it subject to any restrictions, and therefore does not qualify as an informal reservation pursuant to Okla. Admin. Code § 710:50-15-2(a)(2).

Protestant contends the Exclusion applies because Protestant's residence, during the relevant tax periods, was within the boundaries of the Muscogee (Creek) Nation Reservation that was never disestablished by Congress and qualifies as Indian Country under 18 U.S.C. § 1151(a). (FCRs 11.) To support this argument, Protestant cited the OTC's *Report of Potential Impact of McGirt v. Oklahoma* to assert that the Commission has taken the position that the 2020 U.S. Supreme Court decision in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), determined that most of eastern Oklahoma is now Indian Country, specifically a reservation, and no longer subject to state taxation. (Hr'g Tr. 10-13, 77-81; Protestant Ex. 8.) Protestant's assertion is incorrect.

The *Report of Potential Impact of McGirt v. Oklahoma*, cited by Protestant, was prepared in response to an Executive Order as to any potential impact of the *McGirt* ruling. (See Okla. Exec. Order 2020-24.) The Report was prepared and issued by the Office of the Executive Director of the Oklahoma Tax Commission on September 30, 2020, and bears the signature of FORMER EXECUTIVE DIRECTOR, the Executive Director at the time. (Protestant Ex. 8.) The Commissioners were not aware the Report was being prepared, and the Commissioners did not review, issue or approve the Report prior to its publication and distribution. A formal position taken by the Commission would be set forth in a Commission order, signed by the Commissioners, and to date no such order has been issued. (En Banc Hr'g Tr. 42.)

After the administrative hearing, the Administrative Law Judge issued FCRs, recommending the protest be granted because "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).” ((FCRs 22)(emphasis added in original).)

A review of the record makes it abundantly clear that the analysis and recommendation in the FCRs hinges entirely upon an unauthorized expansion of the recent decision of the U.S. Supreme Court in *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020), to state taxation matters.

However, the *McGirt* decision was limited to whether the defendant’s crimes were committed within Indian Country, as defined by 18 U.S.C. § 1151, in order to determine whether the state’s criminal jurisdiction was preempted by federal law, specifically, the Major Crimes Act (“MCA”).<sup>7</sup> *Id.* at 2459. The Court focused on whether the land where the crimes were committed qualified as a reservation under 18 U.S.C. § 1151(a) for this purpose. *Id.* The Court ultimately held that, “For MCA purposes, land reserved for the Creek Nation since the 19th century remains ‘Indian country.’” *Id.* at 2456. As a result, the Court determined the federal government had exclusive jurisdiction to prosecute the defendant since the crimes were committed within Indian Country. *Id.* at 2478.

In the FCRs, the Administrative Law Judge completely disregarded the Court’s express limitation of *McGirt* to the Major Crimes Act, and instead concluded that “the importance of the *McGirt* decision to the instant matter is the Court’s analysis of whether Congress disestablished or diminished the Creek reservation.” (FCRs 13.) The

---

<sup>7</sup> The Major Crimes Act provides that, within “the Indian country,” “[a]ny Indian who commits” certain enumerated offenses “shall be subject to the same law and penalties as all other persons committing any of [those] offenses, within the exclusive jurisdiction of the United States.” 18 U.S.C. § 1153(a). *McGirt*, 140 S.Ct. at 2456.

Administrative Law Judge's unilateral conclusion that the *McGirt* decision has application to the taxation protest before the OTC is without basis and completely discounts the Supreme Court's express limitation of *McGirt* to the MCA<sup>8</sup>. In fact, within the *McGirt* opinion, the Court repeatedly stated the scope of the case was limited.

**For MCA purposes**, land reserved for the Creek Nation since the 19<sup>th</sup> century remains "Indian country." *McGirt*, 140 S. Ct. at 2456 (emphasis added).

Today we are asked whether the land these treaties promised remains an Indian reservation **for purposes of federal criminal law**. *Id.* at 2459 (emphasis added).

Mr. McGirt's appeal **rests on the federal Major Crimes Act** (MCA). *Id.* (emphasis added).

The Court even acknowledged Oklahoma's concern that the decision might be interpreted to have a wider impact, and reiterated the narrow scope of the case to federal criminal jurisdiction under the Major Crimes Act.

Finally, the State worries that our decision will have significant consequences for civil and regulatory law. **The only question before us**, however, concerns the statutory definition of "Indian country" **as it applies in federal criminal law under the MCA**, and often nothing requires other civil statutes or regulations to rely on definitions found in the criminal law.

*McGirt*, 140 S.Ct. at 2480 (emphasis added).

Since *McGirt*, the Supreme Court issued another decision that further clarifies *McGirt* is limited to the Major Crimes Act. In *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2489 (2022), the Court made clear that while federal law may preempt state authority

---

<sup>8</sup> To go a step further, the ALJ included another MCA case to aid in his analysis. *Murphy v. Royal*, 875 F.3d 896 (Nov. 9, 2017), *aff'd sub nom. Sharp v. Murphy*, 140 S.Ct. 2412, L.Ed.2d 1043 (July 9, 2020), was a Tenth Circuit criminal case that was affirmed by the Supreme Court for the reasons set forth in *McGirt*. However, like in *McGirt*, the Court made clear *Murphy* was also a Major Crimes Act case, therefore its application is limited. "The Major Crimes Act is the jurisdictional statute at the heart of this case. It applies to enumerated crimes committed by Indians in 'Indian country.' When the Major Crimes Act applies, jurisdiction is exclusively federal." *Murphy*, 875 F.3d at 915.

in certain circumstances, (e.g., the Major Crimes Act as determined by *McGirt*), the general rule remains that the State is entitled to exercise authority over the whole of its territory.

To begin with, the Constitution allows a State to exercise jurisdiction in Indian country. Indian country is part of the State, not separate from the State. To be sure, under this Court's precedents, federal law may preempt that state jurisdiction in certain circumstances. But otherwise, as a matter of state sovereignty, a State has jurisdiction over all of its territory, including Indian country. See U.S. Const., Amdt. 10. As this Court has phrased it, a State is generally "entitled to the sovereignty and jurisdiction over all the territory within her limits." *Lessee of Pollard v. Hagan*, 3 How. 212, 228, 11 L.Ed. 565 (1845).

*Id.* at 2493.

In *Castro-Huerta*, the defendant appealed his state court conviction after *McGirt v. Oklahoma* was decided, claiming the State did not have authority to prosecute him, a non-Indian, because the crimes were committed within Indian Country. *Id.* at 2489. The defendant attempted to use the General Crimes Act (18 U.S.C. § 1152) and Public Law 280 (18 U.S.C. § 1162) to support the claim that state jurisdiction to criminally prosecute is preempted by federal law. The Court reviewed both laws and concluded neither preempts state jurisdiction, and ultimately held the State has concurrent jurisdiction with the federal government to prosecute crimes in Indian Country. *Castro-Huerta*, 142 S. Ct. 2486, 2504-05 (2022).

The *Castro-Huerta* decision is important because it makes clear that the *McGirt* decision preempting state jurisdiction has very limited application, even in the scope of criminal matters, to a single federal law- the Major Crimes Act. *Id.* And by its very language, the Major Crimes Act does not apply to taxation. 18 U.S.C. § 1153.<sup>9</sup> Under

---

<sup>9</sup> 18 U.S.C. § 1153

(a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony

*Castro-Huerta*, Oklahoma clearly has concurrent jurisdiction, even under the *McGirt* boundaries, unless otherwise preempted. There is no preemption for taxation established under *McGirt*, or otherwise.

Therefore, application of the Exempt Tribal Income Exclusion is contingent upon Protestant satisfying three requirements set forth in Okla. Admin. Code § 710:50-15-2. Protestant cannot meet this burden because the entire argument rests wholly on *McGirt* to prove residence within Indian Country. (Protestant Br. in Supp. Oral Arg. before Comm'n En Banc 11.) Absent the application of the *McGirt* decision to the present case, Protestant's claim is without foundation, and Protestant does not qualify for the Exclusion.

The Oklahoma Tax Commission is an agency of the Executive Branch, not the Legislative Branch, and not the Judicial Branch, and as such does not have the authority to unilaterally extend the *McGirt* holding to taxation absent a statutory change or a determination by a court of competent jurisdiction. Okla. Const. art. IV, § 1. To date, the U.S. Supreme Court has not expanded the scope of *McGirt* to state taxation, nor has Congress or the State Legislature made any changes to Oklahoma tax laws that would exempt the *McGirt* defined historical reservation boundaries from state taxation.

The *City of Sherrill* case cited by the Division in its Brief (Division's En Banc Hr'g Br. 19-23) supports the same conclusion, that without a legislative change or a court

---

under chapter 109A, incest, a felony assault under section 113, an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

(b) Any offense referred to in subsection (a) of this section that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.



decision expanding *McGirt* to taxation cases, neither the tribes, nor the Oklahoma Tax Commission for that matter, have the unilateral authority to revive ancient sovereignty newly reclaimed by the Tribes since the *McGirt* decision was issued. See *City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 202-03, 125 S. Ct. 1478, 1483, 161 L. Ed. 2d 386 (2005). That case involved a dispute between the Oneida Indian Nation and the City of Sherrill, New York, over property taxes on land purchased by the Tribe that was once within its reservation long ago. *Id.* The Court considered the longstanding, non-Indian character of the area and the inhabitants, the history of state control over the area, and the Tribe's long delay in seeking relief and determined the Tribe could not unilaterally revive its ancient sovereignty. *Id.*

Finally, strictly for the sake of argument, even *if* the Supreme Court were to expand *McGirt* to state taxation matters, it would not give Protestant the requested relief for the 2017, 2018, and 2019 tax years. The *McGirt* decision is a new rule of criminal procedure (decided in July of 2020), and as such, is not retroactive. *State ex rel. Matloff v. Wallace*, 2021 OK CR 21, ¶ 6, 497 P.3d 686, 688, *cert. denied sub nom. Parish v. Oklahoma*, 142 S. Ct. 757, 211 L. Ed. 2d 474 (2022). In *Matloff*, the District Attorney appealed a district court judge's decision to vacate a second degree murder conviction following the decision in *McGirt*. *Id.* at 687. The Oklahoma Court of Criminal Appeals ("OCCA") overturned the decision to vacate, finding that the *McGirt* ruling is a new rule of criminal procedure that cannot be applied retroactively. *Id.* at 691-92. The OCCA noted that the Supreme Court did not declare *McGirt* to be retroactive, and even predicted that *McGirt's* potential to unsettle convictions would be limited by other legal doctrines. *Id.* at 693. The defendant appealed the OCCA's decision to the U.S. Supreme

Court, but the Court refused to take up the question of retroactivity. *Parish v. Oklahoma*, 142 S. Ct. 757, 211 L. Ed. 2d 474 (2022).

As a result, even if each of the other reasons denying Protestant's protest were to be overturned, the protest would still be denied because Protestant's 2017, 2018, and 2019 tax year protests cannot be won with the retroactive application of the 2020 Court decision.

### **CONCLUSION**

In order to claim the Exempt Tribal Income Exclusion, all three requirements set forth in Okla. Admin. Code § 710:50-15-2 must be met. The only disputed requirement is whether Protestant lived within Indian Country under the jurisdiction of the member's tribe. The Division denied Protestant's claim of the Exclusion, thereby putting the burden on the Protestant to show the OTC's action to be incorrect. Okla. Admin. Code § 710:1-5-47. Protestant's entire case rests on the retroactive application of the *McGirt* decision to state taxation. However, the Commission does not have the authority to extend *McGirt* beyond the limitation set forth by the U.S. Supreme Court in its holding. Without the benefit of *McGirt*, the Protestant has not put forth any evidence to overturn the Division's action.

### **ORDER**

The Commission hereby VACATES the Findings of Fact, Conclusions of Law and Recommendation issued in this case by the Administrative Law Judge on April 12, 2022.

The Commission finds the Protestant does not qualify for the Exempt Tribal Income Exclusion because the requirements set forth in Okla. Admin. Code § 710:50-15-

2 have not been met. Protestant did not provide evidence to establish residence within Indian Country for the 2017, 2018, and 2019 tax years. As a result, the protest is DENIED.

The Commission further finds that absent a decision by a court of competent jurisdiction holding that all lands within the *McGirt* defined boundaries of the Muscogee (Creek) Nation Reservation are exempt from taxation, the Commission does not have the authority to allow tribal members to claim the Exempt Tribal Income Exclusion because they may live and work within the *McGirt* defined boundaries. For the foregoing reasons, Protestant's income for these periods is fully taxable by the State of Oklahoma.