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TAXATION: SALES TAX EXEMPTION OF THE FIVE CIVILIZED TRIBES

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Introduction

With the passage by Congress of the Indian Financing Act,[1] the opportunity for the Five Civilized Tribes to enter the business world is greatly enhanced. The Oklahoma Indian Welfare Act[2] gave the Five Civilized Tribes the right to organize and acquire land for their use.[3] The Indian Financing Act provides them with the capital to purchase land and finance their businesses. Once the Five Civilized Tribes start availing themselves of these loans and organizing businesses, problems will arise as to whether these businesses may be taxed.

This note will limit its scope to businesses organized by the Five Civilized Tribes of Oklahoma.[4] Because of their similar legislative histories, an analysis of all five together is appropriate. In addition, the scope will be limited to an exemption from Oklahoma's sales tax[5] on sales by the businesses to non-Indians.

History

Upon the arrival of the first Europeans to America, the Five Civilized Tribes lived in what are now the southeastern states of the United States.[6] Later, due to pressure from the white population wishing to settle on the land occupied by the tribes, the tribes moved westward.[7] To induce the tribes to move, the federal government entered into treaties with the tribes promising them certain rights upon the surrender of their land. One of the most important provisions of the treaties was that the tribes were to have the right of self-government.[8] This right was guaranteed by

1. 25 U.S.C. § 1451 (Supp. 1976).
2. 49 Stat. 1967 (1936).
3. *Id.* at § 1.
4. G. FOREMAN, THE FIVE CIVILIZED TRIBES preface (1934): "These tribes, the Cherokee, Creek, Chickasaw, Choctaw and Seminole, were distinguished by character and intelligence far above the average aboriginal.... Because of their progress and achievements they came to be known as The Five Civilized Tribes."
5. 68 OKLA. STAT. § 1310 (1971).
6. G. FOREMAN, THE FIVE CIVILIZED TRIBES 17 n.4 (1934).
7. Harjo v. Kleppe, 420 F. Supp. 1110, 1119 (D.D.C. 1976).
8. *See* Treaty with the Cherokee, Aug. 6, 1846, 9 Stat. 871; Treaty with the Choctaws and Chickasaws, June 22, 1855, 11 Stat. 611; Treaty with Creeks and Seminoles, Aug. 7, 1856, 11 Stat. 699.

later treaties.[9] This guarantee prevailed until the federal government passed acts providing for the allotment of tribal lands.[10]

The allotment acts[11] provided for the compulsory allotment of the tribal lands in severalty. Each act provided that the allotted land would be tax exempt.[12] At the same time, Congress adopted the policy of terminating tribal governments.[13]That policy was implemented by the Five Tribes Act of 1906.[14]

The Curtis Act,[15] enacted before the Five Tribes Act, also applied to the Five Civilized Tribes. Several provisions of the Curtis Act affected the sovereign power of the tribes' governments. Section 14 of the Act provided for establishing territorial municipal governments within the tribes' reservations.[16] Section 26 of the Act made the civil law of the tribes unenforceable in federal courts[17] and Section 28 abolished the tribal courts.[18] However, the Act did not totally eliminate the sovereignty of the tribes.[19]

Congress, by passing the Five Tribes Act, contemplated the complete abolition of the tribes' governments.[20] One of the more damaging provisions of the Act was contained in Section 11:"[P]rovided, that all taxes accruing under tribal laws or regulations of the Secretary of the Interior shall be abolished from and after [December 31, 1905]."[21] Although the original purpose of the Act was to provide for the final disposition of the affairs of the tribes, it never accomplished that purpose. Instead, Section 28 provided: "[T]he tribal existence and present tribal governments of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes or nations are hereby continued in full force and effect for all purposes authorized by law, until otherwise provided by law...."[22] However, "The legal effect of this provision was un-

9. *See* Treaty with the Cherokee, July 19, 1866, 14 Stat. 799; Treaty with the Choctaw and Chickasaw, April 28, 1866, 14 Stat. 769; Treaty with the Creek, June 14, 1866, 14 Stat. 785: Treaty with the Seminole, March 21, 1866, 14 Stat. 755.

10. *See* 32 Stat. 716 (1902); 30 Stat. 495 (1898); 31 Stat. 861 (1901); 30 Stat. 567 (1898). Following the passage of these Acts, Congress began to address the tribes as a group rather than individually.

11. *See* F. COHEN, FEDERAL INDIAN LAW 434-35 (1971 ed.).

12. *Id.* at 435-38.

13. *Id.* at 429-30.

14. 34 Stat. 137 (1906). The intent of the Act was "To provide for the final disposition of affairs of the Five Civilized Tribes."

15. 30 Stat. 495 (1898).

16. *Id.* at 499.

17. *Id.* at 504.

18. *Id.* at 504-505.

19. *See* Harjo v. Kleppe, 420 F. Supp. 1110, 1124 (D.D.C. 1976).

20. *Id.* at 1126.

21. 34 Stat. 137, § 11 (1906).

22. *Id.* at § 28.

mistakable: Congress had declined to terminate the tribal existence or dissolve tribal governments, despite all of its earlier indications to do so...."[23] Thus, after passage of the Five Tribes Act, the validity of the tribes' governments remained intact, although now limited by both the Five Tribes Act and the Curtis Act.

In 1936, Congress passed the Oklahoma Indian Welfare Act.[24] This Act incorporated all rights and privileges given to tribes under the Indian Reorganization Act,[25] which had specifically exempted the Five Civilized Tribes.[26] The Indian Reorganization Act and the Oklahoma Indian Welfare Act evidenced a new policy of the federal government: "[I]ndians can better meet the problems of modern life through corporate, group, or tribal action rather than as assimilated individuals";[27] and "The central provisions of the Act ended allotments in severalty, allowed the re-establishment of communal lands, and permitted the organization of tribal governments with control over tribal funds."[28] Thus, the federal government had come full circle in its policy toward the Indians, from enacting treaties and statutes allowing the continued existence of tribal governments, to termination, and back to continued existence. After over a hundred years of control by Congress, the Five Civilized Tribes had survived with many of their sovereign powers intact.

Case Law

An analysis of the Five Civilized Tribes' right to an exemption from Oklahoma's sales tax requires consideration of a series of cases involving Indian tax questions. In *McClanahan v. Arizona Tax Commission*,[29] Rosalind McClanahan, a Navajo Indian, brought an action to recover $16.20 withheld from her income as Arizona state income tax. McClanahan claimed that because all the income was earned on the Navajo Reservation, the state tax was unlawful as applied to Navajo Indians.[30]

The Supreme Court reviewed the various doctrines used by the courts in previous cases dealing with Indian issues. The Court

23. *See* Harjo v. Kleppe, 420 F. Supp. 1110, 1129 (D.D.C. 1976).
24. 49 Stat. 1967 (1936).
25. *Id.* at 1967 § 3.
26. 48 Stat. 984, § 13 (1934).
27. Board of County Commn'rs v. Seber, 318 U.S. 705, 716 n.20 (1943).
28. *See* Harjo v. Kleppe, 420 F. Supp. 1110, 1136 (D.D.C. 1976).
29. 411 U.S. 164 (1973).
30. *Id.* at 166.

observed that in the past the Indian sovereignty doctrine[31] and federal instrumentality doctrine[32] had been in vogue, but the recent trend was toward using federal preemption as the test for determining state tax validity.[33] The federal preemption test doctrine requires the Court to consider relevant treaties and statutes to determine whether the area in which the state wishes to apply its tax is regulated by the federal government. If it is, the state cannot apply its tax, as the federal government is considered to have preempted the area.[34]

Using this doctrine, the Supreme Court held that the state had exceeded its authority in taxing the income of the appellant.[35] In reaching its decision, the Court also considered the Navajo Treaty of 1868,[36] the Arizona Enabling Act,[37] the Buck Act,[38] and the Indian Civil Rights Act.[39] Based on these considerations, the Court concluded that the appellant's "activity is totally within the sphere which the relevant treaty and statutes leave for the Federal Government and for the Indians themselves."[40]

In the same year as *McClanahan* the Supreme Court decided *Mescalero Apache Tribe v. Jones.*[41] *Mescalero* involved a snow ski enterprise owned by the tribe in New Mexico.[42] The enterprise was established on land acquired under the authority of the Indian Reorganization Act.[43] The state of New Mexico claimed the right to impose a tax on the gross receipts of the ski resort.[44] The tribe contended the enterprise was a federal instrumentality and

31. *Id.* at 168. This doctrine recognized that Indian tribes have retained over the years some inherent powers attributable to any sovereign. Thus, unless those powers have been abrogated by the federal government, the tribe may still exercise them. *See* The Kansas Indians, 72 U.S. (5 Wall.) 737 (1866); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

32. McClanahan v. Arizona Tax Comm'n, 411 U.S. 164, 169 (1973). The federal instrumentality doctrine holds that the states may not tax any part of the federal government. The reasoning as applied to Indian tribes is that since they are under the control of the federal government, they are a federal instrumentality and, thus, cannot be taxed by the states. *See* The New York Indians, 72 U.S. (5 Wall.) 761 (1866).

33. *Id.* at 170.

34. *See* Warren Trading Post v. Arizona Tax Comm'n, 380 U.S. 685 (1965).

35. McClanahan v. Arizona Tax Comm'n, 411 U.S. 164, 177 (1973).

36. 15 Stat. 667 (1868).

37. 36 Stat. 568 (1910).

38. 4 U.S.C. § 105 (1964).

39. 25 U.S.C. § 1322(a) (1964).

40. McClanahan v. Arizona Tax Comm'n, 411 U.S. 164, 179-80 (1973).

41. 411 U.S. 145 (1973).

42. *Id.*

43. 48 Stat. 984 (1934).

44. Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973). In addition to the gross receipts tax, the state attempted to impose a use tax on personalty used in connection with the business.

therefore immune from state taxes because it was acquired in accordance with provisions in the Indian Reorganization Act.[45] In addition, the tribe contended that Section 5 of the Indian Reorganization Act specifically exempted the business from taxation.[46] The Court rejected both contentions.

In regard to the instrumentality theory, the Court noted that the federal instrumentality doctrine had been rejected in numerous cases.[47] Furthermore, the Court determined that none of the provisions of the Indian Reorganization Act could be construed as establishing federal instrumentality status for projects initiated under the Act.[48] Concerning Section 5 of the Act, the Court stated that the language which exempted from taxation "any lands or rights acquired" under the Act, should be interpreted to exempt "land and rights in land."[49] The Court held that the language of the Act was not specific enough to give an exemption to the tribe from the gross receipts tax and that it would not imply an exemption from this language.[50]

Three years after *Mescalero*, the Supreme Court considered *Moe v. Confederated Salish & Kootenai Tribes.*[51] In this case the tribes questioned the validity of the application of Montana's cigarette tax to sales made on tribal reservation land by businesses owned by tribal members.[52] The tax as it applied to sales to both Indians and non-Indians was considered.[53]

The Court held that the cigarette sales tax as applied to Indian consumers was invalid.[54] In support, the Court quoted from *Mescalero*: "[T]here has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservations."[55] However, the Court found the tax as it applied to sales to non-Indians was within the proper exercise of state power. The Court reasoned that "it is the non-Indian consumer or user who saves the tax and reaps the benefit of the tax exemption."[56] Since the burden of the tax fell

45. *Id.* at 150.
46. *Id.* at 155.
47. *Id.* at 150.
48. *Id.*
49. *Id.* at 155. The Court said that "rights in land" did not include income derived from land under the Act, thus, no exemption.
50. *Id.* at 156.
51. 425 U.S. 463 (1976).
52. *Id.*
53. *Id.*
54. *Id.* at 476.
55. *Id.*
56. *Id.* at 481.

on the non-Indian, the Court felt there was no reason to allow an exemption.

The case of *Confederated Tribes of the Colville Indian Reservation v. Washington*,[57] a federal district court case from the Eastern District of Washington, provides some direction on the problem of an exemption for the Five Civilized Tribes. In *Colville*, the Colville, Makah, and Lummi tribes within the state of Washington joined in a suit against the state seeking declaratory and injunctive relief from Washington's statutes and regulations which imposed a sales tax on cigarette and tobacco products sold to non-Indians by tribally licensed retailers at shops owned by the tribes.[58] The state did not assert that it had any right to impose the tax on sales to Indians.[59]

Each of the tribes had enacted their own ordinances regulating the sale, distribution, and taxation of cigarettes and other tobacco products on their reservation. The Makah Tribe organized and passed its cigarette ordinance under authority of the Indian Reorganization Act.[60] The ordinance had been approved by the Secretary of the Interior as required in the Indian Reorganization Act.[61] The Colville and Lummi tribes, however, did not organize under the Indian Reorganization Act. Rather, they organized and passed their cigarette ordinances according to Section 53.1 of Title 25 of the Code of Federal Regulation, which contains the same conditions imposed on tribes organized under the Indian Reorganization Act.[62] The ordinances of the Colville and Lummi tribes were also approved by the Secretary of the Interior.[63]

In discussing the merits, the district court first considered the tribes' contention that this case could be distinguished from *Moe* because the legal incidence of the tax fell on the tribe, while in *Moe*, it fell on the consumer.[64] The Court rejected this argument: "Where on-reservation tribal sales to non-Indians are involved, the first taxable event is, therefore, the use or consumption by the non-Indian purchaser. In such situations, the legal incidence falls

57. 446 F. Supp. 1339 (E.D. Wash. 1978), *pet. for cert. filed*, 47 U.S.L.W. 3278 (U.S. Oct. 24, 1978) (No. 78-630).
58. *Id.* at 1345.
59. *Id.* at 1346 n.4
60. *Id.* at 1361.
61. *See* 48 Stat. 984 (1934).
62. *Id.*
63. Confederated Tribes of the Colville Indian Reservation v. Washington, 446 F. Supp. 1339, 1361 (E.D. Wash. 1978).
64. *Id.* at 1352, 1353.

upon the non-Indian purchaser rather than the tribal seller."[65]

The Court also briefly discussed the tribes' contention that the Indian Reorganization Act, Indian Financing Act, and Indian Self-Determination Act established a well-defined federal policy of promoting Indian self-government and economic growth and that this policy preempted state taxation.[66] The Court found no authority for holding that such policy implied a tax immunity.[67] *Mescalero* was cited as the authority for holding that federal policy does not necessarily create a tax immunity.[68]

The tribes also argued that the tax imposed by the state had been preempted by the tribal cigarette ordinances.[69] The Court acknowledged clear authority that the exercise of federally delegated authority by an Indian tribe is sufficient to preempt a state statute which conflicts with the delegated authority.[70] Consideration was then given to whether the tribes actually possessed federally delegated authority.

Section 16 of the Indian Reorganization Act had authorized the reestablishment of tribal governments and adoption of tribal constitutions.[71] Citing *Iron Crow v. Oglala Sioux Tribe*,[72] which held that power to tax both Indians and non-Indians is a recognized tribal power, the Court concluded that the Makah Tribe exercised federally delegated authority under the Indian Reorganization Act.[73] The Court also said that it was insignificant that the Colville and Lummi tribes were not organized under the Indian Reorganization Act. Since the tribes' actions were approved by the Secretary of the Interior and subject to the same regulations as the Indian Reorganization Act, the Court felt the tribes came under the federal program and thus were exercising federally delegated

65. *Id.* at 1355.
66. *Id.* at 1359, 1360.
67. *Id.* at 1360.
68. *Id.* at 1359.
69. *Id.* at 1360.
70. *Id.* The Court cited Fisher v. District Ct., 424 U.S. 382 (1976), to support its statement, although it admitted that the state statute preempted in the case did not affect non-Indians. To support its statement that state statutes which affect non-Indians may be preempted, the Court referred to Confederated Tribes of the Colville Indian Reservation v. Washington, 412 F. Supp. 651 (E.D. Wash. 1976) and Eastern Band of Cherokee Indians v. North Carolina, No. BC-C-76-65 (W.D.N.C. Aug. 27, 1976).
71. 48 Stat. 984 (1934).
72. 231 F.2d 89 (8th Cir. 1956). This was an action by several members of the tribe to enjoin it from assessment and collection of taxes for the privilege of grazing stock on reservation land. The Court said, "the defendant Oglala Sioux Tribe possesses the power of taxation which is an inherent incident of its sovereignty."
73. Confederated Tribes of the Colville Indian Reservation v. Washington, 446 F. Supp. 1339, 1361 (E.D. Wash. 1978).

authority.[74] Consequently, the Court found that since the state statute was regulating the same matter as the tribal ordinances, the state statute had been preempted.[75]

Analysis

To determine if the Five Civilized Tribes are exempt from Oklahoma's gross sales tax, it is necessary to decide how the factors used in the preceding cases will apply to the tribes. First, in *Moe*[76] and *Colville*[77] both Courts felt that it was important to determine whether the legal incidence of the tax fell on the consumer or the business. Oklahoma has a two per cent gross sales tax upon a variety of items ranging from food to hardware.[78] The statute states, "[the] tax levied is . . . paid by the consumer or user to the vendor."[79] Thus, the literal meaning of the statute clearly specifies that the legal incidence of the tax falls on the consumer and not the business.

Another factor to determine is to whom the sales are to be made. In *Moe*, the Court found an exemption from the state sales tax on sales to Indians, but not on sales to non-Indians.[80] It is clearly within the power of a tribe to limit its sales to members of the tribe, eliminating the problem found in *Moe*; however, the majority of cases indicate that most tribes set up their businesses to sell to both Indians and non-Indians.[81] Additionally, since the areas in eastern Oklahoma occupied by the Five Civilized Tribes are densely populated by non-Indians, providing a larger sales market, it is likely that most businesses will allow sales to non-Indians.

The authority under which the tribes organize and adopt laws and ordinances is another factor which may determine the likelihood of an exemption for the tribes. The Five Tribes Act of 1906[82] attempted to abolish the tribal governments of the Five Civilized Tribes.[83] However, as previously discussed, this Act did

74. *Id.*
75. *Id.*
76. Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976).
77. Confederated Tribes of the Colville Indian Reservation v. Washington, 446 F. Supp. 1339 (E.D. Wash. 1978).
78. 68 OKLA. STAT. § 1310 (1971).
79. *Id.*
80. Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976).
81. *See* Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976); Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973); Tonasket v. State, 448 P.2d 281 (Wash. 1971).
82. 34 Stat. 137 (1906).
83. Harjo v. Kleppe, 420 F. Supp. 1110, 1126 (D.D.C. 1976).

not totally eliminate the sovereign powers of the tribes.[84] The Indian Reorganization Act provided for the reorganization of tribal governments.[85] Under provisions of this Act, those powers which had remained intact after the attempted termination of the tribal governments and which had been held continually from the date of such attempted termination by the tribe as a whole, were returned to the reorganized tribal governments. Although the Five Civilized Tribes were excluded from the Indian Reorganization Act,[86] they were included in the Oklahoma Indian Welfare Act.[87] This latter Act provided that the Five Civilized Tribes should have all rights and privileges which had previously been given to other tribes by the authority of the Indian Reorganization Act.[88] Thus, if the Five Civilized Tribes were to organize and adopt laws and ordinances pursuant to the provisions in the Oklahoma Indian Welfare Act, those laws and ordinances would be federally delegated authority under the rationale of *Colville.*[89] If the state statutes covered the same subject matter as the tribal ordinances, the statutes would be preempted.

The next step in the analysis is to determine whether the power to tax was one of the existing powers of the Five Civilized Tribes at the time of the enactment of the Oklahoma Indian Welfare Act. "Tribal governments are subject to the plenary power of Congress and so retain only those powers which Congress allows them to retain."[90] The Court in *Iron Crow*[91] held that the power to tax is a power vested in Indian tribes; therefore, the Five Civilized Tribes have the power absent abrogation of that power by Congress. A review of the Five Tribes Act of 1906[92] leaves unclear whether the tribes possess the power to tax.

The pertinent language used by Congress in the Act is "all taxes accruing under tribal laws or regulations of the Secretary of the Interior shall be abolished from and after [December 31, 1905]. . . ."[93] The language could be interpreted as abolishing the existing laws and the power to enact any future tax laws. Since the language does not specifically refer to abolishing the tribes' power

84. *Id.* at 1129.
85. 48 Stat. 984 (1934).
86. *Id.* at § 13.
87. 49 Stat. 1967 (1936).
88. *Id.*
89. Confederated Tribes of the Colville Indian Reservation v. Washington, 446 F. Supp. 1339 (E.D. Wash. 1978).
90. *Id.* at 1361.
91. Iron Crow v. Oglala Sioux Tribe, 231 F.2d 89 (8th Cir. 1956).
92. 34 Stat. 137 (1906).
93. *Id.*

to enact future taxes, the best interpretation would be that the Act only abolished the existing tax laws of the tribes of 1906.[94]

An alternative basis for the tribes' power to tax is found in the Oklahoma Indian Welfare Act. Section 3 of the Act states: "The Secretary of the Interior may issue to any such organized group a charter.... Such charter may convey to the incorporated group... the right to participate in the revolving credit fund and to enjoy any other rights or privileges secured to an organized Indian tribe under the [Indian Reorganization Act]"[95] Again, the language of the Act is not clear. It could be interpreted to say that the Oklahoma Indian Welfare Act tribes received all rights and privileges *given* to other Indian tribes by the Indian Reorganization Act, or in the alternative, that the Oklahoma Indian Welfare Act tribes received all rights and privileges *that were already possessed* by the Indian Reorganization Act tribes. The latter interpretation would confer on the Oklahoma Indian Welfare Act tribes the right to tax, because the Indian Reorganization Act tribes possessed taxation rights.[96] The intent of the Oklahoma Indian Welfare Act was to "promote the general welfare of the Indians of the State of Oklahoma"; therefore, the better interpretation would appear to be that the Act did give the Oklahoma Indian Welfare Act tribes all the rights and privileges of the Indian Reorganization Act tribes, including the right to tax.

Conclusion

There is a good possibility that in the future a court will have to determine if businesses operated by the Five Civilized Tribes are exempt from Oklahoma's two per cent sales tax on sales to non-Indians. If the court rules the tribes are exempt, it will have to make certain findings of fact and conclusions of law to support that holding. First, the court will have to find that the tribes have organized pursuant to the provisions of the Oklahoma Indian Welfare Act. Alternatively, if the tribes have not organized pursuant to the Oklahoma Indian Welfare Act,[97] the court will have to find, as in *Colville*,[98] that the tribes have organized pursuant to the

94. For a discussion of powers left in the Seminole Tribe, *see* Work, *The "Terminated" Five Tribes of Oklahoma: The Effect of Federal Legislation and Administration Treatment on the Government of the Seminole Nation*, 7 AM. INDIAN L. REV. 81 (1978).

95. 49 Stat. 1967 (1936).

96. *See* Iron Crow v. Oglala Sioux Tribe, 231 F.2d 89 (8th Cir. 1956).

97. 49 Stat. 1967 (1936).

98. Confederated Tribes of the Colville Indian Reservation v. Washington, 446 F. Supp. 1339 (E.D. Wash. 1978).

provisions of Section 53.1 of Title 25 of the Code of Federal Regulations. Second, the court will have to find that the tribes have enacted tribal ordinances that regulate and tax the same items that are taxed under Oklahoma's sales tax. Third, the court will have to decide, according to *Colville*, that Section 16 of the Indian Reorganization Act[99] confers on Indian Reorganization Act tribes, therefore on the Oklahoma Indian Welfare Act tribes, federally delegated authority. Fourth, the Court will have to decide either that Section 11 of the Five Tribes Act of 1906 did not abolish the power of the Five Civilized Tribes to tax, or that Section 3 of the Oklahoma Indian Welfare Act reconferred that power on the tribes.

99. 48 Stat. 984 (1934).