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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

OSAGE NATION,

Plaintiff,

vs.

STATE OF OKLAHOMA ex rel.
OKLAHOMA TAX COMMISSION;
ROBERT E. ANDERSON, Chairman
of the Oklahoma Tax Commission; JERRY
JOHNSON, Vice-Chairman of the Oklahoma
Tax Commission; and
DON KILPATRICK, Secretary-Member
of the Oklahoma Tax Commission,

Defendants

Case No. 01-CV-0516B (M)

FILED
SEP 10 2001
Phil Lombardi, Clerk
U.S. DISTRICT COURT

PLAINTIFF'S RESPONSE BRIEF TO DEFENDANT'S
MOTION TO DISMISS

In response to Defendant State of Oklahoma, ex rel Oklahoma Tax Commission's motion to dismiss Plaintiff Osage Nation's ("Nation") complaint pursuant to Fed.R.Civ.P. 12(b)(1), the Nation advises the Court as follows:

NATURE OF NATION'S AMENDED COMPLIANT

Fed.R.Civ.P. 15(a) authorizes a plaintiff to amend its complaint at any time before a responsive pleading is filed. A motion to dismiss is not a responsive pleading. Glenn v. First National Bank, 868 F.2d 368, 370 (10th Cir. 1989). Where a defendant has only filed a motion to dismiss, the plaintiff may amend its complaint without requesting or receiving leave of the court. Breuer v. Rockwell International Corporation, 40 F.3d 1119, 1131 (10th Cir. 1994).

Contemporaneously with the filing of this Response Brief, the Nation has filed an Amended Complaint. The Nation's Amended Compliant seeks (1) a declaratory judgement holding that the

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Nation's reservation is Indian country; (2) a declaratory judgement holding that the Nation's members who earn income and reside within the Nation's reservation are not subject to Oklahoma income taxes; and (3) a permanent injunction against the Oklahoma Tax Commission ("OTC") and its employees and agents from levying or collecting such taxes from the Nation's members. (Amended Complaint, p. 5).

1. The Nation asserts this Court has jurisdiction pursuant to 28 U.S.C. §1331 and §1362. (Amended Complaint, para. 1).

2. The Nation asserts it is a Federally recognized Indian tribe with a governing body duly recognized by the Secretary of the Interior. (Amended Complaint, para. 3).

3. The Nation asserts that the OTC is an agency of Defendant State of Oklahoma ("State") authorized to administer and enforce Oklahoma's tax laws. The Nation further asserts that individual Defendants Robert E. Anderson, Jerry Johnson and Don Kilpatrick are the three persons currently appointed by the Governor of the State to administer the OTC. (Amended Complaint, para. 4).

4. The Nation asserts that under Federal law, tribal members who are employed and reside in Indian country are exempt from paying state income taxes on the income earned from their employment in Indian country. (Amended Complaint, para. 12).

5. The Nation asserts that the Nation's Indian country consists of all lands within the Nation's reservation boundaries. (Amended Complaint, para. 13).

6. The Nation asserts that the Defendants, in violation of Federal law, have and are attempting to collect income taxes from members of the Nation who are employed and reside within the Nation's Indian country. (Amended Complaint, para. 14).

7. The Nation asserts its causes of action arise under 18 U.S.C. §1151, the treaties between

the Nation and the Government of the United States of America, the Act of June 5, 1872, Ch.310, 17 Stat. 228 (1872), the Act of May 2, 1890, Ch. 182, §1, 26 Stat. 81 (1890), the Act of June 16, 1906, Ch. 3335, 34 Stat. 267 (1906), the Act of June 28, 1906, Ch. 3572, 34 Stat. 539 (1906), and the federal common law relating to Indians. (Amended Complaint, para. 1).

8. Attached to the Nation's Amended Complaint as an exhibit is a copy of OTC Order No. 2000-05-30-018, denying the State tax court protest of Mary Jo Webb, a member of the Nation employed and residing within the Nation's reservation, to an assessment of Oklahoma income taxes. (Amended Complaint, Exhibit "A").

LEGAL ARGUMENT

Fed.R.Civ.P. 12(b)(1) authorizes a party defendant to assert the defense of "lack of jurisdiction over the subject matter" by motion prior to filing a responsive pleading to the complaint. A motion to dismiss under Fed.R.Civ.P. 12(b)(1) should be granted only when it appears beyond doubt that the plaintiff could prove no set of facts entitling it to relief. United States v. Colorado Supreme Court, 87 F.3d 1161, 1164 (10th Cir. 1996). In considering a motion to dismiss, the Court must accept as true all well-pleaded facts and construe all reasonable allegations in the light most favorable to the plaintiff. Skrzypczak v. Kauger, 92 F.3d 1050, 1053 (10th Cir. 1996).

A. The Eleventh Amendment To The U.S. Constitution Does Not Bar The Nation's Claims For Relief

The terms of U.S. Const. amend XI provide as follows:

"The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State, or by Citizens or Subjects of any Foreign State."

Primarily relying upon the decision in Seminole Tribe of Florida v. Florida, 517 U.S. 44, 116 S.Ct.1114, 134 L.Ed.2d 252 (1996), which concerned questions over the power of Congress to abrogate a state's Eleventh Amendment immunity from suit in a Federal court pursuant to the Indian Commerce Clause of the U.S. Constitution (U.S. Const. art I, §8, cl.3), the State asserts the Nation's claims are barred by the Eleventh Amendment. However, the Seminole Tribe decision is not controlling authority for determining whether the Court has jurisdiction to hear the Nation's claims.

In Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation, 425 U.S. 463, 96 S.Ct. 1634, 48 L.Ed.2d. 96 (1976), the tribe brought suit in the U.S. District Court for declaratory and injunctive relief against the state's cigarette tax as applied to tribal members who sold cigarettes within the tribe's reservation. In its decision, the Supreme Court recognized that the important threshold question was whether the district court was prohibited from entertaining jurisdiction over the tribe's suit. Moe at U.S. 470, S.Ct. 1639-40. In analyzing this question, the Supreme Court acknowledged:

1. That in enacting 28 U.S.C. §1362, Congress intended to open the Federal courts to the kind of claims that could have been brought by the United States as trustee for the tribe¹. Moe at U.S. 472-73, S.Ct. 1641.
2. That the United States, as trustee for the tribe, could have brought an identical action against the state seeking to enjoin the application of the state's cigarette tax against tribal members². Moe at U.S. 473-74, S.Ct. 1641-42.

¹ 28 U.S.C. §1362 provides for the U.S. District Courts to have original jurisdiction of all claims brought by a Federally recognized Indian tribe arising under the U.S. Constitution or Federal laws or treaties.

²The Eleventh Amendment does not bar the Federal government from bringing a suit against a state in Federal court. See Blatchford v. Native Village of Noatak, 501 U.S. 775, 782, 111 S.Ct. 2578, 2582, 115 L.Ed.2d 686 (1991).

Based thereon, the Supreme Court held that the district court had jurisdiction and the tribe was not barred from pursuing its suit.

In Sac and Fox Nation of Missouri v. Pierce, 213 F.3d 566 (10th Cir. 2000), cert.den., __U.S.__, 121 S.Ct. 1078, 148 L.Ed.2d 955 (2001), the Tenth Circuit recognized the continuing vitality of Moe. In Pierce, three tribes filed suit in U.S. District Court to enjoin the state from collecting taxes on motor fuel distributed to the tribes' retail gasoline stations located on tribal trust lands. In response, the state asserted the district court had no jurisdiction over the controversy because the state's sovereign immunity under the Eleventh Amendment barred the tribe's suit. After reviewing the decisions in both Seminole Tribe and Moe, the Tenth Circuit held as follows:

“Neither ... nor the Eleventh Amendment bars the Tribes' suit in this case. Undoubtedly after Seminole Tribe, the Eleventh Amendment generally bars an Indian tribe's suit in federal court against a state where the tribe's claim rests solely on Article I's Indian Commerce Clause. As the Supreme Court stated in both Blatchford and Moe, however, an Indian tribe's suit for injunctive relief against state taxation occurring on trust lands is another matter. Blatchford expressly recognized what Moe necessarily inferred from §1362. Blatchford explained that in Moe, the Court found in §1362-

an implication that a tribe's access to federal court to litigate federal question cases would at least in some respects be as broad as that of the United States suing as the tribe's trustee. The “respect” at issue in Moe was access to federal court for the purpose of obtaining injunctive relief from state taxation.

Blatchford, 501 U.S. at 784, 111 S.Ct. 2578 (emphasis in original). Accordingly, we conclude that the Eleventh Amendment does not bar the Tribes' suit against the State to enjoin enforcement of the Kansas motor fuel tax law.”
Pierce at 572-73.

In Moe, the Supreme Court found that the U.S. District Courts have jurisdiction under 28 U.S.C. §1362 to hear suits by Indian tribes against states seeking to enjoin the collection of state cigarette taxes on reservation lands. In Pierce, the Tenth Circuit held that the district courts have jurisdiction under §1362 to hear suits brought by tribes against states seeking to enjoin the collection of state motor fuel taxes on tribal trust lands. In neither Moe nor Pierce did the Eleventh Amendment serve to bar the tribes from pursuing their suits for injunctive relief against the states.

In the present action, the Nation asserts the jurisdiction of the Court under §1362 and seeks to enjoin the state from levying and collecting state income taxes from the Nation's members who are employed and reside within the Nation's reservation. There is no substantive difference in suits seeking to enjoin the collection of state cigarette and motor fuels taxes on tribal lands and the Nation's suit. Based on the decisions in Moe and Pierce, the Eleventh Amendment does not bar the Nation's claims for relief against the State.

B. The Tax Injunction Act Does Not Deprive This Court Of Jurisdiction To Hear The Nation's Claims

The Tax Injunction Act ("TIA") provides as follows:

“[t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such state.”

28 U.S.C. §1341.

While the TIA may constitute a bar to most Federal court suits seeking to enjoin the levying and collection of a state tax, it is not an absolute bar. In Moe, supra, the Supreme Court recognized the TIA to be inapplicable to suits brought by the United States to protect itself and its instrumentalities from unconstitutional state exactions. Moe at U.S. 470, S. Ct. 1640. Accordingly,

after finding that one purpose in the enactment of 28 U.S.C. §1362 was to allow an Indian tribe to bring the same suit in Federal court which the United States could have brought as trustee for the tribe, the Supreme Court held in Moe that the TIA does not deprive the U.S. District Courts of jurisdiction to entertain a tribe's suit to enjoin collection of a state tax. Moe at U.S. 474-75, U.S. 1642.

In Pierce, supra, the defendant state, apparently recognizing the Moe decision, did not expressly assert the TIA was a bar to the tribes' suit. However, in reaching its decision that the district court had jurisdiction to hear the tribes' suit, the Tenth Circuit held that the TIA did not serve to bar the tribes' claims. Pierce at 572.

In its brief, the State cites several cases for the proposition that the TIA forbids Federal injunctive and declaratory relief against the state. However, the cases cited by the State are easily distinguished by the fact that the party seeking such relief was not an Indian tribe. As explained in Moe and Pierce, the prohibitions set forth in the TIA do not bar suits by Indian tribes for injunctive relief from unlawful state taxes being levied against tribal members on reservation lands.

The State also cites two cases, Brooks v. Nance, 801 F.2d 1237 (10th Cir. 1986) and Amarok Corporation v. State of Nevada, Department of Taxation, 935 F.2d 1068 (9th Cir. 1991); for the proposition that the TIA's "restrictive force specifically [emphasis in brief] has been held to deprive a federal court of jurisdiction to determine whether land is Indian country for purposes of state taxation." State's brief, p.9. However, a review of the Brooks and Amarok Corporation decisions reveals that neither court ever considered that issue, much less made that holding. Further, both of

these cases can be distinguished from Moe, Pierce and the present action in that the parties complaining about state taxation laws were not Indian tribes³.

CONCLUSION

The Nation has brought suit against the State seeking injunctive and declaratory relief due to the State's actions in violation of Federal law to levy and collect income taxes from the Nation's members who are employed and reside in the Nation's Indian country. In bringing its suit, the Nation has asserted that this Court has jurisdiction to hear the case pursuant to 28 U.S.C. §1362. Decisions by the Supreme Court and the Tenth Circuit have held that Federal courts have jurisdiction under §1362 to hear such a suit and that neither the Eleventh Amendment nor the TIA serve to bar the suit. See Moe, supra, and Pierce, supra. Based thereon, Plaintiff Osage Nation respectfully requests the Court to deny the State's motion to dismiss and order the State to file its answer to the Nation's complaint.

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³What the Amarok Corporation court did state is that the §1362 exception to the jurisdictional bar of §1341 granted to Indian tribes would not be extended to allow individual members of Indian tribes to bring suits challenging state tax laws. *Id.*, et p.1070.

CERTIFICATE OF SERVICE

This is to certify that on the 18th day of September, 2001 a true and correct copy of the within Plaintiff's Response Brief to Defendant's Motion to Dismiss was deposited in the U.S. Mail, postage prepaid thereon, addressed to the following counsel of record:

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