UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Fond du Lac Band of Lake Superior Chippewa,

Plaintiffs,

v.

Ward Einess, in his official capacity as the Commissioner of the Minnesota Department of Revenue,

Defendant.

Civ. No. 09-385 (PAM/RLE)

MEMORANDUM AND ORDER

The matter before the Court is Plaintiff Fond du Lac's Amended Motion for Summary Judgment. The only issue before the Court on summary judgment is the purely legal question of whether the State of Minnesota may tax the off-reservation, out-of-state income of a tribal member living on the reservation. For the following reasons, the Court concludes that tribal members living on the reservation may be taxed for their out-of-state income.

BACKGROUND

The Fond du Lac Band is a federally recognized tribe that occupies reservation land set apart for the tribe in the Treaty of LaPointe in 1854. The Band brought suit against the State of Minnesota claiming that Minnesota is improperly taxing its members.

The Band specifically identifies two individuals it claims are being improperly taxed. First, Minnesota taxed Band member Leonard M. Houle on his military pension. Minnesota

now agrees that the military pensions of members who reside on the reservation should not be subject to tax. Therefore, it appears the argument is moot as to Houle.

The second individual identified is Band member Charles M. Diver. Diver lived in Cleveland, Ohio, for a number of years where he was employed as a dock worker with Yellow Freight System. As part of his compensation, Diver earned a pension. When Diver returned to Minnesota, he returned to the Band's reservation. Although his pension does not come from in-state sources, Diver has paid taxes on his pension after returning to the reservation.

The Band contends that there are other members who derive income from out-of-state sources, including federal benefits, private pensions, investment income, and employment. They seek relief on behalf of those members as well.

DISCUSSION

Summary judgment is proper if there are no disputed issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The Court must view the evidence and the inferences that may be reasonably drawn from the evidence in the light most favorable to the nonmoving party. Enter. Bank v. Magna Bank, 92 F.3d 743, 747 (8th Cir. 1996). The moving party bears the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Id. at 747.

The facts in this case, as they pertain to the two identified individuals, are not disputed. Thus, the only issue for the Court is a legal one: Can the State of Minnesota tax the out-of-state income of tribal members living in Indian country?

The issue of whether the State may tax the out-of-state income of a tribe member falls

in the gap between two lines of United States Supreme Court precedent. In 1973, the Supreme Court issued two companion cases that set the framework for this Court's decision. First, in McClanahan v. State Tax Commission of Arizona, 411 U.S. 164 (1973), the Supreme Court ruled that a tribe member living and working solely on his member reservation was exempt from state income tax. Second, in Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973), the Supreme Court held that states could tax tribal income made within the state's boundaries but off the reservation.

Because of tribal sovereignty, different presumptions apply to state taxation of tribe members depending on whether the taxed activity is in Indian country. Unless there is an express act of Congress, a state has "no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation." Id. at 148 (citing McClanahan, 411 U.S. 164). "But tribal activities conducted outside the reservation present different considerations. . . . Absent express federal law to the contrary, Indians going beyond the reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State." Id. Congress has not acted to either permit or prohibit Minnesota from taxing the Fond du Lac Band members' out-of-state income. Therefore, how the Court should interpret the lack of Congressional action depends on whether Diver's income is characterized as on-reservation activity or off-reservation activity.

The Band urges the Court to apply McClanahan's presumption requiring express Congressional authorization before the State is permitted to tax on-reservation activity. But Diver's income was not earned from on-reservation activity. The Court must read

McClanahan, and subsequent cases applying McClanahan, to determine whether Diver's current residence on the reservation is enough to trigger McClanahan's presumption against state taxation.

In McClanahan, the Supreme Court concluded that a state could not tax a tribal member's on-reservation income when: (1) the income was earned in Indian country, and (2) the income was earned by a tribe member living in Indian country. McClanahan, 411 U.S. at 165. Since that time, the Supreme Court has not exempted income from taxation under McClanahan unless both prongs have been met. See Oklahoma Tax Comm'n v. Chicksaw Nation, 515 U.S. 450, 464 (1995) (no tax immunity under McClanahan for income earned on the reservation where tribe member resides off the reservation); id. at 467 (rejecting an argument as absurd because it would give tax immunity to non-member employees of the tribe); Oklahoma Tax Comm'n v. Sac and Fox Nation, 508 U.S. 114, 123 (1993) (remanding where the lower court failed to determine whether the tribe member both earned income on reservation and lived in Indian country); Mescalero, 411 U.S. at 153 (permitting state taxation of tribal income earned outside the reservation boundaries).

The Band has cited no Supreme Court case in which a tribe member has been exempt from a non-discriminatory state tax based on the member's residence on the reservation alone.[1] For McClanahan immunity to apply, the activity being taxed must take place on the

[1] McClanahan has been applied to excise taxes as well, although in a somewhat modified way. See, e.g., Chicksaw Nation, 515 U.S. at 458; Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 155 (1980). Yet, even in application to excise taxes states have been able to enforce the taxes in Indian country except where the taxes are (1) collected for activity on the reservation, *and* (2) the legal incidence of the tax falls upon tribe members living on the reservation. E.g., Wagnon v. Prairie Band Potawatomi

reservation. Diver earned his income off the reservation and, therefore, McClanahan does not apply.

Because McClanahan does not apply, the opposite presumption prevails. Under Mescalero, unless there is an express federal law to the contrary, a State may impose a non-discriminatory state law against a tribe member. Minnesota is permitted under state and federal law to tax the out-of-state income of its residents, and it does so on a non-discriminatory basis. Therefore, Minnesota may tax the out-of-state income of members of the Band even though they reside solely on the reservation.

Relying on a decision out of the Western District of Wisconsin, the Band argues that permitting the State to collect taxes on out-of-state income violates due process. As far as this Court is aware, the case relied on by the Band, Lac du Flambeau Band of Lake Superior Chippewa Indians v. Zeuske, is the only case to address the precise issue raised. 145 F. Supp. 2d 969, 975-77 (W.D. Wis. 2000). In Zeuske, the court decided that due process prohibits states from imposing taxes on income earned by tribe members while out-of-state. Because of tribal sovereignty, the court concluded that a reservation's location within the state's boundaries did not provide a sufficient nexus between the state and a tribe member residing on the reservation to permit taxation. Id. at 975 (citing Moe, 425 U.S. at 476;

Indian Nation, 546 U.S. 95, 112-13 (2005) (permitting state fuel tax on non-Indian distributors selling on a reservation); Chicksaw Nation, 515 U.S. at 461-62 (prohibiting the state from enforcing a state fuel tax on tribal retailers); Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463, 96 (1976) (upholding state taxation of on-reservation sale of cigarettes to non-members, but prohibiting the state from taxing cigarette sales to members); id. (prohibiting the collection of personal property taxes and vendor license fees because the taxes were imposed on tribe members for on-reservation activities).

McClanahan, 411 U.S. at 172-173). While Zueske has persuasive precedential value, it is not binding on this Court.

It is well established that a state may tax non-residents only for income earned within the jurisdiction, whereas a state can tax all the income of its residents, even if earned outside the jurisdiction. Chicksaw Nation, 515 U.S. at 462-63. The parameters of this rule are based on the Due Process and Commerce Clauses, which require a nexus between the interstate activity and the state before that activity can be taxed. E.g., Container Corp. of America v. Franchise Tax Board, 463 U.S. 159, 165-66 (1983). Where the resident of a state earns income outside the jurisdiction, that resident's domicile in the state provides the required nexus. Chicksaw Nation, 515 U.S. at 463.

The Band argues, and the Zueske court held, that there is not a sufficient nexus between an individual residing on a reservation and the state to permit state taxation of out-of-state income. See Zueske, 145 F.Supp.2d at 475-76. Zueske cited Moe and McClanahan in support of its conclusion that the benefits the state provides to tribal members do not overcome due process requirements.

Moe concerned the State of Montana's efforts to collect various taxes within Indian country: personal property taxes for vehicles owned by tribe members and kept on the reservation; vendor licensee fees for a "smoke shop" located on the reservation and owned by tribe members; and sales tax for the sale of cigarettes to both tribal members and to others. 425 U.S. at 480-81. Moe explained that a state's regulatory interest was at its lowest when on-reservation conduct involving only tribe members was at issue. See id. Thus, Montana was prohibited under McClanahan from collecting the personal property taxes and the vendor

license fees because the taxes were imposed on tribe members for on-reservation activities. Id. Montana also could not collect sales taxes for the on-reservation sale of cigarettes to tribe members. Id. But, Montana was permitted to tax the on-reservation sale of cigarettes to individuals who were not members of the Tribe. Id.

In Moe, the only source of Montana's authority to collect taxes for sales on the reservation was the fact that the reservation was located in Montana. Thus, the Supreme Court implicitly found a sufficient nexus between individuals located on the reservation and the state to permit such taxes. Subsequent cases have reiterated that a state may require the collection of taxes in Indian country. See e.g., Chicksaw Nation, 515 U.S. at 458-462 (permitting the state to collect taxes from consumers on fuel sold in Indian country); Colville, 447 U.S. at 154-57 (permitting the state to tax the on-reservation sales of cigarettes to non-member Indians). The Supreme Court has explicitly permitted states to collect excise taxes from individuals living in Indian Country, therefore due process does not prohibit Minnesota from taxing a tribe member's residency on a reservation located within state boundaries.

CONCLUSION

States are permitted to tax income and activities related to tribe members unless the McClanahan immunity principle applies. The Band must show that tribe members are living in Indian country *and* that Minnesota is taxing either activities conducted or property located within Indian Ccountry. Because the Band does not claim that Minnesota is taxing property located or activities conducted in Indian country, the McClanahan immunity principle does not apply to this case. As a result, Minnesota is permitted to impose non-discriminatory taxes based on a tribe member's location within state boundaries and has the authority to tax the

out-of-state income of tribe members residing in Indian country.

Accordingly, **it is HEREBY ORDERED that** Plaintiff's Motion for Summary Judgment (Docket No. 32) is **DENIED**.

Date: Wednesday, November 4, 2009

s/ Paul A. Magnuson
Paul A. Magnuson
United States District Court