IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

NEW MEXICO TAXATION AND REVENUE DEPARTMENT,
Defendant-Appellant,

Court of Appeals No. A-1-CA-38577

v.

Administrative Case No. 36198
AHO Decision and Order No. 19-28

JENNIFER SKEET,
Plaintiff-Appellee

APPELLANT'S REPLY BRIEF

Appeal of Decision of Hearing Officer
Ignacio V. Gallegos, Administrative Hearings Office

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STATEMENT OF COMPLIANCE WITH RULE 12-213(F)(3) NMRA

This Reply Brief complies with the page limitation imposed by Rule 12-213(F)(2) and type-volume limitation imposed by Rule 12-213(F)(3) NMRA. The word count feature of the word processing system (Microsoft Word, Version 2016) used to prepare the brief indicates a word count of 1,901, excluding the cover page, table of contents, table of authorities, signature block, certificate of service, and this statement of compliance.

Peter Breen

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STANDARD OF REVIEW AND HOW THE ISSUE WAS PRESERVED; STATEMENT OF COMPLIANCE WITH NMRA 12-305 (F) (3)

The standard of review is as stated in the Brief-in-Chief, p.6. Where the facts are not in dispute, the standard of review is *de novo* for legal error. *A&W Restaurants, Inc. v. Taxation & Revenue Dep't*, 2018-NMCA-069, ¶ 6, 429 P.3d 976, 978, *cert. denied* (Oct. 26, 2018).

The issue of Appellee's domicile was preserved through the assessment, and the litigation of the case through the Administrative Hearings Office and in closing arguments. The domicile issue was the only proposed adjustment to the assessment requested by the Taxpayer. (a requested complete abatement.). The issue was argued at the conclusion of the hearing. The length of this Reply Brief is 2,093 words.

THE REVERSAL OF THE DECISION AND ORDER WOULD PROTECT EXISTING NOTIONS OF TERRITORIAL TRIBAL SOVEREIGNTY

The issue before the Court is whether the State of New Mexico has jurisdiction to impose personal income tax upon a New Mexico resident member of the Navajo Nation not domiciled on the Navajo Nation, but commutes to work on the Navajo Nation. Tribal tax jurisdiction is not the issue in this appeal. Nonetheless, the Appellee's Answer Brief devotes pages five to eighteen to an erudite restatement of history and principles of Indian law and protection of tribal sovereignty that have no

bearing on this case. Though not relevant here, the Navajo Nation through litigation conducted through its own Department of Justice established long ago that the Indian Pueblos and tribes have inherent authority to establish their own tax programs that apply on Native American lands. *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195 (1985). By now, most Federally recognized Indian Tribes in New Mexico have gross receipts tax programs operating that administered by the Taxation and Revenue Department on behalf of the Native American Taxation authorities through intergovernmental agreements.[1] The Navajo Nation does not have a competing income tax program, and in any event a dual taxation circumstance would not invalidate the state tax program. *Cotton Petroleum v. New Mexico* 490 U.S. 163 (1989). Instead, this case is about New Mexico tax jurisdiction and domicile. We have long, very detailed regulation on what constitutes domicile for the PIT definition of "resident" 3.3.1.9(C) NMAC- Although the Taxpayer worked on tribal trust land during the week, as shown in the record below, TR13:10;15;18;15;55;25;28 36;30, the Taxpayer was plainly domiciled with her husband in a house she owned in Albuquerque, to the point of not maintaining a mailing address on the reservation and voting absentee under provisions of Navajo Nation election law.

[1] http://www.tax.newmexico.gov/Government/tribal-cooperative-agreements.aspx

Starting with the *McClanahan* case in 1973, the United States Supreme Court held that Indians "living" or residing and working on the Indian reservation for which they were a member of the tribe are exempt from state income tax. This is expressed in the very first sentence of the opinion: "This case requires us to once again reconcile the plenary power of the states over ***residents*** within their borders with the semi-autonomous status of Indians ***living on*** tribal reservations." *McClanahan v. State Tax Comm'n of Arizona* 411 U.S. 164 (1973) (emphasis added). There follows an extensive discussion by the Court of Indian law principles culminating in a decision for the alleged taxpayer, Rosalind McClanahan, a Navajo Nation member who resided on Navajo Nation lands. *Id.*

There is absolutely no discussion in *McClanahan* to suggest that in addition to issuing a landmark opinion regarding tribal sovereignty, the Court also meant intended to casually dispense with the ancient Roman law of domicile as adopted by each of the states, for a vague, ambiguous and unbounded new law based upon where one "lives" to be developed from scratch by the state court judges and the hearing officers for the various state taxing authorities. The lower Arizona state appellate court overruled by the Supreme Court likewise did not use the word "domicile" but simply stated that "Plaintiff does not contend that she is not a 'resident' of the State of Arizona within the meaning of the Arizona state tax law..."

McClanahan v. State Tax Comm'n, 14 Ariz. App. 452, 484 P.2d 221 (1971), *rev'd sub nom. McClanahan v. State Tax Comm'n of Arizona,* 411 U.S. 164 (1973).

New Mexico has similarly used the word "lived" to be synonymous with "domicile" in connection with the *McClanahan* question. *New Mexico Taxation & Revenue Dep't. v. Greaves,* 1993-NMCA-133, ¶ 2, 116 N.M. 508, 509. (Comanche tribal court judge who "lived" on Jicarilla lands subject to state income tax because not a member of the tribe with the relevant land base.). In other contexts, New Mexico has made plain that "resident" or "residence" means "domicile." *Hagan v. Hardwick,* 1981-NMSC-002, 10, 95 N.M. 517, 518. ("'Residence' has been defined by this court to be substantially synonymous with 'domicile'...") 3.3.1.9 (C) NMAC and 3.3.1.10 NMAC [resident means an individual domiciled in New Mexico].

If there could be any question about the applicability of normal domicile rules with respect to the application of the state income tax to Native Americans, it was explicitly dispelled in *Oklahoma Tax Comm'n v. Chickasaw Nation,* 515 U.S. 450 (1995). Once again, as in *McClanahan,* the Court in the very first paragraph used "reside" synonymously with the word "domiciled" *Id.* "May Oklahoma impose its income tax upon tribal members who are employed by the Tribe but who reside in the State outside Indian country." The Court used the word "living" elsewhere in the opinion synonymously with domicile. *Chickasaw,* 515 U.S. at 466- 467. Before answering in the affirmative, *Id.*,the Court in *Chickasaw* characterized the holding

in *McClanahan* as a case concerning "tax on income earned on reservation by tribal members residing on reservation". *Chickasaw,* 515 U.S. at 458.

The Court in *Chickasaw* discussed at length the consideration of domicile in *McClanahan* tax cases and held that although it used the words "residence" and "living" for consideration of these cases, the consideration was with domicile as with any other tax case. *Id.* at 462-465. As in *McClanahan,* the lower court, this time the Federal Tenth Circuit Court of Appeals, likewise used some conjugation of "reside" and "live" to be synonymous with "domicile." *Chickasaw Nation v. State of Oklahoma. ex rel. Oklahoma Tax Comm'n,* 31 F.3d 964 (10th Cir. 1994*), aff'd in part, rev'd in part sub nom. Oklahoma Tax Comm'n v. Chickasaw Nation,* 515 U.S. 450, 115 S. Ct. 2214, 132 L. Ed. 2d 400 (1995), and *vacated in part, Chickasaw Nation v. State of Okl. ex rel. Oklahoma Tax Comm'n,* 64 F.3d 577 (10th Cir. 1995).

THERE IS NO AMBIGUITY IN THE STATUTE

If there is a rule of statutory construction that applies to NMSA 1978, § 7-2-5.5 which encapsulates the *McClanahan* holding into state law, it is that undefined terms that are used in a statute that references a court holding should be construed to have the same meaning that they had in the appellate court decisions. NMSA 1978, § 12-2A-20 (B) and (C). Both the United States Supreme Court and the New Mexico appellate courts have repeatedly used "residence" and "living" to be synonymous with "domicile." The New Mexico Court of Appeals has explicitly

ruled that "residence" is synonymous with "domicile." *Hagan, supra.* The Supreme Court ruled that a non-member Native American "living" on Jicarilla lands was not entitled to the *McClanahan* tax exemption. *Greaves, supra.* In light of the common appellate use of the words "living" and "residence" to be synonymous with "domicile" it would be implausible to rule that the undefined statutory use of the word "living" concerning the *McClanahan* circumstance would have a radically different meaning and instead of being a synonym for "domicile," the word "living" is really an authorization of the Administrative Hearings Office to dispense with thousands of years of the law of domicile- and instead create a new and different law of "living" untethered from historical concepts of domicile.

The Taxpayer argues that she is entitled to the benefit of the plain meaning rule in her answer brief, but this is disingenuous. There is no law of "place of living" separate from the concept of domicile. The invented concept of "place of living" is anything but "plain" if not the place of domicile. Instead, the supposed distinction between "living" and "domicile" has been used in a freewheeling fashion by the Administrative Hearings Office. For example, a Tesuque Pueblo lawyer domiciled in Albuquerque but working on the Pueblo during the week must pay the state income tax, In *the Matter of the Protest of Mekko Miller & Elaine Suazo,* Decision and Order 10-1, while ruling in this case that a Navajo lawyer domiciled in Albuquerque but working on the Navajo Nation during the week is exempt.

While undoubtedly beneficial to the pecuniary interests of individual Native American commuters who may find it convenient to live off the reservation and work on reservation facilities, there are no Native American interests in self-determination and tribal self-government otherwise at stake in this matter. The Taxpayer makes no contention that she is subject to double taxation of the same income by Navajo Nation and New Mexico. Moreover, the concept of "living," if it is separate from "domicile," is unbounded. Is ownership and occasional use of a traditional seasonal reservation home by the Taxpayer enough to exempt the Taxpayer from the tax who otherwise is domiciled at a house in Albuquerque? Is attendance at a multi-day traditional ceremony, a Navajo Sing, for example, on tribal lands, sufficient "residence" on Tribal lands The Taxpayer in this case votes at her childhood home chapter in accordance with Navajo ***absentee*** voting provisions in Tribal elections, TR: 18:00, but would participation in political and tribal activities at a Navajo Chapter House, a kind of town meeting type institution, be enough to establish "living" on the Navajo Nation's lands for purposes of the Administrative Hearing Office? (*See, Blatchford v. Gonzales*, 1983-NMSC-060, ¶ 6, 100 N.M. 333, 335 for a description of the uses of the Navajo chapter house.)

A better approach is to recognize that a conventional application of domicile rules is what was expected by the Legislature by the passage of NMSA 1978, § 7-2-5.5.

A WEAKENED VERSION OF DOMICILE ADVANCES NO NATIVE AMERICAN INTERESTS

The weakened version of 'domicile' proposed by the Administrative Hearing Office only protects the pecuniary interest of individual commuter-taxpayers, and, as seen in the differential treatment of the similarly situated Tesuque Taxpayer and in this case a Navajo taxpayer, in an arbitrary and capricious way, at that.

Instead, the Department's application of conventional notions of domicile used as a starting point, has the effect of fully respecting the territorial boundaries of the Navajo Nation. As the Supreme Court held in *Chickasaw, supra,* this "categorical" territorial approach is precisely the same approach used in international law, and in considering the sovereign interest of the various states. Moreover, in holding that the *McClanahan* exemption applied to "Indian Country" not just to tribal trust lands, the Court adopted the most expansive expression of Tribal territorial jurisdiction available. Given the inconsistent consideration of these cases by the Administrative Hearings Office, future, less-sympathetic tribunals could just as easily reinterpret the statutory "living" requirement to mean effectively, "domicile plus additional factors" to the detriment of the individual taxpayers, the concept of tribal sovereignty and the principle of even-handed tax administration.

CONCLUSION

The Decision and Order of the Administrative Hearings Office should be reversed.

Respectfully submitted by: */s/ Peter Breen (electronically signed)*

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CERTIFICATION OF EMAIL AND MAILED SERVICE

A copy of the foregoing Reply Brief, was mailed and emailed to opposing counsel This 28th day of August 2020 to Jeanette Wolfley, Wolfley Law Office, P.O. Box 816, Bernalillo, NM 87004. Email: wolfleyje@gmail.com

By: */s/ Peter Breen (electronically signed)*
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