

DERRIS WAUKAZOO,

Appellant,

v.

**STATE OF MONTANA,
DEPARTMENT OF REVENUE,**

Respondent.

CASE №: IT-2020-28

**FINDINGS OF FACT,
CONCLUSIONS OF LAW, ORDER
AND OPPORTUNITY FOR
JUDICIAL REVIEW**

STATEMENT OF THE CASE

Under the authority of MCA §15-2-302, this is a direct appeal from the Department of Revenue Office of Dispute Resolution (ODR), where a hearing was held on December 4, 2019, and the ODR Final Decision issued on March 2, 2020. The ODR upheld the DOR’s final audit determination, which denied the Taxpayer’s assertion of tax immunity to nonmember Indians in Montana and held there is no legal distinction between nonmember Indians and non-Indians for purposes of state taxing authority.

ISSUE TO BE DECIDED

Whether the Taxpayer is correct that the state of Montana cannot tax his personal income. The DOR believes the Taxpayer is not exempt from income tax under Montana law.

EXHIBIT LIST

The Board admitted the following exhibits submitted by the Taxpayer:

Ex. 1: Copy of Final Decision from ODR;

Ex. 2: Copy of the ODR Hearing Examiners Findings of Fact and Conclusions of Law;

Ex. 3: Taxpayers narrative document with grounds for relief in the form of referenced Acts and Sections of Law Cases including:

- a) Buck Act, 4 U.S.C. Chapter 4 – The States;
- b) 1868 treaty of Fort Laramie with the Northern Cheyenne & Northern Arapahoe;
- c) Montana Code Annotated 2-1-102;
- d) McClanahan v. Arizona State Tax Comm’n, 411 U.S. 164 (1973);
- e) Oklahoma Tax Comm’n Chickasaw Nation, 515 U.S. 450 (1995);
- f) Montana v. Blackfoot Tribe, 471 U.S. 759 (1985);
- g) Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 8 L. Ed. 483 (1832);
- h) LaRoque v. Montana, 583 P.2d 1059, 1063 65 (Mont. 1978)
- i) Dillon v. Montana, 451 F. Supp. 168 (D. Montana 1978);
- j) Topash v. Commissioner of Revenue 291 N.W.2d 679 (1980)
- k) U.S. Court of Appeals for Fourth Circuit – 632 F.2d 373 (4th Cir. 1980);
- l) Oklahoma Tax Commission v. Sac and Fox Nation, 508 U.S. 114, 113 S. Ct. 1985, 124 L. Ed.2d 30 (1993);
- m) County of Yakima v. Yakima Nation, 502 U.S. 251, 258, 112 S. Ct/683, 116L. Ed. 2d 687 (1982);
- n) Williams v. Lee, 358 U.S. 217 (1959);
- o) Joint Committee on Taxation (2008). Overview of Federal Tax Provisions relating to Native American tribes and Their Member;

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Attachments to the narrative included: 1868 Treaty of Fort Laramie (Sioux Treaty, Northern Cheyenne & Northern Arapahoe Treaty), and 1851 and 1868 Treaty of Fort Laramie Maps.

Post Hearing Briefs were submitted by Taxpayer and Department of Revenue on July 29, 2020.

The Board admitted the following exhibits submitted by the DOR:

- Ex. A: DOR 6 W-2 form for Derris Waukazoo
- Ex. B: DOR 7-16 2018 Montana Individual Income Tax Return
- Ex. C: DOR 17-20 June 3, 2019 Statement of Account
- Ex. D: DOR 21-24 Notice of Intent for IRS Offset
- Ex. E: DOR 25-27 August 7, 2019 Letter from Taxpayer
- Ex. F: DOR 28 Certificate of Indian Blood
- Ex. G: DOR 29 Notification of Personnel Action
- Ex. H: DOR 30 August 14, 2019 Letter from N.C. Tribal Health Department
- Ex. I: DOR 31-32 August 26, 2019 DOR Final Determination Letter
- Ex. J: DOR 33 ARM 42.15.220
- Ex. K: DOR 34-35 September 25, 2019 Taxpayer Referral to ODR

FINDINGS OF FACT

1. The Taxpayer is an enrolled member of the federally recognized Rosebud Sioux Tribe. *Taxpayer Ex. 1.*

2. In 2018 the Taxpayer moved to Montana for work and filed a return as a Montana resident. *Id.*

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3. The taxpayer resides within the exterior boundaries of the Northern Cheyenne Reservation. *Id.*
4. As an employee of the Bureau of Indian Affairs (BIA), Mr. Waukazoo derives his income from the BIA, which is part of a federal agency. There was nothing provided in the record to indicate any portion of Mr. Waukazoo's income was derived directly from on-reservation sources. *Taxpayer Ex. 1.*
5. The taxpayer's employer withholds Montana State Income taxes, as demonstrated in his W-2 forms. *Dept. Ex. B.*
6. The Taxpayer duly filed a request for a refund of Montana Income taxes withheld. In a final determination letter filed on August 26, 2019, the Montana DOR notified the Taxpayer that his request for a refund was denied and that he owed Montana \$605.00 plus penalty and interest. *Dept. Ex. I.*
7. The DOR, relying on Montana statutes and administrative rules, determined that the Taxpayer was not entitled to a refund because he was not a member of the Northern Cheyenne Tribe residing on his home reservation. Taxpayer exercised his right of appeal of that decision to the Office of Dispute Resolution (ODR). *Dept. Ex. K.*
8. The ODR hearings examiner heard the dispute on December 4, 2019. The hearings examiner wrote a twenty-five-page opinion denying the Taxpayer the relief he sought and affirmed the decision of the DOR in all respects on March 2, 2020. *Taxpayers Ex. 1.*

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9. The Taxpayer appealed the ODR decision to this Board, which heard the dispute on July 8, 2020. Post-hearing information and briefing were filed on July 29, 2020. The matter is now ripe for decision.
10. To whatever extent the foregoing findings of fact may be construed as conclusions of law, they are incorporated accordingly.

JURISDICTION AND STANDARD OF REVIEW

11. The Taxpayer filed a timely appeal to the MTAB. Therefore, this Board has jurisdiction to hear and decide this matter. Mont. Code Ann. §15-2-302.
12. This appeal is governed by the contested case provision of the Montana Administrative Procedure Act. Mont. Code Ann. § 15-2-302(5)

CONCLUSIONS OF LAW

13. The DOR is an agency of the executive branch of government created and existing under the authority of Mont. Code Ann. § 2-15-13. The DOR is charged with the administration and enforcement of the Montana Code Annotated, Title 15, Chapter 20 (Individual Income Tax), and the ancillary Administrative Rules of Montana Title 42, Chapter 15.
14. “If, in the opinion of the department, any return of a taxpayer is in any essential respect incorrect, it may revise the return.” Mont. Code Ann. §15-30-2605(1).
15. “‘Taxable income’ means the adjusted gross income of a taxpayer less the deductions and exemptions provided for in this chapter.” Mont. Code Ann. §15-30-2101(32).

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16. “[G]ross income means all income from whatever source derived, including (but not limited to) ... [c]ompensation for services, including fees, commissions” 26 U.S.C. §61.
17. “[A]djusted gross income is the taxpayer’s federal adjusted gross income as defined in section 62 of the Internal Revenue Code, 26 U.S.C. 62,” and includes certain additions. Mont. Code Ann. §15-30-2110(1).
18. “Under Montana law, in computing net income, deductions are generally those permitted by 26 U.S.C. §§161 and 211. Mont. Code Ann. §15-30-2131(1)(a).” *Robinson v. DOR*, 2012 MT 145, 3, 365 Mont. 336, 336, 281 P. 3d 218, 218.
19. “Tax deductions are a matter of legislative grace, and it is the taxpayer’s burden to clearly demonstrate the right to the claimed deduction.” *Robinson v. DOR*, 2012 MT 145, ¶12, 265 Mont. 336, 340, 281 P. 3d 218, 222 (Quoting *INDOPCO, Inc. v. Commissioner*, 503 U.S. 79, 84, 112 S. Ct. 1039, 117 L. Ed. 2d 226 (1992)).
20. This Board relies upon the well written, researched, and focused ODR opinion in this matter. *Taxpayer. Ex. 8*. The voluminous material submitted by the Taxpayer includes copies of numerous Treaties and both State and Federal Court decisions from the District Courts levels to the respective Supreme Courts. The references are not clear citations but a generalized recitation of the Taxpayer’s arguments and generalizations from the Treaties and Decisions. *Taxpayer Ex. 1-3*.
21. The essence of the Taxpayer’s arguments is that Montana has impermissibly levied its income tax on him, according to Treaties and Court decisions, and that he is due a refund for the income taxes withheld from his paycheck. *Dept Ex. E*.

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22. The facts that the Taxpayer relies upon, unfortunately for him, do not fall within the recognized authority preventing the State of Montana from collecting income tax from him.
23. The taxpayer relies on *Flat Center Farms v. Dep't of Revenue*, for the proposition that the Montana Supreme Court has ruled on the question of whether an individual tribal member not residing on his Tribe's reservation and not earning income from reservation sources is subject to state tax. Taxpayer misreads *Flat Center Farms* to say he is not subject to the State income tax. 2002 MT 140, 310 Mont. 206, 49 P.3d 578.
24. This is not the holding in *Flat Center Farms*. The taxpayer, in that case, was not an individual but a tribal business entity with shareholders, one of whom was an enrolled member on his reservation, the other not. While the status of the shareholders did flow through to the tribal corporation for purposes of imposing the Montana corporation license tax, it is not applicable to the facts in this case. *Id.*
25. Further, as discussed in the well-reasoned opinion by the Montana Fifteenth District Court opinion in *Dep't of Revenue v. Daniels*, *Flat Center Farms* was effectively overruled by subsequent Montana and US Supreme Court cases. 2004 ML 1449, 2004 Mont. Dist. LEXIS 3157; See *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973); See *Wash. v. Confederate Tribes of Corville Indian Reservation*, 447 U.S. 134 (1980); *Duro v. Reina*, 495 U.S. 676 (1990); See also *La Roque v. State*, 178 Mont. 315, 583 P.2d 1059 (1978).
26. The Taxpayer found no support for his arguments in the notion that Mont. Code Ann § 15-30-2102, which requires that all income be considered for purposes of

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levying the Montana individual income tax, provided an effective shield for Mr. Waukazoo on the facts herein. There is also no support found in ARM 42.15.220, which adopts the federal standard for immunity from state taxation. *McLanahan* and *Colville* stand for the premise that the wages of a tribal member which are earned from reservation sources while the tribal member resides on the reservation of the tribal member's governing tribe are exempt from State taxation. 411 U.S. 164 (1973), 447 U.S. 134 (1980). There is also a clear legal distinction between an enrolled member on their reservation and a non-member of the same reservation. *Fox Nation v. Oklahoma Tax Commission*, 967 F.2d 1425, 1430 (10th Cir. 1992). Non-member Indians are not entitled to the same immunities as enrolled members working and residing on their own reservations.

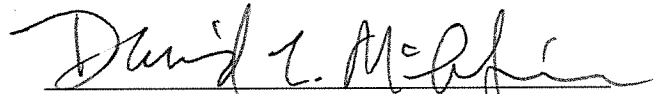
27. The DOR's argument that to treat state tax exemptions based on race could have "significant constitutional implications" is confusing and could well run afoul of fundamental, bedrock law. The relationship between a tribal member and their governing Tribe is a political relationship, not a racial one. *Morton v. Mancari*, 417 U.S. 535 (1974). And that relationship is to be determined by the Tribe alone, not the State. *Id.*
28. The facts of this case and the controlling law result in this matter firmly in favor of the DOR's initial determination, the ODR decision and the presentation of the case. The Board believes all were correct and that the Taxpayer has not presented a case for reversal. Accordingly,
29. The Department's final determination that the Taxpayer's income was not exempt from State taxation is AFFIRMED.

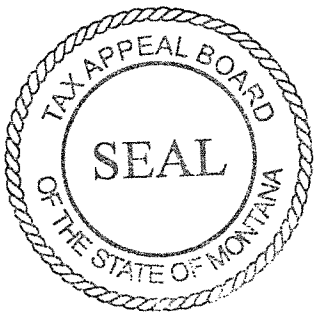
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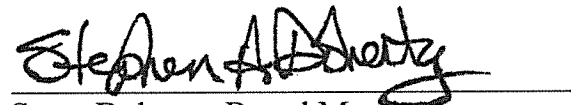
ORDER

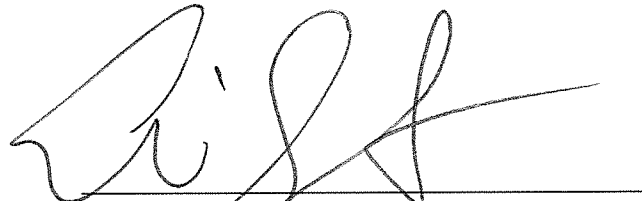
IT IS HEREBY ORDERED that the tax, penalties, and interest, as assessed by the Department in this matter remain due.

Ordered October 27, 2020,


David L. McAlpin, Chairman
MONTANA TAX APPEAL BOARD




Steve Doherty, Board Member
MONTANA TAX APPEAL BOARD


Eric Stern, Board Member
MONTANA TAX APPEAL BOARD

Notice: You are entitled to judicial review of this Order by filing a petition in district court within 60 days of the service of this Order. The Department of Revenue shall promptly notify this Board of any judicial review to facilitate the timely transmission of the record to the reviewing court. MCA §15-2-303(2).

Certificate of Service

I certify that I caused a true and correct copy of the foregoing Findings of Fact, Conclusions of Law, Order and Opportunity for Judicial Review to be sent by email and by United States Mail via Print and Mail Services Bureau of the State of Montana on October 27, 2020 to:

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Lynn Cochran, Legal Secretary
MONTANA TAX APPEAL BOARD