

STATE OF WISCONSIN
TAX APPEALS COMMISSION

EDWARD AND MARGARET SNOW
W75 Hwy. Cty. M
Suring, WI 54174,

DOCKET NO. 01-I-137

Petitioners,

vs.

DECISION AND ORDER

WISCONSIN DEPARTMENT OF REVENUE
P.O. Box 8907
Madison, WI 53708-8907,

Respondent.

DIANE E. NORMAN, COMMISSIONER:

The above-entitled matter was heard by the Commission on August 26, 2004. The parties presented no testimony, but stipulated to the introduction and explanation of exhibits. Post-hearing briefs were filed by Attorney Carol J. Brown on behalf of petitioners,¹ Edward and Margaret Snow (“petitioners”), and by Deputy Chief Counsel Robert J. Hackman on behalf of respondent, Wisconsin Department of Revenue (“respondent”).

Having considered the entire record before it, the Commission finds, concludes, and orders as follows:

¹ Petitioners’ brief is entitled “Petitioners’ Brief in Support of Motion to Dismiss”. Since a dismissal would result in dismissal of petitioners’ appeal of the tax assessment by respondent and is not the requested relief in petitioners’ brief, petitioners’ brief will not be treated as a motion to dismiss but as argument to reverse the tax assessed by respondent.

UNDISPUTED FINDINGS OF FACT

The Commission accepts the following facts as being stipulated to by the parties:

1. Petitioners are a married couple.
2. Petitioner Edward Snow ("Mr. Snow") is an enrolled member of the Lac du Flambeau Band of Lake Superior Chippewa Indians.
3. Petitioner Margaret Snow ("Mrs. Snow") is an enrolled member of the Menominee Tribe of Indians of Wisconsin.
4. Petitioners reside together within the Menominee Indian Reservation Boundaries.
5. During all times during 1996 - 1999 ("the years at issue"), petitioners resided on the Menominee Indian Reservation.
6. During all times during the years at issue, Mr. Snow was employed by the Menominee Tribe of Indians as an investigator for the Tribal Police Department.
7. All of the income earned by Mrs. Snow on the Menominee Indian Reservation is not subject to Wisconsin income tax laws.
8. During the 1996 income tax year, the notation on Line 19 of petitioners' federal Form 1040 represents the total of unemployment compensation payments made to Mr. Snow.
9. During the 1998 income tax year, the adjusted income of petitioners is \$34,650, which is \$100 less than the original adjustment made by respondent.
10. During the 1999 income tax year, the PERCAPITA/FBO (Fee Based

Officer) notation on line 21 of petitioners' federal Form 1040, totaling \$25,712, represents: \$22,912 in "fee based officer" pay to Mrs. Snow; \$2,700 per capita payment to Mr. Snow; and a \$100 per capita payment to Mrs. Snow.

ADDITIONAL JURISDICTIONAL FACTS

11. Petitioners filed Wisconsin income tax returns for the years at issue. On each return, petitioners claimed a deduction of all earned income that included Mr. Snow's income based on his status as an enrolled member of a federally recognized Indian tribe (Lac du Flambeau Band of Lake Superior Chippewa) who lived and worked on a federally recognized Indian reservation (Menominee). As a result of these deductions, petitioners claimed refunds from respondent for each year at issue.

12. By notice dated June 19, 2000, respondent disallowed that portion of the deductions that represented Mr. Snow's income for each of the years at issue.

13. Under date of July 16, 2000, petitioners filed a petition for redetermination, which was denied by respondent in a Notice of Action issued July 9, 2001.

14. On September 10, 2001, petitioners filed a timely petition for review with the Commission.

CONCLUSION OF LAW

Wisconsin may impose an income tax on Mr. Snow, an Indian who is an enrolled member of the Lac du Flambeau Band of Lake Superior Chippewa Indians but who lives and works on the Menominee Indian Reservation, because he is not a member of the Menominee Tribe.

OPINION

Nonmember Indians are not exempt from state income tax.

The issue in this case is identical to the issue already decided in *LaRock v. Dep't of Revenue*, 241 Wis. 2d 87, 621 N.W. 2d 907 (2001). In that case, the Wisconsin Supreme Court held that a nonmember of an Indian tribe was not exempt from state income tax, even though the nonmember lived on the reservation and earned income from the reservation. *LaRock* was an enrolled member of the Menominee Indian Tribe. She lived on the Oneida Indian Reservation and earned her income from working for the Oneida Indian Tribe's casino, but she was not an enrolled member of that Tribe. She had been married to an enrolled member of the Oneida Tribe, but was divorced during the period under review in that case. She had four children who were all enrolled members of the Oneida Tribe. *LaRock* at 91.

Although petitioners argue that the facts of this case are clearly distinguishable from *LaRock*, petitioners' brief fails to state any distinguishable facts. The material facts in the present case are actually extremely similar to those in *LaRock*. Mr. Snow is an enrolled member of the Lac du Flambeau Band of Lake Superior Chippewa Indians. He is married to an enrolled member of the Menominee Tribe, but is not an enrolled member himself. During the years at issue, he lived and worked on the Menominee Reservation. In both this case and *LaRock*, the parties challenging income taxation by the state of Wisconsin are nonmember Indians of the reservation tribe where they live and where they earn their income.

Mr. Snow's income is not exempt from state income tax because he is a member of a federally recognized Indian tribe and lives and works on a federally recognized Tribal Reservation. Generally, the state of Wisconsin requires that "[f]or the purpose of raising revenue for the state and the counties, cities, villages and towns, there shall be assessed, levied, collected and paid a tax on all net incomes of individuals . . . by every natural person residing within the state." Wis. Stat. § 71.02(1).

There is a narrow exemption from this state taxation for certain American Indian income. The United States Supreme Court has held that an enrolled member of a federally recognized Indian tribe living and working on that tribe's reservation is exempt from state income taxation. *McClanahan v. State Tax Comm'n of Arizona*, 411 U.S. 164 (1973). The *McClanahan* case applies only to member Indians living and working on their own tribe's reservation.

Since *McClanahan*, the United States Supreme Court has explicitly marked the distinction between nonmember Indians living on the lands of another tribe and tribal members living on their own tribal lands. In *Washington v. Confederated Tribes of Colville*, 447 U.S. 134 (1980), a state was allowed to impose sales and use tax upon Indians who lived on the reservation of another tribe. The Court stated that this state tax on nonmember Indians was allowed because the tax would not "contravene the principle of tribal self-government, for the simple reason that nonmembers are not constituents of the governing Tribe." *Id.* at 161.

The Wisconsin Supreme Court looked at the issue of whether or not a state has the jurisdiction to regulate and tax activity occurring on tribal land within the state, and held that:

(1) [T]here is a distinction between nonmember Indians on the lands of another tribe and tribal members living on their own tribal lands; and (2) state authority may be asserted over American Indians on all tribal lands where the exercise of such authority does not conflict with federal law or treaties and it does not unlawfully infringe on the right of reservation Indians to make their own laws or to be ruled by them.

LaRock at pages 97-98.

Therefore, even though petitioners are living and working on a federally recognized Indian reservation, the state of Wisconsin has a nexus or reasonable relationship with Mr. Snow because he is not a member of the tribe on whose reservation he resides. Mr. Snow may be taxed by the state of Wisconsin if this taxation is not preempted by federal law or if it does not unlawfully infringe on tribal self-government.

State income tax of a nonmember Indian is not preempted by federal law.

Petitioners argue that the state of Wisconsin is preempted by federal law from taxing Mr. Snow. The Wisconsin Supreme Court in *LaRock* found no federal law, including treaties, statutory provisions, and case law, that preempted the state from imposing an income tax on a nonmember Indian living on another tribe's lands. *LaRock* at 108.

Petitioners argue that the Menominee Restoration Act (PL 93-197 1973) invokes preemption by federal law in this case. This Restoration Act restored official

recognition of the Tribe, repealing the act that had terminated this recognition in 1954. The Restoration Act prevented the state from any encroachment onto the Tribe's jurisdictional or regulatory authority unless specifically authorized by the Tribe or Congressional action. This Act does not invoke federal preemption of income tax of nonmember Indians because it pertains only to the members of the Menominee Tribe. Moreover, there is nothing in the Restoration Act stating that state taxation of a nonmember Indian's income is preempted by the Act.

State taxation of a nonmember Indian does not encroach on Tribal authority.

Petitioners argue that since Mr. Snow is a federally recognized Indian living and working on Indian Tribal lands, the state would be infringing on the right of the Menominee Tribe for self-government if his income were taxable by the state. Petitioners argue that Mr. Snow "enjoys the normal and usual benefits granted to individuals residing within a governmental jurisdiction" (Petitioners' Brief, p. 3) and should, therefore, be exempt from Wisconsin taxation.

The Wisconsin Supreme Court also addressed this issue in the *LaRock* case:

It is because LaRock is not an enrolled member of the Oneida Tribe that the tribal sovereignty of the Oneidas is not implicated. The fact is that LaRock—who is an enrolled member of the Menominee Tribe—has no voice in the affairs of the Oneida Tribe as she may in the affairs of the Menominee Tribe. Nor does she have an expectation of having a voice in Oneida Tribal affairs as her children, who are enrolled members of the Oneida Tribe, may have. She merely asserts that she is an "Indian" residing in "Indian Country" and therefore is exempt from the State's income tax. While it is undisputed that she is an American Indian, her ethnicity does not confer upon her any more rights or privileges within the Oneida Tribe than a non-Indian has within the Oneida Tribe.

Therefore, we do not find that the State is preempted from imposing an income tax on LaRock.

LaRock at 109.

Similarly, in this case, Mr. Snow is not an enrolled member of the Menominee Tribe and has no voice in the affairs of the Menominee Tribe as he may have in the Lac du Flambeau Band of Lake Superior Chippewa Tribe. Nor does he have an expectation of having a voice in Menominee Tribal affairs because his wife is an enrolled member of the Menominee Tribe. Since he is a nonmember of the Menominee Tribe, taxation of his income by the state of Wisconsin will not infringe on the tribal sovereignty of the Menominee Tribe.

IT IS ORDERED

That respondent's action on petitioners' petition for redetermination is affirmed.

Dated at Madison, Wisconsin, this 31st day of March, 2005.

WISCONSIN TAX APPEALS COMMISSION

Jennifer E. Nashold, Chairperson

Diane E. Norman, Commissioner

ATTACHMENT: "NOTICE OF APPEAL INFORMATION"