

**JURISDICTION:** OKLAHOMA TAX COMMISSION  
**CITE:** 2021-12-08-04 / NON-PRECEDENTIAL  
**ID:** P-18-239-S  
**DATE:** DECEMBER 8, 2021  
**DISPOSITION:** DENIED  
**TAX TYPE:** INCOME  
**APPEAL:** NONE TAKEN

### ORDER

The above matter comes on for entry of a final order of disposition by the Oklahoma Tax Commission. Having reviewed the files and records herein, the Commission hereby adopts the Findings of Fact, Conclusions of Law and Recommendation made and entered by the Administrative Law Judge on the 9<sup>th</sup> day of November, 2021, appended hereto, together herewith shall constitute the Order of the Commission.

SO ORDERED

#### FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION

NOW, on this 9<sup>th</sup> day of November, 2021, the above-styled and numbered cause comes on for consideration under assignment made by the Oklahoma Tax Commission to ALJ, Administrative Law Judge (“ALJ”). PROTESTANT (“Protestant”) is represented by ENROLLED AGENT, EA<sup>1</sup>. The Income Tax Accounts Division, formerly the Account Maintenance Division (“Division”), of the Oklahoma Tax Commission (“Commission” or “OTC”) appears through AGC, Assistant General Counsel, Office of General Counsel, Oklahoma Tax Commission.

#### PROCEDURAL HISTORY

On November 15, 2018, the Office of Administrative Law Judges received the protest file for further proceedings consistent with the *Uniform Tax Procedure Code*<sup>2</sup>

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<sup>1</sup> Any enrolled agent properly licensed to practice as required under rules promulgated under 31 U.S.C.A. § 330(a) shall be allowed to use the credentials or designation of “enrolled agent”, “EA”, or “E.A.” 31 U.S.C.A. § 330 (West).

<sup>2</sup> 68 O.S.2011, § 201, *et seq.*, as amended.

and the *Rules of Practice and Procedure Before the Office of Administrative Law Judges*.<sup>3</sup> The protest was assigned to ORIGINALLY ASSIGNED ALJ, Administrative Law Judge and docketed as Case No. P-18-239-H. On February 22, 2021, ENROLLED AGENT, EA, filed an entry of appearance as representative for Protestant.

At the request of the parties, a *Scheduling Order* was issued on March 12, 2021. The parties filed a *Joint Stipulation of Issue and Facts* (“*Jt. Stips.*”), with Joint Exhibits A-J (“*Joint Ex. A-J*”) on March 24, 2021. On April 6, 2021, Protestant filed *Protestant’s Position/Brief-In-Chief* (“*Protestant’s Br.*”). On May 3, 2021, the parties were notified this case was assigned to ALJ and renumbered as Case No. P-18-239-S. See OAC 710:1-5-31. The Division filed *Division’s Response Brief* (“*Div.’s Resp. Br.*”) on May 5, 2021. Protestant filed *Protestant’s Reply to Division’s Response Brief* (“*Protestant’s Reply Br.*”) on May 13, 2021.

On July 27, 2021, the record was closed and the case was submitted for decision.

### **JOINT STIPULATED ISSUE, FACTS AND EXHIBITS**

On March 24, 2021, the parties filed *Joint Stipulation of Issue and Facts*. The *Joint Stipulation of Issue and Facts* makes reference to and attaches Joint Exhibits A through J which are made a part of and incorporated into the *Joint Stipulations*.

#### **Statement of [stipulated] issue:**

Whether Protestant qualifies for the Exempt Tribal Income Exclusion claimed on his 2015, 2016, and 2017 Returns.

#### **Statement of [stipulated] facts:**

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<sup>3</sup> Rules 710:1-5-20 through 710:1-5-49 of the *Oklahoma Administrative Code* (“OAC”) governing administrative proceedings related to tax protests.

1. On April 15, 2016, Protestant filed his 2015 Oklahoma Individual Income Tax Return (“2015 Return”) with the OTC claiming \$75,811.00 as exempt tribal income as reported from line 10 of the attached 511-A. Joint Exhibit A.<sup>4</sup>
2. On April 17, 2017, Protestant filed his 2016 Oklahoma Individual Income Tax Return (“2016 Return”) with the OTC claiming \$80,737.00 as exempt tribal income as reported from line 10 of the attached 511-A. Joint Exhibit B.<sup>5</sup>
3. On April 16, 2018, Protestant filed his 2017 Oklahoma Individual Income Tax Return (“2017 Return”) with the OTC claiming \$82,114.00 as exempt tribal income as reported from line 10 of the attached 511-A. Joint Exhibit C.<sup>6</sup>
4. On July 23, 2018 the Division sent Protestant a letter requesting additional information to support his 2015, 2016, and 2017 Returns. Specifically, the Division requested documentation showing Protestant’s tribal membership, documentation showing Protestant worked on tribal land, and a legal document or deed showing Protestant lived on tribal land for the entire tax year. Joint Exhibit D.<sup>7</sup>
5. In response to the Division’s letter, on August 3, 2018, Protestant returned documents to the Division. Joint Exhibit E.<sup>8</sup>
6. On August 8, 2018, after reviewing the documentation received by [sic] Protestant, the Division determined Protestant did not qualify for the exempt tribal

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<sup>4</sup> The Exhibits referenced in and attached to the *Joint Stipulated Facts* are more fully described in footnotes added by the undersigned ALJ. Joint Ex. A consists of Protestant’s 2015 Oklahoma Resident Income Tax Return (Form 511).

<sup>5</sup> Joint Ex. B consists of Protestant’s 2016 Oklahoma Resident Income Tax Return (Form 511).

<sup>6</sup> Joint Ex. C consists of Protestant’s 2017 Oklahoma Resident Income Tax Return (Form 511).

<sup>7</sup> Joint Ex. D is a copy of the letter described in *Jt. Stips. 4*. In addition to the request for additional information described in *Jt. Stips. 4*, the letter alerted Protestant as follows: “If the requested information is not provided within thirty (30) days of the date of this letter, the return will be adjusted accordingly.”

<sup>8</sup> Joint Ex. E includes copies of: (1) Division’s letter to Protestant described in *Jt. Stip. 4*, executed by Protestant; (2) Protestant’s Forms W-2, Wage and Tax Statements, for Tax Periods 2015, 2016, and 2017 issued by EMPLOYER, EMPLOYER ADDRESS; (3) Letter dated August 1, 2018, on EMPLOYER letterhead, indicating: “[Protestant] has been an employee of the EMPLOYER, Thlopothlocco Tribal Town, in the Gaming Division for the entire year of 2017”; (4) Promissory Note dated DATE, 2009, from Protestant to the Muscogee (Creek) Nation in the principal amount of \$AMOUNT with an interest rate of 0%; (5) Real Estate Mortgage from Protestant, to Muscogee (Creek) Nation on the property known as RESIDENTIAL ADDRESS; (6) Protestant’s Oklahoma Driver License and Muscogee (Creek) Nation Citizenship ID; and (7) Warranty Deed conveying the property known as “LEGAL DESCRIPTION” to Protestant.

income exclusion and adjusted Protestant's 2015, 2016, and 2017 Returns. Joint Exhibits F, G, H.<sup>9</sup>

7. On September 19, 2018, in response to the Division's adjustment of Protestant's returns, Protestant timely protested the adjustments to his returns. Joint Exhibit I.<sup>10</sup>

8. On July 21, 2020, Protestant sent the Division a copy of his Warranty Deed to his residence. See Joint Exhibit E, p. 14.

9. Protestant's physical residence is RESIDENTIAL ADDRESS. *Id.* p. 13.

10. Protestant is a member of Muscogee (Creek) Nation. *Id.*

11. Protestant has been employed by EMPLOYER since January 15, 2014. EMPLOYER is owned by Thlophlocco Tribal Town of Oklahoma, a Muskogee Creek Nation Township located at EMPLOYER ADDRESS. Joint Exhibit J.<sup>11</sup>

### **PROTESTANT'S "UNDISPUTED" FACTS**

Protestant presents the following as undisputed facts:<sup>12</sup>

1. Protestant . . . is a citizen of the Muscogee (Creek) Nation. (See Exhibit "A")
2. Protestant . . . resides at RESIDENTIAL ADDRESS, a/k/a LEGAL DESCRIPTION, located within the boundaries of the Muscogee (Creek) Nation. (See Exhibit "B")
3. Protestant . . . is and has been employed by EMPLOYER, located at EMPLOYER ADDRESS, located with (sic) the boundaries of the Muscogee (Creek) Nation. (See Exhibits "C" & "F")

The "Undisputed Facts" contained in *Protestant's Br.* correlate in part to *Jt. Stips.* Nos.

9-11. The Division restates the jointly stipulated facts. See *Div.'s Resp. Br.* at 1-3.

### **FINDING OF ADDITIONAL FACTS**

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<sup>9</sup> Joint Ex. F, G, and H consist of letters dated August 8, 2018, informing Protestant his claims of the Exempt Tribal Income Exclusion for Tax Periods 2015, 2016, and 2017 were disallowed.

<sup>10</sup> Joint Ex. I consists of a copy of Protestant's letter protesting the Division's decision to disallow the Tribal Income exclusion for Tax Periods 2015, 2016, and 2017, together with copies of the Division's letters dated August 8, 2018.

<sup>11</sup> Joint Ex. J contains a January 19, 2021 letter from the EMPLOYER verifying that Protestant "has been employed by EMPLOYER since January 15, 2014 full time."

<sup>12</sup> See *Protestant's Br.* at 1.

The undersigned ALJ takes judicial notice<sup>13</sup> of the Thlopthlocco Tribal Town website, <https://tttown.org/about-us.html> (visited Oct. 23, 2021), and finds:

The [Thlopthlocco Tribal] Town owns 2,330 acres of land in Okfuskee and Hughes Counties Oklahoma, consisting of trust and fee simple lands. The tribal town headquarters is located on a 120 acre tract of tribal trust land just north of Interstate-40 Exit 227 near Okemah in Okfuskee County, Oklahoma. The Town's gaming enterprise, EMPLOYER, is also headquartered there. The Town is governed by a Business Committee consisting of five elected officers; the Town King, two Warriors, Secretary, and Treasurer. The Business Committee also has a five-person advisory council appointed by the officers. The Business Committee is empowered to transact governmental functions and business on behalf of the Town. Among the corporate purposes and powers of the Town is the authority to acquire real property for the Town.

*Id.*

### CONCLUSIONS OF LAW

1. The Oklahoma Constitution vests the whole matter of taxation exclusively within the power of the Legislature as limited by the Constitution. *Adair v. Clay*, 1988 OK 77, 780 P.2d 650, 655, citing Okla. Const. Art. X § 12, *cert. denied*, 493 U.S. 1076, 110 S.Ct. 1125, 107 L.Ed.2d 1032 (1990).

2. Jurisdiction of the parties and subject matter of this proceeding is vested in the Oklahoma Tax Commission. 68 O.S.2011, § 221.

3. In administrative proceedings before the Tax Commission, the burden of proof is on the taxpayer to show in what respect the action or proposed action of the Tax Commission is incorrect. *OAC 710:1-5-47; Enterprise Management Consultants, Inc. v. State ex rel. Okla. Tax Com'n*, 1988 OK 91, ¶ 5, n. 11, 768 P.2d 359, 362 (citations

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<sup>13</sup> The Administrative Law Judge may, regardless of whether requested by the parties, take official notice of matters which the judges of district courts of Oklahoma can judicially notice and of facts within the scope of personal knowledge or within the specialized knowledge of the Tax Commission. *OAC 710:1-5-36(a)*. In determining the propriety of taking judicial notice of a matter, the court may consult and use any source of pertinent information, whether or not furnished by a party. 12 O.S. § 2203(A).

omitted); *Geoffrey, Inc. v. Okla. Tax Com'n*, 2006 OK CIV APP 27, ¶ 25, 132 P.3d 632, 640 (citations omitted). The burden of proof standard is preponderance of evidence. 2 Am.Jur.2d *Administrative Law* § 344. Each element of the claim must be supported by reliable, probative and substantial evidence of sufficient quality and quantity as to show the existence of the facts supporting the claim are more probable than their nonexistence. *Id.* Failure to provide evidence showing an adjustment to the action of the Tax Commission is warranted will result in denial of the protest. OAC 710:1-5-47.

4. Rules promulgated pursuant to the provisions of the Administrative Procedures Act<sup>14</sup> are presumed to be valid until declared otherwise by a district court of this state or the Oklahoma Supreme Court. 75 O.S.2011, § 306(C).

5. The Oklahoma Income Tax Act<sup>15</sup> ("Act") governs the imposition of state income tax in Oklahoma. A taxpayer's income tax liability is determined under the law in effect when the income is received. *Wootten v. Okla. Tax Com'n*, 1935 OK 54, ¶ 10, 40 P.2d 672, 674.

6. In cases in which a taxpayer files a return and the Tax Commission determines the tax disclosed on the return is less than the tax disclosed by its examination, the Commission is required to issue a proposed assessment based on its determination. 68 O.S.2011, §221(A). The Commission may assess, correct or adjust the return or report as a result of audit or investigation. 68 O.S.2011, §221(B).

7. The income of an enrolled member of a federally recognized Indian tribe shall be exempt from Oklahoma individual income tax when the member is living within "Indian Country" under the jurisdiction of the tribe to which the member

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<sup>14</sup> 75 O.S.2011, § 250 *et seq.*, as amended.

<sup>15</sup> 68 O.S.2011 § 2351 *et seq.*, as amended.

belongs; and, the income is earned from sources within "Indian Country" under the jurisdiction of the tribe to which the member belongs. OAC 710:50-15-2(b)(1).

8. "Indian Country' means and includes formal and informal reservations, dependent Indian communities, and Indian allotments, the Indian titles to which have not been extinguished, whether restricted or held in trust by the United States. [See: 18 U.S.C. § 1151]" OAC 710:50-15-2(a)(1).

9. "The income of an enrolled member of a federally recognized Indian tribe shall not be exempt from Oklahoma individual income tax when . . . [e]ither the source of the income or the place of residence is under the jurisdiction of a tribe of which the taxpayer is not a member." OAC 710:50-15-2(c).

#### **CONTENTIONS OF THE PARTIES**

"Protestant believes that the Tribal income excluded from his 2015, 2016 and 2017 State of Oklahoma Tax Returns is, in fact, excludible from State of Oklahoma Income Tax." *Protestant's Br.* at 2. Protestant's principal argument is based on OAC 710:50-15-2(a)-(b) which states in part: "The income of an enrolled member of a federally recognized Indian Tribe shall be exempt from Oklahoma individual income tax when . . . [t]he member is living within 'Indian Country' under the jurisdiction of the tribe to which the member belongs; and, the income is earned from sources within 'Indian Country' under the jurisdiction of the tribe to which the member belongs." OAC 710:50-15-2(b). Protestant cites *McGirt v. Oklahoma*, 140 S.Ct. 2452, 2482 (2020), to assert he derives his income from endeavors within the boundaries of the Muscogee (Creek) Nation reservation since Congress never disestablished the Nation's reservation. *Protestant's Br.* at 3-4.

The Division relies on the same provision of OAC 710:50-15-2(b) to conclude that Protestant does not qualify for the Tribal exclusion because “Protestant has not provided proof that he earns income from sources within ‘Indian Country’ under the jurisdiction of the tribe to which he belongs.” *Div.’s Resp. Br.* at 6. The Division notes that because “*McGirt* has not been expanded to civil matters, including taxation, . . . the Division continues to follow its previous verification process to enforce the requirements set forth in OAC § 710:50-15-2 to all claims for the tribal income exclusion.” *Id.* at 11. The Division additionally concludes Protestant is not eligible to claim the tribal income exclusion because he fails to meet the requirements of OAC § 710:50-15-2(a)(1) by demonstrating that he resides on restricted trust land. *Id.*

### **DISCUSSION AND ANALYSIS**

#### **Application of OAC 710:50-15-2:**

The issue presented in this matter, as stipulated by the parties, is whether Protestant qualifies for the Exempt Tribal Income Exclusion claimed on his 2015, 2016, and 2017 Returns. The analysis required to resolve this issue, in the context of the relationship between tribal towns and the Muscogee (Creek) Nation (“Nation”), appears not to have been addressed by the Commission previously. That is, whether an enrolled member of the Nation who asserts residence within Indian country under the jurisdiction of the Nation qualifies for the Exempt Tribal Income Exclusion for income earned as an employee of the EMPLOYER, a casino located on a 120 acre tract of Thlopthlocco Tribal Town (“Tribal Town”) trust land and owned by the Tribal Town, a federally recognized Indian tribe. See *Thlopthlocco Tribal Town v. Stidham*, 762 F.3d 1226, 1229 (10<sup>th</sup> Cir. 2014) (“The Thlopthlocco Tribal Town is a federally recognized Indian tribe in Oklahoma.”)



The *Stidham* opinion presents a “tribal history” of the relationships amongst the tribal towns, specifically the Thlopthlocco Tribal Town, and the Nation. This “tribal history” helps to inform the analysis presented herein.<sup>16</sup> From 1907 until 1936, “the tribal towns were essentially governed by their respective counties and the state of Oklahoma.” *Id.* at 1230. In 1936, Congress enacted the Oklahoma Indian Welfare Act (OIWA) which invited any “recognized tribe or band of Indians residing in Oklahoma” to adopt a constitution and bylaws and be acknowledged by a federal charter of incorporation.<sup>17</sup> *Id.* quoting 25 U.S.C. § 503. “The Thlopthlocco Tribal Town created its constitution and received its federal charter of incorporation in 1939, rendering it a federally recognized tribe.” *Stidham*, 762 F.3d at 1230.

“The towns are recognized as having an existence not derived from the constitution of the Muscogee Nation but in fact antedating and continuing alongside the constitution.” *Id.* at 1231, quoting Frederic Kirgis, Memorandum to the Commissioner of Indian Affairs 4 (July 15, 1937). “It was not until 1979 that the Muscogee Nation became a ‘tribe or band’ of Creek Indians recognized under OIWA.” *Id.* at 1231. As part of its application for a federal charter, the Nation adopted its current constitution which provides that it “shall not in any way abolish the rights and privileges of persons of the Muscogee Nation to organize tribal towns.” *Id.* quoting App. 1197.<sup>18</sup>

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<sup>16</sup> Protestant asserts *Stidham* is a legal red herring because it “does not determine the boundaries of the Muscogee (Creek) Reservation.” *Protestant’s Reply Br.* at 2. Regardless, *Stidham* remains an opinion of the United States Court of Appeals for the 10<sup>th</sup> Circuit that provides an objective statement of the history of the Thlopthlocco Tribal Town and its relationship with the Muscogee (Creek) Nation that is relevant to the issue presented here.

<sup>17</sup> Of the sixteen (16) tribal towns active at the time, only the Thlopthlocco, the Kailegee, and the Alabama-Quassarte Tribal Towns sought and received federal charters in the years immediately following the OIWA’s enactment. *Stidham*, 762 F.3d at 1230, citing *Oklahoma v. Hobia*, 2012 WL 2995044, at \*7 (N.D.Okla. July 20, 2012).

<sup>18</sup> See also A.D. ELLIS, in his official capacity as Principal Chief of the Muscogee (Creek) Nation,

Under the governing structures of the Tribal Town and the Muscogee Nation “[t]he Tribal Town invites the descendant of any Thlopthlocco Indian to join, and the Muscogee Nation invites the descendants of any Creek Indian to join; thus, all of the Tribal Town’s members seem to be eligible for Muscogee Nation membership.” *Stidham*, 762 F.3d at 1231. “In practice, most but not all of the Tribal Town’s memberships are also members of the Muscogee Nation.” *Id.*

Protestant asserts the income he earns as an employee of the EMPLOYER, a casino owned by the Thlopthlocco Tribal Town, a federally recognized Indian tribe, should be exempt. However, Protestant presents no evidence that he is a member of the Thlopthlocco Tribal Town.<sup>19</sup>

**Application of *McGirt v. Oklahoma*, 140 S.Ct. 2452, 207 L.Ed. 985 (2020):**

Protestant asserts the Division’s position that the *McGirt* case only applies to criminal matters and not civil matters “just makes no sense.” *Protestant’s Br.* at 4. However, a full reading of the Court’s opinion in *McGirt* reveals the Court’s concerns with the possible impact of its decision if extended beyond criminal matters without further guidance from Congress, compacts between the State and the Tribe, or the Court’s analysis of other interests in “later proceedings crafted to account for them.”

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*Plaintiff v. 1) BRISTOW MUSCOGEE INDIAN COMMUNITY, 2) Checotah Muscogee Creek Indian Community, 3) Duck Creek Indian Community, 4) Eufaula Indian Community 5) Holdenville Creek Indian Community, and 6) Okemah Indian Community, Chartered Communities of the Muscogee (Creek) Nation, Defendants* (“Defendants are Indian Communities that are “chartered” under Title 11, Section 1-101 *et seq.* of the Muscogee (Creek) Nation Code, and which function as political subdivisions of the Nation as provided by tribal law. Unlike the Alabama-Quassarte, Kialegee, and Thlopthlocco Tribal Towns, Defendant Communities are not separately federally recognized.”)

<sup>19</sup> Having found the income of Protestant is not derived from a source under the jurisdiction of a tribe of which Protestant is a member, it is not necessary for the undersigned to address whether Protestant resides in “Indian Country.”

*McGirt*, 140 S.Ct. at 2481, citing *Ramos v. Louisiana*, 590 U.S. \_\_\_, 140 S.Ct. 1390, 1047, 206 L.Ed.2d 583 (plurality opinion).

In *McGirt*, the Court discussed the many ramifications of its decision; however, the Court emphasized its holding is limited to the definition of “Indian Country” for purposes of the Major Crimes Act (“MCA”). See *McGirt*, 140 S.Ct. at 2456 (*Syllabus*) (“*Held*: For MCA purposes, land reserved for the Creek Nation since the 19<sup>th</sup> century remains “Indian Country.”); see also *McGirt* at 2480 (“State worries that our decision will have significant consequences for civil and regulatory law. The only question before us, however, concerns the statutory definition of ‘Indian country’ as it applies in federal criminal law under the MCA.”).

With regard to the definition of “Indian Country”, the Court acknowledged the State’s concern that the decision would “have significant consequences for civil and regulatory law.” *McGirt*, 140 S.Ct. at 2480. The Court noted the issue before it was the statutory definition of “Indian country” as it applies in federal criminal law under the MCA, and often nothing requires other civil statutes or regulations to rely on definitions found in the criminal law. *Id.* The Court noted many federal civil laws and regulations do currently borrow from 18 U.S.C. § 1151 when defining the scope of Indian country, but questioned “why this collateral drafting choice should be allowed to skew [the Court’s] interpretation of the MCA, or deny its promised benefits of a federal criminal forum to tribal members.” *Id.*

The Oklahoma Tax Commission falls within that set of entities that made the “collateral drafting choice” to incorporate the § 1151 definition of Indian country into its regulations.

**“Indian Country”** means and includes formal and informal reservations, dependent Indian communities, and Indian allotments, the Indian titles to which

have not been extinguished, whether restricted or held in trust by the United States. [See: 18 U.S.C. § 1151]

OAC 710:50-15-2(a)(1) (emphasis original).

The *McGirt* Court addressed the dissent's concern that the consequences of the decision would be drastic precisely because they depart from more than a century of settled understanding. See *McGirt*, 140 S.Ct. at 2481.

[W]e do not disregard the dissent's concern for reliance interests. It only seems to us that the concern is misplaced. Many other legal doctrines – procedural bars, res judicata, statutes of repose, and laches, to name a few – are designed to protect those who have reasonably labored under a mistaken understanding of the law. And it is precisely because those doctrines exist that we are free to say what we know to be true today, while leaving questions about reliance interest for later proceedings crafted to account for them.

*Id.* (Internal quotations omitted.), citing *Ramos*, 140 S.Ct. at 1047. In addition, the Court observed:

With the passage of time, Oklahoma and its Tribes have proven they can work successfully together as partners. Already, the State has negotiated hundreds of intergovernmental agreements with tribes, including many with the Creek. These agreements relate to taxation, law enforcement, vehicle registration, hunting and fishing, and countless other fine regulatory questions. No one before us claims that the spirit of good faith, comity and cooperative sovereignty behind these agreements will be imperiled by an adverse decision for the State today any more than it might be by a favorable one.

*McGirt*, 140 S. Ct. at 2481 (Internal citations and quotes omitted).

Given the Court's efforts to address the potential implications of its decision in *McGirt* for civil matters, the Commission is justified in proceeding cautiously when considering Protestant's argument that because "the *McGirt* decision ruled that the Muscogee (Creek) Nation Reservation was not ever disestablished, therefore it applies to everything in relation to its reservation." *Protestant's Reply Br.* at 5. Further, Protestant's "all inclusive" argument may be interpreted to imply some type of subordinate or subservient relationship of the sovereignty of the Thlopthlocco Tribal

Town to that of the Nation, both of which are federally recognized tribes under the OIWA. See *Stidham*, 762 F.3d at 1230-1231 (“[T]he Tribal Town and the Muscogee Nation are both federally recognized Indian tribes.”).

To be clear, the Oklahoma Tax Commission has not asserted any jurisdiction over the Muscogee (Creek) Nation or the Thlopthlocco Tribal Town. Nor has Protestant asserted he paid income tax to the Nation or the Tribal Town on the income he seeks to exclude from income on which the Oklahoma Tax Commission based its assessment. Neither the Nation nor the Tribal Town is a party to this action; nor may the joinder of either as a necessary party be compelled. *Id.* at 1235-1236. Regardless, any difference in the position of the Nation and the Tribal Town regarding the sovereign relationship presents either an intratribal dispute or a federal question, neither of which is subject to the jurisdiction of the Oklahoma Tax Commission. *Id.* at 1233-1234.

It is unnecessary for the Tax Commission to resolve the criminal/civil implications of the *McGirt* decision in order to reach a decision on the merits of the substantive issue presented.

### **CONCLUSION AND RECOMMENDATION**

Based on the facts and circumstances of this case, the undersigned concludes:

1. The income Protestant seeks to exclude from his 2015, 2016, and 2017 Oklahoma Income Tax Returns pursuant to the Exempt Tribal Income Exclusion is reported on Forms W-2 issued by the EMPLOYER, EMPLOYER ADDRESS, as Employer, to PROTESTANT, MAILING ADDRESS as Employee. See *Jt. Stips.* 11, Joint Ex. A, B, C; see *also* Joint Ex. E, pp. 2-4.
2. EMPLOYER is owned by the Thlopthlocco Tribal Town, a Muscogee (Creek) Nation Township, located at EMPLOYER ADDRESS. See *Jt. Stips.* 11, Joint Ex. J. The

Thlopthlocco Tribal Town and the Muscogee (Creek) Nation are both separate, federally recognized Indian tribes. *Stidham*, 762 F.3d at 1231, 1233.

3. The Tribal Town headquarters is located on a 120 acre tract of tribal trust land just north of Interstate-40 Exit 227 near Okemah in Okfuskee County, Oklahoma. The Town's gaming enterprise, EMPLOYER, is also headquartered there. <https://tttown.org/about-us.html> (visited Oct. 23, 2021).

4. Protestant is a member of the Muscogee (Creek) Nation. *Jt. Stips*. 10, Joint Ex. E, p. 13. Protestant presents no evidence, nor does he assert, that he is a member of the Thlopthlocco Tribal Town. See *Joint Stipulation of Issue and Facts* and attached Joint Exhibits A through J, *Protestant's Br.*, and *Protestant's Reply Br.*

5. "The income of an enrolled member of a federally recognized Indian tribe shall not be exempt from Oklahoma individual income tax when . . . [e]ither the source of the income or the place of residence is under the jurisdiction of a tribe of which the taxpayer is not a member." OAC 710:50-15-2(c).

6. Protestant does not qualify for the Exempt Tribal Income Exclusion claimed on his 2015, 2016, and 2017 Returns because Protestant has not shown the income he seeks to exclude is derived from a source under the jurisdiction of a tribe of which he is a member.

WHEREFORE, the undersigned recommends denial of the protest of Protestant to the Division's adjustment to Protestant's 2015, 2016, and 2017 Returns.

OKLAHOMA TAX COMMISSION

CAVEAT: This decision was NOT deemed precedential by the Commission. This means that the legal conclusions are generally applicable or are limited in time and/or effect. Non-precedential decisions are not considered binding upon the Commission. Thus, similar issues may be determined on a case-by-case basis.

NOTE: The distinction between a Commission Order designated as “Precedential” or “Non-Precedential” has been blurred because all OTC Orders resulting from cases heard by the Office of Administrative Law Judges are now published, not just “Precedential” Orders. *See* OKLA. STAT. ANN. tit.68, § 221(G) (West 2014) and OKLA. STAT. ANN. tit. 75, § 302 (West 2002).