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Oklahoma Tax Commission v. United States: Death Taxes on Restricted Indian Personality

Thomas E. Simmons*

In *Oklahoma Tax Commission v. United States*, the United States Supreme Court upheld the application of a state inheritance tax to the restricted personality of deceased tribal members.¹ The case turned on statutory construction. The question: Had Congress withheld from Oklahoma the power to tax Native Americans' estates?² Justice Hugo Black, writing the plurality opinion, said no; restricted personality of the Indians' estates was taxable.³ The Court's conclusion still holds today, but the path of reasoning by which it was reached is shaded by doubt.

Restricted Indian personality is a unique variety of property defined by federal law.⁴ Restricted personality may not be alienated absent the consent of the Department of Interior.⁵ It is not trust property (which represents another unique variety of Indian property), but it shares some of its characteristics. Restricted personality reflects the sometimes paternalistic relationship between Native Americans and the federal government.

Prior cases posing similar questions⁶ had invoked the instrumentality theory, typically resulting in tax immunities for Indians. The theory reflects the constitutional principle of safeguarding the federal government from state taxes (and vice versa). The instrumentality theory went something like this: title to Indian trust land is held by the United States as trustee for Native American beneficiaries. Intergovernmental immunities preclude state taxation of federal property or instrumentalities (while precluding federal taxation of state agencies or property).⁷ Since

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¹ Okla. Tax Comm'n v. United States, 319 U.S. 598, 610-11 (1943).

² *Id.* at 600. The combined estates' value was approximately \$1.2 million. *Id.* at 600 n.1.

³ *Id.* at 600.

⁴ *Id.*

⁵ *Id.* at 601.

⁶ *Id.* at 602-03 (citing *United States v. Rickert*, 188 U.S. 432 (1908)).

⁷ Thomas Reed Powell, *The Remnant of Intergovernmental Tax Immunities*, 58 HARV. L. REV. 757, 788 (1945).

the federal government holds title to Indian trust land, as a federal instrumentality, the land was immune to state taxes.⁸

Even property with only indirect connections to government could be held immune under the doctrine.⁹ The doctrine's broad sweep was arrested in the mid-1930s along with judicial activism generally, and its containment in tax jurisprudence continued in the years leading up to *Oklahoma Tax Commission* in 1943.¹⁰ By then, the instrumentality theory offered little support for the argument that Oklahoma's tax could not be applied to Indians' restricted personal property. As the 1982 edition of *Cohen's Handbook on Federal Indian Law* put it: "The rush to repudiate the broad version of the federal instrumentality doctrine caught Indian property cases in its undertow."¹¹

Three estate proceedings had been consolidated in the case which reached the Supreme Court. The first involved Lucy Bemore, a member of the Seminole Tribe. She had died intestate survived by her husband and son. The second, "Nitey" (oddly, no last name is given), also a member of the Seminole Tribe, had died testate. Nitey had devised her estate to her five children. The third, Wosey Deere, a member of the Creek Tribe, had died intestate, survived by her husband and her three children.¹² About one-tenth of the value of all three estates represented allotted fee land with restrictions against alienation. The remaining nine-tenths was comprised of proceeds of oil and gas royalties generated from that land.¹³ These royalty proceeds, comprised of cash and some securities, were restricted personalty.

Oklahoma assessed inheritance taxes against each estate.¹⁴ The Secretary of Interior, as trustee and quasi-executor, paid the taxes under protest, then sought a refund.¹⁵ The district court held for Oklahoma.¹⁶ The Tenth Circuit Court of Appeals reversed.¹⁷ The Supreme Court

⁸ *United States v. Rickert*, 188 U.S. 432, 437-39 (1903). *Rickert's* holding also rested on its interpretation of federal statute, the General Allotment Act. *Id.* at 433.

⁹ See Powell, *supra* note 7, at 774 n.48.

¹⁰ *James v. Dravo Contracting Co.*, 302 U.S. 134, 161 (1937) (sustaining Congress' ability to impose a tax on a federal contractor). See, e.g., *Helvering v. Mountain Producers Corp.*, 303 U.S. 376, 386 (1939) (holding that tax immunity for an individual "because he is engaged in operations under a government . . . lease cannot be supported").

¹¹ FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 422 (Rennard Strickland et al. eds. 1982).

¹² *Okla. Tax Comm'n v. United States*, 131 F.2d 635, 636 (10th Cir. 1942).

¹³ *Okla. Tax Comm'n v. United States*, 319 U.S. 598, 600 (1943).

¹⁴ *Id.* at 599. The opinion and briefs use the terms "death tax," "inheritance tax" and "estate tax" interchangeably.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Okla. Tax Comm'n*, 131 F.2d at 638.

agreed that the real property was immune from the state tax, but held that the restricted personal property was not.¹⁸

Justice Black wrote: “We conclude that [the Act of January 26, 1933] does not exempt the restricted property from taxation for two reasons: (1) the legislative history of the Act refutes the contention that an exemption was intended; and (2) application of the normal rule against tax exemption by statutory implication prevents our reading such an implication into the Act.”¹⁹ After dissecting the legislative history of the statutes, Justice Black examined the statutory text; it lacked any express exemption.

Just because the restricted personalty was inalienable did not mean it was nontaxable. Inalienability and tax immunity are two different things. “If Congress intends to prevent the State of Oklahoma from levying a general non-discriminatory estate tax applying alike to all its citizens, it should say so in plain words,” Black emphasized.²⁰ Tax exemptions, as a matter of statutory construction, cannot be granted by implication.²¹

Justice Frank Murphy penned a dissent.²² He argued that the case was less a matter of statutory construction, and more one of history. Generally, “strong considerations of fiscal and social policy view tax exemptions with a hostile eye.”²³ But not where Indians’ property is involved. Tax immunity questions generally and Native Americans’ tax immunities specifically are different inquiries. “For as to them a totally different principle comes into operation, namely, the special status of Indians during the whole course of our constitutional and legal history.”²⁴ Given this history, “so far as the power of state to tax Indian property is concerned, the ordinary rule of tax exemption is reversed; a state must make an affirmative showing of a grant by Congress of the withdrawal of the immunity of Indian property from state taxation.”²⁵ Because the personalty was subject to alienation restrictions, state tax immunity followed, the dissent concluded: “In other words restriction is tantamount to immunity from state taxation.”²⁶ Tax immunity and inalienability, the dissent concluded, are not distinct characteristics at all.

Five years later, the Supreme Court decided *West v. Oklahoma Tax Commission* which sunk another nail in the coffin of the expansive in-

¹⁸ *Okla. Tax Comm’n*, 319 U.S. at 611-12.

¹⁹ *Id.* at 604.

²⁰ *Id.* at 607.

²¹ *Id.* at 606.

²² *Id.* at 612-24 (Murphy, J., dissenting).

²³ *Id.* at 612.

²⁴ *Id.* at 613.

²⁵ *Id.*

²⁶ *Id.* at 614-15.

strumentality doctrine.²⁷ *West* upheld the application of Oklahoma's inheritance tax to mineral rights held in trust by the Department of Interior for a deceased member of the Osage Tribe.

After reviewing the retreat of the federal instrumentality doctrine and *Oklahoma Tax Commission*, the Court concluded, "We fail to see any substantial difference for estate tax purposes between restricted property and trust property."²⁸ The fact that Native Americans held title to restricted personalty in *Oklahoma Tax Commission* while in *West* the United States held title as trustee "affords no distinguishing characteristic from the standpoint of an estate tax."²⁹ Stone and Frankfurter dissented, joined by Douglas.³⁰ This time, Justice Murphy wrote the majority opinion.³¹ His switch underscored, perhaps, the power of Black's reasoning.

The legacy of both *Oklahoma Tax Commission* and *West* is a cloudy one.³² In 1956, the United States Supreme Court decided *Squire v. Capoeman*, reasoning that gain on the sale of timber from land held by a Quinaielt Indian under trust patent was exempt from federal capital gains tax.³³ *Capoeman* did not overrule *West* or *Oklahoma Tax Commission*. It interpreted a different statute.³⁴ Yet *Capoeman* implied an exemption from taxation that was not expressly articulated by the Congressional text, an interpretive technique that had been flatly rejected by Justice Black in *Oklahoma Tax Commission*.³⁵

Oklahoma Tax Commission had rejected tax exemptions by implication for Indians.³⁶ But *Oklahoma Tax Commission* became more doubtful with *Big Eagle v. United States*.³⁷ In *Big Eagle*, the Court of Claims held that tribal mineral deposits' royalty income was exempt

²⁷ *West v. Okla. Tax Comm'n*, 334 U.S. 717, 727 (1948).

²⁸ *Id.* at 726.

²⁹ *Id.*

³⁰ *Id.* at 728.

³¹ *Id.* at 718.

³² See COHEN, *supra* note 11, at 423 (discussing the differences between these Supreme Court decisions and concluding that the "relationship of these decisions thus bear examination.").

³³ *Squire v. Capoeman*, 351 U.S. 1, 10 (1956). The timber was sold at government discretion. *Id.* at 4.

³⁴ *Id.* at 10.

³⁵ Compare *Squire*, 351 U.S. at 10 (interpreting an exemption from taxation through the General Allotment Act), with *Okla. Tax Comm'n v. United States*, 319 U.S. 598, 604 (1943) (concluding that to imply a tax exemption into the Act would be an incorrect reading of the text).

³⁶ *Okla. Tax Comm'n*, 319 U.S. at 607 ("[W]e cannot assume that Congress will choose to aid the Indians by permanently granting them immunity from taxes . . .").

³⁷ *Big Eagle v. United States*, 300 F.2d 765, 771 (Ct. Cl. 1962) (per curiam).

from the federal income tax.³⁸ The I.R.S., following the rationale of Justice Black, argued that the “Osage Allotment Act, as amended, neither expressly nor impliedly confers tax exempt status on either the taxpayers themselves or on their headright income.”³⁹ Rather than a knee-jerk application of Black’s reasoning, the *Big Eagle* Court weighed Black’s favored rule of statutory construction against Murphy’s in his *Oklahoma Tax Commissioner* dissent, explaining that

it is necessary to assess the weight to be given to two principles difficult to reconcile. The first of these, as laid down by [Justice Black], is that tax exemptions must be clearly expressed and cannot be granted by implication. The second principle is that statutes affecting Indians must be liberally construed, with all doubtful expressions being resolved in their favor.⁴⁰

The Court of Claims then quoted from Justice Murphy’s dissent, concluded that Congressional “silence is conclusive” and found the Indian taxpayers’ income nontaxable.⁴¹

In 1973, the Court once again considered the opposed rules of construction with tax statutes involving Native Americans – the one requiring tax exemptions to be express, the other presuming tax exemptions by implication – in *United States v. Mason*.⁴² The trajectory of judicial decisions after *West* suggested that the Court would simply jettison the first rule. The *Mason* plaintiffs asserted that the United States, as trustee, had breached its duty by failing to resist paying a tax on Indian trust property.⁴³ They argued confidently that *West* was “so undermined by later decisions of this and other courts that the United States had an obligation to challenge its continuing validity.”⁴⁴ The Court disagreed. It characterized *West* as “fully consistent with later developments.”⁴⁵

The power of *Oklahoma Tax Commissioner*’s reasoning is thus uncertain. In an estate planning context, if one is faced with a state tax on Indian property where Congress’ intent is ambiguous, which statutory presumption applies? Justice Black’s 1943 opinion adhered to the general rule against granting tax exemptions by implication.⁴⁶ It rejected a

³⁸ *Id.* at 772.

³⁹ *Id.* at 766.

⁴⁰ *Id.* at 769.

⁴¹ *Id.* at 772.

⁴² *United States v. Mason*, 412 U.S. 391, 394 (1973).

⁴³ *Id.* at 391.

⁴⁴ *Id.* at 392.

⁴⁵ *Id.* at 400.

⁴⁶ *But see* *Chickasaw Nation v. United States*, 534 U.S. 84, 95 (2001) (finding tribes liable for federal occupational excise taxes assessed against “pull-tab” Indian gaming activities).

presumption of contextual tax exemptions for Native Americans.⁴⁷ That reasoning has been followed inconsistently.⁴⁸ Yet it has not been overruled, either. Perhaps the historical emphases in the *Oklahoma Tax Commissioner* dissent still have life in them.⁴⁹

⁴⁷ *Id.* at 86.

⁴⁸ Compare *Seminole Tribe of Fla. v. Stranburg*, 799 F.3d 1324, 1345 (11th Cir. 2015) (holding utility taxes for Indian tribe violated federal Indian law), with *Chickasaw Nation*, 534 U.S. at 86 (holding no tax exemptions for Indian gaming under the Internal Revenue Code).

⁴⁹ See, e.g., *Seminole Tribe of Fla.*, 799 F.3d at 1345 (holding a federal regulatory scheme preempted a state's imposition of rental tax on reservation land) *cert. denied* (2016). Speaking for the majority, Chief Judge Rosenbaum wrote "Benjamin Franklin said, '[I]n this world nothing can be said to be certain, except death and taxes.' He was almost right. As this case illustrates, even taxes are not certain when it comes to matters affecting Indian tribes." *Id.* at 1326 (citation omitted).