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Criminal Law: Are Indian Tribal Courts and Federal District Courts "Arms of Different Sovereigns" for Purposes of the Double Jeopardy Clause? Two Views; Indian Lands: Establishment of a Prima Facie Case Under the Nonintercourse Act; Taxation: Federal Income Tax

RECENT DEVELOPMENTS

CRIMINAL LAW: Are Indian Tribal Courts and Federal District Courts "Arms of Different Sovereigns" for Purposes of the Double Jeopardy Clause? Two Views

In *United States v. Wheeler, 545 F.2d 1255 (9th Cir. 1976)*, the defendant, a Navajo Indian, entered a plea of guilty before the Navajo Tribal Court to charges of contributing to the delinquency of a minor and disorderly conduct. The charges stemmed from a sexual incident which transpired on the reservation. More than a year later defendant was indicted in federal court and charged with carnal knowledge of a female Indian under the age of sixteen years. It was not disputed that the federal charge grew out of the same incident and charge presented to the Navajo Tribal Court. Prior to trial, the federal district court dismissed the indictment on the ground that defendant had been previously placed in jeopardy for the same offense. There was a government appeal from that dismissal. The issue on appeal was whether Indian tribal courts and federal district courts are "arms of different sovereigns" for purposes of the double jeopardy clause. The Ninth Circuit held that Indian tribal courts and the United States district courts are not arms of separate sovereigns and affirmed the holding of the district court.

In *United States v. Walking Crow, No. 77-1136 (8th Cir., August 10, 1977)*, the defendant, a member of the Rosebud Sioux Tribe, entered a plea of guilty before the Tribal Court to a charge of simple theft. These charges stemmed from an incident involving another member of the Rosebud Sioux Tribe. In March, 1977, Walking Crow was indicted by the Federal Grand Jury for the District of South Dakota for the crime of robbery under the Major Crimes Act, 18 U.S.C. 1153, in connection with 18 U.S.C. 2111, which defines the offense of robbery when committed within the special territorial jurisdiction of the United States. A motion to dismiss was filed by the appellant, stating as a ground therefor that because he had been convicted of theft in Tribal Court and because the theft and the alleged robbery he was now being indicted for arose out of the same incident, the felony prosecution in the United States district court was prohibited by the double jeopardy clause of the fifth amendment as tribal courts are arms of the same sovereign as United States district courts. The motion was denied and after a nonjury trial appellant was found guilty and sentenced to a three-year term of imprisonment.

Taking notice of the fact that appellant's position was fully sustained by *United States v. Wheeler, 545 F.2d 1255 (9th Cir. 1976), pet. for cert. filed, 45 U.S.L.W. 3826 (U.S. June 21, 1977) (No. 76-1629)*, the Eighth Circuit said, "With all due respect to that court, we disagree with its holding and decline to follow it.... It is quite true as the Ninth Circuit points out... that the United States has plenary control over the criminal jurisdiction of tribal courts. That does not answer the question. While Congress might deprive the tribal courts of all of their residual jurisdiction to try offenses not punishable under § 1153, it has not seen fit to do so." The Eighth Circuit then proceeded to hold that "a tribal court in administering its residual jurisdiction is not acting as an adjudicatory arm of the federal government and that it is not... an inferior court in the federal judicial system."

INDIAN LANDS: Establishment of a Prima Facie Case Under the Nonintercourse Act

Oneida Indian Nation of New York State v. Oneida County, 434 F. Supp. 527 (1977): In order to establish a prima facie case under the Nonintercourse Act, plaintiff must show that it is or represents an Indian tribe within the meaning of the Act, that the parcels of land at issue are covered by the Act as tribal land, that the United States has never consented to the alienation of the tribal land, and that the trust relationship between the United States and the tribe, which was established by coverage of the Act, has never been terminated or abandoned.

TAXATION: Federal Income Tax

In *Fry v. United States, No. 76-1779 (9th Cir., June 22, 1977)*, Lawrence and Nellie Fry, members of the Confederated Tribes of the Colville Reservation, appealed from a United States district court summary judgment holding that their income, derived from logging operations on tribal land, is not exempt from federal income taxation. The Ninth Circuit affirmed on the grounds that (1) Indians, like other United States citizens, are subject to federal income taxation unless exempted by treaty or statute, (2) appellants failed to point to any treaty or statute which exempts their activities on the tribal lands from federal taxation, and (3) appellants' income is not derived "directly" from tribal lands, but rather is derived from an employment contract between them and the non-Indian lumber company that contracted with the tribe to cut timber on the unallotted lands.

The tribe contracted with Kettle Falls Lumber Company, a non-Indian concern, to cut timber from unallotted lands of the reservation. Subsequently, Lawrence Fry was hired by Kettle Falls as a logging subcontractor. There was no privity of contract between Fry and the tribe. Appellants acknowledge the established law that Indians, unless exempted by treaty or statute, are subject to federal income taxation in the same manner as are other United States citizens. They conceded that they could not point to a statutory or treaty exemption which would specifically apply to them or their activities. They base their claim on an analogy to the exemption found in the General Allotment Act of 1887 and the construction of such exemption as found in *Squire v. Capoeman* [351 U.S. 1 (1956)]. This case held that because the Act "evinces a congressional intent to subject an Indian Allotment to all taxes only after a patent in fee is issued to the allottee," and because "the exemption accorded tribal and restricted Indian lands extends to the income derived directly therefrom," the income realized by a noncompetent Indian allottee from the sale of timber taken from his trust-allotted land was exempt from federal capital gains tax. Proceeding on this foundation, the appellants contended that because the income the tribe directly derives from the logging operation on tax-exempt land is exempt from federal income taxation, the income of appellants as members of the tribe should also be shielded.

The court held this argument to be without merit on the following grounds: (1) The exemption construed in *Squire v. Capoeman* was intended to provide the allottee with unencumbered land when he became competent. It was not to benefit him simply because he was an Indian or to benefit Indians generally. (2) The appellants failed to point to any treaty or statute by which the tribe acquired tax-exempt status on the lands in question, but assuming *arguendo* that such tax-exempt status did exist, appellants' income did not derive "directly" from those lands. Although income to the tribe from the logging operation derives directly from its ownership of the lands and trees thereon, appellants' income derives from the contract between Lawrence Fry and Kettle Falls Lumber Company for the logging of timber. (3) The category of tax-exempt income based on tax-exempt land is concerned with land held by the taxpayer. The Eighth Circuit has held that even if income derived from tribal land may be tax-exempt to the tribe itself, the income a noncompetent Indian derives from operations conducted on such lands is not tax-exempt [Holt v. C.I.R., 386 U.S. 931 (1967). *See also* Strom v. C.I.R., 158 F.2d 520 (1947)].