

IN THE MAGISTRATE DIVISION  
OF THE OREGON TAX COURT  
Income Tax

LON S. NOE,	)	
	)	
Plaintiff,	)	No. 001022F
	)	
v.	)	
	)	
DEPARTMENT OF REVENUE,	)	
STATE OF OREGON,	)	
	)	
Defendant.	)	<b>DECISION</b>

Plaintiff appealed from Notices of Tax Assessment. This appeal includes plaintiff's personal income tax returns for tax years 1997 and 1998. The only issue at trial was plaintiff's commuting costs, specifically the cost of gasoline for his commute. A telephone trial was held on November 27, 2000. Lon Noe appeared for the himself. Tammy Spangler, Auditor, appeared for defendant.

**STATEMENT OF FACTS**

Plaintiff is a construction worker. During 1997 and the first seven months of 1998 he lived in The Dalles and worked in Portland. Prior to 1997 he lived in Damascus. After both of his parents died he moved into his parents' home in The Dalles. He moved so that he could more easily take care of matters relating to his parents' estate. He also remodeled his parents' home over the next year and a half. In August 1998, the home in The Dalles sold. Plaintiff then moved to Troutdale.

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During most of 1997 plaintiff worked on the Liberty Insurance building located at NE Broadway and Grand Avenue, near Lloyd Center.<sup>1</sup> The last part of December 1997 and the first seven months of 1998, plaintiff worked at a Kaiser Permanente building on North Interstate Avenue.<sup>2</sup> Using the most direct route, each of those work sites is approximately 83 miles from plaintiff's home in The Dalles. The most direct route would involve driving west on Interstate 84 (commonly known as and hereafter referred to as the Banfield) until it merged with Interstate 5 ("I-5") northbound. After less than one half mile a person would exit at Broadway and then head west to Interstate Avenue.

Plaintiff testified that he did not drive the most direct route, instead he drove the fastest route. Instead of driving on the Banfield until it merges with I-5, he exited the Banfield at Marine Drive, driving west on Marine Drive to I-5. He exited I-5 at Interstate Avenue, heading south on Interstate Avenue to his destination. This faster route added approximately 10 miles to his drive. Plaintiff also testified that the freeway entrance in The Dalles that he would normally use was closed. The alternate freeway entrance adds approximately two and one half miles to his commute. Plaintiff testified that his alternate route was approximately 100 miles, one way. Defendant did not dispute the length of the alternate route.

On his 1997 and 1998 personal income tax returns, plaintiff mistakenly used the standard mileage rate. He submitted additional materials to defendant that estimated his

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<sup>1</sup>Plaintiff's materials are somewhat confusing on this point. His sworn testimony indicated that he worked at the Liberty Insurance building. Defendant did not dispute this point. The court finds plaintiff's testimony credible.

<sup>2</sup>Plaintiff's materials indicate that Interstate Avenue is in northwest Portland. The court takes judicial notice that Interstate Avenue is in north Portland.

actual expenses based on his recollections of his weekly gasoline costs, tune-up costs and replacement tires. Plaintiff made the round trip of 200 miles 220 times in 1997 and 142 times in 1998. Plaintiff drove a 1967 Buick with a 344 cubic inch transmission, getting 16 miles per gallon of gasoline. He testified that even though gasoline was more expensive in The Dalles, he got gasoline in The Dalles, using regular octane gasoline. According to his recollection, he paid approximately \$1.50 per gallon for gasoline. Plaintiff claims that any receipts he had were lost when he moved from The Dalles to Troutdale.

Based on his lack of receipts or other substantiation, defendant disallowed all commuting costs. Defendant contacted four gasoline stations within a two mile radius of the Kaiser Permanente site in an attempt to find gasoline prices from 1997 and 1998. The gasoline stations were unable to provide that information.

### **COURT'S ANALYSIS**

ORS 316.812 allows a construction worker to deduct his traveling expenses “during the first year of continuous employment on the same construction job site.” *Id.* Traveling expenses are defined by ORS 316.806(4) and (5) as:

“(4) ‘Traveling expenses’ means daily transportation expenses that:

“(a) Are not otherwise deductible under the federal Internal Revenue Code.

”(b) Are incurred by a construction worker in job-related travel between a construction job site located more than 50 miles from the principal residence of the construction worker.

“(5) ‘Traveling expenses’ includes gas, oil and automobile repairs and maintenance, but does not include meals unless the construction worker is required by the employer to stay overnight at the construction job site.”

The parties agree that plaintiff commuted. The parties also agree as to length of the commute. The only dispute is the lack of substantiation. The court was able to find a

table published by the Energy Information Agency, a part of the United States Department of Energy. See *Motor Gasoline Retail Prices, U.S. City Average* (visited Nov. 27, 2000) <[www.eia.doe.gov/pub/energy.overview/monthly.energy/txt/mer9-4](http://www.eia.doe.gov/pub/energy.overview/monthly.energy/txt/mer9-4)>. The court takes judicial notice of the above-cited table. The average price of unleaded regular gasoline in 1997 was 123.4 cents per gallon in cities in the United States. *Id.* The average price of unleaded regular gasoline for the first 7 months of 1998 was 108.2 cents per gallon in cities in the United States. *Id.* While it is likely that gasoline was more expensive in The Dalles than in the average city in the United States, the court finds the information from the Energy Information Agency a reasonable approximation of plaintiff's actual costs.

Plaintiff drove 44,000 commuting miles in 1997.<sup>3</sup> Driving a car that got 16 miles per gallon, plaintiff used 2,750 gallons of gasoline. Plaintiff spent at least \$3,393.50 in gasoline for commuting. Plaintiff drove 28,400 commuting miles in 1998.<sup>4</sup> Driving a car that got 16 miles per gallon, plaintiff used 1,775 gallons of gasoline. Plaintiff spent at least \$1,920.55 in gasoline for commuting.

### **CONCLUSION**

The court finds that plaintiff shall be allowed a deduction of \$3,393.50 for his commuting expenses in 1997. The auditor's report adjusted plaintiff's 1997 return by \$14,582. The court finds the adjustment should be \$11,188.50. The court also finds that plaintiff shall be allowed a deduction of \$1,920.55 for his commuting expenses in 1998. The auditor's report adjusted plaintiff's 1998 return by \$9,623. The court finds the

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<sup>3</sup>200 miles per round trip times 220 round trips.

<sup>4</sup>200 miles per round trip times 142 round trips.

adjustment should be \$7,702.45.

IT IS THE DECISION OF THIS COURT that

- 1) The adjustment to plaintiff's 1997 income tax return shall be \$11,188.50;
- 4) The adjustment to plaintiff's 1998 income tax return shall be \$7,702.45; and
- 5) Defendant shall recalculate the taxes, penalties and interest owed for each year

accordingly.

Dated this \_\_\_\_\_ day of December, 2000.

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SALLY L. KIMSEY  
MAGISTRATE

**IF YOU WANT TO APPEAL THIS DECISION, FILE A COMPLAINT IN THE REGULAR DIVISION OF THE OREGON TAX COURT, FOURTH FLOOR, 1241 STATE ST., SALEM, OR 97310. YOUR COMPLAINT MUST BE SUBMITTED WITHIN 60 DAYS AFTER THE DATE OF THE DECISION OR THIS DECISION BECOMES FINAL AND CANNOT BE CHANGED.**

**THIS DOCUMENT WAS SIGNED BY MAGISTRATE SALLY L. KIMSEY ON DECEMBER 6, 2000. THE COURT FILED THIS DOCUMENT ON DECEMBER 6, 2000.**