

IN THE OREGON TAX COURT
MAGISTRATE DIVISION
Income Tax

JEFFREY M. DUNKIN,)	
)	
Plaintiff,)	No. 010989F
)	
v.)	
)	
DEPARTMENT OF REVENUE,)	
STATE OF OREGON,)	
)	
Defendant.)	DECISION

This matter is before the court on Plaintiff's Motion for Summary Judgment.

STATEMENT OF FACTS

Defendant issued its Notice of Determination and Assessment on May 29, 2001, asserting a tax to pay of \$2,856, a 50 percent penalty for failing to file a return and associated interest. The tax to pay was based on income of \$39,828. In its Amended Answer, Defendant asked the court to increase the tax to pay to \$3,081, an increase of \$225. The increase was based on unemployment compensation of \$2,539, previously unknown to Defendant, paid to Plaintiff in 1999. Defendant also asked the court to award damages pursuant to ORS 305.437.¹

Even though he had income of \$42,367.60, Plaintiff did not file a personal income tax return for 1999 because of his belief that he "was not involved in any taxable activities during 1999." (Ptf's Compl at 2.) Plaintiff's belief is apparently based on his theory the income tax is an excise tax to which his wages are not subject. Plaintiff's income included \$39,501.72 from S & B James Construction Co., \$326.88 from Wenger Corporation and \$2,539 of unemployment compensation. (Def's Ex B, C,

¹All references to the Oregon Revised Statutes (ORS) are to 1999.

and F.) Plaintiff claimed he was exempt from taxation in the withholding forms, W-4s, he filed with his two employers. (Def's Ex D and E.)

COURT'S ANALYSIS

The court has authority to award damages under ORS 305.437. That statute reads:

"(1) Whenever it appears to the Oregon Tax Court that proceedings before it have been instituted or maintained by a taxpayer primarily for delay or that the *taxpayer's position in such proceeding is frivolous or groundless, damages in an amount not to exceed \$5,000 shall be awarded* to the Department of Revenue by the Oregon Tax Court in its judgment. Damages so awarded shall be paid within 10 days after the judgment becomes final. If the damages remain unpaid, the department may collect the amount awarded in the same manner as income taxes are collected under ORS 314.430.

"(2) As used in this section, a taxpayer's position is 'frivolous' if there was no objectively reasonable basis for asserting the position."

ORS 305.437 (Emphasis added.)

Plaintiff presented no evidence that the \$42,367.60 was not taxable income. Plaintiff's beliefs may be sincerely held, if misguided. This court has previously held that "[o]rdinary citizens without legal training are free to interpret the laws any way they choose. However, if their interpretations are contrary to those of the legislature and the Supreme Court, they do so at their peril." *Harvey v. Dept. of Rev.*, 11 OTR 407, 409 (1990). In a case affirming the dismissal of a taxpayer's petition as frivolous and upholding the imposition of a penalty, the Fifth Circuit Court of Appeals stated:

"An appeal that lacks merit is not always - or often - frivolous. However, we are not obliged to suffer in silence the filing of baseless, insupportable appeals presenting no colorable claims of error and designed only to delay, obstruct, or incapacitate the operations of the courts or any other governmental authority. * * * The government should not have been put to the trouble of responding to such spurious arguments, nor this court to the trouble of 'adjudicating' this meritless appeal."

Crain v. Com., 737 F2d 1417, 84-2 USTC ¶ 9721 (1984).

As this court stated in *Mansuetti v. Dept. of Rev.*, OTC-MD No. 991425F (Mar 20, 2002), 2000 WL 321415:

"The language of ORS 305.437 is mandatory. In order to determine the appropriate level of damages, the court will evaluate a number of factors. Some of the factors include: the specific arguments presented to the court, whether plaintiff made threats against the government or its employees, whether any amount was withheld from wages, the number of years at issue, whether returns were filed, whether plaintiff sent defendant a 'demand' letter, how many levels of authority plaintiff has appealed to and whether defendant is represented by an attorney. This list is not meant to be exhaustive nor is each argument weighted equally. The first two factors address whether it is appropriate to impose damages. The balance goes to the level of damages."

As noted above, Plaintiff's basic argument is that wages are not income. The Second Circuit Court of Appeals in *Connor v. Com.*, 770 F2d 17, 85-2 USTC ¶ 9598 (2d Cir. 1985) held that "[w]ages are income. * * * The argument that they are not has been rejected so frequently that the very raising of it justifies the imposition of sanctions." (Citation omitted.) This court agrees with that reasoning.

Taking all the factors into consideration and the time that both Defendant and the court spent on Plaintiff's claim, the court finds that the appropriate level of damages under ORS 305.437 is \$750.

CONCLUSION

As this court stated in *Clark v. Dept. of Rev.*, 15 OTR 209, 211 (2000), aff'd 332 Or. 236, 26 P3d 821 (2001), "[t]he public should not have to suffer increased tax burdens because particular individuals use state resources to espouse views that are frivolous or groundless." Now, therefore,

IT IS THE DECISION OF THIS COURT that Plaintiff's Motion for Summary Judgment is denied.

IT IS FURTHER DECIDED that Plaintiff's tax to pay for tax year 1999 shall be increased to \$3,081 with corresponding increases in the 50 percent penalty and interest.

IT IS FURTHER DECIDED that pursuant to ORS 305.437, Defendant shall be awarded a money judgment for damages against Plaintiff in the amount of \$750.

Dated this _____ day of November, 2002.

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 97301-2563. 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 NOVEMBER 26, 2002. THE COURT FILED THIS DOCUMENT ON NOVEMBER 26, 2002.