

IN THE OREGON TAX COURT  
MAGISTRATE DIVISION  
Income Tax

GERY G. ELLIBEE,	)	
	)	
Plaintiff,	)	TC-MD 020026D
	)	
v.	)	
	)	
DEPARTMENT OF REVENUE,	)	
STATE OF OREGON,	)	
	)	
Defendant.	)	<b>CORRECTED DECISION<sup>1</sup></b>

Plaintiff appeals Defendant's notices of assessment for tax years 1996, 1997, and 1998 and Defendant's adjustment of Plaintiff's Oregon taxable income for tax year 1995 based on federal audit adjustments. Defendant filed a Motion for Summary Judgment; Motion for Frivolous Appeal Damages; and Motion for Attorney Fees on February 14, 2003. Plaintiff responded. Oral argument was not requested.

**STATEMENT OF FACTS**

The parties agree that Plaintiff filed an Oregon state income tax return for tax year 1995. After receiving information from the Internal Revenue Service (IRS), Defendant increased Plaintiff's reported taxable income. (Ptf's Compl, Attach B.) Plaintiff disputes Defendant's adjustments.

On April 16, 2001, Defendant issued Plaintiff a Notice of Assessment for tax year 1996. (Def's Ex A.) Subsequently, under an exchange agreement with the IRS, Defendant was informed that Plaintiff sold stocks or bonds. Defendant alleges that Plaintiff did not include the proceeds from these sales in his 1996 income tax return and

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<sup>1</sup> On April 28, 2003, Defendant wrote to the court stating that the tax year for the stock sale proceeds was incorrectly stated in the Conclusion of the court's Decision. This Corrected Decision is filed to change the tax year. See Analysis, page 4 and Conclusion, page 6.

Defendant did not include them in its Notice of Assessment. (Affidavit of Christi H. Daniken, Ex A at 3.) Defendant requests that Plaintiff's taxable income be increased in the amount of \$8,030, resulting in additional tax due in the amount of \$618. (*Id.* at 4.)

In April 2001, Defendant issued Plaintiff a Notice of Assessment for tax year 1997. (Def's Mem of Law in Support of Mot for Summ J; Mot for Frivolous Appeal Damages; and Mot for Attorney Fees at 2.) In June 2001, Defendant issued Plaintiff a Notice of Assessment for tax year 1998. Defendant alleges that Plaintiff's appeal for tax years 1997 and 1998 is not timely. Plaintiff's Complaint was filed January 15, 2002.

### **ANALYSIS**

The court's analysis will begin with Plaintiff's appeal for tax years 1997 and 1998. Defendant's Notices of Assessment for tax years 1997 and 1998 were issued April 2001 and June 2001, respectively. Plaintiff filed its appeal for those tax years on January 15, 2002. A taxpayer receiving a Notice of Assessment from Defendant is permitted to file an appeal within 90 days after the date of the notice:

"An appeal under ORS 323.416 or from any notice of assessment or refund denial issued by the Department of Revenue with respect to a tax imposed under ORS chapter \* \* \* 314, 316 \* \* \* shall be filed within 90 days from the date of the notice."

ORS 305.280(2)<sup>2</sup>

Plaintiff's appeal was not filed within 90 days of the date of the notice and Plaintiff failed to offer any evidence why his appeal for those years should not be dismissed. The court concludes that Plaintiff's appeal for tax years 1997 and 1998 must be dismissed.

Moving to Plaintiff's appeal of tax years 1995 and 1996, Plaintiff alleges that he is not subject to Oregon state income taxes:

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<sup>2</sup> Unless otherwise noted, all references to the Oregon Revised Statutes (ORS) are to 1995.

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"[B]ased on 26 CFR §§1.861-8(a)(1), 1.861-8(a)(4), 1.861-8(f)(1), and on decades worth of statutory and regulatory history of those sections (such as Section 217 of the Revenue Act of 1921, and Sections 39.119-1 and 39.119-10 of the regulations under the 1939 Code), that 26 USC § 861(b), and the related regulations beginning at 26 CFR §1.861-8, do not show domestic income to be taxable when received by United States citizens who live and work exclusively within the 50 states."

(Ptf's Resp to Mot for Summ J, Mot for Frivolous Appeal Damages, and Mot for Attorney Fees; Mot for Summ J (Ptf's Response) at 3 - 4.)

Contrary to Plaintiff's allegations, recent United States Tax Court cases hold that taxpayers alleging that only foreign source income (IRC 861(b) and Treas Reg 1.861-8(f)) is taxable are making frivolous arguments. *Madge v. Commissioner*, 80 TCM (CCH) 804 (2000); *See also Corcoran v. Commissioner*, 83 TCM (CCH) 1107, 1110 (2002) (The court rejected taxpayers' argument that their income was not from any of the sources in Treas Reg 1.861-8(f) and therefore not taxable. The court further required the taxpayers to pay a \$2,000 penalty because "they \* \* \* wasted limited judicial and administrative resources.")

In analyzing the law governing state taxable income, the court is guided by the legislature's expressed intent "to make the Oregon personal income tax law identical in effect to the provisions of the federal Internal Revenue Code relating to the measurement of taxable income of individuals." ORS 316.007.

Plaintiff is a resident of Oregon. "A tax is imposed for each taxable year on the entire taxable income of every resident of this state." ORS 316.037(1)(a). "Taxable income" is defined in ORS 316.022(6) as follows:

"'Taxable income' means the taxable income as defined in subsection (a) or (b), section 63 of the Internal Revenue Code, with such additions, subtractions and adjustments as are prescribed by this chapter."

The Internal Revenue Code (IRC) states that the term "taxable income" means gross

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income minus allowable deductions. “Gross income” is defined in IRC § 61(a) (1995):

“General definition.

Except as otherwise provided in this subtitle, gross income means **all income from whatever source derived**, including (but not limited to) the following items:  
“(1) Compensation for services, including fees, commissions, fringe benefits, and similar items.”

(Emphasis added.)

Using those statutory definitions, this court has previously held that wages are clearly taxable. See *Combs v. Dept of Rev.*, 15 OTR 60, 61 (1999). Plaintiff was employed by Waddell and Reed and received wages. (Ptf's Status Report and Mot, Ex A - 3.) With respect to wages, Plaintiff's position is “unrealistic and uninformed.” *Combs*, 15 OTR at 61. Plaintiff's failure to include the proceeds from the sale of stocks or bonds in his 1996<sup>3</sup> income tax return is incorrect. In addition, Plaintiff has failed to provide any information to Defendant and the court with respect to the cost of the stocks or bonds. Without knowing the original cost of those investments, the correct taxable gain cannot be computed.

Defendant's Motion for Frivolous Appeal Damages requests damages under ORS 305.437(1) (2001), which provides:

“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.”

In *Combs*, the court concluded that taxpayer's appeal was “groundless and totally

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<sup>3</sup> Tax year corrected.

devoid of merit.” *Combs*, 15 OTR at 61. Further, the court held that there was no “objective reasonable basis” for such as assertion. *Id* at 61-62. After weighing various factors, the court assessed a frivolous penalty because of the time required of the court and the administrative agency, Oregon Department of Revenue, to respond to taxpayer’s groundless appeal. *Id.* at 62.

In evaluating the amount of the damages award, the court is guided by the definition of “frivolous” as a claim where “there was no objectively reasonable basis for asserting the position.” ORS 305.437(2). In the case before the court, Plaintiff made the same assertion as the taxpayer in *Combs*: wages are not subject to personal income tax. Plaintiff did not present any legal argument in support of his appeal different from that previously denied by this court. Plaintiff made the same assertion that in prior cases has been deemed frivolous. *Clark v. Dept of Rev.*, 15 OTR 197 (2000), *on recons*, 15 OTR 209 (2000), *aff’d*, 332 Or 236, 26 P3d 821 (2001); *Clark v. Dept. of Rev.*, 16 OTR 51 (2002); *Combs*, 15 OTR 60. The court awards Defendant \$1,000 in damages under ORS 305.437.

Having determined that Plaintiff's arguments are frivolous, Defendant seeks attorney fees, attributing the status of prevailing party to itself.<sup>4</sup> Defendant cites the Oregon Tax Court Regular Division's holding in *Sesma v. Dept of Rev*, 16 OTR 29 (2002), for its determination that the court is required to award attorney fees to a prevailing party.

Defendant is unaware or has overlooked the statutory provision outlining the authority given

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<sup>4</sup> ORS 20.105(1): In any civil action, suit or other proceeding in a circuit court or the Oregon Tax Court, or in any civil appeal to or review by the Court of Appeals or Supreme Court, the court shall award reasonable attorney fees to a party against whom a claim, defense or ground for appeal or review is asserted, if that party \* \* \* asserting the claim, defense or ground, upon a finding by the court \* \* \* that there was no objectively reasonable basis for asserting the claim, defense or ground for appeal."

to the tax court judge of the Regular Division to award attorney fees for proceedings in the Magistrate Division. See ORS 305.490(3)(a)(A). The statute provides that attorney fees are only recoverable in income tax cases before the Regular Division of the Tax Court. ORS 305.490(3)(a). By expressly providing for attorney fees in that situation, the legislature implicitly did not grant authority to magistrates to award attorney fees.

Plaintiff requests that the court order Defendant to respond to six questions labeled "determining taxable income." (Ptf's Ex F.) Plaintiff did not explain why Defendant should be so ordered. Plaintiff's request is denied.

### **CONCLUSION**

Now, therefore,

IT IS THE DECISION OF THIS COURT that Plaintiff's appeal for tax years 1997 and 1998 is dismissed.

IT IS FURTHER DECIDED that Plaintiff's appeal for tax years 1995 and 1996 is denied.

IT IS FURTHER DECIDED that Plaintiff's taxable income for tax year 1996<sup>5</sup> can be increased for the sale of stocks and bonds, adjusted for documentation submitted to Defendant showing the original cost.

IT IS FURTHER DECIDED that Defendant's Motion for Frivolous Appeal Damages is granted in the amount of \$1,000.

IT IS FURTHER DECIDED that Defendant's Motion for Attorney Fees is denied.

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<sup>5</sup> Tax year corrected.

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IT IS FURTHER DECIDED that Plaintiff's request that Defendant respond to six questions labeled "determining taxable income" is denied.

Dated this \_\_\_\_\_ day of May, 2003.

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JILL A. TANNER  
PRESIDING 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 JILL A. TANNER ON MAY 8, 2003. THE COURT FILED THIS DOCUMENT ON MAY 8, 2003.**