IN THE OREGON TAX COURT
MAGISTRATE DIVISION
Income Tax

MADELINE M. CARPIGNANO and ROBERT CARPIGNANO,	)	
Plaintiffs,	)	TC-MD 020389C
v.	)	
DEPARTMENT OF REVENUE, STATE OF OREGON,	)	
Defendant.	)	**DECISION**

This matter is before the court on Defendant's request for summary judgment, filed September 6, 2002. In the Complaint, which concerns the 1996 tax year, Plaintiffs seek "redress from an unconstitutional statute" based on this court's decision in *Fisher v. Dept. of Rev.*, ___ OTR-MD ___ (Feb 13, 2001). (Compl at 1.)

STATEMENT OF FACTS

The parties have stipulated to the majority of the facts. Plaintiffs are California residents. On August 1, 1996, Plaintiffs exchanged Oregon investment real property for similar investment property in Virginia. The transaction qualified as a like-kind exchange under Internal Revenue Code (IRC) § 1031. Plaintiffs timely filed their 1996 Oregon return (Oregon Form 40N Nonresident) reporting the gain from the sale, and paid the applicable tax (including the tax on the gain from the like-kind exchange). Plaintiffs received two refunds from Defendant, one based on Defendant's increase to Plaintiffs' itemized deductions and personal exemption amounts and a second based on the Oregon "surplus refund," commonly known as the "kicker." According to Plaintiffs, the net tax liability after the refunds was $34,335.

Roughly four years later, on June 4, 2001, Plaintiffs filed an amended Oregon return claiming deferral of the recognition of the gain in 1996 and seeking a refund of the tax previously paid. By notice issued October 29, 2001, Defendant denied the refund request under ORS 314.415(1) because the amended return was not filed within three years of the date of the original return. Plaintiffs filed written objections and on January 31, 2002, Defendant issued a written conference decision denying the refund request because Plaintiffs did not meet the requirements of House Bill 2206.

Plaintiffs timely appealed based on the *Fisher* decision. Defendant requests its denial be upheld because the three-year refund period in ORS 314.415 has lapsed and relief under House Bill 2206 only applies to tax years beginning on or after January 1, 1998.

COURT'S ANALYSIS

Under former ORS 314.290,[1] a resident disposing of property in a qualified like-kind exchange involving the acquisition of property in another state could defer the gain for Oregon tax purposes as long as that individual remained a resident of Oregon. A nonresident could not defer the gain in that same transaction. That disparate treatment was the basis for the court's declaration of unconstitutionality in the *Fisher* case. The court severed subsection (2)(b) of the statute and enjoined the department from pursuing collection against the plaintiffs in *Fisher* until the state could show that it complied with the mandate in *McKesson v. Division of Alc. Bev.*, 496 US 18, 39, 43, 51, 110 S Ct 2238, 110 L Ed 2d 17 (1990), to provide a clear and certain remedy. *Fisher*, ___ OTR-MD ___ (Feb 13, 2001) (slip op at 15).

The department did not appeal and the legislature passed House Bill 2206. The

[1] Repealed by Or Laws 2001, ch 509, § 19.

act was effective October 6, 2001. Or Laws 2001, ch 509, § 21. Under section 15 of that Act, both residents and nonresidents may defer the gain in a qualifying like-kind exchange where the acquired property is located outside of Oregon. However, that legislation, which is codified as ORS 316.738 (2001), has two limitations: the Act (and the statute) only applies to "(1) [t]ax years beginning on or after January 1, 1998; and (2) [a]ny tax year for which an amended return may be filed or a notice of deficiency issued on or after the effective date of th[e] 2001 Act." Or Laws 2001, ch 509, § 20.

Plaintiffs seek relief under *Fisher*. That case, however, did not fashion a comprehensive remedy. Rather, it enjoined the department from pursuing collection against the plaintiffs and left it to the legislature to fashion the remedy. *Fisher*, ___ OTR-MD ___ (Feb 13, 2001) (slip op at 15). The legislature has done so and Plaintiffs herein do not qualify under the newly enacted statute because the tax year involved is before January 1, 1998, and Plaintiffs are beyond the three-year window in ORS 314.415 for claiming a refund.

Plaintiffs cite language in *Fisher* which states that:

> "[e]quality of treatment must begin with the 1995 tax year, which is the year of the department's assessment against plaintiffs and thus the year the cause of action arose. This is so because plaintiffs are entitled to a meaningful opportunity to contest the tax. (Citation omitted.) Because the dispute involves a one-time request for deferral of the recognition of the gain resulting from a taxable sale of property in 1995, the corrective measures must go back to that year."

Fisher v. Dept. of Rev., ___ OTR-MD ___ (Feb 13, 2001) (slip op at 14).

That statement, however, was made in the context of the facts in the *Fisher* case. Plaintiffs in *Fisher*, who were nonresidents of Oregon at the time of their

IRC § 1031 exchange, claimed the deferral on their 1995 Oregon return.[2] Thereafter, the plaintiffs timely challenged the department's deficiency and then timely appealed the assessment to this court. Thus, the *Fisher* plaintiffs timely challenged the statute at all steps of the process. The court ultimately found the statute to violate the federal constitution. Here, Plaintiffs first attempted to challenge the application of ORS 314.290 by filing an untimely claim for refund. Plaintiffs reported the gain on their original 1996 Oregon return (rather than taking the deferral), thereby accepting as constitutional the provisions of that statute. They did not object to the application of ORS 314.290 to their circumstances until *Fisher* was issued, which was beyond the three-year window provided in ORS 314.415 (1999) for seeking a refund. Plaintiffs insist they are merely seeking a meaningful opportunity to contest the tax and note they filed their amended return just four months after this court issued the *Fisher* decision. However, that return was late in terms of the refund request and the relief afforded by ORS 316.738 (2001) does not reach back to 1996 under the facts of this case. Plaintiffs are not entitled to relief under the new legislation and they read too much into *Fisher*.

CONCLUSION

Plaintiffs' request for relief under *Fisher* is denied because the decision in *Fisher* only provided relief for the plaintiffs in that case and the legislative response does not encompass Plaintiffs' amended 1996 return. Accordingly, Plaintiffs are not entitled to a refund based on a retroactive deferral of the recognition of the gain stemming from their IRC § 1031 exchange. Now, therefore,

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[2] The facts in *Fisher* do not specifically indicate that the deferral was taken on the original return. However, on appeal to the department, the conference officer stated in her written decision that: "[t]he auditor's position is that ORS 314.290 requires you to include the gain in Oregon income * * *." In March 1998 the department issued a deficiency. Deficiencies are issued under ORS 305.265 after examination of a return.

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IT IS THE DECISION OF THIS COURT that Plaintiffs' request for a refund of taxes paid in 1996 on the income realized from a like-kind exchange is denied.

Dated this _____ day of April, 2003.

DAN ROBINSON
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 DAN ROBINSON ON APRIL 8, 2003. THE COURT FILED THIS DOCUMENT ON APRIL 8, 2003.