

IN THE OREGON TAX COURT
MAGISTRATE DIVISION
Income Tax

ROBERT L. WHITE,)
)
 Plaintiff,) TC-MD 021311D
)
 v.)
)
 DEPARTMENT OF REVENUE,)
 STATE OF OREGON,)
)
 Defendant.) **DECISION**

Plaintiff appeals Defendant's Notice of Refund Denial, dated November 26, 2002.

The parties have submitted the matter to the court for decision. Plaintiff requested the court "make a decision based on the information you have been provided to date."

(Ptf's letter dated Aug 25, 2003, at 2; telephone conference held on Sept 30, 2003.)

Plaintiff wrote that he had "attached the information I feel you need to make a clear and final decision in my case." (*Id.*) During the telephone conference on September 30, 2003, Defendant's representative stated that he did not intend to submit any additional information other than the information submitted to the court on April 1, 2003.

I. STATEMENT OF FACTS

Plaintiff, a resident of Washington state, is employed by Yellow Freight Corporation (Yellow Freight). (John Eckhardt's (Eckhardt) letter dated June 22, 2003.) According to Eckhardt, who is a General Operations Manager for Yellow Freight, Yellow Freight "is an interstate motor carrier regulated by the United States Department of Transportation."¹ (*Id.*)

¹ Plaintiff's information submitted to the court on July 7, 2003, included a four-page description of Yellow Freight from a website labeled "myyellow.com" dated June 8, 2003.

During the 2000 tax year, Plaintiff worked in Yellow Freight's Portland terminal as a "City Driver/Dock Worker." (*Id.*) Plaintiff's "regularly assigned job duties" were as follows:

"As a Driver:

"Operate a tractor trailer in excess of 60,000 gvwr.

"To deliver and pickup freight in Oregon and Washington

"To secure freight for interstate transportation

"Check vehicle tires, lights, braking systems, place appropriate hazmat placards on trailer according to USDOT rules and regulations.

"As a Dock Worker/Freight Handler:

"Load and unload freight. Load trailers using materials such as plywood, cardboard, and load bars to secure contents of trailer for safe interstate transportation and apply the appropriate hazardous materials placards according to USDOT rules and regulations."

(*Id.*)² Eckhardt wrote that "[f]or year 2000, Robert White had **both** driving and hostling **bids**."³ (*Id.*) (Emphasis added). Eckhardt explained that "[a]s a hostler you move trailers from dock to a load to go status that includes securely hooking the trailers together, and checking the trailer or trailers (if doubles or triples) for lights, brakes, tires, and hazmat placards insuring it for safe in-state, or interstate transport according to USDOT rules and regulations." (*Id.*) In addition to the job description information, Plaintiff submitted three documents labeled "City Delivery and Pickup Manifest" (Manifests) to "show" that he "drove to Washington" as "part of my regular job duties." (Ptf's letter dated Aug 25, 2003;

² From the website "myyellow.com," Plaintiff submitted two job descriptions, City Driver/Dock Worker and Dock Worker, dated June 8, 2003. In addition, Plaintiff submitted a job description labeled City Driver/Dock Worker, dated December 21, 2002, from the same website. Plaintiff also submitted a position description, dated August 19, 1993, for a City Driver/Dockworker (Combination). Despite the different year listed on each document, each of the position descriptions are quite similar.

³ None of Plaintiff's evidence defines or explains 'bid.'

Ptf's documents submitted June 22, 2003). According to the Manifests, Plaintiff drove in Washington on Feb 3, 2000, and Feb 6, 2000. The date on the third Manifest is illegible.

Although Defendant agrees that Plaintiff is a nonresident of Oregon employed by an interstate motor carrier (Yellow Freight), Defendant alleges that Plaintiff does not qualify to have his wages exempt under the Amtrak Reauthorization and Improvement Act of 1990. Defendant concluded that Plaintiff did not have "regularly assigned duties in more than one state" because Plaintiff "might drive if they need someone to drive" and the "driving assignment are 'as needed.'" (Def's Notice of Refund Denial dated Nov 25, 2002, citing OAR 150-316.127(E).) In support of its conclusion, Defendant submitted a letter dated March 28, 2003, from Eckhardt to Defendant's representative, Jason Iverson. In the letter, Eckhardt wrote that Plaintiff "may very well have been moved into a city driver position in the event that we needed extra drivers or he may have driven on an overtime day." Defendant explained in its Notice that "[t]here is no indication Congress intended to extend the tax exemption to classes of employees whose work is essentially in one place." (Def's Notice of Refund Denial dated Nov 25, 2002.)

II. ANALYSIS

Nonresidents earning taxable income in Oregon are subject to tax under ORS 316.037(3).⁴ The federal Amtrak Reauthorization and Improvement Act of 1990 (Amtrak Act) exempts certain nonresidents from Oregon income taxation. Pub L 101-322, § 11504, 104 Stat 295 (1990). The Amtrak Act was passed so that "rail and motor carrier transportation workers will only have to pay State taxes to their State of residence." Testimony of Senator Slade Gorton, 136 Cong Rec S8676 (June 25, 1990). The intent of

⁴ All references to the Oregon Revised Statutes (ORS) are to 1999.

Congress in enacting the Amtrak Act was to “relieve employees of railroads and interstate trucking firms from income taxes that could be imposed if the employees earn part of their income while passing through a state.” *Butler v. Dept. of Rev.*, 14 OTR 195, 197 (1997). The desired result of the law was to reduce the likelihood that employees may be subject to burdensome filing requirements and conflicting claims for credits in multiple state jurisdictions. *Id.* at 197. In some cases an employee avoids state tax liability altogether, as when an employee lives in a state without an income tax and works in a state that does impose a tax. That would be the case if Plaintiff falls within the scope of the Amtrak Act.

Under the Amtrak Act, state and local governments may not tax the compensation of nonresident employees who have regularly assigned duties in more than one state. To qualify for the exemption, a number of requirements must be met. First, the employee must work for one of three types of employers:⁵ an interstate railroad, interstate motor carrier or a motor private carrier. Pub L 101-322 § 11504, 104 Stat 295 (1990). Second, the employee must be a nonresident of Oregon. Finally the employee must have regularly assigned duties in more than one state. *Id.*

In this case, the parties agree that Plaintiff is not a resident of Oregon and works for an interstate motor carrier. The only issue before the court is whether Plaintiff during tax year 2000 had regularly assigned duties in two or more states.

A. *Regularly assigned duties in two or more states*

The pertinent portion of the Act, found in Title 49 of the United States Code, reads:

“No part of the compensation paid by a motor carrier * * * to an employee who performs regularly assigned duties in 2 or more States as such an employee with respect to a motor vehicle shall be subject to the income tax laws of any State or subdivision of that State, other than the State or

⁵ Federal, state or local governments are not qualifying employers.

subdivision thereof of the employee's residence.”

49 USC § 11504 (b)(1).

In interpreting a federal statute, the court must look to federal principles of statutory construction. See *Butler v. Dept. of Rev.*, 14 OTR 195, 199 (1997). The “task is to identify and carry out the intent of Congress when it enacted” the statute. *Shaw v. PACC Health Plan, Inc.*, 322 Or 392, 400, 908 P2d 308 (1995) (citing *Pilot Life Ins. Co., v. Dedeaux*, 481 US 41, 45, 107 S Ct 1549, 95 L Ed 2d 39 (1987)). The court first looks at “language of the governing statute, guided not by ‘a single sentence or member of a sentence, but look[ing] to the provisions of the whole law, and to its object and policy.’” *John Hancock Life Ins. v. Harris Bank*, 510 US 86, 94-95, 114 S Ct 517, 126 L Ed 2d 524 (1993). (alteration in original) (quoting *Pilot Life Ins. Co.*, 481 US at 51).

Having examined the language of 49 USC § 11504 (b)(1) in light of Congress’ intent in passing the statute, this court has held that “[t]he phrase “regularly assigned” suggests that Congress intended to exclude “irregular,” “unusual,” or “special” assignments.” *Hughes v. Dept. of Rev.*, OTC-MD No 991228D, WL 292644 (Jan 6, 2000) citing *Butler*, 14 OTR at 200. Although the statute does not require a certain percentage of the taxpayer’s time be spent outside Oregon, a taxpayer’s failure to spend enough time outside of Oregon may yield a finding that the taxpayer did not have regularly assigned duties in two or more states. See, e.g. *Stout v. Dept. of Rev.*, OTC-MD No 981059, (Mar 1, 1999), also *Lawyer v. Dept. of Rev.*, OTC-MD No 983074D, WL 1060437 (June 15, 2000).

In determining whether an employee performs regularly assigned duties in two or more states, as required by 49 USC § 11504 (b)(1), the court considers *Butler* insightful

and controlling. In the *Butler* case, as here, the taxpayer lived in Washington, was a mechanic and worked for Yellow Freight out of a Portland terminal. *Butler*, 14 OTR at 196. In “emergency situations,” on an “as-needed” basis, Butler traveled to Washington to pick up parts for particular jobs. *Id.* Butler made about three trips to Washington a year. *Id.* at 200. The court held that Butler’s trips were not part of his regularly assigned duties. *Id.* The trips were unusual and there was no established regularity involved. *Id.* His regularly assigned duties were to inspect and repair trucks in the Portland terminal. *Id.* at 199. Consequently, the court held that Butler was not eligible for the exclusion in 49 USC § 11504 (b)(1). *Id.* at 200.

In order to determine whether Plaintiff performs regularly assigned duties in two or more states, the court looks to the evidence presented. A party before the court must present his case through evidence. It is not sufficient to simply tell one’s story; there must be a presentation of proof. That proof may consist of sworn testimony, documentary evidence and/or tangible evidence as appropriate. In most cases, one party must make a greater showing of evidence in order to prevail. That party is said to carry the burden of proof.

B. *Burden of proof*

The burden of proof in Tax Court proceedings is found in ORS 305.427. The statute provides that “a preponderance of the evidence shall suffice to sustain the burden of proof. The burden of proof shall fall upon the party seeking affirmative relief and the burden of going forward with the evidence shall shift as in other civil litigation.” ORS 305.427. “Preponderance of the evidence means the greater weight of evidence, the more convincing evidence.” *Feves v. Dept. of Revenue*, 4 OTR 302, 312 (1971). It is

such evidence that, when weighed with that opposed to it, has more convincing force and is more probably true and accurate. *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390, 394, 737 P2d 595 (1987). “[I]f the evidence is inconclusive or unpersuasive, the taxpayer will have failed to meet his burden of proof.” *Reed v. Dept. of Rev.*, 310 Or 260, 265, 798 P2d 235 (1990). If the evidence appears to be equally balanced, or if it cannot be said upon which side it weighs heavier, the question must be resolved against the party upon whom the burden of proof rests. *Riley Hill*, 303 Or at 394-95.

In this case, the burden of proof fell on Plaintiff, who failed to sustain it. Plaintiff refused to participate in a trial and did not give sworn testimony. Plaintiff relied on job descriptions and Manifests to persuade the court that he had regularly assigned duties in two or more states.

The fact that Plaintiff’s job description included “deliver and pickup freight in Oregon and Washington,” without more evidence, does not carry Plaintiff’s burden. Plaintiff claims to have had a driving bid, yet has not submitted any documentary evidence or sworn testimony indicating what a bid is, how it operates, how it is possible to hold more than one bid at a time, or how bids determine daily job duties. Plaintiff did not provide the court with work schedules or sufficient records demonstrating the frequency of his driving assignments to allow a determination that these were regularly assigned.

Both legible Manifests before the court are dated the same week in February and prove that he did drive in Washington on at least two occasions in tax year 2000. However, Plaintiff’s claim that his driving bid includes **regularly assigned** out of state trips is not borne out on the basis of these two Manifests. Although the court in previous decisions has not set forth an exact number that will determine when an event occurs

frequently enough to be considered regular, in this case a larger number of Manifests dated periodically throughout the year would be the minimum necessary to support a finding that Plaintiff had regularly assigned duties in two or more states. Without further documentary evidence or sworn testimony that Plaintiff was regularly scheduled to drive in Washington, the court must conclude that Plaintiff has fallen short of the “preponderance of the evidence” standard that he is required to meet.

ORS 305.427.

III. CONCLUSION

Now, therefore,

IT IS THE DECISION OF THIS COURT that Plaintiff does not meet the requirements of 49 USC § 11504(b)(1). Plaintiff has not satisfactorily demonstrated that he had regularly assigned duties in two or more states for the tax year 2000. Therefore, Plaintiff is not allowed to exclude his income earned in Oregon from Oregon state income taxes for the 2000 tax year.

Dated this _____ day of November, 2003.

JILL A. TANNER
PRESIDING MAGISTRATE

IF YOU WANT TO APPEAL THIS DECISION, FILE A COMPLAINT IN THE REGULAR DIVISION OF THE OREGON TAX COURT, BY MAILING TO: 1163 STATE STREET, SALEM, OR 97301-2563; OR BY HAND DELIVERY TO: FOURTH FLOOR, 1241 STATE STREET, SALEM, OR. 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 NOVEMBER 26, 2003. THE COURT FILED THIS DOCUMENT ON NOVEMBER 26, 2003.