IN THE OREGON TAX COURT
MAGISTRATE DIVISION
Income Tax

U-HAUL CO. OF OREGON,	)	
	)	
Plaintiff,	)	TC-MD 030994B
	)	
v.	)	
	)	
DEPARTMENT OF REVENUE, State of Oregon,	)	
	)	
	)	
Defendant.	)	**DECISION**

This case involves certain corporate excise tax matters for the two tax years ending March 31, 2001, and March 31, 2002.

Cross-motions for summary judgment were filed on November 20, 2006, (Plaintiff) and December 22, 2006 (Defendant). Oral argument was held February 21, 2007. Plaintiff was represented by Robert T. Manicke, Attorney, Stoel Rives LLP, and Brad S. Ostroff, Attorney, Burch & Cracchiolo. Defendant was represented by Marilyn J. Harbur and Darren Weirnick, Assistant Attorneys General, Department of Justice.

I. FACTUAL BACKGROUND

A. *Stipulated Facts*

On October 25, 2006, the parties filed an initial stipulation of facts. The following 30 numbered items were contained in those documents.[1]

1. The sole issue in this case is whether payments made by AMERCO are expenses attributable to business income (and therefore apportionable) or nonbusiness income (and therefore allocable to another state) for Oregon corporation excise tax purposes under the definition of business income in ORS 314.610(1). AMERCO is the common parent of the

[1] The form and style of the Stipulated Facts produced here are per the original filed by the parties.

affiliated group of which Plaintiff is a member. Plaintiff treated the payments as expenses attributable to business income for tax years ended March 31, 1996, and March 31, 1997. This treatment gave rise to net operating losses for the periods at issue, which are the tax years ended March 31, 2001, and March 31, 2002.

2. Following an audit and informal discussions between Plaintiff and Defendant, Defendant issued Notices of Tax Assessment dated June 24, 2003, for the tax years ended March 31, 2001, and March 31, 2002. Plaintiff timely appealed to this Court. Plaintiff does not contest the Department's calculations of the amounts of tax that would be due if the payments are nonbusiness items.

3. AMERCO, a Nevada corporation, owns all of the stock of the following corporations: U-Haul International Inc. ("U-Haul International"), Amerco Real Estate Company, Republic Western Insurance Company, and Oxford Life Insurance Company.

4. U-Haul International owns all of the stock of 48 corporations, each of which operates in one or two states (the "State Companies"). U-Haul Company of Oregon, the taxpayer in this matter, is the State Company for Oregon.

5. Each State Company owns and operates the Nationwide U-Haul moving system in a particular territory, through company-owned U-Haul Centers and independent dealers renting trucks and trailers to the public, as well as the sale of moving aids, such as boxes and the rental of self-storage spaces to the do-it-yourself mover.

6. Except for the insurance companies, AMERCO, all of its subsidiaries, and all of the State Companies, were members of the same unitary group for Oregon tax purposes during the tax years 1996 and 1997.

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7. For the tax years 1996 and 1997, AMERCO filed consolidated federal income tax returns as the common parent of an affiliated group that consisted of AMERCO, its four subsidiaries named above, and each of the State Companies.

8. For the tax years 1996 and 1997, AMERCO filed consolidated Oregon corporation excise tax returns that included all companies in the federal consolidated return, except the insurance companies.

9. AMERCO is a publicly traded corporation with its shares listed on NASDAQ under the stock symbol "UHAL".

10. AMERCO has always had a Board of Directors that directs the management and operations of the company.

11. The Board of Directors amended AMERCO's Articles of Incorporation on October 22, 1987, to commit AMERCO to indemnify company directors and officers. A copy of the amendment to the Articles, as filed December 4, 1987, is attached hereto as stipulated Exhibit "A".

12. AMERCO has never had a formal dividend policy. AMERCO's Board of Directors has periodically considered the advisability of declaring and paying dividends. However, the payment of dividends has been irregular and sporadic.

13. Historically, majority ownership of AMERCO has rested with the Shoen family or their personal holding companies. The Shoen family consists of L. S. Shoen, the father, who was the founder of the U-Haul rental system, and his children, Edward Joseph Shoen, Mark Shoen, Michael Shoen, James Shoen, Paul Shoen, Mary Ana Shoen (Eaton), Theresa Shoen (Romero), Cecilia Shoen (Hanlon), Katrina Shoen (Carlson) and Samuel Shoen.

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14. During the late 1980's, a rift developed between the Shoen family members concerning the operation of the company, including the lack of paying dividends. Edward Joseph Shoen, and some of this brothers and sisters, individually and through their personal holding companies, owned a majority interest, held executive corporate offices, and, along with unrelated parties, sat on the corporation's Board of Directors. These Shoen family members were running the corporation and had adopted a position that earnings would be put back into the company and not paid out as dividends.

15. Certain Shoen family members who collectively held a minority interest in AMERCO, either personally or through their personal holding companies, filed a lawsuit on August 2, 1988, against certain directors of AMERCO (the "Director-Defendants"), in Superior Court of the State of Arizona (the "Share Case Litigation") alleging breach of fiduciary duty, wrongful exclusion from the Board of Directors, and breach of contract and covenant of good faith and fair dealing, and requesting monetary damages. The Director-Defendants were (i) family members Edward Joseph Shoen, Paul Shoen, and James Shoen, and (ii) non-family members Aubrey K. Johnson, William E. Carty and John M. Dodds. AMERCO was subsequently joined in the lawsuit as a defendant, but it was dismissed before the case went to the jury. A copy of the Fourth Amended Complaint from the Share Case Litigation is attached hereto as stipulated Exhibit "B".

16. AMERCO's Board of Directors subsequently restated the company's by-laws. A copy of the restated by-laws dated February 8, 1989, is attached hereto as stipulated Exhibit "C".

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17. AMERCO also entered into separate indemnification agreements with each Director-Defendant. The agreements provided for indemnification "by the Corporation to the fullest extent permitted by applicable law or the Articles of Incorporation or Bylaws of the Corporation in effect * * *." The agreements required individuals to assert indemnification claims and provided for review by the stockholders, directors not parties to the litigation, outside counsel, or a panel of arbitrators to determine the validity of any indemnification claim. A sample of one of these indemnification agreements dated February 8, 1989, and amendment dated February 6, 1990, is attached hereto as stipulated Exhibit "D".

18. On October 7, 1994, an Arizona state court jury returned a compensatory damages award of approximately $1.48 billion against the Director-Defendants and a punitive damages award of $70 million against Director-Defendant Edward J. Shoen. The jury determined that the Director-Defendants had breached their fiduciary duty as directors to plaintiffs, that the value of plaintiffs' stock had been diminished as a proximate result of the Director-Defendants' breach of fiduciary duty to the plaintiffs, and accepted the testimony of L.S. Shoen in arriving at the amount of compensatory damages. A copy of the jury verdict is attached hereto as stipulated Exhibit "E".

19. The court subsequently remitted the jury's $1.48 billion compensatory damages award to $461,838,000.00 (the "Share Case Judgment"), which plaintiffs accepted in lieu of a new trial. The court ordered the remittitur after concluding that L.S. Shoen's unsubstantiated testimony provided the only basis for the jury's 1988 valuation, and accepted the Bear Stearns 1988 valuation of $930 million. A copy of the Judgment on Special Verdict and Remittitur is attached hereto as stipulated Exhibit "F". In a separate judgment, the court also reduced the punitive damage award against Edward J. Shoen to $7,000,000.00.

20. Arizona's single satisfaction rule barred the Share Case Litigation plaintiffs from obtaining a double recovery. Prior to trial, the Director-Defendants moved for summary judgment contending, in part, that because the plaintiffs alleged that their stock was worthless, any recovery that permitted the plaintiffs both to retain the stock and to receive damages for diminution in value would constitute a double recovery in violation of the single satisfaction rule. The court agreed that to prevent a double recovery the plaintiffs could either seek damages and relinquish their stock, or retain their stock and have the action dismissed. The plaintiffs elected to pursue their damages claims in lieu of retaining their stock. Accordingly, long before the Share Case Judgment was issued, the plaintiffs had agreed to transfer their stock to AMERCO in order to pursue their damages claims.

21. The Director-Defendants filed individual Chapter 11 bankruptcy petitions in February 1995, which were later consolidated. The Director-Defendants were jointly and severally liable for the Share Case Judgment and made demands on AMERCO for damages.

22. AMERCO subsequently evaluated whether it was advisable to fund the Share Case Judgment under its articles of incorporation, by-laws, and indemnification agreements covering the individual Director-Defendants. Before making a decision whether to fund the Share Case Judgment, a Special Committee of the Board of Directors (the "Stivers Committee") evaluated the fairness to the company and its shareholders of so doing. A copy of the Minutes of the Special Committee and the biographies of the Stivers Committee is attached hereto as stipulated Exhibit "G".

23. Subsequently, the three AMERCO directors who were not defendants in the Share Case Litigation retained counsel, David Haga, and separately considered the advisability of

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authorizing a settlement with the Director-Defendants. A copy of attorney David Haga's letter dated October 16, 1995, is attached hereto as stipulated Exhibit "H".

24. The Stivers Committee recommendation was approved at a special meeting of the Board of Directors of AMERCO on October 17, 1995. A copy of the minutes of a Special Meeting of the Board of Directors of AMERCO, dated October 17, 1995, is attached hereto as stipulated Exhibit "I".

25. A settlement agreement was entered into between AMERCO and the Director-Defendants while the bankruptcy case of the Director-Defendants was pending (the Settlement Agreement). A copy of the Settlement Agreement is attached hereto as stipulated Exhibit "J".

26. AMERCO's right of first refusal under its by-laws, together with its indemnification of the Director-Defendants and funding of the Share Case Judgment, collectively entitled the company to receipt of the Share Case Litigation plaintiffs' transferred stock.

27. Pursuant to the Settlement Agreement, AMERCO satisfied the full Share Case Judgment by payment in cash to the Share Case Litigation plaintiffs, and the Director-Defendants released AMERCO.

28. Following (i) entry into the Settlement Agreement and a separate settlement with Mary Anna Shoen (Eaton) and Maran, Inc., and (ii) the payments to the Share Case Litigation plaintiffs, AMERCO in its federal tax filings allocated between the amounts paid for damages (approximately $337,800,000) and the amounts paid to reacquire the plaintiffs' stock (approximately $124,000,000). This allocation is referred to on AMERCO's Form 1120 for the 1996 and 1997 tax years, and on the Forms 1099 issued to the Share Case Litigation plaintiffs.

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AMERCO reported the payments by reference to treasury stock on its Form 10-K, while contemporaneously detailing the payments' bifurcated nature. For example, the company's 1996 Form 10-K described the bifurcated payments to L.S. Shoen and his personal holding company, LSS, Inc., as follows:

> "Pursuant to the judgment in the Shoen Litigation, on January 30, 1996, the Company acquired 83,420 shares of Common Stock held by L.S.S., Inc. (L.S.S.) in exchange for approximately $5.7 million and paid damages to L.S. Shoen of approximately $15.4 million. The Company also funded a total of approximately $2.1 million statutory post-judgment interest on the above amounts."

29. On its federal income tax returns filed with the Internal Revenue Service, the company deducted the payments made for damages as "damages," not for the acquisition of stock, as an ordinary and necessary business expense deductible under Section 162 of the Internal Revenue Code. For purposes of this case, Defendant takes no position whether AMERCO's treatment of the payments as deductible business expenses under IRC § 162 was proper. The sole issue in this case is as described in paragraph 1, regardless of whether the payments were properly treated as deductible under IRC § 162.

30. As a result of the payments of damages, AMERCO had large net operating losses, which it has carried forward to subsequent tax years on its federal and Oregon tax returns.

B. *Other Submissions*

The parties stipulated to the submission of Exhibits A through J, filed on October 25, 2006, and Exhibits K through DDD, filed as a "Supplemental Stipulation of Facts" on November 20, 2006. The parties' November 20, 2006, submission stated that "[t]he copies of stipulated Exhibits described in the attached list are authentic and admissible as true and correct copies of the documents they purport to be." (Supp Stip Facts at 2.)

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In support of its Motion for Summary Judgment, Plaintiff submitted the affidavit of George Olds (Olds), Senior Assistant General Counsel for U-Haul International, Inc., dated November 17, 2006, and the affidavit of Terence W. Thompson (Thompson), Attorney, dated November 7, 2006. The court received those affidavits while noting Defendant's objection to the Olds affidavit.

Plaintiff subsequently submitted an additional affidavit of Olds, dated January 17, 2007, as well as the affidavit of Brad S. Ostroff, Attorney, dated January 17, 2007. Those were received by the court while noting Defendant's objection to the second Olds affidavit, and continued objection to the first Olds affidavit.

II. ANALYSIS

The parties have stipulated that "the sole issue in this case is whether payments made by AMERCO are expenses attributable to business income * * * for Oregon corporation excise tax purposes under the definition of business income in ORS 314.610(1)."[2] (Stip Facts at 1.) Under ORS 314.610(1), " '[b]usiness income' means income arising from transactions and activity in the regular course of the taxpayer's trade or business and includes income from tangible and intangible property if the acquisition, the management, use or rental, and the disposition of the property constitute integral parts of the taxpayer's regular trade or business operations."

The Oregon Supreme Court has recognized that "ORS 314.610(1) defines business income as income derived from two sources." *Willamette Industries, Inc. v. Dept. of Rev.*, 331 Or 311, 316, 15 P3d 18 (2000) (*Willamette Industries*) (citing *Simpson Timber Co. v. Dept. of Rev.*, 326 Or 370, 374, 953 P2d 366 (1998) (*Simpson*)). "The first source is 'income

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[2] Unless otherwise noted, all references to the Oregon Revised Statutes (ORS) are to 1999.

arising from transactions and activity in the regular course of the taxpayer's trade or business.' " *Id.* at 316. That portion of the definition is referred to as the "transactional" test. *Id.* "The second source is 'income from tangible and intangible property if the acquisition, the management, use or rental, and the disposition of the property constitute integral parts of the taxpayer's regular trade or business operations.' " *Id.* That portion of the definition is referred to as the "functional" test. *Id.* If the payments in question satisfy either the transactional test or the functional test, they may be apportioned as business income. *Pennzoil Co. v. Dept. of Rev.*, 332 Or 542, 546-47, 33 P3d 314 (2001) (*Pennzoil*) (citing *Willamette Industries*, 331 Or at 316).

A. *Transactional Test*

Applying the transactional test to the present case, the first question is what transaction or activity gave rise to the payments, and the second question is whether that transaction or activity occurred in the regular course of Plaintiff's business. *Id.* at 547-48 (separating the transactional test into two questions).

1. *Transaction or activity*

In addressing the initial question of what transaction or activity gave rise to the payments by AMERCO, the court "may consider the frequency or regularity of the transaction and how the income created by the transaction is used." *Id.* at 547 (citations omitted). Courts have also applied the "in lieu of what" test. *Id.* Specifically, "courts determining the tax consequences of income received through litigation or settlement have asked: 'In lieu of what were the damages awarded?' " *Id.* (citations omitted).

The parties agree that identifying the transaction or activity is critical to determining whether the payments are attributable to business income. The parties do not, however, agree on which transaction or activity gave rise to the payments.

Plaintiff asserts that the transaction giving rise to the payments is the "contract * * * between AMERCO and the Director-[D]efendants." (Ptf's Reply and Resp at 9; Stip Ex D.) Plaintiff argues that, under *Pennzoil*, the focus is on the contract between the parties, not interference by third parties. (Ptf's Reply and Resp at 9.) In support of that, Plaintiff argues that the indemnity payments were made for both immediate and underlying reasons, both of which were directly tied to the indemnification provisions. Those reasons were to avoid an immediate lawsuit against AMERCO by the Director-Defendants or an appeal of the Share Case judgment, and to uphold "AMERCO's longstanding decision to offer indemnity" to attract qualified Board[3] members. (*Id*. at 6.) Applying the "in lieu of what" test, Plaintiff asserts that because the payments were in lieu of additional compensation or remuneration to the Defendant-Directors based on their individual indemnification agreements, those agreements and the indemnification provisions should be the focus, not the interference by the Share Case plaintiffs. (*Id*. at 9.)

Defendant argues that the court should apply the "origin of the claim" test,[4] under which the transaction or activity giving rise to the payments was the Defendant-Directors' actions in breach of their fiduciary duty to the shareholders, and not the indemnity agreement. Defendant contends that those actions include the Board's measures to entrench themselves in corporate management. (Def's Cross Mot for Summ J and Resp at 35; Def's Reply and Obj at 3.)[5]

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[3] The court will refer to Plaintiff's Board of Directors as "the Board."

[4] For the "origin of the claim test," Defendant cites *Woodward v. Commissioner*, 397 US 572,5 83, 90 S Ct 1302, 25 L Ed 2d 577 (1970) (*Woodward*), as holding that "the character of litigation expenses for federal income tax purposes 'involves the simpler inquiry whether the origin of the claim litigated' meets the standards that determine the character of expenses or losses for federal income tax purposes * * *." (Def's Cross Mot for Summ J and Resp at 31-32.)

[5] The court recognizes that such actions, as well as additional background information, are extensively described in Defendant's briefs. (*See* Def's Cross Mot for Summ J and Resp; Def's Reply and Obj.)

Although Plaintiff agrees that the origin of the claim doctrine applies here, Plaintiff asserts that Defendant's view of the applicable test is incorrect for several reasons, primarily because AMERCO was not party to the Share Case Litigation nor liable to the Share Case plaintiffs in any way, as demonstrated by AMERCO's dismissal from the federal litigation. (Ptf's Reply and Resp at 5-6.) The court acknowledges that the origin of the claim doctrine is generally applicable to the determination of the character of expenses or losses for federal income tax purposes.

Here, the court will apply the "in lieu of" test, as set forth by the Oregon Supreme Court in *Pennzoil*, to the inquiry of what transaction or activity gave rise to the indemnity payments. Applying that test here, where payments were made as a result of litigation, the court asks: In lieu of what were the payments made?

The Director-Defendants sought payment based on the indemnity provisions in their agreements with AMERCO. The payments were in lieu of their seeking additional remuneration or filing additional litigation to secure the indemnification due them under those agreements. Although the outcome of the litigation triggered the payments, the court declines to hold that the payments arose from Director-Defendants' activity, as advocated by Defendant.

The indemnification provisions provide the basis for the payments. Therefore, the court concludes that the transaction or activity from which the indemnification payments arose is the individual indemnification agreement AMERCO had with each of the Director-Defendants.

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2. *Regular course of business*

Under the transactional test, the second question is whether the payments by AMERCO occurred in the regular course of Plaintiff's business. *See Pennzoil*, 332 Or at 548. Although "[t]he frequency or regularity of a given transaction or activity may be considered[, it] is not determinative of whether that transaction is in the 'regular course of the taxpayer's trade or business[.]' " *Id*. at 549. The court in *Pennzoil* recognized that, even if the specific transaction (purchasing stock in other oil companies) is rare, if the steps taken (to acquire an interest in established oil reserves) are in the regular course of business, then the proceeds are business income under the transactional test. *Id*. It follows that, if an infrequent transaction leads to *an expense*, it may be considered a business expense if the steps taken were taken in the regular course of business.

The parties' arguments as to whether the indemnity payments were in the regular course of Plaintiff's business stem directly from their arguments regarding which transaction or activity gave rise to the payments. Plaintiff's argument focuses on the indemnification provisions and their grounding in both corporate law and practice. Plaintiff asserts that Nevada law requires a board of directors under Nevada Revised Statute section 78.115 and that Nevada law further allows discretionary and mandatory indemnification of officers, directors, employees and agents. (Ptf's Mot for Summ J at 20-21.) Plaintiff maintains that corporations both generally and routinely provide for the indemnification of directors, and that corporations are required to provide indemnification to their directors in order to attract qualified directors. *(Id*. at 23.)[6] Like health insurance payments, stipends, or expense reimbursements, the indemnification obligations

[6] Plaintiff further asserts that AMERCO decided to adhere to the indemnity provisions on the recommendation of an independent committee, which determined it would be in the best interests of AMERCO to fund the Share Case judgment. (Ptf's Mot for Summ J at 7-8.)

were customary and legally required by AMERCO in order to secure the services of qualified individuals to serve on its Board. (*Id*. at 24-25.)

Defendant focuses on the Director-Defendants' actions and argues that their activity was "not in the regular course of the business of renting trucks and trailers, selling moving aids, and renting self-storage space to customers." (Def's Cross Mot for Summ J and Resp at 36.) Further, Defendant argues that the payments should not be considered attributable to business income because losses incurred in fending off hostile takeovers are nonbusiness income under the transactional test, and cites *In re Kroger Co.*, 12 P3d 889 (Kan 2000). (*Id* at 36-37.) The court in that case held that "under the transactional test, the borrowing of money to defend against a hostile takeover is not an expense in the regular course of business, and the resulting interest expense is a nonbusiness expense." *In re Kroger Co*., 12 P3d 889, 896-97 (Kan 2000) (*Kroger*).

In the present case, the court has determined that the transaction or activity giving rise to the payments is the individual indemnification agreement each Director-Defendant had with AMERCO. Although providing for the indemnification of the Board may not be considered a frequent or regular transaction or activity in the course of Plaintiff's business in the same way that renting trucks and selling moving aids may be, under *Pennzoil* that point is not determinative of whether the transaction or activity was in the regular course of business. (*See Pennzoil*, 332 Or at 549.) Additionally, the court distinguishes *Kroger* from the present case because any loss stemming from the payments here was incurred in upholding the indemnification agreements rather than in borrowing money to defend against a hostile take-over.

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Nevada law requires that a corporation have a board of directors and empowers a corporation to indemnify its directors. (Aff of Thompson at 3, 4, and 10 (citing Nev Rev Stat §§ 78.115, 78.7502(3), 78.751)). Recruiting and retaining qualified individuals to serve on such boards "often requires answering and addressing prospective and existing directors' questions and concerns regarding exposure to liability for breach of a directorial duty." (*Id.* at 5.) Indemnification, insurance, and exculpation, limiting or eliminating in advance the personal liabilities of directors for breach of certain duties, are all ways that corporations address the potential liability exposure of a director. (*Id*. at 6-7.) The costs associated with insurance and indemnification, such as payment of premiums, attorneys fees, judgments, and other costs associated with indemnification are "a common and recognized corporation-wide cost of doing business as a corporation * * *." (*Id*. at 11.) As a Nevada corporation, AMERCO was required to have a board of directors, and indemnification was necessary to attract and retain individuals to serve on that Board. (Aff of Olds at 3, Nov 17, 2006.)

The court agrees that, because AMERCO was required by Nevada law to have a board of directors, and the indemnification of directors is not only encouraged by Nevada law but effectively required to attract and retain qualified board members, the indemnification agreements were made in the regular course of corporate business. The court concludes that the indemnification agreements, the transaction from which the payments arose, occurred in the regular course of Plaintiff's business as a corporation operating under the laws of Nevada. Therefore, the transactional test is satisfied and payments are an expense attributable to business income as defined in ORS 314.610(1).

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B. *Functional Test*

Under both *Pennzoil* and *Willamette Industries*, if the payments in question satisfy *either* the transactional test or the functional test, they may be apportioned as business income. *Pennzoil*, 332 Or at 546-47 (citing *Willamette Industries*, 331 Or at 316). Both tests need to be satisfied.

Although the court has already determined that the payments satisfy the transactional test, the court will discuss the arguments of the parties as to the functional test.

ORS 314.610(1) provides that business income "* * * includes income from tangible and intangible property if the acquisition, the management, use or rental, and the disposition of the property constitute integral parts of the taxpayer's regular trade or business operations." Applied here, the first question under the functional test is whether the indemnity payments are income (or loss) from intangible property. *See* ORS 314.610(1). If determined to be from intangible property, the second question is whether the acquisition, management, use or rental, and disposition of the intangible property constitute integral parts of U-Haul's regular business operations. *Id*. "[T]he functional test dictates that acquisition, management, use or rental *and* disposition of property must constitute integral parts of regular business operations." *Willamette Industries*, 331 Or at 316 (emphasis in original). That test "addresses transactions involving property, more specifically, the property of businesses that sell or otherwise dispose of property." *Id*. at 318.

Plaintiff asserts that the payments satisfy the functional test. Plaintiff contends that the Board furthers AMERCO's business by providing services without which the corporation could not exist or function under Nevada law and that maintaining the Board is akin to keeping a "workforce in place." (Ptf's Reply and Resp at 12-13.) Maintaining a "workforce in place"

is generally recognized as an intangible asset for tax purposes, in support of which Plaintiff cites the Internal Revenue Code (IRC) section 197(d)(1)(C)(i). (*Id*. at 13.) The court notes that IRC section 197[7] is entitled "Amortization of goodwill and certain other intangibles," and subsection (d)(1)(C)(i) lists "workforce in place including its composition and terms and conditions (contractual or otherwise) of its employment" as a "Section 197 intangible."[8]

Likening the costs involved in maintaining the Board as a "workforce in place" to amounts paid for institutional or goodwill advertising, Plaintiff asserts that a board of directors similarly furthers a taxpayer's trade or business and creates the intangible asset of the expectation of continued services. (*Id*.; Ptf's Mot for Summ J at 27.) Because costs associated with maintaining the other acknowledged intangible assets that further trade or business are deductible, although they may provide future benefits, Plaintiff asserts that the payments here should also be deductible because they were made to maintain intangible property. (Ptf's Reply and Resp at 12-13.) Plaintiff argues that this satisfies the "income from * * * intangible property" requirement of the functional test in ORS 314.610(1). (*Id*. at 13.)

Defendant disagrees and argues that the indemnity payments are not from intangible property within any commonly accepted definition. (Def's Cross Mot for Summ J and Resp at 40.) Defendant further argues that, even were the Board considered an intangible item of property, the expectation of continued services has no useful life for amortization purposes. (*Id*. at 41.)

Plaintiff does not cite any authority supporting the conclusion that maintaining a board of directors is akin to a "workforce in place." The court declines to extend the concept of

[7] Unless otherwise noted, all references to the Internal Revenue Code (IRC) are to 2000.

[8] "Workforce in place" is further described in Treasury Regulation section 1.197-2(b)(3) (as amended in 2006).

income or loss from intangible property in ORS 314.610(1) to include payments made to maintain the Board as a coherent piece of intangible property that furthers Plaintiff's business. Having determined that the payments are not income (or loss) "from tangible or intangible property[,]" as required by ORS 314.610(1), the court holds that the functional test cannot be satisfied.

Assuming, *arguendo*, that such payments were considered income (or loss) from intangible property, the second requirement of the functional test is still not satisfied. Business income under ORS 314.610(1) includes income from intangible property only "if the acquisition, the management, use or rental, and the disposition of *the* property constitute integral parts of [Plaintiff's] regular trade or business operations." ORS 314.610(1) (emphasis added).

It is unclear to the court how the Board, as an intangible asset, *ergo* intangible property, is acquired, managed, used or rented, and disposed of as an integral part of Plaintiff's regular trade or business operations. The court in *Willamette Industries* specifically distinguished the *Simpson Timber* case on the disposition issue: "In *Simpson Timber*, an actual disposition of the land and timber occurred[.] * * * Here, by contrast, there was no disposition of the land * * *." *Willamette Industries*, 331 Or at 318. Similarly, in the present case, the court finds no disposition of the intangible asset, *i.e.*, the board of directors. Further, Plaintiff is not in the business of acquiring, managing, using, renting, or disposing of its Board. Plaintiff's business operations include renting trucks and trailers and selling moving aids. The tangible property Plaintiff uses in its regular business (such as trucks, boxes, trailers) and income from that property is functionally a different part of Plaintiff's business than maintaining the Board as an intangible asset.

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III. CONCLUSION

Upon application of the transactional tests, the court concludes that the payments made by AMERCO are expenses attributable to business income for Oregon corporate excise tax purposes under the definition of business income in ORS 314.610(1). Now, therefore,

IT IS THE DECISION OF THIS COURT that Defendant's Cross-Motion for Summary Judgment and Objections to Affidavit of George Olds is denied; and

IT IS FURTHER DECIDED that Plaintiff's Motion for Summary Judgment is granted.

Dated this _____ day of August 2007.

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JEFFREY S. MATTSON
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 Jeffrey S. Mattson on August 29, 2007. The Court filed and entered this document on August 29, 2007.