

IN THE OREGON TAX COURT
MAGISTRATE DIVISION
Income Tax

DAVID C. KUHLMAN,)	
)	
Plaintiff,)	TC-MD 040275D
)	
v.)	
)	
DEPARTMENT OF REVENUE,)	
State of Oregon,)	
)	
Defendant.)	DECISION

Plaintiff appeals Defendant’s Notices of Tax Assessment dated August 21, 2001, for tax years 1998 and 1999 and dated February 25, 2003, for tax year 2000. In addition, Plaintiff appeals Defendant’s Notice of Determination and Assessment dated October 7, 2003, for tax year 2001. On October 4, 2004, the court granted Defendant’s Motion to Dismiss Tax Years 1998, 1999, and 2001.

On August 11, 2005, a trial was held in the courtroom of the Oregon Tax Court located in Salem, Oregon. Gerald Douglas, Attorney at Law, appeared on behalf of Plaintiff. Plaintiff testified on his own behalf. Fernando Morton (Morton), Senior Manager, Federal Express Corporation, testified on behalf of Plaintiff. Amy Stalnaker, Tax Auditor, and Jason Iverson, Tax Auditor, appeared on behalf of Defendant. The parties agreed that post-trial briefs were due no later than September 12, 2005. This matter is now ready for decision.

I. STATEMENT OF FACTS

Plaintiff alleges that his income for tax year 2000 should be exempt from Oregon income tax. He states that he meets the federal statutory requirements of the Amtrak Reauthorization and Improvement Act of 1990 because he is a non resident and his assigned duties, which directly affect commercial motor vehicle safety, are performed in two or more states.

Plaintiff, a resident of Camas, Washington, has been employed by Federal Express Corporation since October 16, 1978. (Ptf's Ex 26.) He has held his current position, Operations Manager, since 1997. (Ptf's Ex 44.) According to Plaintiff, he is required to report to work each day in "full uniform, ready to be 'randomly assigned' duties covered." (Ptf's Ex 36.) Plaintiff testified that "not every day is the same." He stated that "no one tells him; he knows how to maintain service" to customers.

Plaintiff's supervisor, Morton, testified that Plaintiff manages couriers assigned to deliver packages in Clark and Cowlitz counties in Washington state. Those couriers start their day at a location either close to the Portland Airport or in Longview, Washington. Each courier has a regular driving route. Plaintiff drives and delivers packages when a driver is sick or on vacation, a safety situation like inclement weather arises, or the volume of freight to deliver exceeds the available number of drivers. Morton stated that it is within Plaintiff's "normal responsibility to ensure service by completing delivery and pick up routes in both states, and because his employees work in Washington, a regular and random part of his duties is operating a commercial vehicle in the State of Washington." (Ptf's Ex 44.)

Plaintiff testified that he is a working supervisor. Plaintiff also testified that he loads and unloads packages on a daily basis, and that he is "expected" to ensure that the load is properly balanced to protect the safety of the public. An additional requirement to hold Plaintiff's position is the ability to lift and "maneuver packages of any weight above 75 lbs. with appropriate equipment." (Ptf's Ex 79.) Morton testified that Plaintiff spends most of his time in the field, using his "hands and back."

Plaintiff trains others to properly load and unload packages and to handle dangerous goods safely. Plaintiff stated that his "position is the only non-hourly position required to hold and

maintain a valid CDL/HAZ” (commercial driver’s license with a hazardous materials endorsement) and “is classified under Federal Law as a Safety Sensitive Position.” (Ptf’s Ex 36.) According to Morton, anyone holding the position of manager is required to have a valid CDL/HAZ because “managers are the employees that have to regularly deliver and pickup placarded Hazardous Materials.” (Ptf’s Ex 44.) Plaintiff testified that he delivers hazardous materials “as assigned or as needed.” He is responsible for ensuring that his group complies with Department of Transportation guidelines. Plaintiff testified that those are “not on call or as needed” responsibilities, but “part of his regular duties within his certification level.”

In his role as a working supervisor, Plaintiff testified that he does not have the authority to “hire and fire employees, set wages or benefits or promote employees.” His input regarding those issues is sought by “personnel, legal, and recruitment.” Plaintiff also supervises customer service agents. Morton testified that Plaintiff’s job is to “foster teamwork.”

II. ANALYSIS

Nonresidents earning taxable income in Oregon are subject to tax under ORS 316.037(3).¹ The federal Amtrak Reauthorization and Improvement Act of 1990 (Amtrak Act) exempts certain nonresidents from Oregon income taxation. *See* Pub L No. 101-322, § 11504, 104 Stat 295 (1990).

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. Instead, those nonresidents will be taxed in their state of residency.

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

To qualify for the exemption, a number of requirements must be met. First, the employee must work for one of three types of employers:² an interstate railroad, interstate motor carrier, or a private motor carrier.³ Second, the employee must be a nonresident of Oregon and have regularly assigned duties in more than one state. *Id.*

For employees who work for interstate motor carriers or motor private carriers, additional requirements must be met. First, the individual must be an employee, not an employer. *Buckel v. Dept. of Rev.*, TC-MD No 010911C, WL 745637 at *2 (Apr 15, 2002). The employee must directly affect the safety of a commercial motor vehicle, and the employee must be an operator of a commercial motor vehicle, a mechanic, or a freight handler.

The pertinent portion of the Amtrak 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 subdivision thereof of the employee’s residence.”

49 USC § 14503(a) (emphasis added).⁴

The word “employee” is defined elsewhere in Title 49, specifically in chapter 311, which reads, in part, as follows:

“(2) ‘employee’ means an operator of a commercial motor vehicle (including an independent contractor when operating a commercial motor vehicle), a mechanic, a freight handler, or an individual not an employer, who--

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² Federal, state or local governments are not qualifying employers.

³ The exemption now covers waterway workers on interstate waterways.

⁴All references to the United States Code (USC) are to 2000.

“(A) *directly affects commercial motor vehicle safety* in the course of employment * * *.”

49 USC § 31132(2) (emphasis added).

Finally, an “employer” is defined in chapter 311 of Title 49 as:

“ * * * a person engaged in a business affecting interstate commerce that owns or leases a commercial motor vehicle in connection with that business, or assigns an employee to operate it * * *.”

49 USC § 31132(3)(A).

The parties agree that Plaintiff’s employer, Federal Express Corporation, is “an interstate motor carrier, USDOT 86876.” (Ptf’s Ex 68 at 2.) Further, the parties agree that Plaintiff is a nonresident.

The issues before the court are: (1) whether Plaintiff is an employee who directly affects the safety of a commercial motor vehicle, and (2) whether Plaintiff has regularly assigned duties in more than one state. In order to receive the exemption he is seeking, both of the above issues must be decided in Plaintiff’s favor. In reaching its decision, the court is cautioned “to read narrowly any federal exemptions preempting a state’s power to tax, to avoid recognizing an exemption from state taxation that Congress did not express clearly.” *Julian & Holliday v. Dept. of Rev.*, ___ OR ___, ___ P2d ___ (Sept 1, 2005) (slip op at 3) (citing *Cal. Equalization Bd. v. Sierra Summit*, 490 US 844, 851-52, 109 S Ct 2228, 104 L Ed 2d 910 (1989)).

A. Employee who directly affects the safety of a commercial vehicle

In *Jensen v. Department of Revenue*, the court analyzed in detail the controlling federal statutes, including 49 USC § 11504(b)(1)⁵ and 49 USC § 31132(3)(A), in determining whether an individual was an employee who directly affected the safety of a commercial vehicle.

See Jensen v. Dept. of Rev., 13 OTR 296, 299-302 (1995). Gary Jensen held the position of

⁵ 49 USC 11504 was moved in 1996 by the ICC Termination Act to 49 USC § 14503(a).

manager of the Portland Operating Group of Consolidated Freightways Corporation. The court concluded that Jensen, in his role as a manager, delegated the responsibility of safety to others “whose daily routine and duty has them moving, touching, or affecting a commercial motor vehicle or its contents.” *Id.* at 301. The court reasoned that “it is unlikely that Congress intended to impose a duty on an employee who cannot comply with the law. A supervisor may instruct a driver on safe driving, but only the driver can actually control the operation of the vehicle.” *Id.* The court commented that “for the limited purpose of this statute” Jensen “may be an ‘employer’ rather than employee.” *Id.* at 300-01.

In the case before the court, Plaintiff and his supervisor testified that Plaintiff both delegates and performs the tasks he delegates to others. In his role as a *supervisor*, Plaintiff assigns deliveries to those “who are at risk of injury if the commercial motor vehicle is improperly operated” or “loaded.” *Id.* at 301. In his role as a *working supervisor*, Plaintiff testified that on “a daily basis” he loads and unloads packages, performing “something with respect to a vehicle which directly affects safety relative to that vehicle.” *Id.* at 302. Notwithstanding the title of his position, which is supervisor, Plaintiff’s regular duties require him to use both his “hands and back” to ensure that packages are properly loaded. The court finds that when Plaintiff loads and unloads packages “on a daily basis” he is an employee within the meaning of the statute. As a *working supervisor*, Plaintiff is personally involved in tasks that directly affect the safety of a commercial vehicle.

B. Regularly assigned duties in more than one state

In order to be exempt from taxation by Oregon, Plaintiff must also be an employee “who performs regularly assigned duties in two or more States as such an employee with respect to a motor vehicle.” 49 USC § 14503(a).

Plaintiff testified that, as part of his duties, he loads packages in Oregon from a location close to the Portland Airport and delivers those packages in Washington state. He assigns those duties to himself when other drivers call in sick or take vacation, or unexpected situations arise due to inclement weather or a heavy volume of packages. In addition, if any of the packages contain hazardous material, Plaintiff is the only driver licensed to transport those types of packages.

In determining whether an individual performs regularly assigned duties in two or more states, the court concluded that “[t]he phrase ‘regularly assigned’ suggests that Congress intended to exclude ‘irregular,’ ‘unusual,’ or ‘special’ assignments.” *Butler v. Dept. of Rev.*, 14 OTR 195, 200 (1997). In a subsequent case, the court agreed with defendant that the assigned duties must be performed “on a regular basis or at fixed intervals.” *Dept. of Rev. v. Hughes*, 15 OTR 316, 320-21 (2001).

In the case before the court, the testimony supports Plaintiff’s position that the assigned duties he performed were regular and not “unusual” or “special.” Plaintiff and his manager testified that “on a daily basis” Plaintiff loads and unloads packages. Further, those regularly assigned duties are performed in two states, Oregon and Washington. Plaintiff testified that although all his deliveries are made in Washington, he picks up packages at either the Oregon or Washington distribution center. Even though “there is no fixed or specific date,” the frequency with which Plaintiff performs his duties makes them “‘regularly assigned.’” *Id.* at 321.

Defendant was concerned because Plaintiff was unable to produce any records to show how many days he worked in Oregon and Washington. The court previously stated that the “federal statute does not impose any minimum time requirements, such as performing more than 25 percent of the employee’s duties in another state.” *Id.* Facing a lack of records in *Hughes*, the

court relied on the testimony of Hughes and his supervisor. Like *Hughes*, the court finds the testimony of Plaintiff and his supervisor credible. Based on the evidence, the court finds that Plaintiff performs regularly assigned duties in two states.

III. CONCLUSION

In sum, the court finds that Plaintiff in his role as a working supervisor performs “regularly assigned duties” * * * that cause him to directly affect commercial motor vehicle safety.” ” *Id.* at 321. In addition, the court concludes that Plaintiff “performs those regularly assigned duties in two * * * states.” *Id.* Now, therefore,

IT IS THE DECISION OF THIS COURT that Plaintiff is exempt from Oregon income tax for tax year 2000; and

IT IS FURTHER DECIDED that Defendant’s motion to dismiss tax years 1998, 1999, and 2001 is granted.

Dated this _____ day of December 2005.

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 Presiding Magistrate Jill A. Tanner on December 1, 2005 . The Court filed this document on December 1, 2005.