

IN THE OREGON TAX COURT  
MAGISTRATE DIVISION  
Income Tax

ALLEN L. HOVDEN,	)	
	)	
Plaintiff,	)	TC-MD 040807D
	)	
v.	)	
	)	
DEPARTMENT OF REVENUE,	)	
State of Oregon,	)	
	)	
Defendant.	)	<b>DECISION</b>

Plaintiff appeals Defendant’s Notice of Tax Assessment, dated March 31, 2004, and October 26, 2004, for tax years 1996 and 1998, respectively.<sup>1</sup> A trial was held on Wednesday, March 2, 2005, in the courtroom of the Oregon Tax Court, Salem, Oregon. Allen Hovden (Hovden) appeared on his own behalf. Kathy Spear (Spear), Tax Auditor, appeared on behalf of Defendant.

I. STATEMENT OF FACTS

Hovden’s primary occupation is a merchant seaman. Hovden testified that he was working in Bellingham and Seattle, Washington during the winter of 1996. He lived in hotel rooms, using the per diem from his employer to offset the cost of the room. Hovden testified that he worked as a logger in Astoria during the summer of 1996. In 1998, Hovden spent 99 days at sea with Manson Construction and 37 days at sea with Dunlap Towing. From September 1998 through the end of the year, he was employed by Mark Marine Service, located in Washougal, Washington. (Ptf’s Ex 1-1,-2 and -3.) While an employee of Mark Marine Service, Hovden

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<sup>1</sup> Plaintiff’s Complaint stated that he was appealing tax years 1995, 1996, 1997, and 1998. Tax years 1995 and 1997 were settled prior to trial and Plaintiff’s Complaint is amended to show tax years 1996 and 1998 at issue.

testified that he lived in an apartment above his employer's shop. Hovden testified that he did not pay rent; he and his employer had a "barter" arrangement.

Based on his time at sea and out of the state of Oregon, Hovden testified that he believes the state of Oregon should classify him as a part-year resident for income tax purposes. He stated that he filed his 1995 Oregon tax return as a part-year resident and it was accepted by Defendant. In response, Spear testified that Defendant did not audit Hovden's tax return for 1995. She testified that she did review the 1995 tax return when she was reviewing Hovden's 1996 tax return. By statute, the 1995 tax year was closed and she could not propose any adjustment. Spear testified that she concluded Hovden should have filed as a full-year resident for all tax years, 1995 through 1998.

Hovden testified that when he was in Oregon he lived with his parents in Astoria from 1979 through 1998. He testified that he did not pay rent to anyone, including his parents. Hovden testified that in 1999 he moved into a duplex in Washington and lived there until 2004. Spear testified that in May 2004, she had a conversation with Hovden and he stated that he had not abandoned Oregon as his permanent residence during the tax years at issue.

Spear presented to the court W-2 statements issued to Hovden by his employer for tax years 1996 and 1998. (Def's Ex J-1.) Each of Hovden's employers reported the wages as Oregon income and, in most cases, the address shown on the W-2 was his parents' address in Astoria, Oregon. (*Id.*) In 1998, Hovden collected \$1,730 in unemployment income from the state of Oregon. (Def's Ex J-5.) Hovden testified that he filed in Washington state for unemployment but was told he had to apply in Oregon because his employers had reported his wages as Oregon source income.

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Hovden testified that he was registered to vote in Clatsop County. Spear submitted information from the Clatsop County Elections and Voter Registration office stating that Hovden first registered to vote in 1988, voted in 2001, and the registration was “made inactive in 2001.” (Def’s Ex G-1.) Hovden testified that he did cast a ballot in some years, but not in 2001. Hovden testified that he purchased resident hunting and fishing licenses, using his parents’ Astoria address, for 1996 and 1998. Hovden testified that he did not have a valid driver’s license. Spear confirmed Hovden’s testimony, stating that, according to the Department of Motor Vehicles’ records, Hovden’s driver’s license was suspended in September 1993, and he was issued an Oregon identification card in July 1991, which expired in May 1996. (Def’s Ex I-1.) Spear testified that Hovden received “numerous driving violations in Clatsop County” from September 1993 through November 1999. (*Id.*) She testified that in 1998 Hovden registered a 1997 GMC vehicle in Oregon. Hovden confirmed that he loaned money to a friend to buy a car and the vehicle was licensed in Oregon in both of their names.

Spear testified that Hovden maintained a banking account at Wauna Federal Credit Union in Astoria, Oregon. Spear submitted a copy of a cashier’s check drawn on Wauna Federal Credit Union used to pay Hovden’s Oregon tax liability for tax year 1997. (Def’s Ex K-3.) She testified that according to the information she obtained “[m]embership in Wauna Federal Credit Union is available to anyone who lives, works, worships, or attends school in Clatsop County and Columbia County, Oregon.” (Def’s Ex M-2.) Hovden confirmed that he had a banking account at the credit union and his mother was a co-signer. He cashed out his Individual Retirement Account with the credit union in 1998.

Hovden alleges that he is covered by the Baird Bill Act and his wages should be exempt from taxation by the state of Oregon. He also alleges that the Amtrak Act applies to him and

exempts his wages. Spear testified that the Baird Bill Act only applies to nonresidents and, in her opinion, Hovden is a resident. Spear testified that she has no information how the Amtrak Act would apply to Hovden.

Hovden asked that the interest and penalties be waived if the court upholds Defendant's assessments. The court responded that Defendant had not assessed any penalties. Spear confirmed that Defendant had not assessed any penalties. Spear argued that interest is a charge for the use of money. Further, Spear testified that Hovden filed his 1996 and 1998 income tax returns long after the original due date. She testified that Hovden filed his 1996 and 1998 income tax returns on March 13, 2003. (Def's Exs K 4-7.) Spear testified that if Hovden had filed his returns on the original due date, the Defendant's assessments would have been more timely and the interest charged would have been less.

## II. ANALYSIS

Hovden alleges that a portion of his income is not subject to Oregon's personal income tax for the tax years at issue because his source of income was outside Oregon. The law provides that Oregon may tax an individual for income earned outside Oregon if that individual was a "resident of this state." ORS 316.037(1)(a).<sup>2</sup> "Resident" or "resident of this state" is defined in ORS 316.027(1)(a) as follows:

"(1) 'Resident' or 'resident of this state' means:

"(a) An individual who is domiciled in this state unless the individual:

"(A) Maintains no permanent place of abode in this state;

"(B) Does maintain a permanent place of abode elsewhere; and

"(C) Spends in the aggregate not more than 30 days in the taxable year in this state."

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

The Oregon Supreme Court has interpreted that statute “to mean that, if an individual is ‘domiciled’ in Oregon, then he or she is a ‘resident’ unless he or she can satisfy all three exceptions under subsection (a).” *Dept. of Rev. v. Glass*, 333 Or 1, 4, 35 P3d 325 (2001), citing *de la Rosa v. Dept. of Rev.*, 313 Or 284, 288-89, 832 P2d 1228 (1992).

With respect to the issue of domicile, the facts of this case are similar to those in a recent Tax Court case, *Dept. of Rev. v. Glass*, 15 OTR 117 (2000), *aff’d Dept. of Rev. v. Miller*, 333 Or 1, 35 P3d 325 (2001). Glass, a truck driver, “lived in his truck: a four-foot-wide, eight-foot-long, and nine-foot-high unit attached to the cab of the tractor.” *Id.* at 118. Glass, like Hovden, stayed in motels “for which his employer reimbursed him.” *Id.* Glass had an Oregon “driver license”; registered “cars in Oregon”; and used “an Oregon mailing address.” (*Id.* at 120.) Like Hovden, Glass collected unemployment income from Oregon. Glass and Hovden maintained similar contacts with Oregon. Glass and Hovden grew up in Oregon and returned to Oregon to visit their parents. Hovden licensed a vehicle in Oregon, registered to vote and did vote in Oregon elections, and purchased Oregon resident hunting and fishing licenses. In reaching the conclusion that Glass was domiciled in Oregon, the court concluded that “[w]hile those contacts are not very substantial, they are significant because of the lack of [similar] contacts with any other state.” *Id.* Hovden did not have similar contacts with any other state, including Washington. Specifically, he did not register to vote in another state; he did not have a driver’s license in another state; he did not register a vehicle in another state; he did not use an address for mailing in another state; he did not have hunting or fishing licenses in another state; and he was unable to collect unemployment income from any other state even though he tried to collect from Washington state. Based on the tax court holding in *Glass*, specifically Hovden’s numerous

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contacts with the state of Oregon and no similar contacts with any other state, the court concludes that Hovden was domiciled in Oregon.

Having concluded that Hovden was domiciled in Oregon, Hovden will not be an Oregon resident if he meets all three of the following exceptions: (1) spends less than 30 days in Oregon during the year; (2) does not maintain a permanent place of abode in Oregon, **and** (3) does maintain a permanent place of abode elsewhere. ORS 316.027(1)(a) (emphasis added).

Looking first to the requirement that time spent in Oregon be less than 30 days during the year, Hovden testified that he spent the summer months of 1996 in Oregon, working for Warrenton Fiber Company. Hovden testified that in early 1998, he returned to Oregon for family visits and he stayed in his parents' Astoria home the months of May and June. Hovden's testimony confirms that he spent more than 30 days in Oregon in 1996 and 1998.

Hovden is unable to meet the requirement that he "maintain a permanent place of abode elsewhere." ORS 316.027(1)(a)(B). Hovden testified that in 1996 he lived in hotel rooms on per diem provided by his employer, returning to Astoria when he was not working. In 1998, he lived at sea most of the year, returning to Oregon to visit and stay with his parents until September 1998 when he moved into an apartment above his employer's shop. Hovden paid no rent to live in the apartment. During both 1996 and 1998, Hovden continued to use his parents' address as his permanent residence.

Having failed to meet the three statutory requirements, the court concludes that Hovden was a resident of Oregon. Under the existing law for the tax years at issue, Hovden was domiciled in Oregon and a resident of Oregon.

Hovden alleges that under "The Baird Bill Act" his income cannot be taxed by the state of Oregon. In 2001, the Oregon legislature passed a law that "exempts certain compensation of

*nonresident* waterway workers from Oregon income tax.” (Def’s Ex N-3) (emphasis added).

ORS 316.127(10) (2003) provides, in pertinent part, that:

“Compensation for the performance of duties described in this subsection that is paid to a *nonresident* does not constitute income derived from sources within this state if the individual: \* \* \*.” (Emphasis added.)

In order to qualify for the provisions of the law, an individual must be a nonresident. In this case, the court has concluded that Hovden is a resident and therefore, the Baird Bill Act does not apply to him.

Hovden alleges that he should not be taxed on his Oregon source income because the Amtrak Act prevents the state from taxing him. In general, the Amtrak Act denies a state the right to tax *nonresidents* on “income earned in this state \* \* \* [by] employees of motor carriers who regularly perform duties in two or more states.” *Dept. of Rev. v. Hughes*, 15 OTR 316, 318 (2001) (emphasis added). Because the court concludes that Hovden is a resident of Oregon, the income earned by Hovden is not exempt under the Amtrak Act.

Hovden requests that the interest charged by Defendant on its assessments be waived. The court does not have the authority to waive lawfully assessed interest.

### III. CONCLUSION

After carefully reviewing the evidence, testimony and applicable law, the court concludes that Hovden was domiciled in Oregon and a resident of Oregon during tax years 1996 and 1998.

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Now, therefore,

IT IS THE DECISION OF THIS COURT that Plaintiff's appeal is denied.

Dated this \_\_\_\_\_ day of April 2005.

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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, 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 April 13, 2005 . The Court Filed this Document on April 13, 2005.**