

IN THE OREGON TAX COURT
MAGISTRATE DIVISION
Income Tax

VINCENT NIBLACK)	
and ANNA LIZA L. NIBLACK,)	
)	
Plaintiffs,)	TC-MD 041021E
)	
v.)	
)	
DEPARTMENT OF REVENUE,)	
State of Oregon,)	
)	
Defendant.)	DECISION

Plaintiffs appeal Defendant’s Notice of Tax Assessment for tax year 2003 and Notice of Refund Denial for tax years 2001 and 2002.¹ A trial in the matter was held in the courtroom of the Oregon Tax Court on May 12, 2005. Phyllis Jackson, a licensed tax consultant, appeared on behalf of Plaintiffs. Jerry Bronner, Assistant Attorney General, appeared on behalf of Defendant.

I. STATEMENT OF FACTS

Plaintiffs were residents of the State of Washington in 2001, 2002, and 2003. During that time, Anna Liza earned income in Oregon as an aircraft dispatcher for Horizon Air at its Portland, Oregon operations center. In 2003, Vincent also earned income in Oregon as a dispatcher for Horizon Air at its Portland operations center. As dispatchers, Plaintiffs’ primary tasks were to prevent and handle aircraft emergencies. Plaintiffs reported to work each day at the operations center in Portland. Their day-to-day duties consisted of planning and monitoring flights from the operations center. Flight planning included preflight analysis of runway

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¹ Although Plaintiffs’ Complaint states that Plaintiffs are also appealing year tax 2000, neither party argued that year before the court. Plaintiffs’ own briefs and testimony only related to tax years 2001, 2002, and 2003. As a result, the court does not consider tax year 2000 as being at issue.

conditions, weather, and navigation restrictions. Flight monitoring included communicating with the flight crew aboard a plane, air traffic control, and other flight agencies.

Horizon Air requires all of its dispatchers to be trained in accordance with Federal Aviation Regulation (FAR) 121.463. Under that regulation, to maintain their dispatcher certificate, dispatchers must spend five hours per year observing operations on each type of aircraft they monitor. That observation may take place in flight or in a flight simulator. Horizon Air does not have a simulator available for training; as a result, Plaintiffs fulfilled the requirement by flying on Horizon Air airplanes twice a year. Those flights were placed on Plaintiffs' schedules by their flight control manager. Anna Liza flew twice per year in 2001, 2002, and 2003 for five hours per flight to maintain her certification on two types of aircraft. Vincent flew twice in 2003 for five hours per flight to maintain his certification on two types of aircraft.

Defendant determined that, although nonresidents of Oregon, Plaintiffs earned their income in Oregon and, as a result, were subject to the Oregon income tax. Plaintiffs claim they are exempt under federal law from taxation by the State of Oregon because they performed regularly assigned duties on aircraft in two or more states during the subject years.

II. ANALYSIS

Oregon imposes an income tax on the taxable income of nonresidents that is "derived from sources within [Oregon]." ORS 316.037(3).² Because Plaintiffs worked in Oregon, their income would normally be taxable by the State of Oregon. However, nonresident employees who are employed by air carriers and perform regularly assigned duties on aircraft in two or more

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² All references to the Oregon Revised Statutes (ORS) are to 2001. The statutory provisions are the same for all tax years in question.

states are subject to different taxing requirements. *See* 49 USC § 40116(f).³ Section 40116(f) provides, in pertinent part:

“(2) The pay of an employee of an air carrier *having regularly assigned duties on aircraft in at least 2 States* is subject to the income tax laws of only the following:

“(A) the State or political subdivision of the State that is the residence of the employee.

“(B) the State or political subdivision of the State in which the employee earns more than 50 percent of the pay received by the employee from the carrier.”

(Emphasis added.)

To qualify for the exemption, and thus avoid Oregon income tax, the employee must be a nonresident of Oregon, have regularly assigned duties on aircraft in two or more states, and earn 50 percent or more of his income outside Oregon.⁴ The parties agree that Plaintiffs were employees of an air carrier and performed duties on aircraft in two or more states during the tax years in question. Defendant contends, however, that Plaintiffs did not perform “regularly assigned duties” on aircraft in two or more states. Defendant further contends that, even if Plaintiffs did perform regularly assigned duties on aircraft in two or more states, their income is still subject to Oregon tax because they earned more than 50 percent of their pay in Oregon in each year.

Interpretation of federal statutes must be guided by federal principles of statutory construction. *Butler v. Dept. of Rev.*, 14 OTR 195, 199 (1997). Under those principles, the court must “enforce the clear language” of the statute by discerning the plain meaning of the statute

³ All references to the United States Code (USC) are to 2001. The statutory provisions are the same for all tax years in question.

⁴ An employee is “deemed to have earned 50 percent of the employee’s pay in a State * * * in which the scheduled flight time of the employee in the State * * * is more than 50 percent of the total scheduled flight time of the employee when employed during the calendar year.” 49 USC § 40116(f)(1)(C).

through consideration of its text and context. *Id.* (internal citations omitted). The Tax Court has previously construed the meaning of “regularly assigned duties” under similar language found in the Amtrak Act⁵ and applied that construction to the statute at issue here. *See Scott v. Dept. of Rev.*, 16 OTR-MD 141, 146 (1999).

A. *Plaintiffs’ duties on aircraft were not “assigned” duties within the meaning of the statute.*

Assigned duties are different from company policies or position requirements that may necessitate occasional out of state travel. *Butler*, 14 OTR at 199; *see also True v. Dept. of Rev.*, TC-MD No 030024F, WL 22846282 at *3 (Oct 29, 2003). In *Butler*, the taxpayer was a truck mechanic employed by Yellow Freight and assigned to a Portland terminal. He was required under a company policy to do “whatever [was] necessary to get a truck quickly repaired.” *Butler*, 14 OTR at 199. Doing “whatever was necessary” entailed making occasional trips to Washington to pick up parts. The court held that “company policy is not an assigned duty.” *Id.* at 200.

Likewise, in *True*, the taxpayer, who was also employed by Yellow Freight but as a city driver/dock worker, was required to be physically and legally able to drive a truck under company policy because he could be required to do so at any time. *True*, TC-MD No 030024F, WL 22846282 at *2. The court, noting that when the taxpayer drove he was required to do something he would not normally do, held that “the position description and requirement of a CDL are not an assigned duty.” *Id.* at *3. The facts of *True* are similar to Plaintiffs’ situation. Plaintiffs must be able to legally perform their jobs. That, in turn, requires that they train five hours per year per aircraft to maintain their certification. Such training is not an assigned duty; instead, it is a job training requirement.

⁵ The Amtrak Reauthorization and Improvement Act of 1990, Pub L 101-322 (1990).

B. *Plaintiffs' duties on aircraft were not "regular" duties within the meaning of the statute.*

When duties outside the state are minimal, it is more difficult for a taxpayer to prove such duties are regularly assigned. *White v. Dept. of Rev.*, TC-MD No 021311D, WL 22908819 at *3 (Nov 26, 2003). For example, in *Stout v. Department of Revenue*, the taxpayer, a dispatcher for Yellow Freight, was required to take two rides per quarter with drivers as well as have one safety meeting per month with drivers. TC-MD No 981059 (Mar 1, 1999). The court held that those trips and meetings were not frequent enough to be considered "regular." *Id.* The court went on to state that the "[t]axpayer's daily routine, based on assigned duties and actual practice, shows that taxpayer rises nearly every work day in Washington, drives to the Portland, Oregon terminal, works his entire shift in Portland, and returns home to Washington each night at the end of his shift." The court then concluded that "[t]he overwhelming majority of taxpayer's regularly assigned duties are in the Portland, Oregon, terminal. Indeed, travel to Washington is so infrequent as to be inconsequential." *Id.* Similarly, in the subject appeal, Plaintiffs performed the "overwhelming majority" of their duties in Portland. Their trips out of state were even less frequent than those of the taxpayer in *Stout*. The court concludes, therefore, that Plaintiffs' duties on aircraft were not "regularly assigned."

The court observes that the amount of time spent outside the state, taken alone, is not determinative. *See White*, TC-MD No 021311D, WL 22908819 at *3. Another factor to consider is whether the duties that took the taxpayer out of state were somehow special or irregular. *See Butler*, 14 OTR at 200. In *Butler*, the taxpayer made approximately three trips each year to Washington to pick up parts. *Id.* The Regular Division of the Tax Court concluded that his regularly assigned duties were to inspect and repair trucks and that those duties were

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performed at the Portland terminal. *Id.* at 199-200. Accordingly, the court concluded that the taxpayer did not perform regularly assigned duties in two or more states.

In the subject appeal, Plaintiffs' "regular" duties were performed on the ground in Portland. They reported each day to workstations in Portland and conducted their regularly assigned duties of dispatching planes from those workstations, not on aircraft. Based on the foregoing, the court concludes that Plaintiffs' training duties on aircraft were not "regularly assigned" and, therefore, Plaintiffs do not qualify for the exemption. Because Plaintiffs do not fall within the statute, it is not necessary for the court to consider where they earned 50 percent or more of their income.

III. CONCLUSION

Plaintiffs' Oregon source income is not exempt from Oregon taxation under 49 USC § 11406(f) because Plaintiffs did not perform regularly assigned duties on aircraft in two or more states. Now, therefore,

IT IS THE DECISION OF THIS COURT that Defendant's Notice of Assessment for tax year 2003 and Notice of Refund Denial for tax years 2001 and 2002 are upheld.

Dated this _____ day of December 2005.

COYREEN R. WEIDNER
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 Coyreen R. Weidner December 8, 2005. The Court filed and entered this document December 8, 2005.