

IN THE OREGON TAX COURT  
MAGISTRATE DIVISION  
Small Claims  
Income Tax

KELLY S. GILROY,	)	
	)	
Plaintiff,	)	TC-MD 050097C
	)	
v.	)	
	)	
DEPARTMENT OF REVENUE,	)	
State of Oregon,	)	
	)	
Defendant.	)	<b>DECISION AND JUDGMENT</b>

Plaintiff appealed to the court seeking relief from income taxes paid to Oregon for 2003, asserting that his wages are exempt from Oregon taxation under the Amtrak Act.<sup>1</sup> Trial was held by telephone on May 17, 2005. Plaintiff appeared *pro se* and testified on his own behalf. Defendant was represented by Jason Iverson, an auditor with the Department of Revenue. The parties will be referred to as “taxpayer” and “the department.”

I. STATEMENT OF FACTS

Taxpayer is a resident of Vancouver, Washington, and was employed during the 2003 tax year by GCR Truck Tire Centers (GCR) in Portland, a company that sells and services tires for use on commercial fleets. Taxpayer reported for work each day at the company’s Portland, Oregon, office, where he had a workstation. Taxpayer testified that his job title was “Commercial Tire Salesperson and Warehouse Manager,” that his primary duty was sales solicitation, and that he spent approximately 10 percent of his time supervising the warehouse. Taxpayer’s written position description explains that the “basic purpose” of the commercial salesperson position is to “generate maximum sales available in the assigned market area by:

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<sup>1</sup> The Amtrak Reauthorization and Improvement Act of 1990, Pub L 101-322 (1990). The court will refer to the statute as the Amtrak Act.

1) maintaining and acceptable gross profit \* \* \* [and] 2) taking responsibility for all sales and service activities as they relate to servicing the customer \* \* \*.” (Def’s Ex C-1.)

As part of his sales solicitation duties, GCR required taxpayer to travel a regular sales route, which included accounts in Washington. Taxpayer would solicit sales and sometimes deliver the tires, although GCR had a full-time employee whose job was to deliver tires. The larger fleet customers had their own employees to remove and replace old tires with new ones. A GCR service employee would install the new tires (including retreads) on the vehicles of smaller fleet customers, by appointment arranged by taxpayer.

Taxpayer also made fleet inspections in connection with his sales efforts. The written position description for a GCR commercial salesperson states: “[m]akes scheduled equipment inspections and fleet analysis, checking air pressure, clearance, condition of tires, wheels, rims, springs, etc. in connection with vehicle safety and commercial sales solicitation.” (*Id.*) If taxpayer found a problem, such as a cracked wheel, flat tire, or a bad lug nut, he would typically either recommend a repair (especially with larger fleet customers with their own mechanic) or schedule an appointment for a GCR servicemen to do the work. Although he was not required to do so, taxpayer would sometimes make small repairs himself, especially with small fleet customers. Robert Prah, GCR’s General Manager and taxpayer’s former supervisor, explains in a letter to the department that “[i]n the capacity of Tire Salesperson [taxpayer] was required to inspect his fleet accounts for tire replacement, repair and safety issues and *make recommendations* to each company.” (Def’s Ex A (emphasis added).) Taxpayer’s job description provides that the salesman is to “[d]etermine[] repairs, replacement, correction of conditions, etc.[] required for efficient and safe operation of equipment, review[] with owner or operator, and *recommend[] appropriate actions.*” (Def’s Ex C-1 (emphasis added).)

## II. ANALYSIS

Although taxpayer is not an Oregon resident, he is, nonetheless, subject to Oregon's income tax on all taxable income earned in this state. ORS 316.037(3).<sup>2</sup> Taxpayer claims exemption under the Amtrak Act, a federal statute exempting certain individuals employed by motor carriers from state income taxes other than those taxes imposed by their state of residency. *See* 49 USC § 14503. The Act provides, in pertinent part:

“No part of the compensation paid by a \* \* \* motor private 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 \* \* \* other than the State \* \* \* of the employee's residence.”

“\* \* \* \* \*

“ ‘[E]mployee’ has the meaning given such term in section 31132.”

49 USC § 14503(a) (2000). The above statute sets out four requirements that must be met before the taxpayer is qualified for exemption: the taxpayer must: 1) be a nonresident of Oregon, 2) be compensated by a motor private carrier, 3) have regularly assigned duties in two or more states, and 4) be an employee within the meaning of the statute. Taxpayer is a resident of Washington and the department does not dispute that taxpayer's employer is a motor private carrier. Further, the department concedes that taxpayer performed regularly assigned duties in two or more states. Therefore, all that remains is to determine whether taxpayer is an employee within the meaning of the statute.

Employees are defined in USC title 49, section 31132, and include four categories. The statute reads 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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<sup>2</sup> All references to the Oregon Revised Statutes (ORS) are to 2001.

(A) directly affects commercial motor vehicle safety in the course of employment; and

(B) is not [a government employee] acting in the course of \* \* \* employment \* \* \*.”

Each type of “covered employee[] \* \* \* must directly affect commercial motor vehicle safety.”

*Buckel v. Dept. of Rev.*, TC-MD No 010911C and TC-MD No 011123C, WL 745637, at \*3 (Apr 15, 2002). Taxpayer’s case turns on whether he has a direct effect on commercial motor vehicle safety. Therefore, it is not necessary to discuss which employment category taxpayer fits into.<sup>3</sup>

Each qualifying employee “must have regularly assigned duties in more than one state and their assigned duties must affect, *directly*, commercial motor vehicle safety.” *Id.* (emphasis added). In *Jensen v. Department of Revenue*, this court stated: “[t]he statute limits ‘directly affects’ to employees whose daily routine and duty has them \* \* \* affecting a commercial motor vehicle,” 13 OTR 296, 301 (1995), *aff’d*, 323 Or 70, 912 P2d 373.

Here, taxpayer’s regularly assigned duty was sales solicitation and the basic purpose of the job was to generate maximum sales. Plaintiff testified sales solicitation was his “primary duty.” To facilitate sales, taxpayer would inspect customer vehicles and, in some cases, make small repairs (replacing a single wheel or tire) on an as-needed basis and mainly in emergency situations. However, when fleet inspections revealed problems, taxpayer would generally recommend the appropriate repair and/or make an appointment for a GCR serviceman to fix the problem. When taxpayer actually repaired wheels or tires, that duty directly affected the safety of

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<sup>3</sup> Taxpayer has presented some evidence that he drove a commercial motor vehicle, defined under 49 USC section 31132(1) as a vehicle “used on the highways in interstate commerce to transport passengers or property” and having a gross vehicle weight of 10,000 pounds or more, at least occasionally, but taxpayer has not met his burden of proof to show that he drove such a vehicle on a regular basis. ORS 305.427 (2003). It appears that the duty of delivering large tire orders was assigned to another individual. Taxpayer, if he fits within any category, is most likely an “individual not an employer” under 49 USC § 31132(2) and (3).

a commercial motor vehicle, but it was not part of taxpayer's regularly assigned duties and can be described as incidental or "as needed." The job description for a GCR commercial salesperson supports that conclusion, providing that service work was to be performed "when needed." (Def's Ex C-2.) Indeed, GCR employed a different individual whose primary duty was to make such repairs. Entitlement to the exemption requires that taxpayer's qualifying duties be regularly assigned, as opposed to work done in emergency situations or on an as-needed basis. *See Butler v. Dept. of Rev.*, 14 OTR 195, 200 (1997).

In *Jensen*, the tax court held that employees who directly affect safety are those who "perform[] such tasks as repairing tires, fueling vehicles, servicing vehicles, [and] inspecting vehicles for safety \* \* \*." 13 OTR at 301. The plaintiff in *Jensen* was an upper-level manager overseeing an entire operating group of 750 to 800 employees, with a consolidation center in Portland and satellite terminals in two other states. *Id.* at 297. The court stated that the statute was designed to protect "employees who are at risk of injury if the commercial motor vehicle is improperly operated, loaded, repaired or maintained" and concluded that, even though the plaintiff's work as an upper level manager had a significant impact on safety, it was not direct because it was "implemented through others." *Id.* at 301-02. Thus, although Jensen did occasionally road test a truck driver's abilities, physically check vehicles for safety, and investigate accidents, his "daily routine and duty [did not have him] moving, touching, or affecting a commercial motor vehicle or its contents[.]" and the plaintiff was, therefore, found not to be an employee within the meaning of section 31132. *Id.* at 301 and 302.

The facts here are very similar. Taxpayer's inspections and recommendations may have had a significant impact on the safety of the fleet vehicles for which he supplied tires, but his recommendations were implemented primarily through others – those who purchased and

installed the tires and other equipment, as well as those GCR employees whose duty it was to make repairs ordered by taxpayer. The tax court “has construed [direct effect] to mean employees who use their hands in performing their duties.” *Department of Revenue v. Hughes*, 15 OTR 316, 319 (2001) (citing *Jensen*, 13 OTR at 301).

In *Hughes*, the tax court found that taxpayer’s regular duties of “repairing, servicing, or personally inspecting [vehicles]\* \* \* for safety” qualified him as an employee under the statute. *Id.* Hughes was a maintenance supervisor for a regional trucking firm who supervised six other mechanics and spent 50 percent of his time in coveralls, with tools in his hand, working on trucks. *Id.* The court described Hughes as “a working foreman whose duties require him to have a hands-on relationship with the vehicles.” *Id.* *Hughes* can be distinguished from the facts here, and from those of *Jensen*, however, because the plaintiff in *Hughes*, after performing the inspection, also undertook the required repairs as part of his regularly assigned duties. Here, as in *Jensen*, taxpayer was only required to make recommendations following inspections designed primarily to enhance customer relations, and the repairs he made were done on an “as needed” basis.

### III. CONCLUSION

Taxpayer’s job was to sell tires and his regularly assigned duty was to solicit such sales. Taxpayer occasionally delivered tires when necessary and, to improve customer relations and facilitate future sales, taxpayer would inspect customers’ commercial motor vehicles and recommend repairs to wheels and tires when problems were observed. Taxpayer did occasionally make repairs himself, repairs which directly affected commercial motor vehicle safety, but the repairs were not part of his regularly assigned duties. Because taxpayer’s regularly

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assigned duties did not directly affect the safety of a commercial motor vehicle, taxpayer does not meet the definition of “employee” under title 49, section 31132(2). Now, therefore,

IT IS THE DECISION OF THIS COURT that taxpayer’s request for an exemption from Oregon income taxes for 2003 under the Amtrak Act is denied.

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

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DAN ROBINSON  
MAGISTRATE

***This document is final and may not be appealed. ORS 305.514.***

***This document was signed by Magistrate Dan Robinson November 18, 2005.  
The Court filed this document November 18, 2005.***