

IN THE OREGON TAX COURT
MAGISTRATE DIVISION
Income Tax

HOWARD S. GORDIN)	
and CHRISTINE D. GORDIN,)	
)	
Plaintiffs,)	TC-MD 050698C
)	
v.)	
)	
DEPARTMENT OF REVENUE,)	
State of Oregon,)	
)	
Defendant.)	DECISION

Plaintiffs appeal from a Conference Decision Letter dated April 19, 2005, in which Defendant assessed a deficiency for tax year 2001 after reducing Plaintiffs' charitable deductions for that year. A trial was held in the courtroom of the Oregon Tax Court on January 11, 2006. Plaintiffs were represented by Frank H. Gordin, a licensed tax consultant. Defendant was represented by David Fisher, an auditor with its staff.

I. STATEMENT OF FACTS

Plaintiffs timely filed their 2001 income tax return sometime before April 11, 2002. On April 11, 2002, Plaintiffs filed a Form 40X to correct their income. Plaintiffs took a charitable contribution deduction of \$11,970, of which \$9,395 was for contributions of used clothing and household items to various charities, mainly Goodwill Industries and the Salvation Army, and \$2,575 was for a 1984 Toyota pickup truck donated to Volunteers of America. (Ptf's Ex 14-2, 3; Def's Ex A-1.) Plaintiffs kept records and receipts of those donations, but presented no cost information. (Def's Ex A, B.) Plaintiffs acquired the pickup truck in July 2001 and donated it later that same month. There is no information on the acquisition of the other donated items.

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On July 21, 2004, Defendant issued a Notice of Deficiency (notice) that reduced the deduction to \$3,711, claiming the fair market value of the contributed items was overstated. (Ptf's' Ex 15-1,2.)¹ The auditor's report (report) included with the notice stated that the auditor had utilized a "thrift valuation guide" to determine values for the used clothing and household items. (*Id.*) Those thrift valuation guides list "good," "better," and "best" prices for items available in thrift stores. (Ptf's' Ex 9-4.) The report also indicated that the auditor had used the Kelley Blue Book private party value for the pickup. Finally, the auditor's report included adjustment information under two columns, one titled "Amended," and one titled "Adjusted." (Ptf's' Ex 15-1.) That notice was forwarded on to the Internal Revenue Service (IRS) on or about July 26, 2005. (Ptf's' Ex 2-4.)

Plaintiffs requested a conference, which was held on March 9, 2005. The conference officer issued a Conference Decision Letter (letter) on April 19, 2005. The conference officer allowed \$5,204 for the charitable contribution deduction; \$1,360 for the donated pickup and \$3,844 for the clothing and household goods. (Ptf's' Ex 9-6.) The officer based her valuation of the used clothing and household items on the thrift valuation guides "better" and "best" prices. (Ptf's' Ex 9-4). She based the pickup value on Kelley Blue Book private party values in 2001 for a 17-year old Toyota pickup with 170,000 miles and standard equipment.

Plaintiffs then filed this appeal in the Magistrate Division. In the course of the appeal, they assert four claims. They first claim that Defendant failed to audit their return "as soon as practicable" as required by ORS 305.265(2). Second, Plaintiffs claim that Defendant wrongfully attempted to extend the period of assessment by notifying the IRS of the audit results and

¹ The auditor made an adjustment of \$8,259 in the charitable contributions. $\$11,970 - \$8,259 = \$3,711$. (Ptf's' Ex 5-3; Ptf's' Ex 15-1,2.)

deliberately misleading Plaintiffs into believing an amended return had been filed sometime after April 15, 2002. Third, Plaintiffs dispute the valuation of the used clothing and household items made by the conference officer using the thrift valuation guides. Finally, Plaintiffs dispute the valuation of the Toyota pickup made by the conference officer using the Kelly Blue Book private party values.

II. ANALYSIS

A. *Execution of audit as soon as practicable*

Plaintiffs request that the court abate the deficiency and refund the tax and interest because Defendant did not timely audit their 2001 return under applicable law. The court disagrees with the premise underlying the prayer for relief.

Under ORS 305.265(2),² Defendant is required to examine or audit returns “[a]s soon as practicable” after they are filed. “Practicable” is not defined in that code section; however, ORS 314.410(1) allows Defendant to “give notice of deficiency as prescribed in ORS 305.265” any time “within three years after the return [is] filed.” Defendant, therefore, may undertake an audit within three years of the date of the return, so long as its notice is issued within three years of the date the return is filed. *See Tiedeman v. Dept. of Rev.*, TC-MD 000748C (Jan 17, 2001) (holding that “[b]y law the department has three years to examine or audit a return and issue a deficiency if it determines that additional taxes are due.”).

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² All references to the Oregon Revised Statutes (ORS) are to 1999. The issues in Part II, A and B are procedural and are, therefore, covered by the 2003 statutes; however, the provisions at issue do not differ between the years in question.

Here, Plaintiffs filed their return April 15, 2002.³ Accordingly, Defendant had until April 15, 2005, to audit the return and issue a notice of deficiency. Defendant's notice was issued to Plaintiff on July 21, 2004, well within the statutory period.

The court rejects Plaintiffs' assertion that the requirement of an audit "as soon as practicable" evidences a legislative mandate that Defendant review the return as soon as it receives the return, or lose the opportunity to do so. The only time constraint on Defendant's ability to audit a return is the three-year limitation on the issuance of a deficiency notice under ORS 314.410(1) stemming from such an audit. Plaintiffs' reliance on *Preble v. Department of Revenue*, 14 OTR 380 (1998), is misplaced. *Preble* concerned the issue of what constitutes "notice" to the department under ORS 314.410(3), which authorizes the department at that time to issue a deficiency within two years of notification of a federal correction.

B. Wrongful extension of the period of assessment

Plaintiffs' second argument is related to the first, in that it concerns the issue of whether Defendant timely audited their return. Plaintiffs argue that under the United States Supreme Court's decision in *Zellerbach Paper Co. v. Helvering*, 293 US 172, 55 S Ct 127 (1934), their second return was merely a supplement or correction to the original return rather than an "amended" return, and that by labeling the column in the auditor's report "Amended," the auditor was deliberately attempting to deceive Plaintiffs into believing Defendant was acting on a recently filed amended return. The purpose of that deception, Plaintiffs contend, was to disguise the fact that the return was not audited "as soon as practicable," as required by ORS 305.265(2).

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³ A return (or amended return) filed before the due date is deemed filed on the due date. *See* IRC § 6501(b)(1), Treas Reg § 301.6501(b)-1(a). The due date is April 15. IRC § 6072(a). All references to the Internal Revenue Code (IRC) are to 2000.

Defendant responds that the reason for using the word “amended” in the auditor’s report was to let the taxpayer know where the numbers came from (i.e., the second return rather than the first).

Plaintiffs’ argument is wholly without merit. Defendant had no reason to deceive Plaintiffs because it timely audited the return and issued its deficiency notice. In fact, the court’s resolution of the timeliness issue, as set forth above, renders this issue moot.⁴ The same reasoning applies to Plaintiff’s argument that Defendant tried to extend the deadline by notifying the IRS of its audit.⁵

C. Valuation of charitable contributions

ORS 316.048 defines taxable income as “the federal taxable income of the resident as defined in the laws of the United States,” with certain modifications. Taxable income is defined in IRC section 63(a) as “gross income minus the deductions allowed by this chapter.” IRC section 170 provides a deduction for certain charitable contributions to qualified organizations. Such deductions are allowed “under regulations prescribed by the Secretary.” *Id.* Under the regulations, the amount of a contribution in property is the “fair market value of the property at the time of the contribution.” Treas Reg § 1.170A-1(c)(1). Fair market value is “the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of relevant facts.” *Id.* § 1.170A-1(c)(2).

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⁴ Moreover, to the extent that this second issue raises a tort claim, the Tax Court is without jurisdiction to resolve the matter.

⁵ If the IRS makes a change or correction to a taxpayer’s return, ORS 314.410(3)(b) extends the time in which Defendant can issue a Notice of Deficiency to two years after Defendant receives notice from the IRS.

1. *Valuation of used clothing and household goods*

To take the deduction for contributions of \$250 or less, the taxpayer must acquire a receipt showing the name of the donee, the date and location of the contribution, and a description of the property. *See* Treas Reg § 1.170A-13(b). IRS Publication 561 states that “[u]sed clothing and other person items are usually worth far less than the price * * * paid for them” and goes on to state that the “price that buyers of used items actually pay in used clothing stores * * * is an indication of the value.” Under ORS 305.427, the plaintiff in Tax Court proceedings has the burden of proof. Plaintiffs kept such receipts as required, with descriptions given in great detail.⁶ The descriptions did not include the original price or date of purchase, however. Plaintiffs offered no testimony or other evidence of how they computed the value. Without more, Plaintiffs have failed to show that Defendant’s method of valuation resulted in something other than fair market value.⁷ Accordingly, the court upholds the conference officer’s allowance of \$3,844 for the used clothing and household items.

2. *Valuation of Toyota pickup*

To qualify for a charitable deduction, a charitable contribution of more than \$250 but less than \$5,000 must be substantiated with a contemporaneous written acknowledgment from the donor. *See* Treas Reg § 1.170A-13(f). For donations made before January 1, 2005, no appraisal is required and the fair market value standard applies. *See* IRS Pub 4303A. A good indicator of value is a published pricing guide. IRS Pub 561. Use of such a guide must still be tempered

⁶ The receipts list descriptions of the items donated, such as “[one] beautiful turquoise knit [long] sleeved woman’s winter sweater” and “[one] very dressy print jacket dress.” (Def’s Ex B-13, 21.)

⁷ Plaintiffs object to Defendant’s use of the thrift valuation guides because, according to Publication 561, “fixed formulas, rules, or methods” should not be used to determine fair market value. However, Publication 561 also offers, as an example of a “fixed formula, rule, or method,” reducing the price of furniture to some percentage of the purchase price. That is different than surveying thrift stores to determine what “buyers of used items actually pay” and compiling a list of those determinations.

with the understanding that fair market value is what a willing buyer would pay a willing seller.

Id. The conference officer used private party values from the Kelley Blue Book to determine the value of the Toyota pickup, stating that using the retail value was not appropriate because “[i]t also takes into account the dealers profit, costs for advertising, sales commissions and other costs of doing business.” (Ptf’s Ex 9-3.)

As with the donated clothing and household items, Plaintiffs did not provide any testimony or evidence pertaining to the donated vehicle. Thus, the court has no information by which to gauge the value of the pickup. A fully equipped vehicle in excellent condition may well be worth retail. However, without such evidence, and lacking an independent appraisal, the court agrees with Defendant that private party pricing more accurately reflects the standard of fair market value. Accordingly, the court upholds the conference officer’s allowance of \$1,360 for the contribution of the 1984 Toyota pickup.

III. CONCLUSION

The court concludes that the three-year rule in ORS 314.410(1) governs the requirement in ORS 305.265(2) that Defendant audit a return “as soon as practicable,” and that Defendant in this case timely audited Plaintiffs’ return and timely issued its Notice of Assessment. The court further concludes that Plaintiffs have failed to demonstrate that they are entitled to a charitable

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contribution deduction in excess of the \$5,204 allowed by Defendant in its April 19, 2005, Conference Decision Letter. Now, therefore,

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

Dated this _____ day of April 2006.

DAN ROBINSON
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 Dan Robinson on April 25, 2006. The Court filed and entered this document on April 25, 2006.