

IN THE OREGON TAX COURT
MAGISTRATE DIVISION
Income Tax

DANTE M. ESPINOZA)	
and SHOWN M. ESPINOZA,)	
)	
Plaintiffs,)	TC-MD 050768B
)	
v.)	
)	
DEPARTMENT OF REVENUE,)	
State of Oregon,)	
)	
Defendant.)	DECISION

Dante M. Espinoza (Espinoza) and Shown M. Espinoza, appeal Defendant's Notice of Assessment, dated December 6, 2004, for tax year 2003. A trial was held by telephone on May 11, 2006. Scott Schlag, Auditor, represented Defendant. Dante Espinoza appeared on his own behalf; Martin Kapp (Kapp) testified as a witness. The record is now closed, and the matter is ready for decision.

A document prepared by Kapp was excluded from the record pursuant to MD Rule 10. It was filed¹ in an untimely manner.

I. STATEMENT OF FACTS

Espinoza is a resident of Washington and works full time as a merchant sailor. (Ptf's Compl at 2.) In 2003, Espinoza earned wages in Oregon and California. (*Id.* at 5-6.) Defendant asserts that in 2003, Espinoza worked 152 days in Oregon and 52 days in California, and, that of the 152 days in Oregon, 78 days were worked in coastal ports, 55 were worked on the Columbia River, and 19 were worked on the Willamette River. (Def's Position Paper at 1.)

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¹ Filed on May 10, 2006, at 3:10 p.m., one day prior to trial.

Plaintiffs do not dispute the number of days worked in Oregon on the Willamette and Columbia Rivers and in coastal ports. Rather, Plaintiffs contend that 46 USC section 11108 prevents Oregon from taxing their income because Espinoza was a crew member on a vessel operating in Oregon and California. Defendant argues that neither 46 USC section 11108 nor ORS 316.127(10), which is substantially similar to section 11108, applies to time Espinoza spent on sovereign Oregon waters. Rather, Defendants argue, those statutes apply only to the time spent on waters belonging to more than one state. Defendant agrees that Oregon is prohibited by both statutes from imposing taxes on income earned while working on the Columbia River.

II. ANALYSIS

Generally, income earned by a nonresident who provides services in Oregon is subject to Oregon income tax. *See* ORS 316.127.² Certain nonresident income, however, is deemed to not be Oregon-source income and is thus excepted from the general rule. *Id.* One such exception is found in subsection 10, which provides, in pertinent part, that:

“Compensation paid to a nonresident does not constitute income derived from sources within this state if the individual:

“* * * *

“(b) Performs regularly assigned duties while engaged as a * * * member of a crew on a vessel operating on the navigable waters of more than one state.”

ORS 316.127(10)(b).

When “[i]nterpreting a statute, the court’s task is to discern the intent of the legislature.” *PGE v. Bureau of Labor & Industries*, 317 Or 606, 610, 859, P2d 1143 (1993). That requires

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² All references to the Oregon Revised Statutes (ORS) are to 2001.

examination of “both the text and context of the statute.” *Id.* “As part of the text and context, the court includes consideration of its own prior interpretations of the statute.” *Davis v. O’Brien*, 320 Or 729, 741, 891 P2d 1307 (1995) (citing *Stephens v. Bohlman*, 314 Or 344, 350 n6, 838 P2d 600 (1992). “If the legislature’s intent is clear” from the text and context, “further inquiry is unnecessary.” *PGE*, 317 Or at 611.

This court considered ORS 316.127(10) in *Davis v. Department of Revenue (Davis v. DOR)*, TC-MD 030062E, WL 22908839 (Nov 25, 2003). The taxpayer in *Davis v. DOR* worked on vessels that were docked on both the Oregon and Washington sides of the Columbia River. The court determined that allowing the taxpayer an exemption under the statute would be contrary to its purpose, “which was to alleviate the hardship of determining the time spent working in Oregon and Washington when a vessel travels between the Oregon and Washington side of a river * * *.” *Id.* at *2. When a “vessel is navigating the waters, it is difficult to determine when the vessel is in Oregon or Washington.” *Id.* There was no uncertainty as to which state taxpayer in *Davis v. DOR* was working in because the vessels were always in dock, and, therefore, the court held he did not qualify for the exemption under ORS 316.127(10).³

Applying those principles to the present case, Espinoza clearly qualifies for the exemption for those times when it would be difficult to determine in which state he was working, namely, those times in which he was working on a vessel that was operating on the Columbia River. At any time his vessel was operating on Oregon sovereign waters, there would be no such uncertainty. Accordingly, ORS 316.127(10) would not apply to time spent on the Willamette River or in Oregon coastal ports.

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³ The court also held that because the vessels on which taxpayer worked were “docked,” not “operating” on the water, the statute, and thus the exemption, did not apply to taxpayer. See *Davis v. DOR* at *2.

Another way to avoid Oregon income tax on Oregon-source income is through federal law, which limits the ability of states to tax certain individuals engaged in interstate commerce. *See Julian v. Dept. of Rev.*, 17 OTR 384, 390 (2004), *rev'd on other grounds*, 339 Or 232, 118 P3d 798 (2005). Plaintiffs claim that Espinoza's earnings escape Oregon taxation under 46 USC section 11108, which provides, in pertinent part:

“(1) Limitation on jurisdiction to tax.—An individual to whom this subsection applies is not subject to the income tax laws of a State * * *, other than the State and political subdivision in which the individual resides, with respect to compensation for the performance of duties described in paragraph (2).

“(2) Application.—This subsection applies to an individual—

“* * * * *

“(B) who performs regularly assigned-duties while engaged as a * * * crewman on a vessel operating on the navigable waters of more than one State.”

When analyzing a federal statute, statutory construction is guided by federal case law. *See Butler v. Dept. of Rev.*, 14 OTR 195, 199 (1997). In “determining the meaning of the statute, the court considers the text and context of the statute.” *Id.* The court is also to be “guided by the object and policy of the statute.” *Id.* Finally, “federal exemptions which pre-empt the states’ power should not be broadly read.” *Julian*, 17 OTR at 389 (citing *California Equalization Bd. v. Sierra Summit*, 490 US 844, 851-52, 109 S Ct 2228, 104 L Ed2d 910 (1989)).

Section 11108 is part of an overall statutory scheme to protect interstate workers from taxation in multiple states. In the past, workers who regularly traveled interstate and earned wages in more than one state “were potentially subject to withholding and income taxation in each of those states.” *Julian*, 17 OTR at 390. “Over the years, piecemeal legislation protected specific groups of interstate workers, such as seamen, whose wages were made exempt from

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withholding in any state other than their state of residence, although the workers were not exempt from taxation itself.” *Id.*

In 1979, Congress exempted air carriers from income tax in all states except for the state in which the worker resides or in which workers earn more than 50 percent of their compensation. *See id.* at 391 (citing Aviation Safety and Noise Abatement Act of 1979, Pub L 96-193, 94 Stat 50 (1980) (currently codified as 49 USC § 40116)). In 1990, that exemption was extended to rail, motor, and motor private carriers by the Amtrak Act. *See id.* (citing Pub L 101-322, 104 Stat 295 (1990)). That act “completely exempts the compensation paid by a rail carrier, motor carrier, or motor private carrier by income taxation from any state other than the employee’s state of residence.” *Julian*, 17 OTR at 391 (citing Pub L 101-322, 104 Stat 295 (1990)).

Waterway workers did not receive a similar exemption until the 1999 passage of the Transportation Employee Fair Taxation Act, which is the statute at issue in the case before the court. *See* Pub L 106-489, 114 Stat 2207 (2000) (currently codified at 46 USC § 11108).⁴ The enacting clause of the statute states that its purpose is to “to provide equitable treatment * * * for certain individuals who perform duties on vessels.” *Id.* This court has noted that “[b]y enacting that statute, Congress sought to make coverage that had been incomplete in the past more complete.” *Julian*, 17 OTR at 391.

Each of the statutes discussed above is designed to protect individuals who perform duties in more than one state, but that protection is subject to certain restrictions. Not every worker who happens to travel to more than one state during the course of that worker’s duties is protected. *See* 49 USC § 40116 (allowing the exemption only for states in which less than

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

50 percent of income was earned); 49 USC §§ 14503, 31132 (allowing exemption only when duties in two or more states are regularly assigned and directly affect commercial motor vehicle safety).

Further, the Amtrak Act, though similar, differs in one important respect. It makes reference to duties “*in* 2 or more states.” *Id.* at § 14503 (emphasis added). The statute at issue here refers to “operat[ion] on the navigable waters *of* more than one state.” 46 USC § 11108 (emphasis added). The words “of” and “in” do not have the same meaning; the word “of” and the terms following modify “waters” and, therefore, suggest that the water must be in the possession of more than one state. The word “in” simply means that the duties must be performed within two or more states. Plaintiffs argument requires this court to replace the phrase “of more than one state” with the phrase “in more than one state,” which the court cannot do. Accordingly, the court concludes that “navigable waters of more than one state” means only waterways that belong to two or more states.⁵

Section 11108, therefore, does not apply to the time that Espinoza spent working on the Willamette River or Oregon coastal ports, which belong entirely to Oregon and are not shared with another state.

III. CONCLUSION

The court concludes that Plaintiffs do not qualify for the exemption in ORS 316.127(10) for the time Espinoza spent on the Willamette River or in Oregon coastal waters, because there is

⁵ The court’s conclusion is also supported by case law construing the old version of section 11108 that exempted the wages of certain waterway workers from withholding. *See Streckfus Steamers, Inc. v. St. Louis*, 472 SW2d 660 (1971) (holding that nonresident waterway workers on the Mississippi River who did not make port in any city but St. Louis were subject to a city tax imposed on all nonresidents who performed services within the city because there was no chance of being subject to the withholding of more than one state for those wages); *see also Alaska v. Petronia*, 69 Wash2d 460, 418 P2d 755 (holding that the statute did not affect the right of Alaska to impose income tax on the wages of nonresident waterway workers earned while the vessel was operating solely on the territorial waters of Alaska).

no difficulty in determining in which state wages were earned while Espinoza was on those waters. In addition, the court concludes that Plaintiffs do not qualify for the exemption in 46 USC section 11108 as to the time Espinoza spent on the Willamette River or in Oregon coastal ports because those waters do not belong to more than one state. Now, therefore,

IT IS THE DECISION OF THIS COURT that the determination of the Defendant be upheld with regard to the wages earned during the 19 days Espinoza was on the Willamette River and the wages earned during the 152 days Espinoza was on Oregon coastal waters.

Dated this _____ day of October 2006.

JEFFREY S. MATTSON
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 Jeffrey S. Mattson on October 19, 2006. the Court filed and entered this document on October 19, 2006.