

IN THE OREGON TAX COURT
MAGISTRATE DIVISION
Income Tax

CHRISTOPHER P. KLEPS)	
and CAROL T. KLEPS,)	
)	
Plaintiffs,)	TC-MD 070636D
)	
v.)	
)	
DEPARTMENT OF REVENUE,)	
State of Oregon,)	
)	
Defendant.)	DECISION

Plaintiffs appeal Defendant’s Notices of Deficiency Assessment for tax years 2002 and 2003. The parties exchanged information. On October 15, 2007, Plaintiff Christopher Kleps (Kleps) requested that the court decide the above-entitled matter based on the evidence submitted as of that date. Defendant did not file an objection. This matter is now ready for decision.

I. STATEMENT OF FACTS

Defendant challenged a business loss reported by Plaintiffs for tax years 2002 and 2003. During its audit, Defendant concluded that the claimed deduction for payments to a defined benefit pension plan were not substantiated nor explained. (Def’s Answer at 1.)

Plaintiffs appealed Defendant’s Notices of Deficiency Assessment to this court. After a case management conference on August 27, 2007, Plaintiffs provided additional information to Defendant. After reviewing the information and contacting Penelope Butler, an actuary Plaintiffs consulted about the defined benefit plan, Defendant stated that allowable deductions are limited to “net earnings from self-employment.” (Def’s Status Report filed Sept 10, 2007, at 1.) Defendant concluded that Plaintiffs are “not entitled to a deduction” for payments

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made to Kleps's "defined benefit pension plan because he did not have any earnings from self-employment in 2002 or 2003." (*Id.* at 2.)

Plaintiffs do not "dispute the auditor's findings." (Ptf's Memo filed at 1.) They challenge Defendant's authority to raise the issue because they concluded that the "sole issue in the notice of deficiency pertains to the payment of the amount being amortized and, therefore, deducted." (*Id.*) Plaintiffs stated that, now that they have "proven payment of the amount being amortized," Defendant should be "barred from making an assessment for any new deficiencies." (*Id.*)

In its Response to Memorandum filed 9/24/07 (Response), Defendant stated that it "is entitled to bring forward any issues in regard to the defined benefit pension plan that are necessary to determine the correct tax." (Def's Resp at 1, citing *U.S. Bancorp v. Dept. of Rev.*, 15 OTR 15, 16 (1999).) Citing ORS 305.575, Defendant concluded that the court "has the authority to determine the correct tax based on the information that is available." (Def's Resp at 2.) Defendant requested that the court uphold its assessments. (*Id.*)

II. ANALYSIS

Plaintiffs accept Defendant's conclusion that a self-employed taxpayer may not deduct a payment to a defined benefit plan in excess of "earned income." Internal Revenue Code (IRC) § 404(a)(8).¹ Even though Kleps made payments to a defined benefit plan, Plaintiffs do not claim that Kleps had any self employment earned income in tax years 2002 and 2003. Therefore, Plaintiffs are not allowed a deduction for those payments made in 2002 and 2003.

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¹ All references to the Internal Revenue Code are to years 2002 and 2003. Any changes in a referenced statute for an applicable year will be noted.

The only issue before the court is whether the court has the authority to uphold the assessed deficiency. ORS 305.575² grants the court the authority to determine a tax deficiency, as follows:

“In an appeal to the Oregon Tax Court from an assessment made under ORS 305.265, the tax court has jurisdiction to determine the correct amount of deficiency, even if the amount so determined is greater or less than the amount of the assessment determined by the Department of Revenue, and even if determined upon grounds other or different from those asserted by the department, provided that claim for such additional tax on other or different grounds is asserted by the department before or at the hearing or any rehearing of the case before the tax court.”

In the case before the court, the amount of Defendant’s assessments has not changed from that stated on its Notices of Deficiency Assessment dated December 18, 2006, for tax year 2002 and June 26, 2007, for tax year 2003. Plaintiffs allege that Defendant’s “grounds” for making the assessment have shifted from lack of substantiation to an unallowable excess contribution. Assuming that the court agrees with Plaintiffs that Defendant’s grounds have changed, ORS 305.575 allows the court to determine the correct amount of the deficiency on “other or different grounds from those asserted by the department.” Because the parties agree and the court concurs that the applicable law, IRC section 404(a)(8), does not allow Plaintiffs to claim a deduction for the payments made to Kleps’s defined benefit plan, the court concludes that Defendant’s assessments for tax years 2002 and 2003 are correct.

III. CONCLUSION

Plaintiffs agree that the applicable tax law does not allow them to claim a deduction for Kleps’s cash contributions to his defined benefit plan. Oregon statutes allows the court to

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² Unless otherwise stated, all references to the Oregon Revised Statutes (ORS) are to 2005.

determine the correct amount of deficiency and, in this case, the court concludes that Defendant's assessments are correct. Now, therefore,

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

Dated this _____ day of November 2007.

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 November 20, 2007. The Court filed and entered this document on November 20, 2007.