

IN THE OREGON TAX COURT
REGULAR DIVISION
Personal Income Tax

JON HILL,)	
)	
Plaintiff,)	
)	TC 4589
v.)	
)	ORDER DISMISSING PLAINTIFF'S
DEPARTMENT OF REVENUE,)	COMPLAINT AND AWARDED
State of Oregon,)	FEEES AND DAMAGES TO
)	DEFENDANT
Defendant.)	

I. INTRODUCTION

Plaintiff (taxpayer) instituted this suit, challenging actions of defendant (the department) which denied credit against taxpayer's personal income tax liability for wage withholdings purportedly made by Allo Dental Inc. Taxpayer has attempted to dismiss his complaint. The department asserts that it is entitled to an award of damages under ORS 305.437 and an award of attorneys fees under ORS 20.105.¹

II. FACTS

Following the filing of taxpayer's complaint in the Magistrate Division, the department became aware of facts indicating taxpayer might have created certain documents to support his claim and tendered those documents to the department and this court. The department then served taxpayer with requests for admission, to which he interposed objections.

The requests for admission gave notice of the department's concern about questionable

¹All references to the Oregon Revised Statutes (ORS) are to 2001.

behavior by taxpayer, who has admitted to the court that he was the sole shareholder and controlling officer of Allo Dental, Inc. at all relevant time. On August 14, 2002, the department filed a motion with the Magistrate Division for leave to amend its answer so as to claim damages and attorney fees. A form of amended answer was attached to the motion. The amended answer was filed on August 14, 2002. That filing, done before action on the motion for leave to file, appears to be out of order.

On August 15, 2002, the department filed a motion for special designation of this matter to the Regular Division. One of the bases for the department's request was its plan to request letters rogatory to obtain certain information from a bank located in a foreign country, on which checks for payment of income tax withholding had purportedly been drawn. The department sought to avoid having to issue such letters twice, as might be required if special designation was not granted. The petition for special designation was granted.

On August 26, 2002, having never responded to the department's motion for leave to amend its answer, taxpayer tendered to this court a document entitled "Plaintiff Wishes to End Appeal." On August 30, 2002, the department objected to any dismissal of this matter, asserting that it had raised counterclaims under TCR 54A, which prevented unilateral dismissal by taxpayer.

This court continued in attempts to deal with the case. However, taxpayer then began a course of evasive conduct, which the court concludes constituted an attempt to avoid or evade this court's communications to him and this court's jurisdiction over him. In April 2003, taxpayer retained counsel through whom he continued to insist that his earlier attempts to dismiss his case had been successful. At a case management conference, in which taxpayer and

his counsel participated, taxpayer assured the court of his address for notice and undertook to promptly advise the court if that address changed.

A trial in this matter was scheduled for December 2, 2003. On October 23, 2003, counsel for taxpayer filed notice of intent to withdraw from his representation of taxpayer. The scheduled trial occurred, although neither taxpayer nor any representative appeared.

At the trial, the department introduced substantial evidence that documents tendered to it and this court by taxpayer were not genuine. In particular, “checks” which were supposedly used to make income tax withholding payments by Allo Dental Inc. were purportedly drawn on a foreign bank which does not provide checking accounts to its customers. These “checks” were signed by the taxpayer. He tendered them to the department and this court as evidence that withholdings had been paid to the department for which he should receive credit in the determination of his personal income tax liability. Further, plaintiff tendered letters to the department and this court that purported to be from a representative of the foreign bank, confirming payment by the bank of those checks. That representative, a credible witness, testified she never wrote such letters.

In the course of this matter the taxpayer has filed objections to requests for admission that were relevant to the question of ORS 304.437 damages as well as underlying tax liability. Taxpayer’s objections were found to be insufficient. The court also finds there to be substantial evidence that he wrongfully attempted to avoid service of court communications.

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III. ISSUES

Is taxpayer liable for damages under ORS 305.437 and attorney fees under ORS 20.105 and the rules of court?

IV. ANALYSIS

Whether his attempt to dismiss his case was or was not completed before the department asserted counterclaims in this matter, taxpayer cannot escape potential responsibility for payment of damages and fees. This is so because even where a matter is dismissed pursuant to TCR 54A(1), any judgment of dismissal “may include any costs and disbursements, including attorney fees, provided by rule or statute.” TCR 54A(3).

The relevant statutes permit an award of damages and fees where the taxpayer’s position is frivolous or groundless and the department is the prevailing party. These statutory provisions would survive a successful motion to dismiss. The court concludes that in this matter the department is the prevailing party. Prior to or at the time of his attempt to dismiss, taxpayer paid to the department all tax amounts the department asserted to be due.² A position is frivolous where there is no “objectively reasonable basis for asserting the position.” ORS 305.437(2). Taxpayer’s position was that he had no tax liability, and indeed had a right to a refund for the years at issue. The court finds that taxpayer’s position was based on documents he created or caused to be created and which he submitted to the department and this court when he knew that they were not genuine. Such a position does not have an objectively reasonable basis and is groundless.

²Initially the department appears to have proceeded against taxpayer both with respect to his individual income tax liability and on the basis that he was an officer of Allo Dental Inc. with responsibility for its failure to properly withhold funds. At this point taxpayer has conceded any claim to a refund for tax amounts he has paid and the only items remaining in contention are damages and fees.

TCR 45C provides for an award of reasonable expenses to a party that has had to request the court to compel discovery. The department requested an award of fees and taxpayer had, but failed to participate in, an opportunity to be heard on the matter. Taxpayers attempt to dismiss his case does not vitiate the rights of the department.

V. CONCLUSION

The department is entitled to damages under ORS 305.437 in the amount of \$5,000 and is entitled to recover attorneys fees in this matter under ORS 20.105. The award of attorneys fees shall also include attorney fees incurred in connection with taxpayer's failure to comply with discovery requests.

IT IS ORDERED that Plaintiff's Complaint is dismissed, and

IT IS FURTHER ORDERED that the Department of Revenue is awarded damages in the amount of \$5,000, and

IT IS FURTHER ORDERED that the Department of Revenue is awarded its reasonable attorney fees.

Dated this ____ day of June, 2004.

Henry C. Breithaupt
Judge

THIS DOCUMENT WAS SIGNED BY JUDGE HENRY C. BREITHAUPT ON JUNE 30, 2004, AND FILE STAMPED ON JUNE 30, 2004. THIS IS A PUBLISHED DOCUMENT.

ORDER DISMISSING PLAINTIFF'S COMPLAINT AND AWARING FEES AND DAMAGES TO DEFENDANT