

BEFORE THE TAX COMMISSION OF THE STATE OF IDAHO

In the Matter of the Protest of)	
)	DOCKET NO. [Redacted]
[REDACTED])	
)	DECISION
Petitioners.)	
_____)	

[Redacted] (petitioners) protest the Notice of Deficiency Determination issued by the auditor for the Idaho State Tax Commission (Commission) dated April 4, 2006. The notice of deficiency determination asserted additional Idaho income tax and interest in the total amounts of \$5,350, \$5,412, \$4,883, and \$4,729 for 2001, 2002, 2003, and 2004, respectively, less refunds which had been requested by the petitioners, but not paid by the Commission.

PROCEDURAL BACKGROUND AND STATEMENT OF FACTS

The petitioners were residents of [Redacted]. [Redacted] was employed by [Redacted] as a [Redacted]. As part of his duties, he supervised operations in [Redacted] and [Redacted], Idaho, and in [Redacted]. He [Redacted] about [Redacted] employees. [Redacted] stated¹ that he had “responsibilities of [Redacted].” He further stated that “I [Redacted] each day and also [Redacted] with these employees.” He had responsibilities for a considerable portion of the safety training for his employees. [Redacted] performed duties in both [Redacted] and [Redacted].

ISSUES

The first question to be resolved is whether [Redacted] wages earned in Idaho are exempt from the Idaho income tax under Public Law 101-322, the [Redacted] and Improvement Act of 1990. The petitioners contend that the wages are exempt. The auditor determined that the wages, to the extent earned in Idaho, were subject to the Idaho income tax.

¹ Letter from [Redacted] received June 5, 2006

The second issue must be decided if the determination regarding the first issue is that the income is taxable by the state of Idaho. This is whether the auditor properly determined the proportion of the income which was from an Idaho source.

ANALYSIS

The [Redacted] and Improvement Act of 1990 stated, in pertinent part:

(1) In general.—No part of the compensation paid by a motor carrier providing transportation subject to jurisdiction under subchapter 1 of chapter 135 or 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 or subdivision of that State, other than the State or subdivision thereof of the employee's residence.

(2) Employee defined. – In this subsection, the term “employee” has the meaning given such term in section 31132.

49 USC 14503(a)(1).

A threshold question for qualification under the [Redacted] Act is whether the taxpayer provided regularly assigned services in more than one state. It is apparent from the record that the petitioner provided services in more than one state. Whether the services were “regularly scheduled” is not so clear. A person must also be an “employee” as defined in 49 USC 31132. The definition of “employee” in 49 USC 31132 states the following:

(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 –

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

(B) is not an employee of the United States Government, a State, or

a political subdivision of a State acting in the course of the employment by the Government, a State, or a political subdivision of a State. (Italics added.)

49 USC 31132(2).

[Redacted] stated that he feels that he qualified for the exemption due to his providing services in two or more states ([Redacted]) and that he is an employee that “directly affects [Redacted] in the course of employment.” He has a “[Redacted]” designation from his employer and as such does a number of “[Redacted]” with the employees of [Redacted]. He did not provide argument or documentation to establish that he qualified as an “employee” on any other basis than as “an individual . . . who . . . directly affects [Redacted] in the course of employment.” The petitioners rely on Department of Revenue v. Hughes, 15 Or. Tax 316 (2001).

The staff of the Commission invited the petitioners to submit additional documentation to establish that [Redacted] might qualify as an employee by being an operator. However, the petitioners have not submitted this documentation.

The definition of “employee” set out above makes it clear that if one is an “employer” he cannot come within the definition of “employee” for the purpose of qualifying for the exemption as one who “directly affects [Redacted].” “Employer” is defined as:

(3) “employer” –

(A) means a person engaged in the business affecting interstate commerce that owns or leases a commercial motor vehicle in connection with that business, *or assigns an employee to operate it*; but

(B) does not include the Government, a State, or a political subdivision of a State. (Italics added.)

49 USC 31132(3).

[Redacted] has clearly stated that he “assign[s] [Redacted] each day.” As such, he was an “employer” for the limited purpose of 49 USC 14503². Jensen v. Department of Revenue, 13 Or. Tax 296 (1995), *aff’d*, 323 Or 70; Ryan v. Department of Revenue, 2001 WL 454899 (Or. Tax Magistrate Div.).

In the Hughes case cited by the petitioners, the taxpayer was a mechanic that supervised six other mechanics. About 50 percent of the time, Mr. Hughes was personally doing mechanical work on the vehicles for his employer. The remainder of the time, he was attending to his management duties. The Commission finds the Hughes case distinguishable. The Court in Hughes stated, in part:

Based on the evidence submitted, the court finds that taxpayer performs safety inspections, minor repairs, and adjustments at his assigned out-of-state terminals as part of his regularly assigned duties. Taxpayer’s supervisory training does not qualify as directly affecting safety under the statute and therefore the number of days spent outside the state would be closer to 10 than 18.

*

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In summary, the court finds that taxpayer’s regularly assigned duties as a working supervisor cause him to directly affect commercial motor vehicle safety. Further, the court finds that taxpayer performs those regularly assigned duties in two or more states. Therefore, the state of Oregon may not impose its income taxes on income earned by taxpayer in Oregon during the years 1995, 1996, and 1997.

Hughes, *supra* at 302-321.

The Court appears to find that the hands-on portion of Mr. Hughes’ work qualified as directly affecting safety, while his supervisory duties did not. This would appear to distinguish the Hughes case from the case at hand. This concept is further enforced by language in the Jensen decision:

The words used in the definitions of employee and employer suggests that Congress intended to distinguish between those who do

² Because the Commission’s finding that [Redacted] is an employer within the meaning of the [Redacted] Act is dispositive of this argument, it need not determine whether he directly [Redacted] in the course of his employment.

and those who delegate. The described employees: i.e., operators, mechanics, and freight handlers, all identify positions which require hands on work. Logically, the open ended category of employees who "directly affect" vehicle safety also suggests positions which require the use of hands in performing their duties. Employees in this category would be performing such tasks as repairing tires, fueling vehicles, servicing vehicles, inspecting vehicles for safety, etc.

On the other hand, there are those who delegate, such as managers, supervisors, and consultants. All such positions may have an impact on safety, but they do not directly affect the operation of a commercial motor vehicle in the sense intended by the statute. The statute limits "directly affects" to employees whose daily routine and duty has them moving, touching, or affecting a commercial motor vehicle or its contents. It is these employees who are at risk of injury if the commercial motor vehicle is improperly operated, loaded, repaired or maintained. If brakes fail, a tire explodes, or a driver loses control because the load shifts, it is the hands on employees who are at risk. Supervisors, managers and other employees are less likely to be injured or have their health impaired by failure to comply with the safety regulations.

Jensen, *supra* at 301.

There is some evidence in the record that indicates that [Redacted] the [Redacted] both in [Redacted] and in [Redacted]. He [Redacted] to do [Redacted]. [Redacted] submitted an e-mailed letter on behalf of the petitioners stating that, "In his centers [Redacted] does some of the [Redacted] for all drivers." He also stated that, "[Redacted] also performs [Redacted] in both [Redacted] and [Redacted]." ³

Is there enough evidence in the file to indicate that [Redacted] had "regularly assigned duties in 2 or more States" . . . as "an [Redacted]," thereby qualifying for the exemption? During the informal conference, inquiry was made of [Redacted] as to the number of days (or hours) during which he drove [Redacted]. The petitioners have failed to present information to establish this fact.

For several reasons, the Commission finds that [Redacted] does not qualify as an [Redacted]. First, the failure of the petitioners to come forward with objective evidence to establish

³ E-mail dated August 4, 2006

the time during which [Redacted] was [Redacted] must be weighed against them. [Redacted] would apparently have access to the pertinent information. The absence of this information may infer such evidence, if presented, would not have been favorable to the petitioners. McKay v. Commissioner, 89 T.C. 1063, 1069 (1987), affd. 886 F.2d 1237 (9th Cir. 1989); Wichita Terminal Elevator Co. v. Commissioner, 6 T.C. 1158, 1165 (1946), affd. 162 F.2d 513 (10th Cir. 1947).

The Oregon Tax Court addressed another perspective regarding the applicable provision in the statute regarding an [Redacted]. The Court stated the following:

From another perspective, it is unlikely that Congress intended to impose a duty on an employee who cannot comply with the law. A supervisor may instruct a driver on safe driving but only the driver can actually control the operation of the vehicle. If a driver operates a vehicle unsafely, it is the driver who is at risk and it is the driver who directly affects that safety.

This perspective is consistent with the language used in § 11504(b)(1), which extends the tax benefit to an employee who performs regularly-assigned duties “with respect to *a* motor vehicle.” (Emphasis in original.) This wording suggests a direct one-on-one relationship between the employee and a motor vehicle. That is, an employee does something with respect to a vehicle which directly affects safety relative to that vehicle.

It is noteworthy that this is the one consistent theme between separate chapters in separate subtitles with different purposes. Both § 11504(b)(1) and § 31132 are consistent in requiring an employee to have a direct, hands on relationship with a motor vehicle. While a supervisor may be responsible for vehicles, and the supervisor's work may have a significant impact upon safety, that impact is not direct, but is implemented through others.

Authority is not the issue. A Group Operations Manager may have authority to order drug tests, remove vehicles and in other ways significantly affect the safe operations of the company. However, this is undoubtedly true of the chief executive officer and many vice presidents and managers. If all managers and supervisors whose decisions affected safety were deemed to be an employee who "directly affects" safety, that phrase would be almost meaningless.

The Group Operations Manager's regularly assigned duties may require performance of duties in two or more states, but it is not with respect to a vehicle. The manager's concerns are large in scope, and his duties require him to communicate with all levels of personnel. He is not in the same category as employees who regularly repair brakes, secure freight and drive the vehicles. It is the health and safety of these types of employees that Congress intended to protect in § 31132. Consequently, it is the same limited group to whom Congress extended the benefits of § 11504(b)(1). Accordingly, the court finds that Taxpayer is not an employee within the meaning of § 31132.

Jensen, *supra* at 301-302.

It would appear that any relationship that [Redacted] would have had with the commercial motor vehicles would not have been with “a” vehicle but would have been more or less with the [Redacted] of vehicles.

The next issue to be addressed is the computation of the proportion of the income earned by [Redacted] which should be taxable by Idaho. The auditor determined this proportion by dividing the number of working days in Idaho divided by the total working days. The petitioners wish to increase the denominator of this fraction by including sick days and days which were holidays, vacation days, and funeral days. They cite no authority to support this position.

The auditor cited Idaho Administrative Rule 270 as authority for his position. It stated:

IDAHO COMPENSATION -- IN GENERAL (Rule 270).

Section 63-3026A(3). (4-5-00)

01. In General. If an individual performs personal services, either as an employee, agent, independent contractor or otherwise, both within and without Idaho, the portion of his total compensation that constitutes Idaho source income is determined by multiplying that total compensation by the Idaho compensation percentage.

(3-20-97)

02. Definitions. (3-20-97)

a. The Idaho compensation percentage is the percentage computed by dividing Idaho work days by total work days. (3-20-97)

b. The term Idaho work days means the total number of days the taxpayer provided personal services in Idaho for a particular employer or principal during the calendar year. (3-20-97)

c. Total work days means the total number of days the taxpayer provided personal services for that employer or principal both within and without Idaho during the calendar year. For example, a taxpayer working a five (5) day work week may assume total work days of two hundred sixty (260) less any vacation, holidays, sick leave days and other days off. (3-20-97)

d. Total compensation means all salary, wages, commissions, contract payments, and other compensation for services, including sick leave pay, holiday pay and vacation pay, that is taxable pursuant to the Idaho Income Tax Act if earned by a resident of Idaho. (3-20-97)

It appears that Rule 270 directly addresses the situation at issue and that it is controlling in this matter. See also Hamilton v. Idaho State Tax Commission, 119 Idaho 552 (1991). The Commission finds that the auditor's computation follows the formula prescribed by Rule 270.

CONCLUSION

The petitioners urge the Commission to find that [Redacted] was "an individual . . . who . . . directly affects [Redacted] in the course of employment." However, it is clear from [Redacted] letters that he [Redacted] to [Redacted]. Therefore, the Commission finds that he is an "employer" under the applicable statutes and, therefore, did not qualify as an "employee." Accordingly, the Commission finds that [Redacted] does not qualify for the exemption on this basis. The Commission further finds that there is inadequate information in the file to support a finding that [Redacted] would qualify for the exemption on any other basis. Therefore, the petitioners' income from Idaho sources is taxable by the state of Idaho.

The auditor prorated the income between [Redacted] and [Redacted] based upon records supplied to the auditor by the petitioners. The petitioners initially challenged this computation by the auditor. It is not clear whether they still contend that the auditor's computation was incorrect. Following the discussion above, the Commission finds no reason to disturb the proration computed by the auditor.

WHEREFORE, the Notice of Deficiency Determination dated April 4, 2006, is hereby APPROVED, AFFIRMED, and MADE FINAL.

IT IS ORDERED and THIS DOES ORDER that the petitioners pay the following tax and interest (calculated to January 15, 2007):

<u>YEAR</u>	<u>TAX</u>	<u>INTEREST</u>	<u>TOTAL</u>
2001	\$ 309	\$ 87	\$ 396
2002	921	201	1,122
2003	1,716	284	2,000
2004	4,426	467	<u>4,893</u>
			<u>\$8,411</u>

DEMAND for immediate payment of the foregoing amount is hereby made and given.

An explanation of the taxpayers' right to appeal this decision is included with this decision.

DATED this _____ day of _____, 2006.

IDAHO STATE TAX COMMISSION

COMMISSIONER

CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of _____, 2006, a copy of the within and foregoing DECISION was served by sending the same by United States mail, postage prepaid, in an envelope addressed to:

[Redacted]

Receipt No.
