IN THE SUPREME COURT OF THE STATE OF OREGON

STUART ETTER,

Plaintiff–Appellant,

v.

DEPARTMENT OF REVENUE, STATE OF OREGON,

Defendant–Respondent.

Tax Court No. 5027

Supreme Court No. S063061

APPELLANT'S CORRECTED REPLY BRIEF

Appeal from the Judgment of the Oregon Tax Court
The Honorable Henry C. Breithaupt, Judge

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November 2015

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APPELLANT'S REPLY BRIEF

INTRODUCTION

This case presents a question concerning the proper application of a federal statute that pre-empts multi-state taxation of income earned by air carrier employees who perform assigned duties in the course of interstate commerce. 49 USC § 40116(f)(2000). This court's construction of the statute will affect state taxation of income earned by flight deck crew members, flight cabin crew members, aircraft dispatchers, airline security personnel, and others on a national scale.

The question studied by Congress throughout the 1960s was whether multi-state taxation of income earned by interstate transportation workers, including air carrier employees, constituted an unreasonable burden on interstate commerce, which it answered in the affirmative when it enacted Pub L 91-569, 84 Stat 1499 (1970) and subsequently broadened in Pub L 96-193, 94 Stat 50 (1980).

Congress provided a broad description of the air carrier employees for whom relief from multi-state taxation was intended in the preemption clause of the statute. 49 USC § 40116(f)(2). The preemption clause describes employees who are assigned duties that create circumstances where multi-state taxation of

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income occur on a regular and ongoing basis. Employees who were assigned duties that created circumstances where multi-state taxation of income occurred on an irregular or isolated basis were excluded from the relief provided by Congress.

Congress did not structure the statute's text in a manner that suggests one of the factors to be considered when determining if an employee is eligible for relief from multi-state taxation was whether an assigned task is performed on a frequent basis. The text and structure of the statute does indicate that Congress was concerned with the performance of employment duties that created consistent, ongoing burdens on interstate commerce, not whether an assigned task was performed on a regular basis as suggested by Defendant and as determined by Tax Court.

Proper construction of the statute does not turn on whether an assigned duty was performed on a frequent basis. In fact, there is no language in the text of the statute to suggest that an assigned duty must be performed for some minimal time period to qualify for preemption of state law. Proper construction of the statute does turn on whether the burdens of multi-state taxation on interstate commerce due to the performance of an assigned duty are present on a regular and ongoing basis.

In the case of aircraft dispatchers, a dispatcher's employer is required by

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the Federal Aviation Administration, as a condition to maintain its operating certificate, to assign its aircraft dispatch employees with the duty of flight deck observations not less than once during any 12 month period. Absent the pre-emptive effect of 49 USC § 40116(f), the Federal Aviation Administration's mandatory requirement creates a situation where the employee and his employer are subject to the withholding, payment, and reporting requirements of each jurisdiction where flight operations terminate during each flight deck familiarization flight.

FIRST REPLY ARGUMENT

1.

A. *The presumption against preemption does not apply in the construction of 49 USC § 40116(f).*

Defendant states that "federal law requires this court to narrowly construe any federal exemptions preempting a state's power to tax to avoid creating an exemption from state taxation that Congress did not express clearly." Resp't Br at 7. Defendant's statement of federal law is incorrect. The test for applying the presumption against preemption is whether the intent to preempt state law is clear. Where Congressional intent to preempt state law is clear, the presumption against preemption is not applied and the statute is subject to fair interpretation.

The preemption clause set forth in 49 USC § 40116(f)(2) states with clarity that the pay of an employee … shall only be subject to the income tax

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laws of [the jurisdictions identified in the savings clause set forth in 49 USC § 40116(f)(2)(A) and 49 USC § 40116(f)(2)(B)]. The text of the preemption clause in 49 USC § 40116(f) expressly states Congress' intent to preempt state law and eliminates any need for resort to the presumption against preemption.

B. *Defendant's assertions that annual flight deck operation observations are required to maintain the flight dispatcher's certification are incorrect. Resp't Br at 1, 3, 6, 8.*

The Federal Aviation Administration provides no further certification requirements after initial certification for flight dispatchers. The Federal Aviation Administration does require, as a condition of the air carrier's operating certificate, that air carriers staff their dispatch centers with qualified aircraft dispatchers, which includes a requirement that aircraft dispatchers employed by an air carrier be required to engage in flight deck operation observations on an annual basis. 14 CFR § 121.463(a)(2). In the event that an air carrier fails to assign flight deck operation observations to an aircraft dispatcher on an annual basis, the air carrier is prohibited from using the aircraft dispatcher in its dispatch center.

C. *Defendant's assertions that are not assigned because the aircraft dispatcher selects the flight for flight deck operation observation is incorrect. Resp't Br at 8.*

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Defendant's assertion that plaintiff has the authority to select any flight to fulfill his assigned duty is misplaced. Plaintiff's employer has the authority to assign flight deck operation observations at its discretion and is required to assign certain routes on the basis of a rotation set forth in its Dispatcher Training and Qualification Manual (See: App Br App-10) as required by the Federal Aviation Administration's Aircraft Dispatcher Training and Qualification Programs (See: App Br App-5).

D. *Defendant's argument asserting that "the key phrase in 49 USC § 40116(f)(2) … supports the Tax Courts holding and undercuts taxpayer's argument" fails to consider the structure of the preemption clause and indirectly asks this court to construe the statute in a manner that effectively re-writes the statute's text.* Resp't Br at 7.

The text of the preemption clause set forth in 49 USC § 40116(f)(2) is: "The pay of an employee of an air carrier having regularly assigned duties on aircraft in at least 2 States …". In this section of the clause, the word "regularly" modifies the verb "having", it does not modify the words "assigned duties". While this distinction may seem semantical, identification of the correct word or words modified by the word "regularly" alters the meaning of the phrase in question.

If the word "regularly" modifies the words "assigned duties" as

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suggested by the Tax Court and defendant, the phrase could be read as follows: assigned duties that are performed on a regular basis. If Congress had structured the phrase in a fashion where the word "regularly" modified the words "assigned duties", Congress would have created a limiting factor within the description of employees entitled to relief from multi-state taxation.

However, if the word "regularly" is read as modifying the verb "having", as it does, the definitions for the words "having" *(Webster's Third New International Dictionary* 1039 p 6(b) (unabridged ed. 2002)) and "regularly" (*Webster's Third New International Dictionary* 1913 p 3(b)(1) (unabridged ed. 2002)) can be substituted into the phrase as follows: … an employee of an air carrier performing duties assigned at uniform intervals on aircraft … . This reading provides an accurate description of the employees and employers Congress was concerned for and is consistent with Congress' intent as stated in S Rep 91-1261 at 1, 91st Cong. 2d Sess (1970) and HR Rep 91-1195 at 3-4, 91st Cong. 2d Sess (1970), relief of the burden on interstate commerce cause by multi-state taxation.

2.

SECOND REPLY ARGUMENT

Defendant states in its second argument that "even if he met the threshold requirement for 49 USC § 40116(f) to apply to him, his pay from Horizon for 200 would be subject to Oregon income tax because he earned

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more than 50 percent of that pay in Oregon." Resp't Br at 11. Defendant misstates defendant's position. The correct statement of defendant's position is that if defendant met the threshold requirement for 49 USC § 40116(f) to apply to him, his pay from Horizon for 2000 would not be subject to Oregon income tax merely because he earned more than 50 percent of that pay in Oregon.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that this court reverse the judgment of the Tax Court and holds that Plaintiff is a member of the class of employees described in the preemption clause of 49 USC § 40116(f)(2) and that the savings clause set forth in 49 USC § 40116(f)(2)(B) precludes defendant from imposing Oregon's income tax on the pay plaintiff receives from his employer, Horizon Air.

DATED: November 17, 2015

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CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

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I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by OARP 5.05(4)(g).

DATED: November 17, 2015

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CERTIFICATE OF SERVICE

I certify that I served the forgoing **APPELLANT'S CORRECTED REPLY BRIEF** on the 17th day of November, 2015, to the following person at the address set forth below.

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DATED: November 17, 2015

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CERTIFICATE OF FILING

I certify that I filed the foregoing **APPELLANT'S CORRECTED REPLY BRIEF** on November 17, 2015, with the Appellate Court Administrator at the following address:

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