IN THE SUPREME COURT OF THE STATE OF OREGON

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| STUART ETTER,<br><br>Plaintiff-Appellant,<br><br>v.<br><br>DEPARTMENT OF REVENUE, State of Oregon,<br><br>Defendant-Respondent. | Tax Court Case No. 5027<br><br><br><br>SC S063061 |

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# RESPONDENT'S ANSWERING BRIEF

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

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# RESPONDENT'S ANSWERING BRIEF

## INTRODUCTION

This case is about whether an airline employee who performs all of his duties on the ground in Portland, Oregon, is exempt from Oregon income tax under a federal statute that applies to airline employees who have "regularly assigned duties on aircraft in at least 2 states." Taxpayer was never assigned by his employer, regularly or otherwise, duties on aircraft. He flies on an airplane for five to ten hours per year solely to maintain his qualifications to be an aircraft dispatcher, but he chooses which flights to take. Because his employer does not assign him to any flight, the federal statute is inapplicable to him.

## STATEMENT OF THE CASE

The Department of Revenue (the department) accepts Appellant Stuart Etter's (taxpayer's) statement of the case except as restated below.

### Question Presented

Does 49 USC § 40116(f), which provides that income of airline employees who have "regularly assigned duties on aircraft in at least 2 states," apply to an aircraft dispatcher whose regular duties are on the ground and who

flies on aircraft of his choosing for five to ten hours each year in order to maintain his certification to be an aircraft dispatcher?[1]

**Summary of Argument**

At issue is whether 49 USC § 40116(f), which restricts the states that may tax the income of an employee of an air carrier who has "regularly assigned duties on aircraft in 2 or more states," applies to taxpayer. By its plain terms, that statute is not applicable. Taxpayer is an aircraft dispatcher who performs all of his duties as a dispatcher on the ground, not on aircraft. To maintain his certification to be an aircraft dispatcher, taxpayer on one or two days per year takes flights to observe flight deck operations. Those flights are not part of his regularly assigned duties, nor is he assigned to any aircraft by his employer. And in any event, even if he met that threshold requirement, taxpayer still would be subject to Oregon income tax because he earns more than 50 percent of his pay in Oregon.

**Statement of Facts**

The facts material to this appeal are undisputed and are set forth in the Tax Court's decision, the parties' Stipulation of Facts, and taxpayer's declaration submitted to the Tax Court. Taxpayer was a resident of the State of

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[1] 49 USC § 40116(f) is reproduced in the Appendix. It is customary in tax cases to cite statutes and rules in effect as of the tax year at issue. Unless indicated otherwise, all statutes and rules cited herein are unchanged since the tax year at issue in this case.

Washington during the year at issue, 2000. (ER 13).[2] He was employed by Horizon Air Industries ("Horizon") as an aircraft dispatcher at its Portland, Oregon, operations center. (ER 14, 15). Taxpayer's regular duties were to plan and monitor flights from Horizon's Portland operations center. (ER 15).

Horizon required its dispatchers to be qualified in accordance with Federal Aviation Administration ("FAA") regulations. One qualification requirement for aircraft dispatchers is to observe flight deck operations either on a flight simulator or on board aircraft. Horizon did not have a flight simulator. (ER 15). To fulfill the requirement, taxpayer selected a flight that operated in air space over Oregon and three other states. (ER 9).

During the year at issue, taxpayer's Oregon source income exceeded 50 percent of his total pay. (ER 14). Taxpayer received his customary pay when he took the flight for purposes of meeting his qualification requirement. (ER 8-9).

## ANSWER TO ASSIGNMENT OF ERROR

The tax court correctly granted the department's Motion for Summary Judgment and denied taxpayer's Partial Motion for Summary Judgment.

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[2] In its General Judgment, the Tax Court denied taxpayer's requests for refunds for tax years 2000, 2001 and 2003, explaining that taxpayer did not oppose the department's motion to dismiss taxpayer's claims as to 2001 and 2003, leaving only 2000 in dispute. (ER 23).

**Preservation of Error**

The department agrees that taxpayer preserved his arguments in support of his assignment of error.[3]

**Standard of Review**

This court reviews decisions of the tax court for "errors or questions of law or lack of substantial evidence in the record to support the tax court's decision." ORS 304.445. On review of a decision granting a motion for summary judgment, this court determines whether the court correctly concluded that there is no genuine issue of material fact and that the moving party was entitled to judgment as a matter of law. *Bresee Homes, Inc. v. Farmers Ins. Exchange*, 353 Or 112, 114, 293 P3d 1036 (2012).[4]

**ARGUMENT**

Taxpayer seeks to avoid payment of Oregon income tax based on a federal statute that limits the ability of states to tax the income of certain airline

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[3] Taxpayer quotes only from his motion for partial summary judgment. (App Br at 18). Although taxpayer does not direct the court to his preservation of his opposition to the department's motion for summary judgment, taxpayer did oppose that motion. (*See* Tr 102). Taxpayer's assignment of error refers only to the court's rulings on the motions and does not "identify precisely the legal ruling * * * that is being challenged." *See* ORAP 5.45(3). The Tax Court's decision indicates that taxpayer made and preserved arguments regarding the court's ruling that 49 USC § 40116(f) is inapplicable to taxpayer. (*See* ER 13).

[4] This standard is in accordance with ORCP 47. In all material respects, TCR 47 is identical to ORCP 47.

employees.[5] The federal statute exempts from Oregon taxation the income of certain employees of air carriers who are not residents of Oregon and earn less than 50 percent of their pay in Oregon. 49 USC § 40116(f)(2). As explained below, taxpayer's argument fails for either of two reasons. First, because taxpayer has no regularly assigned duties on aircraft, let alone on aircraft that operate in at least two states, he does not meet the threshold requirement of the statute that the employee must have "regularly assigned duties on aircraft in at least 2 states." 49 USC § 40116(f)(2). Second, even if he met that threshold requirement, taxpayer still would be subject to Oregon income tax because he earns more than 50 percent of his pay in Oregon.

**A. Taxpayer has no "regularly assigned duties on aircraft in at least 2 states."**

The Tax Court correctly rejected taxpayer's argument that he has "regularly assigned duties on aircraft in at least 2 states." The Tax Court focused on 49 USC § 40116(f)(1)(C) and (3)(B), both of which refer to "flight time" that is scheduled over a full calendar year, in contrast to "duties" that are "regularly assigned." The court explained that limited and episodic activities, such as the flights taxpayer asserts bring him under the federal statute, even if

[5] In general, an individual's income earned in Oregon is subject to taxation under ORS 316.037 (1999).

considered "duties," fail to establish that taxpayer had regularly assigned duties on aircraft. The court observed that:

> "[E]ven if a person is assigned to a flight for purposes of obtaining qualifications that the employer finds important and that such flights are considered 'duties,' it would be illogical to combine a very limited number of episodic activities (in this case two days a year)[6] with the remainder of the taxpayer's regular duties throughout the year in order to express what a taxpayer's 'full time' activities were for a year."

(ER 17-18).

This led the court to conclude that the phrase "regularly assigned duties" equates to duties that are "scheduled" to occur throughout a calendar year and that taxpayer's regularly assigned duties over a calendar year "were to perform dispatching functions on the ground in Portland, Oregon." (ER 19). The court held that the federal statute "only applies to members of an airplane crew of an air carrier who fly on a scheduled basis." (ER 21).

Taxpayer's argument to the contrary is without merit. Taxpayer argues that he is assigned by his employer to fly on an airplane for up to 10 hours per year, App Br at 10, to observe flight deck operations as necessary to maintain his FAA certification to be an aircraft dispatcher, a job he performs entirely on

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[6] The court's reference to "two days a year" is at odds with taxpayer's declaration that he selected a single flight to fulfill his qualification requirements. (ER 9).

the ground in Portland. Taxpayer contends that such flights constitute "regularly assigned dut[ies]" within the meaning of the federal statute.

Because this case turns on the application of 49 USC § 40116(f), federal law governs. *Julian v. Dept. of Rev.*, 339 Or 232, 235, 118 P3d 798 (2005). 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. Id. (citing cases). The starting point for discerning Congressional intent is the statutory text and, when the statute's language is plain, the court's sole function is to enforce the statute according to its terms. *Lamie v. United States Trustee*, 540 US 526, 534, 124 S Ct 1023, 157 L Ed 2d 1024 (2004).[7]

Construction of the key phrase in 49 USC § 40116(f)(2), "regularly assigned duties on aircraft in at least 2 states," supports the Tax Court's holding and undercuts taxpayer's argument. A duty is an "obligatory task." *Webster's Third New International Dictionary*, 705 (unabridged ed 1993).[8] "Regularly"

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[7] The court in *Lamie* nevertheless looked at legislative history. 540 US at 539. The Tax Court reviewed the legislative history of 49 USC § 40116(f). That history shows that the intent of the statute is to eliminate a burden on interstate commerce that would arise if the employers of commercial flight crews had to withhold income tax for their employees in all states traversed by the flights. (ER 19-21). Taxpayer is not on a commercial flight crew. His regular duties are performed on the ground in Oregon.

[8] 49 USC § 40116 was last amended in 1996.

means "a regular, orderly, lawful or methodical way," and "regular," as applicable here, means "steady or uniform in course, practice or occurrence: not subject to unexplained or irrational variation : steadily pursued." *Id*. at 1913. "Assigned" is the past tense of "assign," which means "to appoint one to a post or duty" or "prescribe" as in "carbines are ~ed for guard duty" or "the teacher ~ed the next 20 pages of the text" *Id*. at 132.

Taxpayer's qualification flight or flights, taken on one or two days per year, are neither "regular" nor "assigned." His job description, which lists "Duties and Responsibilities," says nothing about flying on aircraft. (ER 10-11). There is no evidence in the record to support that the flight or flights must be taken in any uniform manner other than that they must be taken as often as needed for him to maintain his certification. Even if such "limited and episodic flights" (ER 17) may be considered regular in any sense, taxpayer was not assigned by his employer to any flight.

Taxpayer chose the flight he wanted to take, and he chose one that traversed the air space of Oregon and three other states. (ER 9). Taxpayer could have chosen a flight that operated wholly within Oregon air space, and if Horizon had a flight simulator he would not have had to fly at all. In any event, he chose a flight that would be sufficient to maintain his certification to perform his regularly assigned duties, and those duties do not involve flights on aircraft,

let alone on aircraft in at least two states. His regularly assigned duties are wholly in Portland, Oregon, on the ground.

**B. Even if the flight taken by taxpayer was a regularly assigned duty, he is subject to Oregon tax because he earned more than 50 percent of his pay in Oregon.**

For the reasons just explained, taxpayer cannot satisfy the "regularly assigned duties" threshold. But even if he could, he still could not overcome the undisputed evidence that, except to the extent that the flight he took to meet his certification requirement was partially outside of Oregon, he performed all of his duties during 2000, the tax year at issue, in Oregon. A person who has regularly assigned duties on aircraft in two or more states is subject to income tax in the state "in which the employee earns more than 50 percent of the pay received by the employee from the carrier." 49 USC § 40116(f)(2)(B).[9] Because, in the light most favorable to taxpayer, he spent at most 10 hours or two days on aircraft (App Br at 10; ER 19), he earned far more than 50 percent of his pay while performing his regular duties on the ground in Oregon. Consequently, even if his short time on an aircraft was a regularly assigned duty, he is subject to Oregon taxation pursuant to 49 USC § 40116(f)(2)(B).

Taxpayer's relies on a memorandum written by an FAA Assistant Chief Counsel to support his argument that his short time on aircraft was a regularly

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[9] "Pay" is defined as "money received by an employee for services." 49 USC § 40116(f)(1)(A).

assigned duty. But that memorandum concludes only that time spent by a dispatcher on "training events and familiarization flights" is considered "duty time" for purposes of 14 CFR § 121.465 App Br at App-13.[10] That regulation addresses duty-hour limitations applicable to aircraft dispatchers. Those limitations include, for example, that an aircraft dispatcher cannot work for more than 10 hours in a 24 hour period unless there is a rest period of at least eight hours at or before the end of the 10 hours of duty. 14 CFR § 121.465(b)(2).

The Assistant Chief Counsel's memorandum addresses only whether time spent by aircraft dispatchers on training and familiarization flights count against the duty-time limitations applicable to those employees. His memorandum does not address whether time spent on training and familiarization flights are "regularly assigned duties on aircraft in at least 2 states" or any other aspect of 49 USC § 40116(f).

In an attempt to evade the plain language of 49 USC § 40116(f), taxpayer searches for ambiguity in the word "earns" in subparagraph (2)(B). He argues that it is unclear whether "'earned' applies to the gross pay of the employee or only to pay earned while performing assigned duties on an aircraft." App Br at

[10] By an order dated August 20, 2015, this court granted taxpayer's motion to take judicial notice of this letter.

30.[11] Taxpayer urges the court to adopt the latter reading; in his view, if more than 50 percent of the ten hours or less he spends on aircraft each year to maintain his certification is spent in or over at least one other state, then all of his income for that year is exempt from Oregon income tax. App Br at 32. Taxpayer's proposed reading is contrary to the statute's plain text and flies in the face of common sense.

There is no ambiguity because the statute refers to "pay received by the employee from the carrier." 49 USC § 40116(f)(2)(B). It does not distinguish between pay earned on one task versus pay earned on another. Consequently, the text of the statute requires consideration of all of taxpayer's pay during the year at issue. Because only a small fraction of his pay for 2000 was earned on aircraft, and some portion of his time on the aircraft was in Oregon, nearly all of his pay was earned in Oregon. Under taxpayer's reading of the statute, even if he met the threshold requirement for 49 USC § 40116(f) to apply to him, his pay from Horizon for 2000 would be subject to Oregon income tax because he earned more than 50 percent of that pay in Oregon.

In addition to conflicting with the statute's plain text, that argument must fail for two other reasons.

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[11] Although the statute uses "earns," taxpayer uses "earned." App Br at 30.

First, if the federal statute supported dividing up the employee's pay between pay earned on aircraft and other pay, then the logical consequence of that approach would be that the federal statute would apply only to taxpayer's pay during his time on aircraft and not to his pay while performing his regularly assigned duties on the ground in Oregon. Under this strained reading of the statute, only taxpayer's pay for time on aircraft would potentially be exempt from Oregon tax.

Second, taxpayer strains this reading even further when he asserts that, because his time on aircraft, viewed in isolation, would subject him to the federal statute while he is on aircraft, then all his pay for the year at issue would be subject to the federal statute. Taxpayer's interpretation would open the door to evasion of taxation in the state where an air carrier employee works but does not reside if the employee takes just one flight a year in order to meet a training or certification requirement and spends all of the rest of his employment performing regular duties on the ground. To take advantage of this reading, all the employee would have to do is choose a flight that operates in at least two states.

Being able to evade state taxation in this manner is not what 49 USC § 40116 intends. It exempts airline employees from taxation by states in which they do not reside when they have "regularly assigned duties on aircraft in at least 2 states." Taxpayer's regularly assigned duties were on the ground in

Portland, Oregon. The fact that he satisfied a certification requirement by choosing to fly on an aircraft that traversed Oregon and three other states does not bring him within the ambit of 49 USC § 40116(f). His earned income in Oregon, like that of any other non-resident taxpayer, is subject to Oregon income tax pursuant to ORS 316.037(3) (1999) and 316.127 (1999).

## CONCLUSION

The judgment of the Tax Court should be affirmed.

Respectfully submitted,

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## NOTICE OF FILING AND PROOF OF SERVICE

I certify that on September 23, 2015, I directed the original Respondent's Answering Brief to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Greg Bessert, attorney for appellant, by using the court's electronic filing system.

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

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 2,988 words. I further 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 ORAP 5.05(2)(b).

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