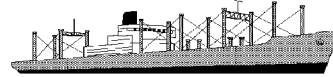




Rollin' On [®]



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INTERSTATE EMPLOYEES: TO TAX OR NOT TO TAX.

Although transportation is the focus of my practice, I do get involved in other matters that are familiar to me. Still, there are areas that I avoid. For example, I stay away from criminal law. If you call me for help in that area, you may as well just sign where it says guilty since that's where you'll end up.

You would think that taxes would be another area that I would avoid, and I do since I can barely spell taxation. I don't even do my own taxes. Yet in the past couple of years I have found myself in the Oregon Tax Court, which I hardly knew existed. The issues have involved the taxation – there's that word again – by the State of Oregon of employees engaged in work involving interstate commerce.

It used to be that every state could tax interstate workers, to use the short phrase, regardless of their state of residency if they earned some income while within its borders. Interstate workers were thus subjected to possible multiple taxation, and the obligation to file multiple income tax returns, and to other sorts of unpleasanties. So Congress decided that a state could tax only resident interstate workers. That made it a lot easier. Sometimes the state would come out ahead, such as when it taxed its resident interstate worker who spent much time outside of the state earning income, and sometimes it lost out, such as when a nonresident interstate worker earned income while within the state. The idea is that on balance, it will work out.

Nonprofits. In today's world it seems like all of the various public entities are broke and looking for other forms of revenue. The State of Oregon

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is no exception. It is therefore looking for ways to enhance those revenues, and as an Oregon taxpayer, I support its efforts to make lawful collections. But the state has recently gone off the deep end in one respect.

The State of Oregon is claiming that this single source of collection does not apply to nonprofit corporations. Thus, a nonresident truckdriver for a nonprofit corporation, according to Oregon, is subject to Oregon income taxes. Out of the 50 states, Oregon is the only state to take this ridiculous position. It would even be laughable if it weren't for the fact that the AG's office has persuaded the Oregon Tax Court that, indeed, you can hammer those truckdrivers to death with taxation.

So here's the visual: You've got a nonresident truckdriver for a Fortune 500 company cruising down I-5, not subject to Oregon's income tax, while alongside that truck you've got a truckdriver for a nonprofit corporation, earning maybe half the wage, who has to pay tribute to the state. I'm not making any of this up.

I've been representing, on a pro bono basis, two of these nonresident, nonprofit truckdrivers since the state's taxation of them, in my opinion, is wrongful and even mean-spirited. The state is not contending that Congress intended this absurd result. It claims that the governing statute simply doesn't cover nonresident, nonprofit truckdrivers. It's a game of gottcha. I don't want to disparage government workers generally, since we all have friends or family in the government, but

sometimes people just don't understand what it's like to be in the real world of private enterprise.

We're going to appeal these cases to the Oregon Supreme Court. Most cases go to the Court of Appeals, but these tax cases go directly to the top.

For Profits. As discussed above, interstate workers, who are employed by for-profit corporations, are exempt from income tax under certain circumstances. There are certain requirements. First, the employee must be a mechanic, freight handler, or an individual who directly affects commercial motor vehicle safety in the course of employment. The employee must also have regularly assigned duties in two or more states.

A question arises as to what constitutes "regularly assigned". Does that mean that you can be regularly assigned a task that may take you out of state, but in practice the trips are infrequent? The tax court has answered negatively in this regard. The court has held that the word "regular" excludes irregular, unusual or special assignments. Thus, in order to invoke the exemption, the employee has to be able to demonstrate sufficient out-of-state activity to warrant an exemption from state tax. There is no magic number and each case is fact specific. In one case the employee had specific out-of-state assignments that arose only twice per year, during which the employee would be absent a few days each time. That was sufficient for the court. Yet more frequent trips, but without the regular assignment, may not be enough. Regularity, or lack thereof, is critical.

That's all for now. Until next time, keep the cargo *rollin'*!

The Obligatory Disclaimer

This newsletter is for informational purposes, does not provide legal advice and does not create an attorney-client relationship.

Short Bio

Admitted to the state bars of Oregon, Alaska, Florida and Massachusetts. Practicing law for over 20 years and emphasizing transportation law, business law and related litigation.