

IN THE OREGON TAX COURT
REGULAR DIVISION
Personal Income Tax

STEVEN E. SPEER and SARAH H. SPEER,)	
)	
Plaintiffs,)	TC _____
)	
v.)	
)	
DEPARTMENT OF REVENUE,)	PLAINTIFFS' COMPLAINT
State of Oregon,)	
Defendant.)	PRAYER AMOUNT: \$88,532.81 plus interest

Plaintiffs Steven and Sarah Speer (the "Plaintiffs"), by and through their undersigned counsel, allege as follows:

PARTIES

1. Plaintiffs are individual taxpayers, who, since December 2018, have resided in Washington.
2. For tax year 2018, Plaintiffs were part-year Oregon residents.
3. Defendant, the Department, is the principal tax collection agency in the State of Oregon. The Department is charged with administering the state's tax laws and the collecting of state taxes, including the personal income tax. (*See* ORS §§ 305.015; 305.025).

JURISDICTION & VENUE

4. Jurisdiction and Venue of this appeal is vested with the Regular Division of the Oregon Tax Court pursuant to ORS § 305.570(1) and TCR 1(A).

NOTICE OF ASSESSMENT

5. On August 8, 2022, the Department issued a Notice of Assessment (the “Notice”) for tax year 2018, providing the following amounts as due and owing:

Tax	Penalties	Interest
\$ 62,478.00	\$12,496.00	\$8,497.01

(The increase of the prayer amount over the sum of the above amounts is due to the increased amount of interest ultimately remitted by the Plaintiffs.)

BACKGROUND

6. During tax year 2018, Plaintiffs were passive investors with a minority share in New Glarus Brewing (“NGB”), a Wisconsin brewery, which has no business activity (including sales), property, income, or employees in Oregon.

7. On April 20, 1993, NGB was registered and incorporated as an S Corporation in New Glarus, Wisconsin.

8. On June 1, 1993, NGB released a Confidential Private Placement Memorandum (the “Memorandum”), authorizing up to 40,000 shares of common stock, with 20,000 of such shares earmarked as voting stock, and the remaining 20,000 earmarked as non-voting stock. Per the terms of the Memorandum, each share of stock was priced at ten dollars, and one unit of stock consisted of 625 shares of voting stock and 625 shares of non-voting for \$12,500.00.

9. On August 15, 1993, Plaintiffs purchased two units of stock for \$25,000, consisting of 1,250 shares of voting stock and 1,250 shares of non-voting stock. This purchase was a valid S Corporation election in accordance with IRC § 1362 and relevant Treasury Regulations.

10. All of NGB’s commercial activity is contained within the State of Wisconsin. At no point in time has NGB owned property, sold products, retained employees, or otherwise engaged in commercial activity in Oregon.

11. NGB's controlling shareholder, sole director, and CEO, Deborah Carey, has not made distributions of NGB's taxable earnings to any individual minority shareholder, including the Plaintiffs, other than the amount sufficient to cover certain minority shareholders' individual income taxes on their pass-through income as S Corporation shareholders in NGB.
12. The Plaintiffs, as minority shareholders, have no access to or control over the distribution of NGB's taxable earnings.
13. In 2021, the Plaintiffs and two other minority shareholders brought a suit against Carey, arguing they never received profits for their shares because Carey refuses to distribute profits beyond those required to pay what she believed necessary to cover certain of minority shareholders' taxes.
14. On February 22, 2024, the Wisconsin Court of Appeals rejected the minority shareholders' claim. *Eichhoff v. New Glarus Brewing Co.*, Appeal No. 2022AP1958, 4 N.W.3d 923, 2024 WI App 16, ¶ 88 (per curiam), 2024 WL 718774, (WI Ct. App. Feb. 22, 2024) (unpublished).
15. As a result, the Plaintiffs are not, and do not expect to be able to control a distribution from NGB.
16. For tax year 2018, Plaintiffs filed a Form 1 NPR Wisconsin Nonresident & part-year resident Wisconsin income tax form (the "Wisconsin Return"), reporting the pass-through income from NGB and imposing Wisconsin tax of \$79,178.
17. On their Wisconsin Return, Plaintiffs claimed a Manufacturing Credit for \$77,705 and a Research Credit for \$350, and the remaining \$1,123 was satisfied through NGB withholding.
18. For tax year 2018, Plaintiffs also filed Form OR-40-P Oregon Individual Income Tax Return for Part-Year Residents (the "Oregon Return"), reporting total income which included pass-

through income from NGB, and Plaintiffs claimed a credit for taxes imposed by another state (i.e., Wisconsin) of \$63,601.

19. Plaintiffs' return was prepared by a CPA, and they consulted with tax consultants and attorneys regarding their ability to claim their Wisconsin taxes pursuant to ORS § 316.082 prior to claiming the credit.

20. In 2021, the Department of Revenue (the "Department") opened an audit.

21. In November 2021, the Department issued a Notice of Deficiency, asserting Plaintiffs could claim a credit for income taxes paid to another state based on tax liability to the other state, not on the income tax withheld by the other state.

22. The Plaintiffs timely filed an appeal with the Department, objecting to the Notice of Deficiency and requesting a conference.

23. A telephonic conference was held on May 13, 2022, and on August 2, 2022, the Department issued a Conference Decision Letter, denying the Plaintiff's appeal.

24. The Plaintiffs then paid the tax, penalties, and interest and timely appealed to the Oregon Tax Court Magistrate Division.

25. The Plaintiffs moved for Summary Judgment before the court, with the Department filing a Cross-Motion for Summary Judgment, and on December 14, 2023, the parties argued their motions before the Magistrate.

26. On May 5, 2025, the Magistrate Division issued a decision granting the Department's Cross-Motion for Summary Judgment and denying the Plaintiffs' Motion for Summary Judgment. *Speer v. Dep't of Revenue*, No. TC-MD 220449G, 2025 WL 1325293 (Or. T.C. May 5, 2025).

27. The Plaintiffs now appeal the Magistrate's decision which is in error for the following reasons:

FIRST CLAIM

The Department's Actions Violate the Plain Language of ORS § 316.082

28. The Plaintiffs reallege and incorporate by reference paragraphs 1 through 27.

29. ORS § 316.082(1), provides a tax credit is allowed “against the tax otherwise due under this chapter for the amount of any income tax *imposed* on the individual, . . . for the tax year by another state on income derived from sources therein and that is also subject to tax under this chapter.”

30. The plain language of ORS § 316.082(1) requires a credit be provided where another state imposes tax and does not require actual payment.

31. Black's Law Dictionary defines “impose” to mean to “levy or exact (a tax or duty),” *Impose*, BLACK'S LAW DICTIONARY (11th ed. 2019). “Paid,” on the other hand, means “to give money to someone for something you want to buy or for services provided.” *Pay*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/dictionary/english/pay> (last visited June 10, 2025).

32. Even if actual payment is required, *Con-Way Inc. & Affiliates v. Dep't of Revenue*, 353 Or. 616, 631, 302 P.3d 804, 812 (2013), stands for the proposition that tax credits and actual payments “function in the same manner in . . . that . . . they both satisfy, in part or whole the amount of taxes owed.” *Id.* at 623, 302 P.3d at 808.

33. The Wisconsin tax “imposed” on the Plaintiffs was the total amount of tax levied against them as calculated and reported as “tax” on line 39 of their Wisconsin tax return prior to the use of credits or cash to pay off this imposed amount.

34. Based on *Con-Way*, the Plaintiffs “paid” the Wisconsin tax imposed with a combination of Wisconsin tax credits, withholding, and cash; thus, the Plaintiffs are entitled to an Oregon credit for this amount as calculated and reported as “tax” on line 39 of their Wisconsin tax return.

35. Accordingly, the Department's assessment against the Plaintiffs is contrary to the requirements of ORS § 316.082(1).

SECOND CLAIM

The Department's Failure to Provide a Credit Violates the Dormant Commerce Clause of the U.S. Constitution

36. The Plaintiffs reallege and incorporate by reference paragraphs 1 through 35.

37. The Commerce Clause of the U.S. Constitution grants Congress the power to "regulate Commerce . . . among the several states." U.S. Const. art. I, § 8, cl. 3.

38. The dormant Commerce Clause "prevents the States from adopting protectionist measures and thus preserves a national market for goods and services." *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 588 U.S. 504, 514 (2019).

39. The Supreme Court has established a four-pronged test to determine if a tax violates the Commerce Clause. A tax is valid under the Commerce Clause if it has "a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977).

40. The Department's taxation of the Plaintiffs fails each of the prongs of the *Complete Auto* test.

41. *Complete Auto*'s first prong "asks whether the tax applies to an activity with a substantial nexus with the taxing State." *South Dakota v. Wayfair, Inc.*, 585 U.S. 162, 188 (2018). A business has a substantial nexus with the taxing state when it "'avails itself of the substantial privilege of carrying on business' in that jurisdiction." *Id.* (quoting *Polar Tankers, Inc. v. City of Valdez*, 557 U.S. 1, 11 (2009)).

42. Here, no nexus exists between NGB or its income and Oregon since NGB is a Wisconsin corporation with its principal place of business in Wisconsin, it conducts all of its business in Wisconsin, and has no business activity in Oregon.

43. Oregon's taxation of NGB's income, via taxation of the Plaintiffs, violates the first prong of *Complete Auto*, because NGB has no substantial nexus with Oregon.

44. *Complete Auto*'s second prong requires a tax to be fairly apportioned. *Complete Auto Transit, Inc.*, 430 U.S. at 279.

45. Here, the Plaintiffs were taxed on NGB's Wisconsin activity by Wisconsin once, and Oregon then taxed the same Wisconsin income.

46. The Department's refusal to provide a full credit or to apportion NGB income under the applicable corporate apportionment provision fails to fairly apportion the income to the state where it takes place, in violation of the fair apportionment prong of *Complete Auto*.

47. Because the share of NGB's income in Oregon is zero, the fairly apportioned share taxable by Oregon is zero.

48. *Complete Auto*'s third prong examines whether a tax discriminates against interstate commerce. *See Complete Auto Transit, Inc.*, 430 U.S. at 279.

49. A state discriminates against interstate commerce "if it 'imposes commercial barriers or discriminates against an article of commerce by reason of its origin or destination out of State.'" *Pharm. Research & Mfrs. of Am. v. County of Alameda*, 768 F.3d 1037, 1041 (9th Cir. 2014) (internal brackets omitted) (quoting *C & A Carbone, Inc. v. Town of Clarkston, N.Y.*, 511 U.S. 383, 390 (1994)).

50. A state's taxation of even its residents' in-state and out-of-state incomes (or S corporation income taxed via an individual) is unconstitutional if it fails to eliminate any discriminatory burden on interstate commerce. *See e.g., Comptroller of the Treasury v. Wynne*, 575 U.S. 542, 545 (2015).

51. Had the Plaintiffs invested in an Oregon company, they would have only been subject to one state tax. But, since the Plaintiffs invested in an out-of-state company, where the state offered incentives to the business, the Plaintiffs are penalized by being subject to a higher tax bill, in violation of the third prong of *Complete Auto*. Oregon, in effect, is taxing away the tax credit provided by Wisconsin for investing in Wisconsin.

52. The fourth prong of *Complete Auto* considers whether the tax is fairly related to the services provided by the state. Because here there were no services provided to NGB by Oregon, the tax violates of the fourth prong. *Complete Auto*, 430 U.S. at 279.

53. Without providing a full credit or sourcing NGB's income to outside of Oregon, Oregon's taxation of NGB's income through the Plaintiffs violates the Commerce Clause.

THIRD CLAIM

The Department's Actions Violate the Due Process Clause of the U.S. Constitution

54. The Plaintiffs reallege and incorporate by reference paragraphs 1 through 52.

55. The Fourteenth Amendment of the U.S. Constitution provides: "No State shall... deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. The Due Process Clause of the Fourteenth Amendment constrains a state's power to impose tax-related requirements on out-of-state entities. *See, e.g., North Carolina Dep't of Revenue v. The Kimberley Rice Kaestner 1992 Fam. Tr.*, 588 U.S. 262, 268–69 (2019).

56. The Supreme Court established a two-part test to determine whether a tax is valid under the Due Process Clause in *Kaestner*: The first part requires there to be "some definite link, some

minimum connection, between a state and the person, property or transaction it seeks to tax.” *Id.* 269 (quoting *Quill Corp. v. North Dakota*, 504 U.S. 298, 306 (1992)). The second part requires that “the income attributed to the State for tax purposes must be rationally related to values connected with the taxing State.” *Id.*

57. In *Kaestner*, the Court held North Carolina’s taxation of an out-of-state trust based on the beneficiaries’ North Carolina residency failed the minimum contact test when the trust did not make a distribution to any North Carolina residents, the trustee resided outside of North Carolina, the beneficiaries could not demand income from the trust, and the beneficiaries were unsure whether they ever would receive income from the trust. *Id.* at 270.

58. NGB is an S Corporation which generally permits states to tax its shareholders, but Oregon lacks the necessary minimum contacts to tax NGB.

59. NGB’s business activities are wholly in Wisconsin, and the Plaintiffs have no control over NGB’s income, no real right to demand income or distributions from NGB, and will never receive such income. *Eichhoff v. New Glarus Brewing Co.*, 2024 WI 36, 11 N.W.3d 922 (2024) (denying cert., No. 2022AP1958, 2024 WI App 16, 2024 WL 718774 (WI Ct. App. Feb. 22, 2024) (unpublished)).

60. Pursuant to *Kaestner*, Oregon does not have the requisite minimum contacts with the undistributed NGB income it seeks to tax, and the Department’s interpretation of ORS § 316.082 violates the Due Process Clause.

61. *Kaestner* also requires that courts consider whether a state tax is “rationally related” to “values connected with the taxing State.” *Kaestner*, 588 U.S. at 2220.

62. As such, Oregon can only tax the Plaintiffs’ unrealized income if it can show this income was rationally related to values connected with Oregon.

63. But there is no “rational relation” between NGB’s Wisconsin business activity and income and Oregon.

64. Thus, Oregon’s taxation of the Plaintiffs’ NGB distributive share of phantom income fails the Due Process Clause because the tax is on undistributed NGB income earned wholly in Wisconsin outside of the Plaintiffs’ control, which does not bear a rational relation to values connected with Oregon.

PRAYERS FOR RELIEF

WHEREFORE, Plaintiffs pray for judgment as follows with respect to the Tax Year:

- (a) Declaring the Notices of Assessment invalid;
- (b) Determining that the Department owes the Plaintiffs a refund for such personal income tax, penalties and interest paid under protest, including interest on such overpayment as calculated under OAR 150-305-0142;
- (c) Awarding the Plaintiff reasonable attorney fees and reasonable expenses;
- (d) Awarding the Plaintiff their costs of suit herein incurred; and
- (e) Awarding the Plaintiffs such other and further relief as the Court deems appropriate.

Dated: July 2, 2025

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s/ Nikki E. Dobay

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