

IN THE OREGON TAX COURT  
MAGISTRATE DIVISION  
Small Claims  
Income Tax

CLINTON F. SMITH and PEARL A. SMITH, )  
 )  
 Plaintiffs, ) No. 020050F  
 )  
 v. )  
 )  
 DEPARTMENT OF REVENUE, )  
 STATE OF OREGON, )  
 )  
 Defendant. ) **DECISION AND JUDGMENT**

The Plaintiffs appeal from a Notice of Refund Donation dated November 16, 2001, for tax year 2000. A case management conference was held on March 6, 2002. Clinton and Pearl Smith appeared for themselves. Mike Halter appeared for the Defendant.

**STATEMENT OF FACTS**

The Plaintiffs hired Mr. Robert Kottke of Oregon Tax Services to prepare their year 2000 personal income tax return. Mr. Kottke had prepared the Plaintiffs' returns for a number of years. Mr. Kottke timely prepared the 2000 return and presented it to the Plaintiffs for their signatures. The Plaintiffs signed the return. Unbeknownst to the Plaintiffs, when preparing the return, Mr. Kottke checked a box on the front of Form 40 that stated "[c]heck here to donate your kicker refund<sup>1</sup> to the School Fund." (Ptf's Form 40.) When the Plaintiffs signed their return, Mr. Smith was very ill, "flat on [his] back in a nursing home - a 6 month duration[.]" (Ptf's Ltr dated Dec. 24, 2001, at 1.)

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<sup>1</sup>The kicker refund is the refund given when revenues from general fund sources exceed projections by two percent or greater. See ORS 291.349 (1999).

The Defendant, while sympathetic to the Plaintiffs' situation, points out that by operation of ORS 305.792(2),<sup>2</sup> an election to donate a kicker refund to the school fund is irrevocable. The Defendant no longer has what would have been the Plaintiffs' kicker refund because it has already been given to the school fund.

### COURT'S ANALYSIS

ORS 305.792 was enacted by the 1999 Legislature. See 1999 Or Laws ch 960,

§ 2. The relevant portion of the statute provides:

"(2)(a) A personal income taxpayer may elect to donate a surplus refund payment to be made under ORS 291.349 to public elementary and secondary school education. The taxpayer may make the election by checking the appropriate checkoff box on the taxpayer's return indicating the taxpayer's intention to donate the surplus refund payment to public elementary and secondary education.

"(b) **Once made, the election is irrevocable** for any surplus refund payments received until a subsequent return is filed for a later tax year, and on which the checkoff box is not checked." (Emphasis added.)

Given the nature of an election, there must be an element of choice, "a clear exercise of the option as shown by some overt act. The election usually involves some option offered by a statute or a Regulation, and even where these do not expressly provide that an election once made is binding, the courts have uniformly applied that rule." Jacob Mertens, Jr, 15 *Mertens Law of Federal Income Taxation* § 60:29 (rev 2000) (citations omitted). Further, "[a]n oversight and error of judgment, or unawareness of tax consequences does not lessen the binding character of an election." *Id.* (citations omitted).

In an election case, this court found that "[t]he actor must bear the loss where the parties are equally innocent." *Georgia-Pacific v. Dept. of Rev.* 5 OTR 33, 39 (1972).

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<sup>2</sup>All references to the Oregon Revised Statutes are to the 1999 Replacement Part.

## CONCLUSION

Given the unambiguous language of ORS 305.792, this court's ruling in *Georgia-Pacific* and general principles of elections, the court finds that the Plaintiffs may not revoke their election and receive their kicker refund.<sup>3</sup> Now, therefore,

IT IS HEREBY ADJUDGED AND DECREED that the Plaintiffs' appeal is denied.

Dated this \_\_\_\_\_ day of April, 2002.

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SALLY L. KIMSEY  
MAGISTRATE

**THIS DOCUMENT WAS SIGNED BY MAGISTRATE SALLY L. KIMSEY ON APRIL 15, 2002. THE COURT FILED THIS DOCUMENT ON APRIL 15, 2002.**

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<sup>3</sup>While the Plaintiffs do not receive their kicker refund, they may be entitled to a charitable donation deduction in 2001 for \$540.50, the amount of their kicker refund donated to the school fund, if they itemize their deductions. If they have already filed their 2001 income tax return, they may wish to consider filing an amended return.