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O.R.S. 411.760
O.R.S. 23.160(1)(i)
26 U.S.C. § 32
OAR 461 195-001(23)
OAR 461-195-001(28)
earned income credit
exemption

In Re Rutter Case # 696-61457-aer-7
1/7/97 AER Published

Debtors were eligible for a \$2,274.00 federal earned income credit for tax year 1995 which they claimed exempt in their Chapter 7 case under both ORS 411.760 (as either "general" or "public" assistance) and ORS 23.160(1)(i) as "child support."

The Trustee objected to the claimed exemptions. The Court sustained the objection. ORS 411.760 only exempts those "general" or "public" assistance funds granted by the Oregon Adult and Family Services Division of the Department of Human Resources. Further, given the definitions of "support" and "child support" set out in OAR 461-195-001(28) & (23) as obligations owed under court order or by voluntary agreement, the earned income credit could not be considered "child support" "spousal support" or "separate maintenance" under ORS 23.160(1)i).

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In Re:) Bankruptcy Case No.
) 696-61457-aer7
PAUL DAVID RUTTER and)
CHRISTINE MARIE RUTTER,) MEMORANDUM OPINION
))
) Debtors.)

This matter comes before the court upon the trustee's objection to the debtors' claim of exemption in certain state and federal tax refunds.

BACKGROUND

The pertinent facts are undisputed. The debtors filed their voluntary petition for relief herein, pursuant to Chapter 7 of the Bankruptcy Code, on April 9, 1996.

Debtors are married with two dependent children. In 1995 they had a total income of \$15,424. They were eligible for a state tax refund of \$276 and a federal refund of \$2,680. The federal refund consisted of \$406 in true tax overpayments and \$2,274 in Earned Income Credit (EIC).

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1 Debtors claim \$788.07 of the refunds as part of their two "k"
2 exemptions, presumably allocated as \$276 (state refund), \$406
3 (federal "true" overpayment) and \$106.07 (portion of EIC). They
4 have also claimed the full EIC as exempt under ORS 411.760 or ORS
5 23.160(1)(i).

6 The trustee maintains that the EIC may not be claimed as
7 exempt under either ORS 411.760 or ORS 23.160(1)(i). In the
8 alternative, the trustee maintains that if the EIC may be properly
9 claimed as exempt, that the so-called "k" exemption provided by ORS
10 23.160(1)(k) is not available since that exemption may not be used
11 to increase any other exemption.

12 The debtors argue that the tax refunds should be looked at as
13 separate assets, those refunds generated by a true overpayment in
14 1995 taxes to which the "k" exemption may be applied and the EIC
15 which is not a refund of a tax overpayment. Thus, both exemptions
16 should be applied.

17 **ISSUES**

18 This court must first determine whether or not the EIC
19 portion of the debtors' federal tax refund may be properly claimed
20 as exempt. If so, this court must then determine whether or not the
21 debtors may apply the "k" exemption to the non EIC portion of their
22 federal and state tax refunds.

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DISCUSSION

The EIC.

The EIC is provided for pursuant to 26 U.S.C. § 32.¹ The Supreme Court has discussed both the nature of and the congressional purpose behind the enactment of the EIC in Sorenson v. Secretary of the Treasury, 475 U.S. 851, 106 S.Ct. 1600, 89 L.Ed. 2d 855 (1986). There, the Supreme Court observed:

Unlike certain other credits, which can be used only to offset tax that would otherwise be owed, the earned income credit is "refundable". Thus, if an individual's earned income credit exceeds his tax liability, the excess amount is "considered an overpayment" of tax under section 6401(b), . . . Subject to specified setoffs, § 6402(a) directs the Secretary

¹26 U.S.C. §32(a) (1) In general. - In the case of an eligible individual, there shall be allowed as a credit against the tax imposed by this subtitle for the taxable year an amount equal to the credit percentage of so much of the taxpayer's earned income for the taxable year as does not exceed the earned income amount.

26 U.S.C. §32(c) (1) (A) In general. - The term "eligible individual" means-

- (i) any individual who has a qualifying child for the taxable year, or
- (ii) any other individual who does not have a qualifying child for the taxable year, if -
 - (I) such individual's principal place of abode is in the United States for more than one-half of such taxable year,
 - (II) such individual (or, if the individual is married, either the individual or the individual's spouse) has attained age 25 but not attained age 65 before the close of the taxable year, and
 - (III) such individual is not a dependent for whom a deduction is allowable under section 151 to another taxpayer for any taxable year beginning in the same calendar year as such taxable year.

(C) 2 or more eligible individuals. - If 2 or more individuals would (but for this subparagraph and after application of subparagraph (B)) be treated as eligible individuals with respect to the same qualifying child for taxable years beginning in the same calendar year, only the individual with the highest adjusted gross income for such taxable years shall be treated as an eligible individual with respect to such qualifying child.

1 to credit or refund "any overpayment" to the person
2 who made it. An individual who is entitled to an
3 earned income credit that exceeds the amount of tax he
4 owes thereby receives the difference as if he had
5 overpaid his tax in that amount.

6 475 U.S. at 854, 855.

7 In discussing the Congressional purpose behind the enactment
8 of the EIC, the Supreme Court stated:

9 The earned income credit was enacted to reduce the
10 disincentive to work caused by the imposition of
11 Social Security Taxes on earned income (welfare
12 payments are not similarly taxed), to stimulate the
13 economy by funneling funds to persons likely to spend
14 the money immediately, and to provide relief for low
15 income families hurt by rising food and energy prices.

16 475 U.S. at 864.

17 It is noteworthy that one need not have dependent children or
18 a "qualifying child" in order to be eligible to receive an EIC
19 although the EIC is much higher for families having two or more
20 qualifying children than for those households without a qualifying
21 child.

22 **The EIC as Exempt.**

23 In Sorenson, supra, Mr. Sorenson was legally obligated to
24 make child support payments for the benefit of a child of his
25 previous marriage, in the custody of his former wife. Mr. Sorenson
26 had fallen behind in his child support payments because of
27 disability and unemployment. As his former wife had applied for
28 welfare benefits from the State of Washington, her rights to the
29 child support had been assigned to that state.

1 The Supreme Court noted that the Internal Revenue Code and
2 the Social Security Act direct the Secretary of the Treasury to
3 intercept certain tax refunds payable to persons who have failed to
4 meet child support obligations. Mr. Sorenson and his current wife
5 were eligible to receive an EIC. The current Mrs. Sorenson brought
6 a class action seeking a declaration that the tax intercept
7 provisions could not reach a refund attributable to the EIC.

8 After discussing the competing policies at stake, the Supreme
9 Court noted that: "The refundability of the earned income credit
10 is. . . inseparable from its classification as an overpayment of
11 tax." 475 U.S. at 859. The court further found that Congress had
12 not provided for an exemption in favor of the EIC from the tax
13 refund intercept law and held that the EIC could be intercepted on
14 behalf of the State of Washington. It therefore, appears that there
15 is no federal exemption applicable to the EIC, any such exemption
16 must be found under Oregon law.

17 **O.R.S. 411.760.**

18 Many states exempt "public assistance" or "general
19 assistance" benefits. Most courts which have considered the issue
20 have found the EIC exempt under these statutes. See e.g., In re
21 Brown, 186 B.R. 224 (Bankr. W.D. Ky. 1995) (exempt as "public
22 assistance" under Kentucky law); In re Murphy, 99 B.R. 370 (Bankr.
23 S.D. Oh. 1988) (exempt as "poor relief payment" defined by statute
24 as "general assistance" under Ohio law, later repealed); In re
25 Jones, 107 B.R. 751 (Bankr. D. Id. 1989) (exempt as "public
26 assistance" under Idaho law); and In re Davis, 136 B.R. 203 (Bankr.

1 S.D. Iowa 1991) (exempt as "local public assistance" under Iowa
2 law).

3 Oregon likewise exempts "general" and "public assistance".
4 The exemption is found in ORS 411.760 which provides as follows:

5 All monies granted under the provisions of ORS
6 411.060, 411.070 and 411.710 - 411.730 shall be
7 inalienable by any assignment or transfer and shall be
8 exempt from garnishment, levy or execution under the
9 laws of this state.

10 A close review of the statutes referred to in ORS 411.760,
11 namely, ORS 411.060 and 411.070 as to "public assistance", and ORS
12 411.710-ORS 411.730 as to "general assistance" make it clear that
13 only those funds granted by the Oregon Adult and Family Services
14 Division of the Department of Human Resources are exempt pursuant to
15 ORS 411.760.²

16 ²The statutes provide, in pertinent part as follows:

17 ORS 411.710 Basis for granting general assistance.

18 (1) General assistance shall be granted in accordance with the rules and
19 regulations of the division. . . (emphasis added);

20 ORS 411.730 Application for general assistance; determination of eligibility and
21 amount of grant.

22 The Adult and Family Services Division shall receive all applications for
23 general assistance, and shall determine in accordance with its rules and
24 regulations the eligibility for and the amount of the assistance which any
25 person shall receive.

26 ORS 411.060 Division as state agency for public assistance.

Subject to ORS 417.300 and 417.305, the Department of Human Resources
through the Adult and Family Services Division shall administer and
supervise all public assistance programs and adopt and enforce such rules as
are necessary to assure full compliance with the terms of federal and state
laws.

ORS 411.070 Statewide standards for public assistance.

(continued...)

1 In contrast, for example, the court in Brown interpreted the
2 Kentucky statute dealing with public assistance as defined by KRS
3 205.010(3) which states:

4 "Public assistance" means "money grants, assistance in
5 kind or services to or for the benefit of the needy
6 aged, needy blind, needy permanently and totally
7 disabled persons, needy children, or persons with whom
8 a needy child lives or a family containing a
9 combination of these categories. . .

10 186 B.R. at 226.

11 Thus, it appears that the Oregon Statutory scheme is more
12 restrictive. In addition, at least in dicta, the district court for
13 this district has observed that there is no exemption under Oregon
14 law. See In re Ott, Civ. #94-6355 (D. Or. 2/3/95) (Hogan, C.J.)
15 (unpublished). It does not appear that ORS 411.760 may be used by
16 the debtors to exempt their EIC.

17 **O.R.S. 23.160(1)(i)**

18 ORS 23.160(1)(i) (hereafter, subsection (i)) exempts:

19 Spousal support, child support, or separate
20 maintenance to the extent reasonably necessary for the
21 support of the debtor and dependent of the debtor.

22 Debtors argue that the EIC is "child support" within
23 subsection (i), contending that the EIC's primary purpose is to pay
24 expenses related to supporting a child. The trustee argues that
25 "child support" only refers to an obligation within the area of

26 ²(...continued)

The Adult and Family Services Division shall by rule fix statewide uniform standards for all public assistance programs and effect uniform observance thereof throughout the state. . .

1 family law where one party is the "obligor" and the obligation
2 arises from the parties' relations with each other. He notes
3 subsection (i) does not refer to payments "in the nature of" child
4 support.

5 This court has found one case to support the debtors'
6 contention. See In re George, 199 B.R. 60 (Bankr. N.D. Ok. 1996).
7 The George court determined that, (under an Oklahoma statute similar
8 to the Oregon statute cited above), the EIC could be claimed exempt
9 as child support. There, the court noted:

10 Ordinarily, payments for alimony, support, maintenance
11 or child support would arise from a divorce decree.
12 However the statute does not limit the exemption to
13 payments arising from a divorce decree. In addition
14 the Oklahoma Supreme Court has held that Oklahoma
15 exemption statutes are to be construed broadly.
16 (citations omitted).

17 As stated above, the purpose of the earned income
18 credit is to provide support for low income workers
19 who have dependent children and maintain a household.
20 An earned income tax credit is in the nature of a
21 payment for the support of a family with dependent
22 children. These types of payments are exempt from the
23 claims of creditors "to the extent reasonably
24 necessary for the support of such person and any
25 dependent of such person under Oklahoma law.

19 199 B.R. at 62.

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21 The trustee notes that nothing in the Oregon statute can be
22 construed to contemplate that any payment that may be used for the
23 benefit of children qualifies as exempt. The trustee observes that
24 if that were so, any payments that could go to the support of a
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1 child, including all of a person's wages, could be claimed as child
2 support and hence exempt pursuant to subsection (i).

3 ORS Chapter 23 does not define the terms "spousal support,
4 child support, or separate maintenance". The terms are, however,
5 defined in the Oregon Administrative Rules pertaining to the Adult
6 and Family Services Division. There, we find that the terms
7 "support" and "child support" are defined in OAR 461-195-001(28) as
8 follows:

9 "Support" means cash payments or other benefits that a
10 person has been ordered by a court or by
11 administrative process, or has voluntarily agreed, to
12 provide for the benefit and maintenance of another
13 person:

14 (a) "Child Support" refers to payments that an obligor
15 has been ordered (or has agreed) to pay for the
16 benefit of a child;

17 (c) "Spousal Support" refers to payments that an
18 obligor has been ordered (or has agreed) to pay for
19 the benefit of a current or former spouse.

20 "Obligor" is defined in OAR 461-195-001(23) as follows:

21 "Obligor" means any person who is required (or has
22 agreed to pay) child support, spousal support, alimony
23 and/or medical support under an administrative process
24 order, court order, or voluntary agreement. The
25 obligor is usually the absent non-custodial parent of
26 the beneficiary children under a support order.

//////

27 It is clear from reading the definitions of support contained
28 in the Oregon Administrative Rules that the rationale of the George
29 court does not apply in Oregon. The EIC cannot be considered to be
30 "spousal support", "child support", or "separate maintenance".

1 Again, the district court has noted in Ott, supra, that no such
2 exemption for the EIC exists under Oregon law.

3 **O.R.S. 23.160(1)(k) .**

4 Having concluded that the EIC may not be claimed as exempt
5 under either ORS 411.760 or ORS 23.160(1)(i), it follows that the
6 debtors may claim their exemption provided by ORS 23.160(1)(k) in
7 any or all of the tax refunds. Based upon a review of the schedules
8 it appears that the debtors have an exemption of \$788.07 available
9 for this purpose. The balance of \$2,167.93 is non-exempt and must
10 be turned over to the trustee.

11 This opinion contains the court's findings of fact and
12 conclusions of law, they shall not be separately stated.

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15 ALBERT E. RADCLIFFE
16 Bankruptcy Judge
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