Oregon Legislative Update

Mid-Valley Tax Forum

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Today’s Topics

- 2019 Statutory Changes
- Portland Gross Receipts Tax
- Recent cases

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Oregon CAT

- We have a brand new tax.
- Or Laws 2019 ch 122 §§ 58-76 (HB 3427), as amended by Or Laws 2019 ch 579 §§ 50-60 (HB 2164), created the "Oregon Corporate Activity Tax" (the "Oregon CAT").
- In drafting the Oregon CAT, the Oregon legislature started with the Ohio commercial activity tax, but then made major changes.

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Oregon CAT (Taxpayers)

- Although titled a "Corporate Activity Tax," the Oregon CAT applies to pass-through entities (such as partnerships, LLCs, joint ventures, and s-corporations) and sole proprietorships.
- Generally, the Oregon CAT applies to all persons and business entities that have:
  - Substantial nexus with Oregon, and
  - "Taxable commercial activity" in excess of $1 million.
- Certain entities are excluded (e.g., 501(c)(3) entities and health insurance companies subject to certain other excise taxes).

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Oregon CAT (Tax Base)

- Imposed on "taxable commercial activity."
- Generally defined as a taxpayer's Oregon–source business gross receipts less a subtraction equal to 35% of the greater of (a) "cost inputs," or (b) "labor costs," apportioned to Oregon.
- Cost Inputs: "the cost of goods sold as calculated in arriving at federal taxable income."
- Labor Costs: include only compensation paid to employees, capped at $500,000 per employee.

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Oregon CAT (Exclusions and Tax Rate)

- **Exclusions**: There are *forty-seven types* of receipts that are excluded from the tax base, which are listed in Or Laws 2019 ch 579 § 50.
- **Tax Rate**: $250 plus 0.57 percent of taxable commercial activity over $1 million.

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Oregon CAT (Property Transferred to Oregon)

- Taxable commercial activity includes the value of property the taxpayer transfers into Oregon for the taxpayer's own use in the course of a trade or business, within one year after the taxpayer received the property.
- No inclusion if the taxpayer "can show" or the Department "ascertains" that the taxpayer's receipt of the property outside Oregon was not intended to avoid the tax.

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Oregon CAT (Sourcing)

- Commercial activity is sourced to Oregon using a market-based sourcing method.
  - A sale of tangible personal property is sourced to Oregon if the property is delivered to a purchaser in Oregon.
  - Receipts from services are sourced to Oregon if and to the extent the service is “delivered” in Oregon.
  - A sale of intangible property is sourced to Oregon if and to the extent the property is used in Oregon.
  - Special rules apply to sourcing:
    - Receipts of financial institutions and insurance companies, and
    - Receipts based on the right to use the property, rather than on actual use.

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Oregon CAT (Unitary Group)

- Unitary groups must register and pay the tax as a single taxpayer.
- The law applies a "more than 50 percent" ownership threshold for a unitary group (not the 80 percent threshold used for the Oregon consolidated corporation excise tax return).
- Unlike the corporation excise tax, the unitary group for the Oregon CAT tax includes non-U.S. entities and non-corporate entities.

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Oregon CAT (Registration and Returns)

- A business with “commercial activity” (i.e., total business receipts in and outside of Oregon) in excess of $750,000 must register with the Department.
- A business with “commercial activity” in excess of $1 million must file a return.

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Oregon CAT (Economic Nexus)

- The tax applies to businesses that have "substantial nexus" with Oregon.
- Substantial nexus is defined by:
  - Bright-line rules, and
  - A catch-all under which a business is deemed to have substantial nexus if the business can be constitutionally required to pay the Oregon CAT.
- The Oregon CAT is intended to reach all income that Oregon is permitted to tax.

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Oregon CAT (PL 86-272)

- The law provides that the Oregon CAT is not subject to PL 86-272.
- PL 86-272, by its terms, only applies to net income taxes.
- It is unclear if the 35% deduction for cost inputs or labor costs makes the Oregon CAT a net income tax. *See, e.g., Graphic Packaging Corporation v. Hegar*, 538 SW 3d 89, 61 Tex Sup Ct J 212 (2017).

Oregon CAT (Vehicle Dealers)

- The tax base excludes registration fees and taxes "owed to a third party by the purchaser."
  - Use Tax collected by out-of-state dealer is excluded.
  - Unclear if privilege tax owed by in-state dealer is excluded.
- Vehicle dealers may collect an estimate of the Oregon CAT from the purchaser.
  - Presumably, this amount is excluded from the tax base.
  - However, the issue is unclear.

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Oregon CAT (Next Steps)

- On July 16, 2019, backers of a proposed referendum announced they were abandoning their efforts to challenge the Oregon CAT.
- The Department plans to release draft administrative rules before the end of the year.

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CPAR Conformity

- The federal centralized partnership audit rules ("CPAR") went into effect in 2019.
  - Assessed taxes collected at the partnership level.
  - "Partnership representative" replaces "tax matters partners" and has more authority.
- Or Laws 2019 ch 132 (HB 2101) conforms Oregon to the new federal rules.

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GILTI (Background)

- Federal taxable income of a “United States shareholder” includes a pro rata share of a CFC’s global intangible low taxed income (“GILTI”).
- The GILTI regime is a new federal anti-deferral regime.
- Generally, GILTI is a CFC’s income, with certain exclusions, in excess of 10% of the CFC’s adjusted basis in its depreciable assets.
- IRC § 250(a)(1)(B) allows a deduction for 50% GILTI (37.5% after 2025).

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GILTI (Oregon Treatment)

- Net repatriated amount is in the starting point.
- Before 2019 session, it was unclear if Oregon treated GILTI as a dividend or deemed dividend.
- If GILTI were a dividend:
  - No add back of IRC § 250(a)(1)(B) deduction because ORS 317.267(1), as amended in 2018, did not include IRC § 250(a)(1)(B).
  - Oregon DRD of 80% of either the gross GILTI or net GILTI.
- If GILTI were not a dividend, factor relief may be available.

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GILTI (Oregon Treatment cont.)

- Or Laws 2019 ch 556 (SB 851):
  - Added a new provision to ORS chapter 314 to treat GILTI "in the same manner as a dividend."
  - Amended ORS 317.267 to require an addback of the IRC § 250(a)(1)(B) deduction.
- 80% Oregon DRD on GILTI.

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Federal Deemed Repatriation (Background)

- 2017 and 2018 income includes pro rata share of a 10% owned foreign corporation's deferred E&P.
  - Accomplished by increasing the IRC § 951(a) subpart F income of the foreign corporation.
  - Includable as subpart F income even if the foreign corporation is not a CFC.
- DRD reduces the tax on the deferred E&P to:
  - 15.5% for cash and cash equivalents.
  - 8% for other property.

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Federal Deemed Repatriation (2018 Oregon Fix)

- In the 2018 session, ORS 317.267(1) was amended to addback the federal DRD.
- Because this was in ORS chapter 317, it did not apply to taxpayers subject to the Oregon personal income tax (ORS chapter 316).

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Federal Deemed Repatriation (Department's Position)

- In a March 19, 2018 Revenews, the Department took the position that the federal DRD had to be added back to income for Oregon personal income tax purposes.
- This was based on ORS 316.737, which requires an addback for an "amount which was deducted and specially tax."
- The amount deducted for federal income tax purposes was not specially taxed (compare to the federal treatment of qualified lump sum distributions from certain qualified plans).

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Federal Deemed Repatriation (New Law)

- Or Laws 2019 ch 556 (SB 851) retroactively conforms Oregon personal income tax law to the position taken by the Department – federal DRD taken on deemed repatriation must be added back.
- The Department may not impose penalties **or interest** for assessments for 2017 or 2018 with respect to the deemed repatriation.

Modified Apportionment Method for Broadcasters

- Starting in 2014, ORS 314.684(4) required interstate broadcasters to use the commercial domicile of its customers, rather than an audience ratio, to apportion income.
- Use of this special method was scheduled to sunset after 2017, which was extended to after 2019.
- Or Laws 2019 ch 365 (SB 193) delays the sunset until after 2020.

Shaming Tax Scofflaws

- Or Laws 2019 ch 336 (SB 523) allows the Department to post information about debtors who owe delinquent taxes on the Department website, including:
  - Person's name,
  - Person's city and state,
  - The lien identification numbers,
  - The type of debt, and
  - The amount of debt due.
- Department must remove the information within 14 days of any debt resolution.

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Disconnect from Federal Withholding Table

- Or Laws 2019 ch 134 (HB 2119) disconnects Oregon from the federal process for creating withholding tables.
- The Department has more flexibility to administer the withholding tax system.
- Enacted in reaction to federal changes to withholding in light of the Tax Cuts and Jobs Act (TCJA).

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Delivery of Property Tax Statements & Correspondence

- Or Laws 2019 ch 360 (SB 80) allows property tax statements and other correspondence to be delivered via methods other than traditional mail, such as e-mail.

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Portland Clean Energy Surcharge ("CES")

- In the November 6, 2018 election, Portland voters passed Measure 26-101.
- The measure was codified in the Portland City Code ("PCC"), with certain revisions made by the Portland City Council, on February 19, 2019.

Portland CES (Key Provisions)

- It applies to tax years beginning on or after January 1, 2019.
- It is in addition to the 2.2% net income tax imposed by the Portland business license tax.
- It applies to "Large Retailers," defined as retailers with total annual revenue of over $1 billion and Portland annual revenue of over $500,000.
- The CES is 1% of "Retail Gross Revenue" within Portland.
- The general schedule for payment of estimated taxes for the Portland business license tax applies to the CES, but no underpayment interest for failure to make quarterly estimated CES payments for 2019.

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Portland CES (Retail Gross Revenue)

- "Retail Gross Revenue" generally is defined as gross receipts from a sale to a consumer for use or consumption, and not for resale.
- Deductions are allowed for:
  - Portland business license tax paid that is attributable to the revenue subject to the CES;
  - retail sales of "qualified groceries" (SNAP-eligible food products);
  - retail sales of medicines, drugs and medical devices, regulated by the FDA as such; and
  - retail sales of health care services, including health insurance.

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Portland CES (Tax on Retailer)

- The CES is a tax on Large Retailers, not their customers.
- A retailer is permitted to itemize the CES on customer invoices separate from the sale price.
- The itemized CES billed to customers is included in the retailer's Retail Gross Revenue.

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Portland CES (Administrative Rules)

- The City of Portland Revenue Division has adopted six administrative rules (each a "BTAR").
- **BTAR 500.19-1.** Defines a "utility" for purposes of an exclusion from "Large Retailer" as an entity defined as a "utility" in the Utility License Law, PCC 7.14.040(I), including entities in the business of "telecommunications," as defined in PCC 7.14.040(H).
- **BTAR 500.19-2.** Provides guidance on the exclusion for retail sales of medicines, drugs, and medical devices.
  - The exclusion does not apply to cosmetics not regulated by the FDA as a medicine or drug, (*e.g.*, vitamins, dietary supplements, shampoos).
  - It appears that products regulated by the FDA as both cosmetics and drugs qualify for the exclusion.

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Portland CES (Proposed Rules cont.)

- **BTAR 500.19-3.** Provides guidance on the exclusion of retail sales of health care services.
- **BTAR 500.19-4.** Provides guidance, including 34 examples, for the meaning of "retail sales" (included in CES base) and "sales for resale" (excluded from CES base).
  - Pursuant to the rule, "the taxpayer must have reasonable certainty that the good or service will be resold by the purchaser * * *."
  - It appears that receipt of a resale certificate, in and of itself, may not be sufficient to establish this "reasonable certainty."

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Portland CES (Proposed Rules cont.)

- **BTAR 500.19-5.** Provides guidance on penalties and interest.
- **BTAR 500.19-6.** Provides guidance on separate itemization of the CES on invoices to customers.
  - Provides Large Retailers with discretion and flexibility on how to list and describe any itemization.
  - A Large Retailer is liable for CES on the itemized amount even if the customer objected to the charge or otherwise failed to pay, but a deduction from future sales would be allowed once the Large Retailer determined that the itemized charge were uncollectible.

Dish Network Corp. v. Dept. of Rev.,

364 Or 254, 434 P3d 379 (2019)

- Absent an exception event, like the addition of new property, a property's MAV cannot increase by more than 3% each year.
- The Regular Division held that changing property from local assessment to central assessment did not cause all of the taxpayer's property (including property that had been subject to assessment over the years) to be new property.
- The Oregon Supreme Court reversed, holding that subjecting property to central assessment for the first time causes all of the taxpayer's assessable property to be "new" property.

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Powell Street I LLC v. Multnomah County Assessor,
365 Or. 245, 445 P3d 297 (2019)

- This case concerned the impact of a vacancy on a property's RMV:
  - Whether comparable sales were properties with similar vacancy; and
  - Whether an adjustment applies to the income valuation method.
- The Oregon Supreme Court affirmed the Regular Division's judgment that the vacancy reduced the RMV.
- The vacancy arose from a condition of the property, not an attribute of the owner.

Seneca Sustainable Energy, LLC v. v. Dept. of Rev.,
363 Or 782, 429 P3d 360 (2018)

- This case concerned, in part, the determination of the value of a biomass electric cogeneration under the income method of valuation.
  - The facility was assessed as industrial property.
  - Intangible value, such as goodwill and contract intangibles, is excluded.
- The plaintiff had a long-term power purchase agreement with a utility.
  - Rates turned out to be extremely favorable and would not have been available as of the assessment date due to significant changes in the energy market.
  - An issue in the case was whether the above-market rates could be taken into account in determining the value of the facility under the income method.
- The Oregon Supreme Court held that the value related to the above-market rates arose from an intangible contract right.

Boquist v. Dept. of Rev.,
TC 5332 (Or Tax, Mar 21, 2019)

- OR Laws 2018 ch 108, § 10 (SB 1528 disconnected Oregon from the IRC § 199A deduction.
- Was SB 1528 was a “bill for raising revenue”
  - Bills for raising revenue must originate in the House and pass with a 3/5 majority vote.
  - A bill is a bill for raising revenue if it (1) brings in revenue and (2) has the fundamental features for a bill levying a tax.
- Based on prior Oregon Supreme Court precedent concerning the repeal of an exemption, the Regular Division held that SB 1528 was not a “bill for raising revenue” because disallowing a deduction changes the tax base, but does not change the tax rate.

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United Streetcar LLC v. Dept. of Rev.,

TC 5308 and 5309 (Or Tax, July 11, 2019)

- Oregon's enterprise zone ("EZ") regime generally provides a 3-5 year property tax exemption for a qualified business that invests in qualified property.
- The case concerned whether a business satisfied the employment requirement for the 5th year and the Regular Division held that there was a material fact in dispute on this issue.
- The county also argued that the business's employees in the zone did not engage in the specific activities identified by the business on its EZ exemption form.
- The Regular Division held that the business's employees could engage in any activity allowed by the EZ law, even if the activities were not ones that the business selected on the form.

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Level 3 Communications, LLC v. Dept. of Rev.,
TC 5269;5291 (Or Tax, May 10, 2019)

- Taxpayer and the Department entered into a confidentiality agreement pursuant to which, in relevant part:
  - Taxpayer would produce documents, marking as confidential the documents it asserted were confidential, and
  - The Department would notify taxpayer before providing documents to a third party in response to a request.
- The Department provided other states copies of documents not marked as confidential.
- The Regular Division held that the notification procedure only applied to documents marked as confidential.

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AKS LLC v. Dept. of Rev.,

TC 5308; 5309 (Or Tax, April 18, 2019)

- Property had an “adjudicated value” in the 2014-15 year.
- Taxpayer subdivided the property on January 9, 2015.
  - County determined a total RMV of the accounts in excess of the adjudicated value pursuant to an exception in the adjudicated value limitation.
  - Taxpayer asserted that the exception was limited to increases in value “directly related” to the subdivision and there were no such increases.
- The Regular Division held that “directly related” means reasonably related to the subdivision without any intervening space or time.
  - If the act of subdividing the property does not increase the RMV of the property, the subdivision does not trigger the exception.
  - Also, the subdivision could result in a decrease in MAV.

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Gray v. Dept. of Rev.,
TC 5324 (Or Tax, Dec 20, 2019)

- ORS 305.288(1) provides special relief for overvaluations of a dwelling, if the change in value is 20% or more of the RMV on the assessment roll.
- The Regular Division held that the 20% test applies to the entire property (land and improvements).
- Accordingly, relief was not available to a taxpayer who only contested the value of the improvements, where the taxpayer asserted that the county overvalued the improvements by more than 20%, but not the total property, taking into account the land.

Hoggard v. Dept. of Rev.,
TC 5336 (Or Tax, June 7, 2019)

- The Magistrate Division ruled that a *pro se* taxpayer's appeal of an omitted property notice was not timely.
  - However, the addition of the omitted property was improper because the county failed to send the second notice required by statute.
  - No one raised this in the Magistrate Division and the Magistrate based timeliness on the date of the first notice.
- Once raised, the county refunded the property tax began the omitted property process anew.
- The Regular Division held that the refund and new process did not moot taxpayer's claims with respect to the initial case and ruled that taxpayer's initial appeal was timely.

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Bay Area Hospital v. Dept. of Rev.,

TC 5333 (Or Tax, April 30, 2019)

- OR Law 2017 ch 528, §§ 26-41 imposes a 0.7% charge on net revenues of a class of hospitals.
- Bay Area Hospital claimed to be the only hospital subject to the charge and sought a declaration from the Tax Court that was not subject to the charge.
- The Regular Division held that it lacked subject matter jurisdiction because the legislature vested jurisdiction in another forum with respect to refunds (administrative appeal, followed by contested case proceeds and appellate review) and the legislature did not give the Tax Court power to provide declaratory relief.

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Santa Fe Natural Tobacco Co. v. Dept. of Rev.,

TC-MD 170251G (Or Tax M Div, Feb 26, 2019)

- PL 86-272 generally prevents states from imposing a net income tax on out-of-state taxpayer if the only in-state activities are the solicitation of orders for the sale of tangible personal property.
- Accepting returns goes beyond solicitation.
- The Magistrate Division held that an independent wholesaler to which a taxpayer sells its product accepted returns "on behalf of" the taxpayer.
  - Each Oregon wholesaler entered into an agreement with the taxpayer pursuant to which the wholesalers accepted returns from retailers for any reason in exchange for a reduced purchase price for taxpayer's product.
  - The number of actual returns had not impact on the price reduction.
  - Providing this incentive to wholesalers undercut the taxpayer's argument that the wholesalers accepted returns from its retailers for the wholesalers' own benefit.

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Ivelia v. v. Dept. of Rev.,
TC-MD 180054R (Or Tax M Div, Dec 18, 2018)

- ORS 316.043 generally provides a preferential tax rate for the personal income tax on non-passive income attributable to a pass-through entity
- To obtain this benefit, the taxpayer must make an irrevocable election on "the taxpayer's original return."
  - The taxpayer filed a return by the extended due date that did not make the necessary election.
  - The taxpayer then filed an amended return, also within the extension period, on which the taxpayer made the election.
- The Magistrate Division held that the term "original return" includes an amended return filed before the due date.

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City of Brookings v. Curry County Assessor,
TC-MD 180027R (Or Tax M Div, Jan 29, 2019)

- Generally, property owned by a local government is exempt from property tax.
- This exemption does not apply, however, if it is "held under a lease or other interest or estate less than fee simple" by a taxable person. ORS 307.110.
- The Magistrate Division of the Oregon Tax Court held that management agreement for a golf course owned by a municipal corporation caused the exemption not to apply because the management agreement gave the manager a sufficient possessory interest in the property.

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Niemela v. Dept. of Rev.,

TC-MD 180091R (Or Tax M Div, May 2, 2019)

- Federal law prevents states from taxing nonresident interstate waterway workers.
- Prior Oregon cases limited this exemption to income earned while the ship was operating (but not docked in Oregon) on an interstate waterway (but not an intrastate waterway).
- In 2010, Congress amended the exemption.
- The Magistrate Division held that the 2010 amendment overturned the prior cases so that a Washington resident was not subject to Oregon tax on all income earned as a crew member, regardless of whether the income was earned while the ship was docked in Oregon or for work done on an intrastate river.

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QUESTIONS?

THANK YOU |

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