

Oregon Issues Guidance for Protective Refund Claims Based on MTC 3-Factor Election

September 26, 2012

Overview

Oregon's apportionment statutes appear to allow taxpayers to elect to use either Oregon's single-sales factor for apportioning business income or the Multistate Tax Compact's equally-weighted three-factor formula. However, the Oregon Department of Revenue (the "Department") believes that legislation adopted in 1993 prevents taxpayers from making this election. The issue of whether a taxpayer may make the election is the subject of ongoing litigation in the Oregon Tax Court. Pending the resolution of this litigation, the Department has published guidance explaining how taxpayers may submit protective claims to secure the right to a tax refund until the outcome of the Tax Court case is known.

In this Tax Alert we provide an overview of the relevant Oregon apportionment provisions and we summarize the Department's guidance regarding the filing of protective refund claims.

Oregon Apportionment

For tax years beginning on or after July 1, 2005, Oregon apportions business income for most taxpayers using a single sales factor formula¹ in accordance with the state's version of the Uniform Division of Income for Tax Purposes Act (the "UDITPA Provisions").²

Oregon has been a member of the Multistate Tax Compact ("MTC") since 1967.³ As adopted by Oregon, the MTC's apportionment rules state that a taxpayer may elect to apportion income in the manner provided by the laws of Oregon without reference to the MTC or in accordance with MTC's Article IV (the "MTC 3-Factor Election").⁴ Under the MTC 3-Factor Election, all business income shall be apportioned based upon an equally-weighted three-factor apportionment formula using the traditional property, payroll, and sales factors.⁵

In 1993 the state adopted Or. Rev. Stat. 314.606 in an effort to eliminate the ability of taxpayers to make the MTC 3-Factor Election. The statute provides that in any case where Oregon's UDITPA Provisions "are inconsistent with" the MTC provisions as adopted by Oregon, the Oregon UDITPA Provisions control. The Department's position is that Oregon's single sales factor provision, in accordance with the state's version of the UDITPA Provisions, is inconsistent with the MTC 3-Factor Election and thus the UDITPA Provision is controlling.

The Department has adopted an administrative rule regarding the MTC 3-Factor Election. The rule states that taxpayers may make the election; however, the rule also states that Oregon's UDITPA Provisions trump the MTC provisions wherever they are inconsistent with each other.⁶ While some might argue that the rule itself creates uncertainty in that the preemption language does not eliminate the specific grant of the right to make the MTC 3-Factor Election, the Department has repeatedly stated its position that the election is not allowed because it is inconsistent with Oregon's UDITPA Provisions. Reiterating this position, on September 24, 2012, a Department Corporation Tax Policy Coordinator issued a release stating that it is the Department's position that the MTC 3-Factor Election "is not available on an Oregon return."

¹ Or. Rev. Stat. 314.665(1). Certain industries (e.g., timber, interstate broadcasting) utilize special apportionment formulas that are beyond the scope of this Alert.

² The UDITPA Provisions are found in Or. Rev. Stat. 314.605 – 314.675.

³ Or. Rev. Stat. 305.655.

⁴ *Id.*, Article III.

⁵ *Id.*, Article IV.

⁶ Or. Admin. R. 150-305.655, Reg. III.1(A).

Department Guidance Regarding Protective Refund Claims

In the September 24, 2012 release mentioned above, the Department Coordinator also notified taxpayers that, “similar to the *Gillette Company v. California Franchise Tax Board* appeal in California, the [MTC 3-Factor Election] is currently being challenged” in the Oregon Tax Court.⁷ The release provides further that while the Department will process all corporation tax returns based on its “longstanding position” that the MTC 3-factor Election “is not available,” Oregon taxpayers may file protective claims to secure a right to a refund pending the outcome of the Oregon Tax Court litigation. The Department will defer all action on these protective claims until the resolution of this litigation. The release also states that protective claims must be filed by the later of three years from the due date of the original return or the date the original return was actually filed. The release provides that claims may be either in the form of an amended return or a letter to the Department. If the refund claim is filed in the form of an amended return, the following requirements apply:

- The same form as originally filed by the taxpayer (e.g., Form 20, Corporate Excise Tax Return) must be used and the “Amended” box on the return must be checked; and
- Taxpayers must show the computation of the refund claim.

If the refund claim is filed in letter form, the letter must include:

- The taxpayer’s name, Federal Employer Identification Number, and Business Identification Number;
- The tax years involved;
- The amount of the refund claim for each year;
- Detail of the apportionment formula used; and
- The name of the appropriate taxpayer contact person, including phone and fax numbers.

For claims both in the form of an amended return and in letter form, the following additional requirements apply:

- Across the top of the amended return or the letter, as applicable, the following words must be written in ink (but not red ink): “Protective Claim for Refund: Compact Apportionment Election.”
- The amended return or the letter, as applicable, must be mailed to: REFUND, PO Box 14777, Salem, Oregon 97309-0960.

Taxpayers should retain a copy of the protective claim for their files.

Contacts

If you have questions regarding the filing of a protective claim or other Oregon income tax matters, please contact either of the following Deloitte Tax professionals or your Lead Multistate Professional.

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⁷ Our August 10, 2012, External Tax Alert summarizing of the *Gillette* decision is accessible at: http://www.deloitte.com/assets/Dcom-UnitedStates/Local%20Assets/Documents/Tax/us_tax_multistate_CA_MTC_Alert_8-10-2012.pdf.