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EXTERNAL ALERT

Oregon Legislature Enacts Tax Haven Legislation, Requiring Income of Certain Unitary Foreign Affiliates to be Included in Oregon Consolidated Return.

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Overview

On August 1, 2013, Governor John Kitzhaber signed HB 2460, which creates a new compliance requirement for Oregon taxpayers with unitary affiliates incorporated in listed so-called "tax haven" countries. This Alert summarizes HB 2460 and identifies a number of open items that remain to be defined by the Oregon Department of Revenue ("DOR") in forthcoming administrative rules.

Inclusion of Foreign Affiliates' Income in Oregon Consolidated Excise Tax Return

Oregon currently requires a corporate taxpayer doing business in Oregon to file a consolidated corporate excise tax return that generally includes unitary affiliates that are included in the taxpayer's federal consolidated return.[1] By virtue of using the federal consolidated return as its starting point, the Oregon consolidated return is effectively a "water's edge" unitary group return.

HB 2460 will require taxpayers to include in Oregon taxable income the taxable income or loss "of any corporation that is a member of a unitary group and that is incorporated in" a listed foreign jurisdiction.[2] Such corporations are generally excluded from the federal consolidated income tax return and, accordingly, were not historically included in the Oregon consolidated excise tax return. If a foreign corporation's income is included under this provision, its apportionment factors will also be included in determining the Oregon apportionment factors under the legislation.[3] The following is the list of foreign jurisdictions included in the legislation:

> Andorra, Anguilla, Antigua and Barbuda, Aruba, the Bahamas, Bahrain, Barbados, Belize, Bermuda, the British Virgin Islands, the Cayman Islands, the Cook Islands, Cyprus, Dominica, Gibraltar, Grenada, Guernsey-Sark-Alderney, the Isle of Man, Jersey, Liberia, Liechtenstein, Luxembourg, Malta, the Marshall Islands, Mauritius, Monaco, Montserrat, Nauru, the Netherlands Antilles, Niue, Samoa, San Marino, Seychelles, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, the Turks and Caicos Islands, the U.S. Virgin Islands and Vanuatu.[4]

This provision is effective for tax years beginning on or after January 1, 2014.[5] HB 2460 does not generally convert Oregon into a worldwide combined unitary filing state, and does not include any provisions for making a water's-edge or worldwide filing election.

Forthcoming Rules and Reports from Oregon Department of Revenue

HB 2460 also requires the DOR to issue the following administrative rules and reports:

- The DOR must report to the Legislature on the use of out-of-state tax shelters, including:

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[1] ORS 317.710(2). Oregon essentially requires a unitary group to file a consolidated Oregon return if a federal consolidated return is filed. There are special rules that require either the inclusion or exclusion of certain taxpayers from the Oregon consolidated return (e.g., REITs excluded from the federal return under IRC § 1504(b)(6)) are required to be included in the Oregon return – ORS 317.710(5)(d)), but these exceptions are beyond the scope of this Alert.
[2] HB 2460, Section 2, amending ORS 317.715. Oregon defines "taxable income or loss" to be income or loss as adjusted by Oregon law, including apportionment. ORS 317.010(10).
[3] HB 2460, Section 2, amending ORS 317.715.
[4] *Id.*
[5] HB 2460, Section 5. HB 2460 becomes effective on October 7, 2013. HB 2460, Section 6. On rare occasions, legal challenges to tax legislation require an approval by the Oregon voters before the tax bills become effective; no such legal challenge is anticipated for this legislation.

a) a description of the methods by which taxpayers shift otherwise taxable Oregon income to other jurisdictions; and b) recommendations to address noncompliance resulting from such shelters (report due by February 1, 2014).[6]

- The DOR must submit reports to the Legislature recommending additions to or subtractions from the list of tax haven jurisdictions (reports due on or before January 1 of each odd-numbered year).[7]
- The DOR must adopt rules a) to determine the computation of income or loss for a corporation that is a member of a unitary group and that is not otherwise required to file a consolidated federal return, and b) to prevent double taxation or double deduction of any amount included in the computation of income under ORS 317.715. (There is no stated deadline for the adoption of these rules.)[8]

Next Steps

HB 2460 leaves open issues for taxpayers to navigate. For example:

- Oregon's consolidated tax return effectively imposes an 80% ownership test because the return relies on the federal consolidated return as its starting point for determining which entities must be included on the Oregon return. However, HB 2460 does not impose an ownership threshold on a "unitary" affiliate incorporated in the listed jurisdictions that is subject to the new tax haven inclusion rules.
- Oregon currently allows only an 80% dividend received deduction for dividends received from a 20% or more owned foreign subsidiary. Accordingly, 20% of dividends from foreign subsidiaries "included" under the new "tax haven" provision will be included in Oregon taxable income. (Presumably this will be addressed by regulations to conform to the treatment of domestic dividends from companies included in the consolidated return.)

Deloitte Tax will track the DOR's rulemaking process and will publish updates as appropriate.

Contacts

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[6] HB 2460, Section 1.
[7] HB 2460, Section 4.
[8] HB 2460, Section 2.