Multistate Tax
EXTERNAL ALERT

Oregon modifies “tax haven” list; allows alternate apportionment petitions

July 28, 2015

Overview

Oregon Governor Kate Brown recently signed into law Senate Bill 61 (SB 61).[1] The new law:

- Updates Oregon’s so-called “tax haven” jurisdictions list for Corporate Excise Tax (CET) purposes
- Lists criteria for determining whether a jurisdiction should be considered a “tax haven”
- Confirms that taxpayers may petition for alternate apportionment for sourcing foreign affiliate income

In this Tax Alert we summarize these CET law changes, highlight open items that remain to be defined by the Oregon Department of Revenue (DOR) in forthcoming administrative rules, and offer some taxpayer considerations.

Background

In 2013, effective for tax years beginning on or after January 1, 2014, Oregon amended Or. Rev. Stat. § 317.715 to provide that Oregon—generally a “water’s edge” state—would require taxpayers to include in their CET consolidated returns the income and apportionment of unitary affiliates that were incorporated in any of 39 listed foreign jurisdictions.[2] Pursuant to the 2013 law change, in each odd-numbered year, the DOR is required to submit a report to the Oregon Legislative Assembly recommending legislation related to the listed jurisdictions, including additions to or subtractions from that list.[3] During the 2015 Oregon Legislative Session, the DOR proposed making changes to the list, triggering a discussion that led to the adoption of several changes to the law as ultimately enacted in SB 61.

Modification of “tax haven” list

SB 61 modifies the original list of foreign jurisdictions by adding Guatemala and Trinidad and Tobago; removing Monaco; and replacing the Netherland Antilles, post-dissolution, with the corresponding jurisdictions of Bonaire, Sint Eustatius, Saba, Curacao, and Sint Maarten.[4] These changes are effective for tax years beginning on or after January 1, 2016.[5]

Criteria to determine foreign countries to be included as listed jurisdictions

As noted above, the DOR must submit a report to the Legislative Assembly on or before January 1 of every odd-numbered year with recommendations for additions to or subtractions from the list of “tax haven” jurisdictions.[6] SB 61 amended Or. Rev. Stat. § 317.717 by adding a further requirement that the DOR, in making the determination to recommend a jurisdiction for inclusion in the list, shall ascertain whether the jurisdiction is “one that for the tax year has no or nominal effective tax on the relevant income and for which at least one of the following applies:”

1. The jurisdiction has laws or practices that prevent effective exchange of information for tax purposes with other governments about taxpayers benefiting from the tax regime.

[1] Oregon Laws, Ch. 755 (2015 Legislative Session; signed by Governor Brown on Jul. 21, 2015). The enrolled version of SB 61 is accessible **here**.
[2] Oregon Laws, Ch. 707, § 2 (2013 Legislative Session), amending Or. Rev. Stat. § 317.715. For a summary of this law change, see our Tax Alert dated August 7, 2013, available **here**.
[3] Oregon Laws, Ch. 707, § 4.
[4] SB 61, Section 2(1)(b). The removal of Netherlands Antilles from the list and its replacement by the five noted jurisdictions was done to reflect the dissolution of Netherlands Antilles in 2010. This political development was not addressed when the Oregon Legislature adopted its list of jurisdictions in 2013.
[5] SB 61, Section 6. Note that SB 61 relocated the listed jurisdiction provisions from Or. Rev. Stat. § 317.715, to Or. Rev. Stat. § 317.717.
[6] Or. Rev. Stat. § 317.717.

2. The jurisdiction has a tax regime that lacks transparency. A tax regime lacks transparency if the details of legislative, legal, or administrative provisions are not open and apparent or are not consistently applied among similarly situated taxpayers, or if the information needed by tax authorities to determine a taxpayer's correct tax liability, such as accounting records and underlying documentation, is not adequately available.
3. The jurisdiction facilitates the establishment of foreign-owned entities without the need for a local substantive presence, or prohibits these entities from having any commercial impact on the local economy.
4. The jurisdiction explicitly or implicitly excludes the jurisdiction's resident taxpayers from taking advantage of the tax regime's benefits, or prohibits enterprises that benefit from the regime from operating in the jurisdiction's domestic market.
5. The jurisdiction has created a tax regime that is favorable for tax avoidance, based upon an overall assessment of relevant factors, including whether the jurisdiction has a significant untaxed offshore financial or other services sector relative to its overall economy.[7]

Confirmation that additional methods for determining business activity may apply per taxpayer petition or DOR permission

As summarized in our August 7, 2013 Tax Alert, taxpayers with foreign unitary affiliates subject to Oregon's "tax haven" law are required to include both the taxable income (or loss) and the sales of their foreign unitary affiliates in the Oregon CET return for the calculation of taxable income and apportionment, respectively. During the 2015 public debate of the proposed amendments to this law, the Oregon Legislature confronted the complexity of how to accurately impose CET on corporate income that was being "shielded" from Oregon taxation, but not impose CET on overseas operating income regarding which Oregon has no connection.

In an attempt to resolve this issue, SB 61 includes a cross-reference to Or. Rev. Stat. § 314.667,[8] which allows both taxpayers and the state to apply a different apportionment method (e.g., separate accounting, the inclusion of one or more additional factors, etc.) if Oregon's apportionment provisions do not fairly reflect the extent of the taxpayer's activity in Oregon.[9] The taxpayer may submit a petition for alternative apportionment and, upon review, the DOR may permit the taxpayer to report its apportionment consistent with the method described in the taxpayer's petition.[10] On July 1, 2015, DOR representative Joe DiNicola[11] testified before the Oregon House Committee on Revenue that the cross-reference to Or. Rev. Stat. § 314.667 is intended to operate so that a taxpayer subject to the "tax haven" law would be able to attach a statement to its CET return, showing how the income (or loss) and apportionment of the foreign unitary affiliate has been calculated.[12] Although not an official DOR pronouncement, it would appear that, based on Joe DiNicola's testimony, the DOR expects that each taxpayer subject to the "tax haven" law will use this statement as a petition for alternative apportionment (e.g., such taxpayers will use separate accounting directed at potentially shielding foreign operating income from Oregon taxation). However, uncertainty remains regarding what constitutes a valid petition, including the actual format and the required minimum information.

Additional DOR rule adoption and reporting

SB 61 also requires the DOR to issue the following administrative rules and reports:

- The DOR must adopt:
  - Rules to determine the computation of income or loss for a corporate member of a unitary group that is not otherwise required to file an Oregon consolidated return;
  - Rules to prevent double-taxation or double-deduction of any amount included in the computation of income under Oregon's "tax haven" laws as amended by Section 2 of SB 61; and
  - Other rules necessary to implement Section 2 of SB 61.[13]
- No later than March 15, 2017, the DOR must provide to the Legislative Revenue Office a report assessing the cost-effectiveness of the tax treatment of corporations incorporated in offshore jurisdictions.[14]

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[7] SB 61, Section 4, amending Or. Rev. Stat. § 317.717.
[8] SB 61, Section 2, adding new subsection (2) to amended Or. Rev. Stat. § 317.717.
[9] Or. Rev. Stat. § 314.667.
[10] Or. Rev. Stat. § 314.667(1). The state may also require that the taxpayer use an alternative method of apportionment. *Id.*
[11] Joe DiNicola, Tax Policy Coordinator, Corporation & Estate Section, Oregon Department of Revenue.
[12] Joe DiNicola's testimony is available **here**.
[13] SB 61, Section 2(3).
[14] SB 61, Section 7.

Considerations

SB 61 leaves open several issues for taxpayers to navigate, including but not limited to:

- What standards will the DOR adopt to evaluate whether income earned by a unitary affiliate incorporated in a listed jurisdiction is either subject to or outside the scope of Oregon taxation?
- What standards will the DOR use when evaluating a given taxpayer's proposed method of apportioning the income earned by such foreign unitary affiliates?
- When reviewing a given taxpayer's proposed method of apportioning the income earned by foreign affiliates, will the DOR adopt an "accept or reject" approach for the proposed method, or will the DOR propose alternatives?
- Will the DOR's rules implementing SB 61, Section 2 include guidance for drafting the petition under Or. Rev. Stat. § 314.667 (e.g., as noted previously, there is uncertainty regarding required minimum information, format, etc.)?
- Will the DOR's rules implementing SB 61, Section 2 include examples demonstrating the DOR's understanding of which income earned by the foreign unitary affiliate is subject to Oregon taxation and which income is outside the scope of Oregon's taxation?
- Given that the 2015 Legislature refused the DOR's recommendation to add such countries as Switzerland and The Netherlands to the list of "tax haven" jurisdictions, will the DOR continue to recommend their inclusion in subsequent years?
- When evaluating the cost-effectiveness of the tax treatment of unitary affiliates incorporated in "tax haven" jurisdictions, will the Legislative Revenue Office include taxpayer compliance costs in the overall calculation?

Contacts

If you have questions regarding SB 61 or other Oregon CET matters, please contact either of the following Deloitte Tax professionals.

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