



MULTISTATE INCOME/FRANCHISE TAX

Oregon Tax Court decision regarding apportionment of Subpart F income and dividend income

Tax Alert

Overview

The Oregon Tax Court, Regular Division (“Tax Court”) reviewed cross motions for partial summary judgment involving dividend income and Subpart F income received by Oracle Corporation (“Taxpayer”) from its controlled foreign corporations (“CFCs”) and whether Oregon statutes require portions of such income that are not subtracted from federal taxable income (“Net Dividends”) through Oregon’s dividends-received deduction (“DRD”) to be included in the taxpayer’s sales factor. Net Dividends are the amount of dividends included in the taxable income after application of the DRD. Ultimately, the Tax Court partially denied the motions for partial summary judgment, holding the Net Dividends are not included within the sales factor.¹ The Tax Court found that genuine issues of material fact existed that prevented other arguments regarding the apportionment of the Net Dividends from being resolved through summary judgment.

This Tax Alert summarizes the Tax Court’s order, specifically focusing on whether the Net Dividends are includable in a taxpayer’s Oregon apportionment.

Procedural history

This Oregon Tax Court order concerns motions for partial summary judgment regarding the inclusion of Net Dividends in a taxpayer’s Oregon sales factor.

Taxpayer, a computer technology company, had filed an Oregon consolidated corporate excise tax return and had sought to include Net Dividends² in its Oregon sales factor, contending that these amounts are “sales” under Oregon’s apportionment statutes.³ The Oregon Department of Revenue’s (“Department”), however, argued that Oregon’s apportionment law requires the exclusion of Net Dividends from the sales factor.⁴ Taxpayer and the Department filed cross motions for partial summary judgment seeking a determination regarding whether Oregon statutes require inclusion or exclusion of Net Dividends from the sales factor.

The Tax Court partially denied each party's motions for summary judgment, concluding that:

1. Or. Rev. Stat. § 317.267(3) does not require Net Dividends to be included in the apportionment formula;
2. Or. Rev. Stat. § 314.665(6)(a) does not apply to the "unsubtracted" portion (i.e., 20 percent) of the taxpayer's Subpart F income because there are no "gross receipts" that constitute or match to the taxpayer's Subpart F income; and
3. A genuine issue of material fact existed regarding whether dividends arose from the taxpayer's "holding" of the CFC stock and if so, whether under Oregon law the dividends were derived from the taxpayer's primary business activity and would therefore be included in the sales factor.⁵

Whether Or. Rev. Stat. § 317.267 (3) allows inclusion of unsubtracted Subpart F or dividend income

In its motion for partial summary judgment, Taxpayer alleged that Oregon law requires the taxpayer to include the unsubtracted 20 percent of the Subpart F Income.⁶ The applicable statute provides that "[t]here shall be excluded from the sales factor of any apportionment formula employed to attribute income to this state any amount subtracted from federal taxable income under [Oregon's DRD]."⁷

In interpreting this statute, Taxpayer "relies on a principle of statutory construction known as 'inclusio unius est exclusio alterius,' (the inclusion of the one is the exclusion of the other), and on Or. Rev. Stat. § 174.020(2), which states that 'particular intent controls a general intent' when the two are inconsistent."⁸ Taxpayer essentially argued that because 80 percent of the dividends and Subpart F income are excluded from the sales factor due to that income being subtracted from federal taxable income under Oregon's DRD provision, then Taxpayer should be able to include the remaining 20 percent of the dividend and Subpart F income in its sales factor.

The Tax Court recognized that the maxim of statutory construction that Taxpayer relied upon is "useful in the absence of other evidence of legislative intent."⁹ The Tax Court analyzed the legislative history of the Oregon DRD and Oregon's apportionment statutes. After extensive analysis, the Tax Court found that it was unlikely that the legislature intended to include the unsubtracted portion of dividends received from the mere holding of stock.¹⁰ Also, as part of its legislative intent analysis the Tax Court did not find (and Taxpayer did not offer) that the Legislature intended to treat passive income from stocks differently than passive income from other intangibles for apportionment purposes.¹¹ On the principle raised by Taxpayer that more specific intent controls, the Tax Court pointed out that Taxpayer incorrectly assumed the Legislature intended to require the unsubtracted dividend to be included in the sales factor solely because Or. Rev. Stat. § 317.267(3) is silent on the issue.

Therefore, the Tax Court denied Taxpayer's motion finding that the Legislature did not intend Or. Rev. Stat. § 317.267(3) to allow Taxpayer to include the Net Dividends in apportionment and that this silence on the issue within the statute required the application of the "substantive law governing the particular apportionment formula applicable to the taxpayer to determine inclusion or exclusion."¹²

Whether Or. Rev. Stat. § 314.665(6)(a) requires exclusion of unsubtracted amounts of Subpart F or dividend income

In its cross-motion for partial summary judgment, the Department argued that Taxpayer is required to exclude the unsubtracted amounts from the sales factor.¹³ The relevant law provides: “‘sales’ . . . [e]xcludes gross receipts arising from the sale, exchange, redemption or holding of intangible assets, including but not limited to securities, unless those receipts are derived from the taxpayer’s primary business activity.”¹⁴

The Department argued that Net Dividends must be excluded from apportionment “because those amounts arise from the holding of the CFC stock.”¹⁵ Additionally, the Department argued the “primary business activity exception” did not apply in this case because Taxpayer’s primary business activity is selling software and not in holding the stock of a CFC.¹⁶

The Tax Court examined these arguments by analyzing Subpart F income and actual CFC dividends as distinct items of income. The Tax Court determined that Subpart F income is “simply additional income.”¹⁷ The terms of ‘gross receipt’ and sales under the “text, context, and legislative history” of Oregon’s sales factor do not include Subpart F income.¹⁸ Specifically, the Tax Court determined that Subpart F income is accrued without the receipt of cash. Because gross receipts for purposes of the sales factor only includes actual cash receipts, the Tax Court found that Subpart F income was not a “gross receipt” under Oregon law, and therefore could not be included in apportionment.¹⁹

The Tax Court also examined whether Or. Rev. Stat. § 314.665(6)(a) applied to the actual CFC dividends. The Tax Court recognized that “Dividends were actual distributions of gross receipts that also constituted income to Taxpayer” and Taxpayer had included the dividends in its Oregon returns as apportionable business income.²⁰ While agreeing that dividends are apportionable business income, the Department argued that “the gross receipts constituting the dividends are excluded from the apportionment factor under Or. Rev. Stat. § 314.665(6)(a).”²¹

The parties did not dispute that “the CFC stock constitutes ‘intangible assets’ under Or. Rev. Stat. § 314.665(6)(a).”²² However, the Tax Court also found that Taxpayer “may have been engaged in the same unitary business with some or all of them” as there was evidence that Taxpayer’s operations “were thoroughly integrated with those of the CFCs.”²³ The Tax Court refused to grant summary judgment because an issue of material fact existed regarding whether the dividends arose from Taxpayer’s primary business activity.²⁴

The Tax Court further clarified that even if the dividends arose from the “holding” of the CFC stock, the dividends that originated from the taxpayer’s primary business activity could not be excluded from the apportionment factor under Or. Rev. Stat. § 314.665(6)(a).²⁵

Conclusion

The Oregon Tax Court clarified that Or. Rev. Stat. § 317.267(3) does tacitly provide for inclusion of Net Dividends within Taxpayer's Oregon sales factor. Additionally, Oregon statutes do not allow the unsubtracted portions of Subpart F income to be included in the sales factor because Subpart F income does not constitute gross receipts or sales. Lastly, the Tax Court concluded that "a genuine issue of material fact exists regarding whether the Dividends arose from Taxpayer's "holding" of the CFC stock and whether under ORS 314.665(6)(a) the Dividends were derived from Taxpayer's primary business activity."²⁶ The Tax Court, however, indicated dividends received as part of the taxpayer's primary business activity are not excluded from Oregon apportionment.

Considerations

While this Oregon Tax Court order provides some clarification regarding how Oregon law disallows the inclusion of unsubtracted amounts of a taxpayer's Subpart F or dividend income in the apportionment formula, this issue remains a complex and fact-specific question and should be carefully analyzed. Additionally, Oregon taxpayers who are accrual basis taxpayers should consider whether this order may create additional considerations for years in which actual cash receipts are not received in the same year as the sale.

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Footnotes

¹ *Oracle Corp. v. Dep't of Revenue*, No. TC 5340, 2020 Ore. Tax LEXIS 72 (T.C. Dec. 16, 2020).

² Oregon's DRD for dividends paid by subsidiaries is generally 70 percent and is increased to 80 percent if the shareholder corporation owns 20 percent or more of the subsidiary. Or. Rev. Stat. § 317.267. Oregon provides an 80 percent DRD for Subpart F income. Or. Admin. R. 150-317-0330(1). Accordingly, the Taxpayer claimed an 80 percent DRD for both the dividends actually received from its CFCs and its Subpart F income, and this position was not challenged. *Oracle Corp.*, No. TC 5340.

³ Or. Rev. Stat. § 314.665.

⁴ *Oracle Corp.*, No. TC 5340 at 4; Or. Rev. Stat. §§ 314.665(6)(a)

⁵ *Id.* at 34. The Tax Court also provided an order regarding an issue of material fact exists regarding whether the dividends were derived from Taxpayer's primary business activities. This issue is outside the scope of this alert.

⁶ *Id.* at 9.

⁷ Or. Rev. Stat. § 317.267(3).

⁸ *Oracle Corp.*, No. TC 5340 at 9.

⁹ *Id.* at 12.

¹⁰ *Id.* at 11-12.

¹¹ *Id.* at 10.

¹² *Id.* at 12, citing Or. Rev. Stat. § 314.665(6)(a).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 25.

¹⁷ *Id.*

¹⁸ *Id.* at 27.

¹⁹ *Id.*

²⁰ *Id.* at 30.

²¹ *Id.* at 31-32.

²² *Id.* at 30.

²³ *Id.* at 32.

²⁴ *Id.*

²⁵ *Id.* at 32-33.

²⁶ *Id.* at 34.

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