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MULTISTATE TAX

Oregon Supreme Court upholds E911 Tax on out-of-state telecommunications company

Tax Alert

Overview

On December 23, 2021, the Oregon Supreme Court ("Court") issued its opinion in *Ooma, Inc. v. Dept. of Rev*. The Court affirmed the Oregon Tax Court's decision and ruled that Oregon may validly impose its E911 Tax on an out-of-state telecommunications company that provides Voice over Internet Protocol (VoIP) services to customers across the United States, including Oregon residents. The Court held that imposing the tax on a company that lacks an in-state physical presence, but has access to Oregon's emergency communications system, does *not* violate the Due Process or Commerce Clauses of the U.S. Constitution.

This Alert summarizes the Court's decision, which is available here. Please click here for the Oregon Tax Court's opinion. Unless noted otherwise, quotations included in this Alert are from the Oregon Supreme Court's decision.

Oregon Supreme Court upholds imposition of E911 Tax on an out-of-state telecommunications company

Background facts

Ooma, Inc. ("Taxpayer") is a California-based telecommunications company that provides VoIP services to customers across the United States. Using Taxpayer's VoIP services, customers can make phone calls using a broadband internet connection. Under federal law, a VoIP provider is required to provide its customers access to the local emergency communication systems when calling 911. This access is provided through something known as E911.

Taxpayer complied with this federal requirement and provided Oregon customers with E911 access to Oregon's emergency communication system. Oregon imposes an E911 tax on VoIP services in exchange for access to its emergency communication system. The proceeds from the E911 tax are used to maintain and improve the system. VoIP providers are required to collect the

E911 tax from Oregon customers and remit the tax to Oregon Department of Revenue (“Department”) via quarterly tax returns filed with the Department.

Taxpayer did not collect or remit Oregon’s E911 tax during the tax period from January 2013 through March 2016. The Department issued notices of assessment and Taxpayer appealed, arguing that subjecting Taxpayer to Oregon’s E911 tax violated the Due Process and Commerce Clauses of the U.S. Constitution because Taxpayer did not have sufficient contacts, or nexus, with Oregon.

Both Taxpayer and the Department filed motions for summary judgment with the Oregon Tax Court. The Tax Court analyzed Taxpayer’s activity within Oregon and found that Taxpayer provided VoIP line access to thousands of Oregon customers during the relevant time period, generating over $2 million in revenue. Additionally, Taxpayer and the Department stipulated the following facts regarding Taxpayer’s Oregon activity, which included:

- Preparing marketing plans that targeted Oregon customers;
- Employing business strategies that targeted Oregon customers;
- Providing promotional and marketing materials to certain retailers for use in retail locations in Oregon; and
- Shipping promotional and marketing materials to retailer locations within Oregon at the direction of the national retailer.

The Oregon Tax Court granted the Department’s motion for summary judgment and denied the Taxpayer’s motion. The Tax Court found that Taxpayer had sufficient contacts and nexus with Oregon as required by the Due Process and Commerce Clauses and thus, the imposition of the E911 tax was permissible.

Taxpayer appealed to the Oregon Supreme Court, where the Court affirmed that the E911 tax was constitutional under both the Due Process and Commerce Clauses.

The Oregon Supreme Court’s Due Process Clauses analysis

Under the Due Process Clause, a state may only impose a tax if it relates to the protection, opportunities, and benefits provided by a state. This requirement is met if there is (1) a minimum connection between the state and what it seeks to tax and (2) the income subject to the tax is rationally related to the values connected with the taxing state. Taxpayer argued that the E911 tax violated the Due Process Clause because Taxpayer did not have a sufficient connection with Oregon since it had not purposefully availed itself of the Oregon market.

The Court disagreed, finding the Taxpayer had purposefully availed itself of the Oregon market. The Court found that the facts clearly demonstrated that the Taxpayer’s contacts with Oregon were not “random, isolated, or fortuitous” but were, instead, the result of its intentional efforts to serve the Oregon market. As a result of those efforts, Taxpayer established VoIP line access for thousands of Oregon customers and entered into ongoing commercial relationships with those customers. As such, the Court deemed the E911 tax constitutional under the Due Process Clause.

The Oregon Supreme Court’s Commerce Clause analysis

To be deemed constitutional under the Commerce Clause, a tax must: (1) apply to an activity with substantial nexus with the taxing state; (2) be fairly apportioned; (3) not discriminate against interstate commerce; and (4) be fairly related to the services provided by the state. Taxpayer argued that Oregon’s

E911 tax violated the first prong of the foregoing test because Taxpayer did not have substantial nexus with Oregon.

Both Taxpayer and the Department relied on the U.S. Supreme Court's analysis in *South Dakota v. Wayfair*, 138 S. Ct. 2080 (2018). In *Wayfair*, the Court upheld the constitutionality of a South Dakota law establishing a sales/use tax nexus standard based on the existence of more than $100,000 of South Dakota sales or 200 or more transactions involving the delivery of goods or services into South Dakota.

The Department argued that because Taxpayer earned over $2 million from Oregon customers over a period of 3 years and provided thousands of Oregon customer access to VoIP, Taxpayer clearly had substantial nexus with Oregon. Conversely, Taxpayer argued that it is not enough to simply establish the existence of $100,000 of in-state sales or 200 or more transactions involving the delivery of goods and services into the state. Instead, Taxpayer contended that *Wayfair* requires that companies must also maintain an "extensive virtual presence" within a state in order to have substantial nexus with that state. See *Wayfair*, at 2099.

The Court was unpersuaded by Taxpayer's argument, reasoning that "a company that earned far greater revenue and engaged in far more transactions than involved in *Wayfair* must be deemed to have also availed itself of the substantial privilege of carrying on business in Oregon." Acknowledging that the taxpayers in *Wayfair* undoubtedly had an extensive virtual presence, the Court explained that the U.S. Supreme Court in *Wayfair* did not articulate that fact as a requirement, and Taxpayer "offers no explanation as to why it would make sense to impose such a requirement when a nexus is otherwise established through sales, marketing, and service delivery efforts."

The Court affirmed the Tax Court's decision and found that Taxpayer had sufficient contacts and nexus with Oregon so that the state's imposition of the E911 tax did not violate the Due Process or Commerce Clauses of the U.S. Constitution.

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