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Hold the Phone, but Not Your Questions – Recent Oregon CAT Updates

By Larry Brant and Peter Evalds on 11.20.19 | Posted in Legislation, State and Local Tax, Tax Laws

In recent months, we have written extensively about Oregon's new Corporate Activity Tax (the "CAT"). As discussed in our last post, the Oregon Department of Revenue (the "Department") recently announced that it would hold a dial-in meeting to solicit input regarding the Department's rulemaking process from stakeholders located out of state or who otherwise could not attend the town hall meetings. Peter Evalds attended the telephone meeting, which was held on Friday, October 25, 2019.

This post continues our coverage of the CAT with an overview of new information we learned during the call. This post also addresses questions and answers that the Department recently uploaded to the Frequently Asked Questions ("FAQs") section of its CAT website.

CAT Telephone Meeting

Attending the telephone call for the Department were its Director of Communications and five policy analysts. The Department reported that approximately 130 to 150 stakeholders were on the call.

Many of the topics and issues previously discussed at the town hall meetings were covered. Several new issues, however, were addressed.

Administrative Items

The following administrative issues were discussed:

- The Department confirmed that registration will be available on its Revenue Online Portal.
- The Department reiterated that it may post draft rules on its website prior to the issuance of temporary rules. It promised to notify CAT email list subscribers if and when it releases draft rules.

Unitary Groups

The centralized management prong of the definition of unitary group was discussed:

- The Department categorized the issue of centralized management as whether entities had the "same management team" running the entities.
- Centralized management for this purpose is not the board of directors, but rather "C-suite" officers (e.g., CEO, CFO).
- If two companies are run by the same CEO, there is a "strong chance" of a finding that they form a unitary group.

The following items were also discussed relative to unitary groups:

- A real estate LLC renting a facility to a corporation would be in a unitary group with the corporation if there was centralized management, but transactions between the members (e.g., the payment of rent) would be excluded.
- The Department anticipates that taxpayers will be free to designate which entity in a unitary group will file returns and pay the CAT.
- The unitary group provisions alone should not make excluded persons subject to the CAT by virtue of any relationship to other entities.

Agency Exclusion

The following highlights the discussion relative to the agency exclusion:

- The Department confirmed that it plans to analyze the agency exception in terms of whether someone is acting on behalf of another person subject to their control.
- An agency determination will depend on the circumstances of each case.
- The contracts at issue and the parties' course of dealing may be considered in determining whether an agency relationship exists.
- We asked whether shipping charges collected on behalf of customers and paid to shipping carriers would fall under the agency exclusion. The Department indicated the normal test would apply—whether the company was acting subject to the control of the customer. The Department also stated that there might be a question of whether the company is in the business of shipping (presumably because, if not, it would not constitute commercial activity at all).
- Regarding cost-plus construction contracts, the Department indicated that whether a general contractor could exclude payments made to subcontractors under the agency exclusion would depend on the specific terms of the construction contract. The

Department suggested it may look to Ohio regulations for guidance on this issue. According to the Department, those regulations provide an inference that long-term contracts are less likely to present an agency relationship.

Out-of-State Wholesale Exclusion

The Department said it is working on generating a resale certificate that wholesalers can give to sellers to certify that goods will be sold out of state so that sales can qualify for the wholesale exclusion.

Residential Real Estate Exclusion

The following items pertain to the exclusion for labor payments made by general contractors to subcontractors for single-family residential real estate construction:

- The Department confirmed that the exclusion applies to general contractors, not subcontractors.
- The Department is looking into whether this exclusion might apply in the case of remodeling in addition to new construction.

Nexus of Foreign Corporations

The following nexus discussion arose from a Canadian corporation that does not have nexus for income tax purposes due to a treaty, but that will apparently have nexus for CAT purposes.

- The corporation inquired as to how it will determine its CAT liability since it does not apportion U.S. sales for income tax purposes. The Department quickly pointed out that the issue will only be relevant in this circumstance for subtraction purposes since its receipts are not apportioned. The Department said it is working through the issue of how to apportion the subtraction and it will aim to make the calculation as easy as possible.
- The Department indicated that it does not think that labor costs are limited to U.S. wages, so a foreign company should be able to use foreign labor costs in the subtraction to the extent they are attributable to Oregon commercial activity. The Department will consider this issue further.

Additional Items of Note

These additional items were discussed:

- Sales to government entities are generally not excluded.
- The Department plans to address where the delivery of professional services occurs for sourcing purposes in the new rules. It expects to use a standard that is similar to that under the corporation excise tax.
- With respect to the exception for farmer sales to agricultural cooperatives, the Department stated it is looking into the definition of "farmer" for such purpose.

New FAQs

The Department recently posted some basic answers to FAQs on its CAT website, including providing a brief overview of the tax and setting forth timeframes for registration and payment.

The following are a few points of note regarding the FAQs:

- The website provides that businesses that use fiscal years must file and pay the CAT based on the calendar year, confirming what the Department has stated in town hall meetings.
- The Department included a table listing the thresholds that trigger registration, filing and tax payment obligations.
- With respect to certain hospitals and care facilities that are excluded entities, the Department linked the relevant laws (presumably to make it easier for taxpayers to determine whether they qualify as an excluded entity).
- The Department included a table showing the quarterly periods and estimated payment due dates.
- The website contains computations and an example showing how to calculate CAT liability with the allowable subtractions.

Ultimately, the FAQs do not offer much in the way of detailed guidance at this point. We hope the Department will include even more detail prior to the issuance of rules. We will keep an eye out for additional guidance and post updates here!

Tags: agency exclusion, compliance, corporate activity tax, Corporate Tax, estimated tax payments, foreign corporations, gross receipts tax, NEXUS, Oregon, Oregon businesses, Oregon Department of Revenue, Oregon Taxpayers, out-of-state sellers, Registration, rulemaking, sourcing rules, subtraction, tax practitioner, taxable commercial activity, telephone meeting, town hall meeting, unitary groups, wholesale exclusion