

Larry's Tax Law

More Good News for Oregon Taxpayers – The Oregon Department of Revenue Got It Right

By Larry Brant and Steven Nofziger and Peter Evalds on 5.7.20 | Posted in Legislation, State and Local Tax, Tax Laws

New guidance from the Oregon Department of Revenue (the “DOR”) with respect to Oregon’s Corporate Activity Tax (“CAT”) was [issued yesterday](#).

Specifically, the DOR announced that:

- Certain forgivable federal loans and advances, including Paycheck Protection Program (“PPP”) loans, are excluded from the definition of commercial activity under the CAT;
- The DOR is scheduling a public hearing to discuss the first set of permanent rules promulgated under the CAT; and
- The DOR released a draft temporary rule regarding the sourcing of commercial activity for financial institutions.

Payments with Respect to Certain Federal Loans and Advances Are Not Subject to the CAT

As discussed in [prior blog posts](#), the Coronavirus Aid, Relief, and Economic Security Act (the “CARES Act”), signed into law on March 27, 2020, created the PPP under which the Small Business Administration (“SBA”) is authorized to make up to \$349 billion in forgivable loans to small businesses to enable them to meet payroll costs, benefits, rent and utility payments (the funding for which was increased to \$659 billion on April 24, 2020 when the Paycheck Protection Program and Health Care Enhancement Act was signed into law). The CARES Act excludes from gross income for federal income tax purposes the amount of any loan made and forgiven under the PPP.

The CARES Act also provides for emergency grants to applicants applying for loans under the SBA’s Economic Injury Disaster Loan Program (“EIDL”). Applicants can get an advance up to \$10,000 within two days of applying for an EIDL loan. The advance must be used for payroll and related expenses. The EIDL grant does not have to be repaid, even if the applicant is subsequently denied an EIDL loan. The CARES Act does **not** appear to provide any similar income exclusion with respect to EIDL grants that are not repaid, so business owners should

expect to have taxable income in the amount of any EIDL grant that is not repaid as part of an EIDL loan.

In an email sent by the DOR and as elaborated on the [DOR's website](#), the DOR announced that the receipt of funds pursuant to PPP loans (whether or not forgiven), EIDL advances and SBA debt relief for certain business loans do not constitute commercial activity under the CAT. Accordingly, taxpayers will not have to include these amounts in computing their Oregon commercial activity under the CAT.

This is obviously the correct result. These loans and advances, as well as repayment forgiveness, are not the result of commercial activity by any stretch of the imagination. Further, they are isolated, non-repetitive events. Commercial activity under the CAT is limited to amounts arising from transactions and activity in the regular course of a trade or business. The DOR got this one right!

Permanent Rule Hearing

The DOR announced that a public hearing on the first set of permanent CAT rules will take place by conference call on May 26, 2020, from 9 to 11 a.m.

OAR 150-317-1050 (Draft Temporary Rule)

The DOR released a draft temporary rule regarding the sourcing of commercial activity for financial institutions. Similar to the other temporary sourcing rules the DOR has issued, this draft rule borrows heavily from a comparable rule under UDITPA (in this case, OAR 150-314-0088).

As a general rule, commercial activity of financial institutions is sourced to Oregon if it is from business conducted in Oregon. Specifically:

- Receipts from sales, rental, lease or license of real property owned by a financial institution are sourced to Oregon if and to the extent the property is in Oregon or, with respect to a sublease of real property, if the property is in Oregon;
- Receipts from the lease or rental of tangible personal property owned by a financial institution are generally sourced to Oregon if the property is located within Oregon when it is first placed in service by the lessee;
- Interest, fees and penalties imposed in connection with loans secured by real property are sourced to Oregon if the property is located within Oregon;
- Interest, fees and penalties imposed in connection with loans not secured by real property are sourced to Oregon if the borrower is located in Oregon;

- Fees, interest and penalties charged to credit and debit cardholders are sourced to Oregon if the cardholder’s billing address is in Oregon;
- Receipts from merchant discounts are generally sourced to Oregon if the merchant is in Oregon;
- Receipts from ATM fees are generally sourced to Oregon if the cardholder’s billing address is in Oregon; and
- Receipts from the sale of a service not otherwise sourced under this rule are sourced to Oregon if and to the extent the service is delivered to a customer at a location in Oregon.

Additional rules apply to the sourcing of the sale of loans and card receivables, loan servicing fees, and receipts from a financial institution’s investment and trading assets and activities.

As noted above, the DOR borrowed heavily from the UDITPA rule when drafting this draft temporary rule. The following are items that were not adopted from the UDITPA rule:

- The requirement that a financial institution’s method for sourcing each receipt from a merchant discount must be consistently applied to such receipt in all states with similar sourcing rules;
- Certain provisions that address the sourcing of receipts from investment and trading assets and activities;
- The attribution rule of receipts where a taxpayer is commercially domiciled in Oregon; and
- Provisions related to the property and payroll factors (which are not present in the CAT).

Conclusion

The CAT landscape continues to change, including the welcome addition of relief from CAT liability for amounts received pursuant to the CARES Act discussed above. Guidance under the CAT will presumably continue to plod along, with a public hearing on the horizon and perhaps more new rules to come. We will continue to review and analyze guidance as it comes out. Stay tuned!

Tags: CARES Act, Coronavirus, corporate activity tax, Corporate Tax, COVID-19, forgivable loans, Oregon, Oregon Department of Revenue, Oregon DOR, Oregon Taxpayers, Paycheck Protection Program, rulemaking, Taxpayer