

Larry's Tax Law

## **The Oregon Department of Revenue Held Its CAT Call as Scheduled – The Business and Tax Community Were Represented**

By Larry Brant and Peter Evalds on 6.25.20 | Posted in Legislation, State and Local Tax, Tax Laws

As we [reported last week](#), the Oregon Department of Revenue (“DOR”) scheduled a public hearing on June 23, 2020 to discuss the second set of temporary administrative rules relative to the Oregon Corporate Activity Tax (the “CAT”) that it intends to make permanent. The show (held telephonically) occurred as scheduled. Peter Evalds from our firm attended the hearing. A summary of the key comments and concerns raised by attendees from the business and tax community, as well as our own guidance with respect to the rules, is set forth below.

The DOR kept to the hearing agenda we reported in our earlier post. Accordingly, the DOR solicited comments about four targeted temporary CAT rules, namely:

- OAR 150-317-1050 (Sourcing of Commercial Activity for Financial Institutions);
- OAR 150-317-1060 (Farmers Sales to Agricultural Cooperatives);
- OAR 150-317-1040 (Wholesale Sale of Groceries Exclusion); and
- OAR 150-317-1400 (Determining Property Resold Out of State).

Receiving no comments with respect to the sourcing of commercial activities for financial institutions, the DOR focused on the three other rules.

### **Farmers Sales to Agricultural Cooperatives**

ORS 317A.100(1)(b)(TT) excludes from commercial activity subject to the CAT: “[f]armer sales to an agricultural cooperative in this state that is a cooperative organization described in section 1381 of the Internal Revenue Code.” OAR 150-317-1160, in its temporary form, specifies that cooperative organizations (the sales to which are excluded from commercial activity) are cooperative organizations described in Code Section 1381(a)(1).

Code Section 1381(a)(1) refers to organizations that are exempt from tax under Code Section 521. Code Section 1381(a)(2) refers to corporations “operating on a cooperative basis” other than exempt organizations, certain mutual savings banks and certain insurance companies.

A representative of a large Oregon agricultural cooperative commented that the DOR, by limiting the statute’s reference of Code Section 1381 to subsection (a)(1) of that Code Section improperly excludes cooperatives defined under Code Section 1381(a)(2) (i.e., cooperatives that are not tax-exempt organizations). The representative asserted that corporations defined in Code Section 1381(a)(2) (those that operate on a cooperative basis but that are not exempt from tax under Code Section 521) should be included due to the plain statutory language in the statute. Given the plain language of the statute, we agree with the representative’s conclusion. Time will tell what the DOR does in its final rule.

**Practice Alert:** Following the meeting, the DOR [announced by email](#) that it is extending the time for public comment with respect to the Farmers Sales to Agricultural Cooperatives temporary rule to July 14, 2020. It is not, however, extending the time for public comment on the other three rules, for which the comment period has expired. Taxpayers and tax practitioners who have comments about the Farmer Sales to Agricultural Cooperatives rule need to weigh in prior to this new deadline.

### **Wholesale Grocery Exclusion**

ORS 317A.100(1)(b)(EE) excludes from commercial activity subject to the CAT: receipts from wholesale grocery sales. As we [previously discussed](#), OAR 150-317-1140 in its temporary form requires a wholesale seller of groceries to obtain verification from the purchaser of the amount of the groceries that will be resold, without processing, to the final consumer for home consumption. Interestingly, the statute itself does not put such a rigorous burden on the taxpayer.

Multiple business representatives and tax practitioners submitted comments about this rule. The comments generally contained a common theme:

- Complying with the verification requirement is unduly burdensome and will be time-consuming and expensive to implement;
- Obtaining certification at the time of each sale will be difficult. Some businesses make multiple sales to customers in short periods of time (some even on the same day). Taxpayers need some flexibility in this regard. A solution may be to allow verification to be obtained on a monthly, quarterly, or annual basis; and
- Allowing sellers to obtain from purchasers a “reasonable estimate” of what amount of a purchase will ultimately be sold to the final consumer is needed. Requiring specificity is not practical or likely possible in most cases.

**Practice Alert:** The temporary rule does not expressly state that certification must be received at the time of sale. However, several of the examples in the temporary rule reference a sales agreement that specifies the amount of the groceries that will be resold for home consumption. Additionally, the temporary rule speaks in terms of specific sales transactions, and it states that the seller must obtain verification that the groceries “will be resold” without processing. This may lead taxpayers to believe that they must receive the certification at the time of sale, or at the very least, prior to the time of resale. Clearly, this was on the mind of the hearing participants.

#### **Out-of-State Wholesale Exclusion**

ORS 317A.100(1)(b)(DD) excludes from commercial activity subject to the CAT receipts from sales to a wholesaler in Oregon, if “the seller receives certification at the time of sale from the wholesaler that the wholesaler will sell the purchased property outside this state.” As we [previously discussed](#), OAR 150-317-1400 in its temporary form provides that a wholesaler must determine which property will be sold out of Oregon based on facts available at the time of purchase. This requirement may be satisfied by use of an approximation ratio if at the time of purchase the wholesaler does not know which property will be sold out of Oregon.

The approximation ratio is a fraction, the numerator of which is the wholesaler’s Oregon commercial activity for the year realized from property delivered from Oregon locations, and the denominator of which is the wholesaler’s total commercial activity for the year realized from property delivered from Oregon locations. An example in the temporary rule provides that a wholesaler can look to prior year sales in determining the approximation ratio.

Several business representatives and practitioners submitted comments with respect to this rule. The comments are summarized as follows:

- The practical concern that a wholesale buyer may not want to provide resale information to the seller was raised. There are a myriad of reasons why this is the case, including cases where the buyer competes with the seller, making the requested information a trade secret;
- While the statute expressly provides that certification must be provided at the “time of sale,” maintaining such rigidity is not practical. Allowing certification on a monthly, quarterly or annual basis with respect to each customer is more practical and will allow taxpayers to be compliant. One taxpayer requested that, particularly in the case of a purchaser that will use an approximation ratio based on prior years’ sales, the seller should only need to obtain a one-time certification from such a purchaser (subject to revision if facts change) rather than a certification for each and every sale; and

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- The DOR failed to define “time of sale” in the rule. *Is the time of sale when the agreement of sale is signed or when title to the property transfers to the purchaser?* This is a question that needs to be answered in the final rule.

### **Conclusion**

The DOR is moving forward with the CAT rulemaking process. It received thoughtful and valid comments from the business and tax communities. Hopefully, the rules will be revised to add practicality and clearer guidance as the commenters requested. Time will tell! We will update the blog when the final rules are published.

**Tags:** corporate activity tax, Corporate Tax, farmers sales, Grocery Exclusion, Oregon, Oregon businesses, Oregon Department of Revenue, Oregon DOR, Oregon Taxpayers, Out-of-State Wholesale Exclusion, rulemaking, tax practitioner, wholesale exclusion