

Oregon CAT Part II: Fixes Still Needed to Ease Administration

by Nikki E. Dobay and Jeff Newgard

Reprinted from *Tax Notes State*, April 27, 2020, p.527

Oregon CAT Part II: Fixes Still Needed to Ease Administration

by Nikki E. Dobay and Jeff Newgard



Nikki E. Dobay



Jeff Newgard

Nikki E. Dobay is senior tax counsel with the Council On State Taxation. She is a key member of COST's advocacy team covering 13 states, including Oregon, and regularly provides written comments to and in-person testimony before the legislatures of those states. She can be reached at ndobay@cost.org. Jeff Newgard is a lobbyist specializing in state and local tax in Oregon. He can be reached at jeff@peakpolicy.com.

In this article, the authors provide an update on technical issues regarding the Oregon corporate activity tax and discuss legislative activity on those issues during the 2020 short legislative session. They also provide political history and context to the discussion regarding these issues.

Copyright 2020
Nikki E. Dobay and Jeff Newgard.
All rights reserved.

I. Introduction

Part I of this series on the Oregon corporate activity tax (CAT) urged lawmakers to address two specific technical corrections — the fiscal year filing issue and the worldwide filing requirement. Both issues were given consideration and ultimately addressed in H.B. 4009-A. Although that bill made it out of the House Committee on Revenue and had a strong chance of passing both chambers, it ultimately fell by the wayside when both chambers failed to obtain a quorum to conduct business. With the failure to H.B. 4009-A, the CAT continues to be extremely challenging for taxpayers to comply with and needs immediate technical fixes to function as intended by the legislature.

It is also worth noting that the impact of COVID-19 is casting even more uncertainty as to both the expected revenues and the process by which taxpayers may see these issues addressed. While understanding that the path forward is unclear, we nonetheless want to reiterate the significant administration and compliance issues that taxpayers face. Thus, this article is not meant to rehash the issues discussed in Part I, but rather to provide an update on the technical issues raised in that article, the legislative activity regarding those issues during the 2020 short legislative session, the need for the Department of Revenue to provide guidance, and the continuing need for lawmakers to enact corrective legislation.

II. Mechanics of the Oregon CAT

The Oregon CAT is now out of the bag! The CAT took effect January 1¹ and the first round of

¹H.B. 3427 section 79 (2019); H.B. 2164 section 60 (2019).

estimated quarterly payments is due April 30.² As discussed in “Oregon CAT Part I: Legislative Fixes Necessary for Administration,” the CAT is a modified gross receipts tax that incorporates features of both the Ohio commercial activity tax and the Texas margins tax.³

At a high level, the CAT is generally equal to 0.57 percent of a taxpayer’s taxable commercial activity⁴ over \$1 million, plus \$250.⁵ Taxable commercial activity is equal to commercial activity⁶ sourced to Oregon,⁷ less 35 percent of the greater of a taxpayer’s apportioned cost inputs or labor costs (referred to as the statutory subtraction).⁸ Commercial activity is broadly defined to include all business receipts in the regular course of a taxpayer’s trade or business without deduction;⁹ however, the CAT provisions do include approximately 47 exclusions.¹⁰

The amount of a taxpayer’s cost inputs equals a taxpayer’s cost of goods sold (COGS) as determined for federal income tax purposes,¹¹ and a taxpayer’s labor costs are limited to \$500,000 per employee.¹² Finally, the statutory subtraction provision references Oregon’s

Uniform Division of Income for Tax Purposes Act provisions (Or. Rev. Stat. sections 314.605 to 314.675) for purposes of apportioning the statutory subtraction.¹³

Although the Oregon CAT is called a corporate activity tax, it applies broadly to all entity types¹⁴ and is required to be filed and computed on a mandatory unitary combined basis.¹⁵ Individuals, partnerships, and other entities specified in the definition of a “person” and not otherwise excluded are also required to be included in the combined filing group, assuming they are unitary.¹⁶ Finally, because the CAT provisions do not distinguish between domestic (U.S.) and foreign (non-U.S.) entities, that calculation appears to be required on a worldwide basis.

III. Need for Technical Corrections

A. Preparing for Technical Corrections

Over the days, weeks, and months since the enactment of the Oregon CAT, the taxpayer community has been trying to make sense of its statutory provisions. Discovering substantial statutory irregularities unintended by the legislature, we quickly approached the governor’s office, legislature, and the DOR to highlight the most pressing concerns (as outlined in Part I) and began working on a resolution.

In Oregon, the legislature convenes for only a 35-day short session in even-numbered years. These sessions are an opportunity for lawmakers to meet to balance the budget and make technical corrections to previously enacted policies. In practice, however, these have become abbreviated sessions featuring the same, if not more, of the political pressures of the regular five-month session. Because there would be a narrow window of time to craft a thoughtful response for any technical corrections, we knew we would have to work quickly.

²Or. Rev. Stat. section 317A.137(1). Since the publication of our first installment on this topic on January 13, 2020, chapter 8, Revenue and Taxation, of the Oregon Revised Statutes has been updated to include the corporate activity tax provisions in chapter 317A. See Nikki E. Dobay, “Oregon CAT Part I: Legislative Fixes Necessary for Administration,” *Tax Notes State*, Jan. 13, 2020, p. 167.

³For an in-depth discussion of the mechanics of the Oregon CAT, see Dobay, *supra* note 2, Section II.

⁴Or. Rev. Stat. section 317A.100(16).

⁵Taxpayers with less than \$1 million of taxable commercial activity are not liable for the CAT but are required to register for and file an annual CAT return. Or. Rev. Stat. section 317A.125(2); Oregon Department of Revenue, “Corporate Activity Tax FAQ: Who is subject to the CAT?”

⁶Or. Rev. Stat. section 317A.100(1)(a).

⁷Or. Rev. Stat. section 317A.128.

⁸Or. Rev. Stat. section 317A.119.

⁹Or. Rev. Stat. section 317A.100(1)(a).

¹⁰Or. Rev. Stat. section 317A.100(1)(b).

¹¹Or. Rev. Stat. section 317A.100(2). The DOR recently announced that a taxpayer that does not otherwise calculate COGS for federal purposes may nonetheless calculate a COGS number for purposes of the statutory subtraction in accordance with IRS Publication 538. (See Mar. 10 meeting video.) The DOR noted that labor expenses included in the federal COGS calculation were not required to be excluded for purposes of the CAT. *Id.*

¹²Or. Rev. Stat. section 317A.100(12). Note: The DOR has issued guidance providing that a partnership’s guaranteed payments do not constitute compensation for purposes of determining a taxpayer’s labor costs. See Temporary Or. Admin. R. section 150-317-1220.

¹³Or. Rev. Stat. section 317A.119(2).

¹⁴Or. Rev. Stat. section 317A.100(14).

¹⁵Or. Rev. Stat. section 317A.106.

¹⁶Or. Rev. Stat. section 317A.100(4) and (17)(a).

B. Administrative Guidance and Rulemaking

Meanwhile, the DOR was required to rely on the existing statutory language to draft its regulatory guidance. Starting on January 1, the DOR began releasing a series of temporary administrative regulations outlining its interpretation and methods for administering the CAT.¹⁷ Much of the guidance was noncontroversial. For example, the DOR used definitions like those from the Oregon corporate income¹⁸ tax regime for substantial nexus and unitary groups, and from the market-based sourcing regime for purchases other than tangible personal property.

Other rules, however, were a surprise. In particular, the DOR's temporary rule for computing the statutory subtraction (Temporary Or. Admin. R. section 150-317-1200 — Cost Input or Labor Cost Subtraction) requires an apportionment method referred to as the “commercial activity ratio” to be used by all taxpayers. This ratio is calculated as a fraction, in which the numerator is equal to a taxpayer's taxable commercial activity sourced to Oregon and the denominator is equal to a “taxpayer's

total commercial activity everywhere plus exclusions from commercial activity.”¹⁹

This commercial activity ratio is perhaps the most perplexing deviation from our understanding of the tax as enacted. During the 2019 session, the legislature outlined the mechanics for the statutory subtraction as being “simple” because of its connection to the rules governing corporate income tax apportionment.²⁰ In other words, a taxpayer would *simply* multiply either its cost inputs or labor costs by its corporate income tax apportionment factor to determine the taxpayer's statutory subtraction. This was, at least for most who participated in the 2019 legislative process, the common understanding of the law.

The current nonconformity between the apportionment factor being used for purposes of a taxpayer's corporate income tax and the CAT creates a compliance nightmare for many taxpayers. For corporate income tax purposes, Oregon apportions income using a single sales factor method and market-based sourcing. Both concepts are commonly understood, and while still complex, most corporate taxpayers have devised a method to comply with such a regime. With this new “commercial activity ratio” a taxpayer would be required to keep an entirely new set of books and records based on Oregon's specific definitions of commercial activity, which, although similar to the sourcing rules for gross receipts for purposes of the corporate income tax, are not the same.

The DOR's temporary regulation also results in a potential reduction of the statutory subtraction for taxpayers selling solely intrastate (that is, non-multijurisdictional businesses). For such taxpayers, the reference to Oregon's UDITPA provisions would seem to indicate apportionment of the statutory subtraction was not required.²¹ The DOR's temporary regulation, however,

¹⁷On January 1, 2020, the DOR released the following temporary regulations. All references in this footnote are to sections of Or. Admin. R. Section 150-317-1000: Definition of Commercial Activity; section 150-317-1010: Substantial Nexus Guidelines for Corporate Activity Tax; section 150-317-1020: Factors Used in Determining Whether a Group of Persons Forms a Unitary Group; section 150-317-1030: Sourcing Commercial Activity to Oregon from Sales of Tangible Personal Property; section 150-317-1040: Sourcing Commercial Activity Other Than Sales of Tangible Personal Property in This State; section 150-317-1100: Agent Exclusion; section 150-317-1130: Property Brought into Oregon; section 150-317-1200: Cost Input or Labor Cost Subtraction; section 150-317-1310: Estimated Tax Payments Delinquent or Underestimated Payment or Both, Constitutes Underpayment; section 150-317-1320: Estimated Tax Unitary Groups and Apportioned Returns; section 150-317-1330: Extension of Time to File. On February 1, 2020, the DOR released the following temporary regulations: section 150-317-1140: Wholesale Sale of Groceries Exclusion; section 150-317-1150: Retail Sale of Groceries Exclusion; section 150-317-1400: Determining Property Resold Out of State and Methods of Determining; and section 150-317-1410: Motor Vehicle Resale Certificate Documentation Required. On March 6, 2020, the DOR released the following temporary regulations: section 150-317-1120: Definition of Single-Family Residential Construction; and section 150-317-1220: Employee Compensation Labor Cost Subtraction.

These temporary regulations will be effective for 180 days unless amended, revoked, or rescinded by the DOR. At the time this article went to print, the DOR has said publicly that it plans to move these temporary rules through the permanent rulemaking process in either May or June. That process requires each rule to go through the notice and public comment period. The DOR has said it will release additional regulations as either temporary rules or as part of the permanent rulemaking process over the next several months.

¹⁸All references to the Oregon income tax are shorthand for Oregon's corporate excise tax provisions in chapter 317 of the Revised Statutes.

¹⁹Or. Admin. R. section 150-317-1200(2). The DOR pointed to Or. Rev. Stat. section 317A.119(3)(b), which excludes from cost inputs or labor costs expenses not attributable to the production of commercial activity for purposes of the statutory subtraction, as the rationale for requiring a different apportionment method.

²⁰During the March 5, 2019, hearing of the Joint Committee on Student Success Subcommittee on Revenue, the Legislative Revenue Office described the apportionment mechanism as being like the corporate income tax by attributing activity using the single sales factor. The approach was outlined in the committee materials for the meeting.

²¹See Or. Rev. Stat. section 314.615.

provided no such guidance for intrastate taxpayers. And, because of the required addback to the denominator for “exclusions from commercial activity,” wholly intrastate taxpayers could wind up with a ratio of less than 1 percent if those businesses had sales from excludable commercial activity. Also, taxpayers primarily engaged in the sale of excluded commercial activity, for example the sale of groceries, might experience significantly higher effective tax rates because of the dilution of the statutory subtraction.

Furthermore, the administrative guidance did not address the worldwide unitary group or fiscal year issues identified in our first installment on this topic, and the compliance concerns relating to the statutory subtraction further compound the already complicated situation.

C. Leadup to the 2020 Session

After the publication of Part I and a series of discussions with elected officials, the governor’s office convened a technical working group to identify the immediate statutory concerns and craft a response to clarify the policy intent. Like any political process, we started worlds apart, with everyone claiming the statute supported their interpretation of the policy intent. The standoff on the different interpretations was perhaps enough for group members to realize the issue was not a matter of right and wrong but, rather, a profoundly confusing statute.

Over a few short days, the differences were discussed. It is customary for lawmakers to rely on the taxing agency to fine-tune any technical issues in regulation. This is generally an acceptable way to address administrability issues. Here, however, some provisions that were key to the core function of the tax needed to be addressed. Thus, the mission was to minimize statutory ambiguities and craft a proposal that would allow the DOR move forward with implementation of the CAT without having to make its own policy decisions.

The focus was on three crucial clarifications to the law to simplify the administration and compliance — the statutory subtraction, mandatory worldwide unitary filing, and accounting year challenges. We noted these issues would not cover all the technical complexities of the new tax but would at least address the most pressing concerns arising from taxpayers in virtually every business sector.

IV. Oregon’s 2020 Session H.B. 4009

A. Introduced Bill

Several weeks before the 2020 short session began, Legislative Concept (L.C.) 249 was being circulated as a placeholder bill for CAT technical corrections. L.C. 249 was introduced as H.B. 4009 just a few days before the session officially started. It was the understanding of those involved in the technical working group that H.B. 4009 was a starting point.

As introduced, H.B. 4009 included the following proposed amendments (listed in the order they appear in the bill):

- add statutory reference regarding registration fees and taxes collected by vehicle dealers;²²
- clarify that returns and allowances are allowed as an offset to commercial activity in the year in which the return or allowance is received;²³
- amend the statutory subtraction apportionment ratio provision to require taxpayers to use the “commercial activity ratio” provided by the DOR in its temporary regulation;²⁴
- dispose of the annual registration requirement;²⁵ and
- amend the penalty provision, authorizing the DOR to impose penalties when

²² See H.B. 4009 (as introduced) section 1, at 3.

²³ See H.B. 4009 (as introduced) section 2, at 7.

²⁴ See H.B. 4009 (as introduced) section 3, at 8. As introduced the H.B. 4009 provision making this change stated that “the denominator . . . is commercial activity in the United States.” Although this language seems to indicate that for purposes of the apportionment ratio only domestic sales could be included even for taxpayers required to file on a worldwide basis, the reference to the United States appears to have been an oversight and not intentional.

²⁵ See H.B. 4009 (as introduced) section 4, at 8.

taxpayers fail to meet payment thresholds for quarterly payments.²⁶

The language of H.B. 4009 as introduced did not address the fiscal year issue or the worldwide filing group issue — the technical corrections that were advocated for in Part I. Nevertheless, the technical working group continued to discuss those issues and it was understood H.B. 4009 would be the vehicle through which those issues would be addressed.

B. Process and Politics

There was a cloud of uncertainty hanging over the legislature as the session began. Carbon policy has quickly become one of the most divisive forces in Oregon politics, and the legislature has spent the past several years crafting and debating legislation imposing strict market limits to the state's greenhouse gas emissions. During the 2019 session, Senate Republicans left the capitol — and the state — after the carbon measure was scheduled for a final vote, denying the quorum necessary for the chamber to conduct any business.²⁷ The absent members only returned on the final day of the session after a deal was reached to carefully maneuver the passage of budget bills and noncontroversial legislation.

Needless to say, the 2019 session adjourned without the legislature's customary end-of-session celebrations, and the scars of the walkout never completely faded. Democrats in both chambers had committed to reconsidering the carbon measure for the next session and Republicans were unyielding in their threats to take any means to stop them, including walking out again or even not participating in the session.

²⁶ See H.B. 4009 (as introduced) section 5 and 6, at 8-9. Sections 7 and 8 of H.B. 4009 (as introduced) corrects effective date issues found in the penalty provision in Or. Rev. Stat. section 317A.161. As in place, section 317A.161(1) provides that the DOR “may not impose interests or penalties” when a taxpayer underreports or underpays its CAT liability. And, section 317A.161(2) authorizes the DOR to impose penalties under section 314.400 when a taxpayer fails to pay 80 percent of its quarterly estimated payments. The effective date provision related to section 317A.161 provides that it applies “to tax years beginning on or after January 1, 2020, and before January 1, 2021, and to returns filed on or before April 15, 2021.” In theory that effective date language was supposed to apply only to section 317A.161 subsection (1); however, due to an apparent drafting error it is written to apply to both subsections. Thus, as codified, the DOR is prohibited from imposing penalties and interest, but also seems to have the authority to do so.

²⁷ Oregon is one of four states requiring two-thirds of all members in attendance for a chamber to conduct its regular business.

To onlookers, it was perhaps a matter of when, not if, the legislature would find itself in another shutdown.

The threat of another walkout was a pressing concern throughout the development of H.B. 4009. There was significant pressure to advance bills out of committee before carbon politics consumed the session. Any realistic hope for CAT corrections required the legislature to move quickly on the bill.

On February 20 Oregon's House Committee on Revenue introduced and unanimously adopted amendments to H.B. 4009. In addition to the core structural clarifications, the committee authorized the DOR to impose penalties for noncompliance and changed the tax treatment of taxpayers in agricultural sectors, which is discussed below.

C. A-Engrossed

H.B. 4009 A-Engrossed (hereinafter A-Engrossed) was the result of the House Committee on Revenue's work throughout the first three weeks of February and was unanimously adopted by the committee February 20. During the committee's work in early February, it reviewed approximately 20 amendments, some but not all of which made it into A-Engrossed. Specifically, A-Engrossed included the following:

- Technical amendments to address administrability;
- Add a provision that allows taxpayers to make a modified group election to exclude some foreign members and provide the DOR with rulemaking authority regarding administrative issues related to elections;²⁸ and
- Rearrange and make amendments to the statutory subtraction provision, including addressing the fiscal year filing issue.²⁹

²⁸ See H.B. 4009 A-Engrossed section 1a, at 7.

²⁹ See H.B. 4009 A-Engrossed section 3, at 8-9.

- Amendments related to the agricultural sector:
 - Specify that crop insurance is an exclusion for payments from insurance policies;³⁰
 - Add exclusion from commercial activity for receipts from the sale of milk by dairy farmers that are not members of a cooperative;³¹
 - Add definitions for agricultural commodity, broker (for purposes of agriculture), and farming operation;³² and
 - Define cost inputs for taxpayers engaged in farming operations.³³
- Other miscellaneous amendments:
 - Clarify that all tax refunds (regardless of the program) are excluded from commercial activity;³⁴
 - Add statutory reference regarding registration fees and taxes collected by vehicle dealers;³⁵
 - Add “manufactured dwelling park nonprofit cooperative” for definition of excluded persons;³⁶
 - Clarify language in the definition of a taxpayer;³⁷
 - Clarify that returns and allowances are allowed as an offset to commercial activity in the year in which the return or allowance is received;³⁸
 - Dispose of the annual registration requirement;³⁹
 - Authorize the DOR to impose a 5 percent penalty when a taxpayer fails to pay at least 80 percent of its estimated quarterly payment and clarifies penalty provisions for the failure to file and pay annually;⁴⁰ and

- Clarify penalty provision effective dates.⁴¹

The remainder of our discussion focuses on the technical amendments to address administrability, including the modified group election and the changes to the statutory subtraction.

The modified group election provision was added to address the worldwide filing group issue. As passed in 2019, the Oregon CAT seems to require mandatory unitary worldwide filing.⁴² And although the worldwide filing method may make theoretical sense when applied to a corporate income tax, the logic of such a filing method breaks down when applied to the CAT.⁴³ Specifically, a multinational taxpayer would likely be required to include tens, if not hundreds, of foreign entities with no commercial activity sourced to Oregon, assuming those entities are unitary. Oregon would receive no additional financial benefit from including foreign entities without Oregon source commercial activity, and the taxpayer would be required to go through the administrative burden of calculating amounts not required for any other corporate tax return filing, which the DOR would have to address on audit.

As an issue that was identified long before the session began, the technical working group came to a solution that worked for taxpayers and kept intact the underlying policy implemented by the legislature. When passed in 2019, the legislature intended to include in the Oregon CAT base commercial activity from foreign (non-U.S. entities) sourced to Oregon (Oregon sales). With that in mind, the technical group developed a modified group election as opposed to a pure water’s-edge election.

The modified group election in A-Engrossed provides that, notwithstanding the general unitary group filing requirement, a taxpayer may elect to exclude from the group non-U.S. members

³⁰ See H.B. 4009 A-Engrossed section 1, at 2.

³¹ See *id.*

³² See H.B. 4009 A-Engrossed section 3b, at 9.

³³ See *id.* at 5.

³⁴ See *id.* at 2.

³⁵ See *id.* at 3.

³⁶ See *id.* at 5.

³⁷ See *id.* at 7.

³⁸ See H.B. 4009 A-Engrossed section 2, at 8.

³⁹ See H.B. 4009 A-Engrossed section 3b, at 9.

⁴⁰ See H.B. 4009 A-Engrossed sections 5 and 6, at 10-11.

⁴¹ See H.B. 4009 A-Engrossed sections 7 and 8, at 11.

⁴² For an in-depth discussion of this issue, see Dobay, *supra* note 2.

⁴³ The acknowledgment of mandatory worldwide combined filing making theoretical sense does not in any way concede our strong opposition to a worldwide filing requirement in the context of the Oregon corporate income tax. Rather, we are pointing out that putting aside the otherwise flawed conceptual and policy reasons for a state to consider worldwide filing, the questionable mathematical reasons (that is, to increase the tax base or starting point) are completely lost when applied to a tax based on gross receipts being sourced to a particular state like the CAT.

that have either no commercial activity sourced to the state or no “amounts realized but by definition excluded from commercial activity” sourced to the state.⁴⁴ The second prong of the modified group election is meant to capture entities with sales that fall within the general definition of commercial activity that would be sourced to Oregon but are excluded pursuant to the statutory provisions (*i.e.*, Or. Rev. Stat. section 317A.100(b)).

To illustrate the mechanics of the modified group election, consider a multinational business with the following entities:

- 300 entities in its global structure, all of which are unitary;
- of the 300 total entities, 75 are U.S. entities and 225 are non-U.S. entities; and
- of the 225 foreign entities, only 10 have commercial activity sourced to Oregon.

If this business were to make the modified group election contemplated in A-Engrossed, it would include the 75 U.S. entities and the 10 non-U.S. entities that have commercial activity sourced to the state in its Oregon combined CAT return. The 225 non-U.S. entities with no connection to Oregon would be excluded. If the business did not make a modified group election, the taxpayer would include all 300 entities in the Oregon CAT return, requiring the taxpayer to calculate its statutory subtraction on a worldwide basis.

Turning to the statutory subtraction, as passed in 2019, the CAT included a subtraction of the greater of 35 percent of either a taxpayer’s cost inputs (generally COGS) or labor costs (up to \$500,000 per employee) multiplied by the taxpayer’s apportionment factor as determined under Oregon UDITPA provisions.⁴⁵ As noted, most taxpayers interpreted the 2019 legislation to mean that a corporate taxpayer would apply its

apportionment factor as determined on its Oregon Form OR-20⁴⁶ to either its cost inputs or labor costs amount. The DOR, however, in its temporary regulation required taxpayers to use a separately computed commercial activity ratio for purposes of the CAT.

That ratio, as set forth in the DOR’s temporary rule and included in H.B. 4009 as introduced as a replacement to using the single sales factor, was ultimately abandoned in A-Engrossed. Rather, section 3 of A-Engrossed clarifies that a “taxpayer having commercial activity both within and without the state” may use any of the following methods to determine its apportionment factor for purposes of the CAT:

1. the single sales factor provisions provided in Or. Rev. Stat. sections 314.650 and 314.655;
2. if the taxpayer is required to use a special industry apportionment formula or uses alternative apportionment⁴⁷ for purposes of determining its corporate income tax apportionment factor, then the taxpayer may use that factor for CAT purposes; or
3. a manner described in rule by the department.⁴⁸

This amendment would have made clear that taxpayers with solely Oregon commercial activity (that is, non-multijurisdictional) would not be required to apportion their statutory subtractions. And multijurisdictional taxpayers, for purposes of the CAT, may generally use the same apportionment factor used for corporate income tax purposes unless a taxpayer chooses to use the commercial activity ratio or some other ratio provided by the DOR in regulation.⁴⁹ Taxpayers could continue to use an alternative apportionment method for purposes of the CAT, because that provision was not amended by A-Engrossed.

⁴⁴ It is important to note that based on Oregon’s drafting conventions, the language that includes “or amounts realized by definition excluded from commercial activity” is offset by commas in section 1a of A-Engrossed. Although the inclusion of these commas has created some confusion, we have confirmed with the DOR that it reads this provision to mean that foreign sellers with intercompany transactions cannot be excluded under this election. In other words, foreign affiliates selling into Oregon through intercompany transactions will be required to be included in the filing; however, the intercompany transactions will nonetheless be excluded under Or. Rev. Stat. section 317A.100(FF).

⁴⁵ The Oregon UDITPA provisions can be found at Or. Rev. Stat. sections 314.605 through 314.666.

⁴⁶ A taxpayer’s Oregon apportionment factor for the corporate excise tax is calculated on Form OR-AP, and that factor follows line 8 on the Form OR-20.

⁴⁷ The DOR has said that it broadly interprets the reference to “alternative apportionment” to include any other apportionment method provided by statute as well as an alternative apportionment method petitioned for by a taxpayer under Or. Rev. Stat. section 314.667.

⁴⁸ See H.B. 4009 A-Engrossed section 3, at 9 (lines 11-17).

⁴⁹ A taxpayer would be required to recompute its single sales factor for purposes of the CAT if the taxpayer’s filing group differed from its corporate income tax return filing group.

Another amendment to this section provided that a taxpayer would be able to use its own fiscal year information for purposes of calculating its statutory subtraction.⁵⁰ This amendment provided a partial fix to the fiscal year filing issue, and although not perfect, it was a step in the right direction as it would significantly ease the fiscal year issue for taxpayers.⁵¹

D. Caught in the Crosshairs

States are tackling many contentious issues, but none may be more provocative than carbon legislation, especially in the rural communities along the West Coast. Oddly enough, the controversy is much less a reflection of the politics of global warming and climate change than it is about the politics and industries of the urban-rural divide. In Oregon, the politics of carbon were, by and large, the defining issue of the recent session, and those politics reached a breaking point.

The legislature was on a collision course for several weeks, scheduling, postponing, and rescheduling the carbon measure in part to buy time for other pressing issues to advance before the looming politics of the session ultimately played out. On February 24 Democrats scheduled the carbon bill for its final vote out of a budget committee and, as promised, Republicans left the building never to return.

As a result, the session ended without the legislature passing any meaningful legislation. It enacted only three measures — increasing some license plate fees, recognizing the disincorporation of a city, and requiring schools to use a form to outline academic accommodations for students diagnosed with concussions. This is not to minimize the legitimacy of any of these enacted bills; just to highlight that more

consequential legislative business was left unfinished.

Upon the constitutional adjournment at midnight March 8, the technical corrections to the CAT laid somewhere in the graveyard of abandoned measures. Coincidentally, it was the first bill on the third reading list on the day Republicans left the building, although the scheduled vote had no bearing on the decision to leave. Unfortunately, H.B. 4009 became a casualty of the unrelated political warfare of the legislative session, leaving taxpayers and the state worse off.

V. Political Uncertainty and Complexities of COVID-19

Oregon lawmakers have been reeling from the consequences of their session. The legislature was unable to balance hundreds of millions of dollars in agency budgets and abandoned many other crucial bills. In the days after calling the session “functionally over,” the House speaker and Senate president asked the governor to call the legislature back into special session within the next 30 days for lawmakers to finish their work. Nonetheless, the outlook for a special session remained uncertain because of the impasse over carbon politics.

The legislature’s inability to find common ground to pass any legislation is an unfortunate outcome. The DOR has said it will soon launch its process for promulgating permanent rules and additional CAT guidance. Thus, there may be some room for the DOR to assist in clarifying the policy intent of the statute. In the absence of legislation, however, taxpayers and practitioners remain in limbo. In our view, legislative action is required to adequately address the technical corrections and to provide the necessary level of certainty to taxpayers.

Looking ahead, there may be opportunities for the legislature to provide the clarity and certainty taxpayers need to comply with the intent of the law. On March 16 the legislature announced the formation of a committee to lead the policy response to the coronavirus outbreak. Later, the committee co-chairs recommended the technical corrections to the CAT as an action the legislature should take to ease uncertainty felt by

⁵⁰ See H.B. 4009 A-Engrossed section 3, at 9 (lines 27-30).

⁵¹ Although a general fiscal year filing option would have been the preferred fix to include in A-Engrossed, the inclusion of the election to use a taxpayer’s fiscal year information for purposes of the statutory subtraction was a significant win for taxpayers. Because the revenue forecasts were based on the CAT taking effect on January 1, 2020, there was some fear in adjusting the period during which the commercial activity receipts were being counted. Thus, the preference was to not adjust the period for determining a taxpayer’s commercial activity (that is, keep that on a calendar-year basis) while recognizing the administrative burden of calculating COGS and apportionment on a calendar-year basis for fiscal-year filers.

businesses.⁵² This high-level legislative support is encouraging for the prospects of the CAT technical corrections.

Another policy change the legislature could and, perhaps, should consider in its response to the coronavirus crisis is the CAT estimated payments schedule. Employers of all sizes and regions in Oregon are facing a cash flow crisis because of the economic stoppage and dire outlook for the weeks and months ahead. While these issues are present for practically all employers, they are ever more dire for Oregon's small businesses, many of whom are suppliers and vendors for larger businesses.

Oregon can provide immediate relief to employers subject to the tax without undermining the revenue the tax would otherwise generate. Oregon could achieve meaningful relief for employers by following the lead of the Nevada commerce tax and Texas margins tax by eliminating the estimated quarterly payments and requiring annual payments. If Oregon is concerned about government cash flows, the legislature could encourage early payment by allowing a discount for early or quarterly payments of the annual tax.⁵³

To be clear, the technical corrections to the Oregon CAT included in H.B. 4009 (specifically A-Engrossed) even if enacted, are not a panacea for every policy and administrative problem with the tax. There will continue to be other administrative and policy glitches identified and requiring the attention of the legislature. Nonetheless, these initial corrections would reduce administrative burdens, facilitate taxpayer compliance with the CAT, and are critical steps forward that should be taken sooner rather than later. ■

⁵²The co-chairs of Oregon's Joint Special Committee on Coronavirus Response recommended the contents of H.B. 4009 be redrafted and included in the legislative response to the viral outbreak. Letter from Rep. Paul Holvey and Sen. Arnie Roblan to Sen. Peter Courtney and Rep. Tina Kotek (Mar. 25, 2020).

⁵³Or. Rev. Stat. section 311.505(3) provides a discount for early payments of property taxes of 2 percent on two-thirds of taxes paid and 3 percent on taxes paid in full. The legislature could provide a similar discount to encourage early payments of the CAT.

*Come for tax news.
Leave with tax wisdom.*

Tax Notes offers more than just the latest tax news headlines. Our online dailies and weekly print publications include commentary and insight from many of the most-respected minds in the tax field, including Lee Sheppard and Martin Sullivan.

To stay smart, visit taxnotes.com

taxnotes[®]

Federal | State | International