

Oregon's Corporate Excise Tax Substantial Nexus Rule 'Substantially' Applies to All Tax Periods Open To Examination

Legal Alert
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Applicability of Substantial Nexus Guidelines Rule (OAR 150-317.010)

The substantial nexus guidelines rule (the Rule) enacted by the Oregon legislature in May 2008 gives the State of Oregon jurisdiction to impose an excise tax on corporations for the privilege of doing business in Oregon.

Recently, the Oregon Department of Revenue was asked to state a position on whether the Rule extended to tax periods prior to its enactment. The Department of Revenue's response: "Because [the Rule] did not state that it would apply only to tax periods beginning after the Rule was adopted,...[it] applies to all periods open to examination," including those prior to May 2008.

The Guidelines

First, the excise tax is only imposed on corporations "doing business" in Oregon, i.e. engaging in "any profit-seeking activity" in Oregon. Whether a corporation is so engaged depends on the facts and circumstances of each case. Beware: even if a corporation has no employees in Oregon, activities of third persons acting on behalf of the corporation may qualify it as doing business in the state.

If a corporation is doing business in Oregon, an excise tax may be imposed as long as there is "substantial nexus" between Oregon and the activity it seeks to tax. "Substantial nexus" is a defined term under the Statute and is intended to apply to corporations that "regularly take advantage of Oregon's

Contact

Larry J. Brant

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economy to produce income...." Fortunately, a list of nonexclusive factors has been codified under the Rule for clarification. Factors include:

Maintaining continuous and systematic contacts with Oregon's economy and market.

Marketing to or soliciting Oregon customers.

Filing reports or returns with Oregon legislative bodies.

Receiving significant gross receipts attributable to customers in Oregon.

Receiving significant gross receipts attributable to the use of intangible property in Oregon.

Receiving certain benefits provided by Oregon (e.g. laws providing protection of business interests, access to highways for transportation of goods, access to educated workforce in Oregon, access to courts and judicial process, etc). OAR 150-317.010 (3).

Consequences of Having a Substantial Nexus

Any corporation doing business in and having substantial nexus with Oregon is required to file an Oregon tax return. If such a corporation has not done so, significant penalties and interest may be levied for failure to file.

Tax Amnesty — Act Quickly to Minimize the Damage

Oregon has provided some saving grace for corporations under its Tax Amnesty Program (the Program). If a corporation has failed to properly file an Oregon tax return for a prior period (i.e. before the May 2008 enactment of OAR 150-317.010), the Program allows the corporation to file the return in exchange for a waiver of penalties and one-half of the interest that would otherwise be owed. The final deadline to file for an application is November 19, 2009.

The Program only applies to tax years prior to 2008. See www.oregontaxamnesty.com for details and applications.

Conclusion

Oregon has jurisdiction to impose an excise tax on any corporation that has a "substantial nexus" with the state, as defined by OAR 150-317.010. The Department of Revenue's recent guidance provides the Rule is applicable to all tax periods open to examination, including those prior to the Rule's enactment.

Consequently, any corporation that had substantial nexus in any year prior to 2008 should consider whether to take advantage of the Tax Amnesty Program by filing an application with the Department of Revenue before November 19, 2009. The benefit of doing so is a waiver of penalties and partial interest for failing to file an Oregon tax return.