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The Timely Filing Requirement Imposed by Oregon DOR in Order for Taxpayers to be Able to use the "Prior Year Tax Safe Harbor" Stricken by the Oregon Tax Court

On September 13, 2013, in *Finley v. Oregon Department of Revenue*, the Oregon Tax Court granted taxpayer's Motion for Summary Judgment, and held Oregon Administrative Rule 150-316.587(8)-(A) is invalid to the extent it requires taxpayers to have timely filed their prior year's Oregon income tax return to be eligible for the "Prior Year Tax Safe Harbor."

I represented the taxpayer in this matter. The facts were straightforward. The tax years at issue were 2008 and 2009. The taxpayer was a resident of Oregon during these years.

For tax year 2008, the taxpayer paid his taxes in a timely manner. Unfortunately, he filed his Oregon individual income tax return late.

For tax year 2009, the taxpayer had a substantial increase in his income due to a capital gain-generating transaction. To avoid an estimated tax payment penalty, on December 31, 2009, thinking he qualified for the "Prior Year Tax Safe Harbor," he made an Oregon estimated tax payment of 100% of his 2008 Oregon income tax liability. Then, he timely filed his 2009 Oregon income tax return, and he paid the additional taxes shown due on the return. Thereafter, the Oregon Department of Revenue sent the taxpayer a nice letter, thanking him for his generous tax payment, but requesting he pay an additional large sum, representing an estimated tax (late payment) penalty. Not being able to resolve the matter with the Department, we filed a complaint in the Oregon Tax Court. The case was ultimately heard by Judge Henry Breithaupt in the Regular Division of the Oregon Tax Court.

The issue before the court was simple. ORS 316.587(8)(b) and OAR 150-316.587(8)-(A)(3)(A) together provide that, if a taxpayer's prior year Oregon income tax return was for a 12?month period, he/she may avoid an estimated tax payment penalty by paying 100% of the tax shown due on the prior year's return within the time period prescribed for making estimated tax payments. This rule is commonly known as the "Prior Year Tax Safe Harbor."

The problem arises with an administrative rule adopted by the Department. OAR 150?316.587(8)-(A)(3)(B) creates an additional requirement for the application of the Prior Year Tax Safe Harbor-it requires that the prior year's return was timely filed. For the taxpayer in this case, that was a big problem-the prior year's return was indisputably late. **YIKES!**

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No timeliness requirement is expressed anywhere in ORS 316.587(8). The statute creating the Prior Year Tax Safe Harbor does not expressly grant the Department authority to expand the requirements for its application. The Oregon Legislature has used the phrase "timely filing" throughout the Oregon Personal Income Tax Act contained in Chapter 316 of the Oregon Revised Statutes. Nowhere does the phrase "timely filing" appear in ORS 316.587(8). So, it seems clear that the Oregon Legislature knows how and when to use the phrase.

It should be noted, the Prior Year Tax Safe Harbor contained in the federal counterpart, IRC Section 6654, does not contain a timely filing requirement. In fact, the Service has refused to import such a requirement. See Rev Rul 2003-23, 2003-1 CB 511.

Despite the Department's arguments in favor of its administrative rule, the Oregon Tax Court concluded that ORS 316.587(8)(b) "is most properly read as not containing any timeliness requirement....To construe Oregon law consistently with Rev Rul 2003-23 also produces a result that places Oregon taxpayers in the same position regardless of whether the federal estimated tax or the Oregon estimated tax is at issue." Consequently, the court struck the timely filing requirement from the administrative rule.

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