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February 26, 2018

Chair Phil Barnhart
House Revenue Committee
900 Court Street NE
Salem, OR 97301

Re: Oregon SB 1529A; –A9 Amendments; HB 4026

Chair Barnhart and Members of the Committee:

If Oregon taxes any part of the new federal "global intangible low-tax income" ("GILTI") it should repeal the existing statute requiring the inclusion of income from a taxpayer's affiliates incorporated in designated tax haven jurisdictions in the taxpayer's tax base. Maintaining the existing tax haven provision means either (1) the income will be taxed twice or (2) complicated calculations must be undertaken to determine GILTI under the federal regime without taking into account the income of the affiliates included under the tax haven provisions. If these complicated calculations are undertaken, it is unlikely that significant additional tax will be collected by Oregon. The new federal GILTI regime provides the same anti-income shifting incentive as Oregon's tax have provisions. Maintaining both is duplicative, complex, and adds nothing to Oregon tax policy.

This Committee should pass SB 1529-A as currently written and the –A9 Amendments should be rejected.

McDermott Will & Emery

McDermott Will & Emery LLP has one of the largest and most diversified state and local tax legal practices in the United States. We routinely advise clients on state business income tax issues in every state and the District of Columbia. Such advice includes analyzing the interplay between federal conformity and unique state tax provisions. We have been involved in numerous issues regarding international businesses with U.S. affiliates, including transfer pricing, add-back provisions, and tax haven legislation. We are currently working on issues related to the 2017 federal tax reform in several dozen states and are been monitoring the legislation in Oregon.

SB 1529-A; the –A9 Amendments; HB 4026

The GILTI regime at the federal level was designed for the same purpose that Oregon had in enacting the tax rules requiring the inclusion of tax haven entities – they are both largely an attempt to tax the income generated from intangible assets that are located overseas in low-tax jurisdictions. While Oregon does this through inclusion in the consolidated return of the income or loss (and the apportionment factors) of corporations incorporated in tax haven jurisdictions, the new federal tax regime accomplishes the same purpose by instituting a complex formula that essentially results in taxation of income earned by foreign subsidiaries over a 10% rate of return on the tangible business assets of those subsidiaries. Essentially, GILTI will result in taxation of a portion of the high-margin foreign earnings generated by corporate groups, such as large profits generated from the ownership of patents and other intellectual property that can be easily located offshore in low-tax jurisdiction. The impact of including GILTI in the tax base is magnified in Oregon because the federal government provides a foreign tax credit to the extent the included earnings are subject to taxes in foreign countries. Oregon does not provide any benefit to taxpayers for foreign taxes paid overseas.

GILTI is computed at the U.S. shareholder level on an aggregated basis. The computation is accomplished by taking the Net Tested Income (defined term) from all of the CFCs owned by the U.S. shareholder, and then excluding 10% of the Qualified Business Asset Investment (“QBAI”) from the group, less attributable interest expense. To compute Net Tested Income, the Tested Income or Loss from each of the U.S. shareholder’s CFC’s are combined. The U.S. shareholder’s QBAI is then computed by aggregating each CFC’s adjusted bases in certain tangible property used in a trade or business. This QBAI amount is then reduced by the portion of the interest expense that was taken into account in calculating the Net Tested Income to the extent the corresponding interest income is not taken into account in determining the shareholder’s Net Tested Income. As noted, the federal computation is complex, and it has to be computed for each U.S. shareholder that has an interest in a CFC. Accordingly, it may have to be performed several times at the federal level for one consolidated group.

If the Oregon tax-haven regime is layered onto this regime, it is not clear how GILTI would be calculated at the state level but it is clear that in order to avoid double taxation this would be a complex, time-consuming exercise with little pay-off. The GILTI calculation at the federal level does not depend on in which country a foreign affiliate is incorporated. Thus, some income included in GILTI will not be included under Oregon’s current tax haven regime and some will. Since GILTI is calculated at the shareholder level (actually the shareholder chain level, which adds further complexity if some members of the chain are not included in the Oregon consolidated return), each of the GILTI separate computations may have to be re-performed for purposes of determining the tax base of an Oregon consolidated group. More specifically, if Oregon includes the income or loss of a CFC in its tax base under the tax-haven regime, to avoid double counting the same income, the GILTI computations will need to be re-performed for each U.S. shareholder by excluding such CFCs incorporated in an Oregon designated tax-haven.

Sincerely,

Steve Kranz