OREGON DEPARTMENT OF REVENUE

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Factor Representation and the IRC 965 repatriation

Purpose: Guidance as to when the mandatory repatriation under IRC § 965 may receive sales factor representation under ORS 314.665 and 314.666.

Tax program: Corporation Excise/Income Tax

Statutes and/or rules: ORS 314.665(6)(a), OAR 150-314-0439, and OAR 150-314-0441 (as in effect for tax years beginning before January 1, 2018), and ORS 314.610(7), ORS 314.666(3)(c), OAR 150-314-0335(5), OAR 150-314-0425(3), and OAR 150-314-0435(1)(f) (as in effect for tax years beginning on or after January 1, 2018).

Issue: Can sales factor representation be given to accumulated post-1986 deferred foreign income of foreign corporations included in federal taxable income for 2017 and 2018 under IRC § 965 and remaining in taxable income after the dividend received subtraction in ORS 317.267(2)?

Background: As a result of the passage of Public Law 115-97, enacted on December 22, 2017, IRC § 965 is amended to require that taxpayers include the accumulated post-1986 deferred foreign income of foreign corporations in their federal taxable income for 2017 and 2018 (deemed repatriation). Under OAR 150-317-0330, the deemed repatriation is treated as a dividend and is eligible for the dividend received subtraction in ORS 317.267(2).

Discussion: For tax years beginning before January 1, 2018, ORS 314.665(6)(a) (2015) provides that gross receipts from the holding of an intangible must be excluded from the sales factor unless the gross receipts in question are derived from the taxpayer's primary business activity. The deemed repatriation arises from the holding of an intangible (an ownership interest) in a foreign corporation. The deemed repatriation amount must be excluded from the sales factor for tax years beginning before January 1, 2018, unless the repatriation gross receipts are derived from the taxpayer's primary business activity.

For tax years beginning on or after January 1, 2018, ORS 314.610(7) (2017) excludes all receipts from the Oregon sales factor unless the receipts are received from transactions and activities in the regular course of the taxpayer's trade or business. In addition, ORS 314.666(3)(c) excludes from the sales factor any sales of intangible property not described in other parts of ORS 314.666. Dividends and deemed dividends from subsidiaries are not described in other parts of ORS 314.666. Therefore, the deemed repatriation amount is excluded from the sales factor for tax years beginning on or after January 1, 2018.

Example: Corporation XYZ repatriates the following amounts on account of its 100% ownership interest in the foreign corporation SUB XYZ: $10 million in 2017 and $10 million in 2018. Corporation XYZ is engaged in the primary business activity of shipbuilding. SUB XYZ, a part of CORP XYZ's unitary business, is engaged in financial services. Corporation XYZ would exclude the 2017 repatriation from its sales factor because Corporation XYZ's ownership interest in SUB XYZ isn't derived from Corporation XYZ's primary business activity of shipbuilding. Furthermore, Corporation XYZ would exclude the 2018 repatriation from its sales factor because the one-time mandatory repatriation Corporation XYZ receives isn't received from transactions and activities in the regular course of Corporation XYZ's trade or business and in any event is excluded from the sales factor under ORS 314.666.

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