FILED June 21, 2013 03:47 PM
Appellate Court Records

IN THE SUPREME COURT OF THE STATE OF OREGON

TEKTRONIX, INC. AND SUBSIDIARIES, Plaintiff-Respondent, v. DEPARTMENT OF REVENUE, State of Oregon, Defendant-Appellant.	Tax Court No. 4951 Supreme Court No. S060912

RESPONDENT'S ANSWERING BRIEF

Appeal from the Judgment of the Oregon Tax Court
The Honorable Henry C. Breithaupt, Judge

Names and Addresses of Counsel on Following Page

June 2013

ROBERT T. MANICKE 954648
ERIC J. KODESCH 032508
BRAD S. DANIELS 025178
STOEL RIVES LLP
900 SW Fifth Avenue, Suite 2600
Portland, OR 97204
(503) 294-9187
rtmanicke@stoel.com
ejkodesch@stoel.com
bsdaniels@stoel.com

Attorneys for Plaintiff- Respondent
Tektronix, Inc. and Subsidiaries

ELLEN F. ROSENBLUM 753239
Attorney General
MARILYN J. HARBUR 802517
DOUGLAS M. ADAIR 951959
Senior Assistant Attorneys General
OREGON DEPARTMENT OF
JUSTICE
1162 Court Street NE
Salem, OR 97301
(503) 378-4402

Attorneys for Defendant-Appellant
Department of Revenue, State of
Oregon

TABLE OF CONTENTS

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

TABLE OF AUTHORITIES

Page

TABLE OF AUTHORITIES

Page

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

Page

Other Authorities

STATEMENT OF THE CASE

Tektronix[1] accepts the Department's statement of the case, except the Department's characterization of the questions presented on appeal. Overall, the appeal involves two issues: (1) a statute of limitations issue concerning the timeliness of the Department's notice of deficiency and (2) an apportionment issue concerning Tektronix's exclusion of gross proceeds from the sale of the Goodwill from its Oregon sales factor. These two issues, however, each involve alternative questions, and Tektronix disagrees with the Department's attempt to condense these matters into a single question for each of the two issues. Tektronix believes that the questions presented on appeal are as follows:

1. Statute of Limitations

    A. As a result of the changes or corrections listed in the IRS's 2005 RAR, was an assessment of tax or issuance of a refund permitted

[1] Unless otherwise indicated, defined terms have the meaning ascribed to them in the filings made before the Regular Division of the Tax Court. Plaintiffs' Motion for Partial Summary Judgment (Dkt No. 31) is referred to as "Tektronix's Opening Brief." Defendant's Cross-Motion for Summary Judgment and Response to Plaintiff's Motion for Summary (Dkt No. 32) is referred to as the "Department's Tax Court Opening Brief." Plaintiffs' Reply and Response to Defendant's Cross-Motion for Summary Judgment (Dkt No. 33) is referred to as "Tektronix's Reply and Response." Defendant's Reply to Plaintiff's Response to Cross-Motion for Summary Judgment (Dkt No. 36) is referred to as the "Department's Tax Court Reply." The Stipulated Facts (Dkt No. 8) are referred to as "Stip Facts."

under any provision of the Code? This question determines whether ORS 314.410(3)(b) reopened the 1999 Tax Year to assessment. The Tax Court decided that an assessment of tax was not permitted. (*See* Order at ER 6-7 ("The answer is that no such positive assessment of tax or deficiency could have occurred.").) The Tax Court similarly concluded that an issuance of a refund was not permitted. (*See id.* at ER 7 ("The refund did not come 'as a result' of an action of a federal official.").) Accordingly, the Tax Court determined that the changes or corrections by the IRS did not cause ORS 314.410(3)(b) to apply.

B. Alternatively, if the IRS changes or corrections triggered ORS 314.410(3)(b), did ORS 314.410(3)(c) also apply and limit the authority provided to the Department by ORS 314.410(3)(b)? Having determined that ORS 314.410(3)(b) did not apply in the first place, the Tax Court decided that there was no need to rule on the impact of ORS 314.410(3)(c) on ORS 314.410(3)(b). (*See id.* at ER 12 (no "further consideration" of dispute between parties about ORS 314.410(3)(c) because ORS 314.410(3)(b) does not apply).)[2]

2. Apportionment Issue

A. In determining Tektronix's sales factor for apportionment purposes, does the definition of "sale" in ORS 314.665(6)(a) encompass gross proceeds attributable to the Goodwill? The Tax Court held that none of the amounts received for the Goodwill were described in ORS 314.665(6). (*See* Order at ER 20 ("The court concludes that neither ORS 314.665(6)(a) nor (6)(b) can be a basis for including some or all of the receipts from taxpayer's disposition of goodwill in the computation of the sales factor.").)

B. Alternatively, if any amount attributable to the Goodwill was from a sale, does the throw-out rule or another provision of Oregon tax law nonetheless exclude the amount from the sales factor? The Tax Court held that the throw-out rule applies to the extent that amounts from the disposition of the Goodwill are a "sale" for

---

[2] Tektronix agrees with the Tax Court that there is no need to determine the effect of ORS 314.410(3)(c) if ORS 314.410(3)(b) does not apply. However, if the Court determines that the IRS changes or corrections triggered ORS 314.410(3)(b), then Tektronix requests that the Court rule that ORS 314.410(3)(c) also applied and limited the amount of the assessment that the Department could issue.

purposes of the Oregon sales factor. (*See id.* at ER 22-23 ("[I]t is the conclusion of the court that the amount paid by the purchaser to taxpayer in this case cannot 'readily' be attributed to any particular income producing activity.").)

In the Tax Court, the relationship between Issues 1 and 2 was such that, although the Tax Court decided the statute of limitations issue first, it also needed to resolve the apportionment issue. (*See* Order at ER 1 (observing that apportionment issue remained a live issue "regardless of which party prevails on the limitations issue").) As described in the General Judgment issued by the Tax Court, however, the parties have entered into a Settlement Agreement Regarding Remaining Issues that disposed of certain issues not addressed by the Tax Court and identified the remaining amount at issue in this appeal. Pursuant to the General Judgment, Tektronix will be entitled to the refund ordered in Item 3 of the General Judgment, and the case will be fully resolved, if this Court rules in Tektronix's favor with respect to either the statute of limitations issue or the apportionment issue. However, if the Court resolves the statute of limitations issue in the Department's favor, the Court must decide the apportionment issue in order to determine the amount of additional tax, if any, the Department may collect.

Further, within each issue, Questions A and B are alternative positions. The Department's notice of deficiency was untimely if ORS 314.410(3)(b) did not apply or if ORS 314.410(3)(b) applied but was overridden by ORS 314.410(3)(c). Similarly, Tektronix properly excluded the Goodwill from its sales factor if either the amounts received with respect to the Goodwill did not constitute a sale or the amounts received were from a sale but the throw-out rule applied. This Court should sustain the Tax Court judgment if it finds in favor of Tektronix with respect to either of the two alternatives under Question 1 or either of the two alternatives under Question 2.

ANSWER TO DEPARTMENT'S FIRST ASSIGNMENT OF ERROR

The Tax Court properly decided that, although the IRS made a change or correction to a capital loss incurred in the 2002 Tax Year that was carried back to the 1999 Tax Year, an assessment of tax or issuance of a refund was not permitted under any provision of the Code as a result of the change or correction.

SUMMARY OF THE ANSWERING ARGUMENT

As of March 27, 2005, the 1999 Tax Year was closed to Oregon assessment. On March 28, 2005, the IRS issued an RAR that included a change or correction to a 2002 Tax Year net capital loss that carried back to the 1999 Tax Year. (Stip Facts ¶ 15.) On July 20, 2005, Tektronix filed an amended Oregon return claiming for the first time an Oregon refund for the 1999 Tax Year attributable to the capital loss carryback, as determined in the RAR. The issuance of the RAR and the filing of the amended return raise two statute of limitations issues.

The first is whether the RAR triggered ORS 314.410(3)(b), so that the 1999 Tax Year was reopened for Oregon audit. A reopening of a year under ORS 314.410(3)(b) can occur only if federal law allows the IRS to do one of two things: make "an assessment of tax" or "issu[e] a refund." The RAR resulted in a reduction, or partial denial, of the "tentative refund" claimed by Tektronix on its Form 1139 filed on February 17, 2004. Given the nature of a tentative refund under federal law, a reduction of a tentative refund requires that the taxpayer return all or a portion of the tentative refund, rather than the IRS simply issuing a smaller refund. However, the procedural mechanism by which the IRS effects this recovery is not an "assessment of tax." Further, the nature of the IRS change or correction was to reduce the amount of the 2002 net capital loss. A change or correction that decreases a loss cannot result in the issuance of a refund. Therefore, the IRS change or correction did not cause ORS 314.410(3)(b) to apply and reopen the 1999 Tax Year to Oregon assessment.

Second, if the Court were to decide that the RAR triggered ORS 314.410(3)(b), the Court would then need to decide whether ORS

314.410(3)(c) also applied, limiting the amount the Department could assess to an offset of Tektronix's Oregon Refund Claim.[3] This requires, in relevant part, that Tektronix have filed "an original or amended return that is accepted by the Internal Revenue Service." ORS 314.380(2)(a)(B)(i) (emphasis added). For purposes of this provision, a return is "accepted" if it meets the requirements for processing. The original Form 1120 for the 2002 Tax Year reporting the capital loss carried back to the 1999 Tax Year and the Form 1139 claiming the tentative refund arising from the net capital loss carryback are each an original or amended return that was accepted by the IRS.[4] The Department asserts that the returns were never "accepted" because the IRS made a change to the net capital loss amount. This interpretation of "accepted" is erroneous.

[3] There is no disagreement between the parties that if ORS 314.410(3)(c) applies it overrides ORS 314.410(3)(b). (*See* Department's Tax Court Reply at 2:9-10 ("Defendant does not disagree with plaintiff that if ORS 314.410(3)(c) applies, then ORS 314.410(3)(b) does not apply."). The parties disagree, however, as to whether ORS 314.410(3)(c) applies.

[4] The Department's ORS 314.410(3)(c) analysis focuses on the Form 1139. Tektronix believes that the Form 1120 is an equally relevant return for purposes of ORS 314.410(3)(c). (Tektronix's Rely and Response at 5:1-11.) To avoid unnecessary confusion, the remainder of this brief will discuss the Form 1139. The same analysis, however, applies to the Form 1120.

ARGUMENT

I. Applicable Law

ORS 314.410(3)(b) and ORS 314.410(3)(c) are the two Oregon statute of limitations provisions at issue in this case. The Department relies on ORS 314.410(3)(b), which provides, in relevant part:

> "If the Commissioner of Internal Revenue * * * makes a change or correction as described in ORS 314.380 (2)(a)(A) and, as a result of the change or correction, an assessment of tax or issuance of a refund is permitted under any provision of the Internal Revenue Code * * *, then notice of a deficiency under any Oregon law imposing tax upon or measured by income for the corresponding tax year may be mailed within two years after the department is notified by the taxpayer or the commissioner * * * of the correction * * *." ORS 314.410(3)(b)(A) (emphases added).[5]

The Department argues that ORS 314.410(3)(b) re-opened the 1999 Tax Year—which the parties agree was otherwise closed to audit and assessment—when the IRS took action in 2005 to make a change or correction for the 2002 Tax Year that affected a so-called "carryback" deduction in the 1999 Tax Year. The Tax Court held that ORS 314.410(3)(b) did not apply, and Tektronix agrees. The main statute of

---

[5] ORS 314.410(3)(b) refers to ORS 314.380(2)(a)(A). The parties agree that the IRS made the change or correction described in ORS 314.380(2)(a)(A) and there is no need to further analyze that provision.

limitations issue in this appeal is whether the IRS's change or correction allowed it to make an "assessment of tax" within the meaning of ORS 314.410(3)(b).

Tektronix argues that, even if ORS 314.410(3)(b) were to apply, ORS 314.410(3)(c) would substantially limit the amount of tax the Department can now collect because the Department could do no more than reduce the refund Tektronix had claimed for the 1999 Tax Year. ORS 314.410(3)(c) provides, in relevant part:

> "If the taxpayer files an original or amended federal * * * return as described in ORS 314.380 (2)(a)(B), the department may reduce any claim for refund as a result of a change in Oregon tax liability related to the original or amended federal * * * return, <u>but may not give notice of a deficiency for an adjustment to Oregon tax liability following the expiration of the applicable period prescribed in subsections (1) and (2) of this section and paragraph (a) of this subsection</u>." (Emphasis added.)

ORS 314.410(3)(c) refers to ORS 314.380(2)(a)(B), which provides, in relevant part:

> "(2)(a) The taxpayer shall report to the department any change in the taxpayer's taxable income that is subject to tax by this state or any change in the taxpayer's tax liability paid to or owing this state because:
>
> "* * * * *
>
> "(B) The taxpayer:

> "(i) Files an original or amended return that is accepted by the Internal Revenue Service * * *[.]" (Emphasis added.)

The Department counters that ORS 314.410(3)(c) cannot apply because the IRS did not "accept" Tektronix's Form 1139 claiming the tentative refund for the 1999 Tax Year. In light of its holding that ORS 314.410(3)(b) did not apply and that the 1999 Tax Year was closed to assessment of tax, the Tax Court held that ORS 314.410(3)(c) applied and would allow the Department to reduce Tektronix's refund should the court agree with the Department on the apportionment issue. (*See* Order at ER 14 ("The way to give effect to that conclusion is to further conclude that on these facts the provisions of ORS 314.410(3)(b) do not apply and the provisions of ORS 314.410(3)(c) do apply.").)

II. The IRS Change or Correction Did Not Trigger ORS 314.410(3)(b) for the 1999 Tax Year

A. No Code Provision Permitted an Assessment of Tax

As part of the IRS audit of the 2000 – 2002 Tax Years, the IRS reduced the net capital loss carried back to the 1999 Tax Year for which the IRS had issued a tentative refund. Tektronix did not challenge the IRS's reduction of the tentative refund issued for the 1999 Tax Year. (*See* Stip Facts ¶ 15.) This case presents the question of whether, as a result of the change or correction to the 2002 Tax Year net capital loss, the Code permitted an "assessment of tax" for the 1999 Tax Year.

1. The Substance of the Action Permitted by the Code Was Reduction of a Refund

The Tax Court, emphasizing the substance of the IRS action permitted by the Code and applying Oregon tax principles to that action, held that the Code did not permit an assessment of tax. In reaching this determination the court described the difference in terms used by the legislature between reducing a refund and assessing tax beyond denying the refund:

> "ORS 305.270(3) speaks of the reduction of a refund claim as an 'adjustment' up to the point that the 'adjustment' goes beyond reduction of a refund claim and seeks recovery from the taxpayer. At that point, the action is referred to as 'the finding of a deficiency.'" (Order at ER 6.)[6]

The Tax Court contrasted these references to "adjustment" or "reduction" of a refund with other statutory references to a "deficiency" and an "assessment," which the legislature used to describe situations in which the Department was not limited by the amount of a claimed refund. The court also noted the different procedural consequences resulting from (1) a reduction in a refund compared to (2) assessing an amount beyond denying the refund. (*See* Order at ER 6 (comparing ORS 305.270(5) and (6).)

---

[6] As described in Part II.B below, the fact that the legislature described "the finding of a deficiency" in ORS 305.270(3) but required in ORS 314.410(3)(b) that the Code permit an "assessment of tax" further demonstrates that ORS 314.410(3)(b) does not apply to the 1999 Tax Year.

The court then considered whether the permitted IRS action in Tektronix's case constituted a reduction of a refund or an assessment of tax. Because the changes or corrections arose in the context of a "tentative refund claim" related to a capital loss carryback, IRC § 6501(h) and (k) are the relevant provisions that describe what the Code permitted. Both of those provisions limit the amount the IRS can recover to the amount of the tentative refund claim. *See* IRC § 6501(h) (limiting deficiency to amount "attributable to the application to the taxpayer of a * * * capital loss carryback"); IRC § 6501(k) ("the amount which may be assessed solely by reason of this subsection shall not exceed the amount" of the tentative refund). In substance, therefore, the Code allowed the IRS to "'decrease the amount of the refund claim.'" (Order at ER 6 (*quoting* ORS 305.270(3)).) This is not an "assessment of tax," as that phrase is used by the Oregon legislature and as required by ORS 314.410(3)(b).[7]

[7] This conclusion is consistent with the legislative history of IRC § 6501(k). When Congress first created the tentative refund process in 1945, it understood that the IRS would issue tentative refunds before having sufficient time to review the application for a tentative refund. Accordingly, as part of the same bill that created the tentative refund, Congress enacted the predecessor to IRC § 6501(k). Tax Adjustment Act of 1945, Pub L No. 79-172, § 3780(c), 59 Stat 517, 522-23. This provision "provides a summary procedure whereby the Commissioner and the taxpayer each may be restored to the same position occupied prior to the approval of such application." HR Rep No. 79-849 (1945), *reprinted in* 1945 CB 566, 583.

The Tax Court then focused on the requirement in ORS 314.410(3)(b) that the change or correction be made to the tax year "corresponding" to the year for which the Department can issue a notice of deficiency. The court determined that, in the context of a capital loss of a corporate taxpayer, the "corresponding" tax year must be the year of the loss, not an earlier year to which the loss may be carried back as a deduction. This conclusion is inescapable, given the numerous instances in which a change or correction to an item arising in one tax year can have an effect in some other tax year that cannot be predicted in isolation. For example, an IRS change to a capital loss can affect any of the three most recent past tax years and any of the next five future tax years, or all eight of the past and future years, or none of them, depending entirely on whether the taxpayer had or will have capital gain and net taxable income in any of the years to absorb the loss. *See* ORS 317.013(1) (incorporating IRC §§ 1211, 1212). Given this fact, the "corresponding tax year" referred to in ORS 314.410(3)(c) can only mean the year of the loss.

Nothing in Appellant's Opening Brief refutes the analysis in Part IV.A.1 of the Order. In fact, Appellant's Opening Brief never refers to ORS 305.270(3), (5), or (6). Further, the Department never tries to explain how Code provisions that allow the IRS to recover only some or all of the tentative refund permits an "assessment of tax," as required by ORS

314.410(3)(b). Instead, it appears that the Department focuses on Part IV.A.2 of the Order – the portion of the Tax Court decision concerning whether the IRS made the necessary change or correction.[8]

For example, according to the Department:

> "The question here is whether the legislature intended the change or correction made in the IRS's RAR to constitute a 'change or correction' for purposes of ORS 314.410(3)(b), where the IRS was permitted to assess only a limited amount of tax under the provisions of IRC § 5601(h) and (k)." (Appellant's Opening Brief at 13 (emphasis added).)

This misses the point of the Tax Court's analysis of the import of the limited assessment authority provided by the Code. The Tax Court did not rule that the inability of the IRS to assess an amount beyond the tentative refund meant that there was no "change or correction" for purposes of ORS 314.410(3)(b). Rather, it meant that the Code only allowed the IRS to deny a refund, so that the permitted action was not an "assessment of tax" for purposes of ORS 314.410(3)(b). (*See* Order at ER 6-7 ("The answer is that no such positive assessment of tax or deficiency could have occurred.").)

---

[8] Even here, the Department does not address the Tax Court's determination that the year for which there is a "consequence" is not the "corresponding" year.

2. A *State v. Gaines* Analysis Supports the Tax Court's Determination That the Code Did Not Permit an Assessment of Tax

The Tax Court's reasoning also can be framed within the statutory interpretation rules described by this Court in *State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009). That is, an analysis of the applicable text, context, and legislative history demonstrates that the Code did not permit an assessment of tax.

a. The Text of ORS 314.410(3)(b) Does Not Provide Guidance

The phrase "assessment of tax" is not specifically defined in ORS 314.410, and each of the words within the phrase has a range of plain meanings, so that the text of the phrase does not, by itself, resolve whether the IRS's change or correction permitted an assessment of tax in Tektronix's case. For example, *Webster's Third New International Dictionary* 131, 2345 (2002) lists 12 definitions of "assessment" and three definitions of "tax" as a noun). In addition, *Black's Law Dictionary* 116-17, 1457 (6th ed 1990), as in effect in 1997 when the legislature added the "assessment of tax" provision to ORS 314.665(6)(b), provides at least five definitions of "assessment" depending on context and three definitions of "tax." In the context of taxation, the definition of assessment describes "an additional tax liability," which would not include a reduction of a refund.

b. Statutory Context (State and Federal) Shows that ORS 314.410(3)(b) Did Not Permit an "Assessment of Tax"

As described above, the Tax Court analyzed the statutory context of ORS 314.410(3)(b) and concluded that the legislature knew how to distinguish between (i) an assessment that is limited only by application of the law to the facts in place for the particular tax year and (ii) an assessment that is limited to an offset of tax against a refund that is otherwise due (referred to as an "adjustment" or "reduction" of a refund). (*See* Order at ER 6-7.) The court drew from other provisions of Oregon law, concluding that the legislature intended "assessment of tax," as used in ORS 314.410(3)(b), to have meaning (i).

The same conclusion arises from an examination of the text and context of the relevant provisions of the Internal Revenue Code as in effect in 1997 when the Oregon legislature adopted the "assessment of tax" language in ORS 314.410(3)(b). The primary Code provisions are IRC § 6501(h) and (k). IRC § 6501(h) provides:

> "In the case of a deficiency attributable to the application to the taxpayer of a net operating loss carryback or a capital loss carryback (including deficiencies which may be assessed pursuant to the provisions of section 6213(b)(3)), <u>such deficiency may be assessed</u> at any time before the expiration of the period within which a deficiency for the taxable year of the net operating

> loss or net capital loss which results in such carryback may be assessed." (Emphasis added.)

IRC § 6501(k) provides:

> "In a case where an amount has been applied, credited, or refunded under section 6411 (relating to tentative carryback and refund adjustments) by reason of a net operating loss carryback, a capital loss carryback, or a credit carryback (as defined in section 6511(d)(4)(C)) to a prior taxable year, the period described in subsection (a) of this section for <u>assessing a deficiency</u> for such prior taxable year shall be extended to include the period described in subsection (h) or (j), whichever is applicable; except that the amount which may be assessed solely by reason of this subsection shall not exceed the amount so applied, credited, or refunded under section 6411, reduced by any amount which may be assessed solely by reason of subsection (h) or (j), as the case may be." (Emphasis added.)

Both provisions permit an assessment of a "deficiency," but they do not refer to an "assessment of tax."[9]

As further context, IRC § 6501 prescribes the IRS's assessment authority in 23 different circumstances. In this Code section, Congress sometimes referred to an assessment of "tax" and sometimes to an assessment of a "deficiency" or something else. IRC § 6501 describes the relevant action as an assessment of "tax" in 15 of the provisions: IRC

[9] In addition, nothing in the text of those provisions would permit the issuance of a refund.

§ 6501(a) (general three-year limitations period); ten of the eleven special rules in IRC § 6501(c)(1) through (11) (filing of a false return, no return, attempt to evade tax, etc.);[10] IRC § 6501(e)(1), (2) and (3) (substantial omissions); IRC § 6501(f) (assessment of personal holding company tax); and IRC § 6501(l)(2) (assessment of "deficiency of tax" for private foundation). These situations generally involve deficiencies resulting from transactions or activities occurring in the same year for which the applicable tax return is being filed and in which there is no restriction preventing assessment of all amounts owed—or , in the words of the Tax Court, "a demand for a payment limited by nothing other than the facts present in any given year." (Order at ER 6.)

By contrast, Congress referred to assessment of a "deficiency" when prescribing the limitations period arising from four carrybacks, and in each of those circumstances Congress capped the amount the IRS could recover, limiting it to the refund attributable to the carryback. *See* IRC § 6501(h) (limited to "a deficiency attributable to the application to the taxpayer of a

---

[10] In 1997, it was nine of the nine special rules. IRC § 6501(c)(10) (listed transactions) was added by the American Jobs Creation Act of 2004 (Pub L No. 108-357, § 814, 118 Stat 1418), and IRC § 6501(c)(11) (restitution) was added by the 2010 Firearms Excise Tax Improvement Act of 2010 (Pub L No. 111-237, § 3(b)(2), 124 Stat 2497). The IRC § 6501(c)(11) rule for restitution provides that "such amount may be assessed."

net operating loss carryback or a capital loss carryback"); IRC § 6501(i) (limited to "a deficiency attributable to the application to the taxpayer of a carryback" of foreign tax credit); IRC § 6501(j)(1) (limited to "a deficiency attributable to the application to the taxpayer of a credit carryback"); IRC § 6501(k) (limited to amount of tentative refund). Each of these situations involves an IRS "clawback" of a refund amount, and in each situation Congress prescribed that the IRS may not assess an amount in excess of the refund—or, in the words of the Tax Court, "no such positive assessment of tax or deficiency could have occurred." (Order at ER 7 (emphasis added).)[11] The Oregon legislature's choice of words in 1997 reflects Congress's ability to distinguish between an "assessment of tax" and an "assessment of a deficiency." In light of this distinction, the Oregon legislature provided that ORS 314.410(3)(b) would be triggered by a Code provision that permitted "an assessment of tax." ORS 314.410(3)(b) is not triggered by IRC § 6501(h) or (k), which only permits the IRS to recover a tentative refund.

[11] The remaining two provisions are IRC § 6501(l)(3) ("a deficiency attributable to the failure of an amount set aside by a private foundation for a specific project to be treated as a qualifying distribution") and IRC § 6501(m) (a deficiency attributable to an election to forgo a tax credit and claim a deduction instead). Like the carryback provisions, these two provisions (i) refer to the assessment of a deficiency, not the assessment of a tax and (ii) impose a cap on the amount that the IRS can recover, preventing "positive assessment of a tax or deficiency." (*See* Order at ER 6-7.)

c. An Analysis of the Legislative History and Development of ORS 314.410(3)(b) Does Not Change the Conclusion That the Code Did Not Permit an Assessment of Tax

In reaching its decision, the Tax Court provided a detailed analysis of the history of ORS 314.410(3)(b). The Tax Court:

- Started with this Court's decision in *Swarens v. Dept. of Rev.*, 320 Or 326, 883 P2d 853 (1994). (*See* Order at ER 9-11.) The Tax Court determined that the Department's notice of deficiency would have been untimely pursuant to *Swarens* because the IRS change or correction to the net capital loss occurred after the period for "assessment of tax" had expired under Oregon law. (Order at ER 9.)
- Then considered whether the 1997 Law, which revised ORS 314.410(3)(b) to look to the timeliness of an assessment of tax pursuant to <u>federal</u> law, changed the result that would have occurred pursuant to *Swarens*. (*See* Order at ER 9-11.) Based on a detailed review of the legislative history of the 1997 Law, the court found no intention to deviate from the basic holding of *Swarens*. Because the IRS's changes or corrections in 2005 could only reduce Tektronix's tentative refund, no "assessment of tax" was permitted for the 1999 Tax Year. (Order at ER 11.)

- Finally analyzed the impact, if any, of the 2001 Law. (*See* Order at ER 11-13.) The Tax Court first discussed the addition of ORS 314.410(3)(c) and concluded that the provision has no impact because the notice of deficiency was not timely pursuant to ORS 314.410(3)(b). The court next described the three changes to ORS 314.410(3)(b) effected by the 2001 Law and held that none of those changes have a material impact on this case. These changes included the addition of ORS 314.410(3)(b)(B), which the Department asserts supports its statute of limitations position. (*See* Appellant's Opening Brief at 27-28.) The Tax Court concluded, however, that ORS 314.410(3)(b)(B) "describes the scope of Oregon deficiency assessments if, but only if, they are timely made." (Order at ER 12.)

As described above, the Tax Court held that the permitted IRS action resulting from the change or correction to the 2002 Tax Year net capital loss carryback was a reduction of a refund, and not an "assessment of tax," for purposes of ORS 314.410(3)(b). "The statutory and legislative history of ORS 314.410(3) and relevant case law is consistent with [this] construction * * *." (Order at ER 8-9.)

The Department never directly addresses any of this analysis by the Tax Court. The Department's only discussion of *Swarens* claims simply that "that case is factually distinguishable." (Appellant's Opening Brief at 17.)

This disregards the fact that, as in *Swarens*, at the time of the federal change or correction the Oregon period of assessment for the 1999 Tax Year had expired.[12] In addition, the Department never explains the relevance of ORS 314.410(3)(b)(B) to an untimely and improper notice of deficiency.

B. No Code Provision Permitted the Issuance of a Refund as a Result of the IRS Change or Correction

ORS 314.410(3)(b) would apply if a Code provision permitted an issuance of a refund as a result of the IRS change or correction to the 2002 net capital loss. The Tax Court concluded:

> "There is no question that the issuance of a federal refund to taxpayer was not the product of any action of a federal official with respect to the 1999 tax year. The refund was solely a result of changes made for the 2002 year, the application of the <u>mandatory</u> loss carryback provisions of IRC section 1212 and the extended time for refund provisions of IRC section 6511(d)(2)." (Order at ER 7 (emphasis in original).)

Accordingly, an issuance of a refund was not permitted as a result of the IRS change or correction. Nothing in the Appellant's Opening Brief contests or otherwise challenges this conclusion. The Department instead relies entirely on the mistaken notion that the Code permitted an assessment of tax.

---

[12] The Department also never explains how, in light of the change enacted by the 1997 Law, a federal assessment of tax, rather than merely a refund reduction, could have occurred. This is not surprising as the Department never addresses this fundamental aspect of the Order.

III. Even if the IRS Assessment Triggered ORS 314.410(3)(b), ORS 314.410(3)(c) Also Applied and Capped the Amount the Department Can Recover

A. Summary of Tektronix's ORS 314.410(3)(c) Argument

As an alternative argument, if the Court were to conclude that ORS 314.410(3)(b) applies, Tektronix asserts that the Oregon Refund Claim triggered ORS 314.410(3)(c), which prevented the Department from recovering more than the amount attributable to the Oregon Refund Claim. These arguments concerning ORS 314.410(3)(c) are detailed in Tektronix's briefing and in statements at oral argument but can be summarized as follows:

1. The Form 1139 changed Tektronix's Oregon tax liability for 1999. (*See* Stip Facts ¶ 13.) Further, although the issue is in dispute, the IRS accepted the Form 1139. Therefore, ORS 314.410(3)(c) applies by its terms.
2. Because ORS 314.410(3)(c) applies, ORS 314.410(3)(b) does not. Tektronix's argument that ORS 314.410(3)(c) "trumps" ORS 314.410(3)(b) is based on the following:
   a. Pursuant to the plain text of ORS 314.410(3)(c), the Department could not issue an assessment beyond denying the Oregon Refund Claim after the expiration of the periods of limitation allowed by ORS 314.410(1), (2), or (3)(a). The legislature omitted any

reference to ORS 314.410(3)(b). *See* ORS 314.410(3)(c) (last sentence).

b. The context of ORS 314.410(3)(c) demonstrates the legislature's ability to ensure that ORS 314.410(3)(c) does not cut off other limitation periods. The legislature did not do this with respect to ORS 314.410(3)(b). (*See* Tektronix's Opening Brief at 25:25-28:8.)

c. The legislature's choice to limit the amount that the Department can now recover to the amount of the Oregon Refund Claim is logical and rational in the case of a carryback year and is consistent with the federal approach. *See* IRC § 6501(h), (k). The Tax Court concurred with, and expanded upon, this view, pointing out that Tektronix was merely obtaining the same result that would have applied if Tektronix had chosen to follow the regular federal refund process instead of electing to use the federal government's expedited "tentative refund" procedure.[13]

[13] Congress specifically created the tentative refund mechanism to provide taxpayers with the benefit of obtaining refunds more quickly. 1945 CB at 566 (purpose of tentative refund provision includes to "[p]rovide for speed-up of refunds resulting from carry-backs of net operating losses"); S Rep No. 91-552 (1969), *reprinted in* 1969 USCCAN 2027, 2232 (extension of tentative refund provision to net capital loss carrybacks intended to "apply this same 'quickie' refund procedure in the case of the 3-year capital loss

Late in the litigation below, the Department acknowledged that it "does not disagree with plaintiff that if ORS 314.410(3)(c) applies, then ORS 314.410(3)(b) does not apply." (Department's Tax Court Reply at 2:9-10.) Because of this acknowledgment, Tektronix will not elaborate here on points 2.a through 2.c.

B. Response to the Department's Position Concerning ORS 314.410(3)(c): The IRS Accepted the Form 1139 Filed by Tektronix

As in the Tax Court proceedings, the Department asserts that ORS 314.410(3)(c) does not apply because the IRS did not "accept" Tektronix's Form 1139 for purposes of ORS 314.410(3)(c). The parties' disagreement can be distilled to whether "accepted," as used in ORS 314.410(3)(c), means that the IRS (1) can process the return (Tektronix's position) or (2) substantively agrees with every item listed on the return (the Department's position). The Department's arguments in Section I.B of Appellant's Opening Brief are almost identical to those in Section II.2 of the Department's Tax Court Opening Brief. Tektronix's response to these arguments is unchanged from Sections II.A.2.a and II.A.2.b of Tektronix's

---

(...continued)
carrybacks as presently is available in the case of net operating loss carrybacks"). Tektronix agrees with the Tax Court that the Oregon legislature did not intend a taxpayer's use of a Congressionally authorized quicker refund method to substantively affect the limitations period for a carryback year.

Reply and Response. As a "capsule summary," Tektronix's position is correct for several reasons:

1. Tektronix's position comports with longstanding IRS practice, by which a return is considered "accepted" when the return has been filed in a form that enables the IRS to process it. *See, e.g.*, *Bradley v. U.S.*, 817 F2d 1400, 1402 (9th Cir 1987) ("'We [the IRS] cannot accept the Form 1040 . . . we received from you . . . . We find it does not contain information that the law requires you to give, and it does not comply with certain Internal Revenue Code requirements.'" (quoting a letter from the IRS to the taxpayer)).
2. Tektronix's position comports with the Department's own practice of associating "acceptance" with processing and not substantive agreement. *See* Oregon Tax Year 2009 Electronic Filing Handbook for Tax Professionals at 13 ("An acceptance acknowledgement indicates that the Department of Revenue has received the return. ***It does not indicate the return is error-free or not subject to examination by the [D]epartment or if the refund may be offset for other liabilities***." (emphasis in original)).[14]

---

[14] Tektronix acknowledges that this case does not concern electronically filed returns and that the Department issued this guidance after the years at issue. Nonetheless, the Handbook clearly shows that the

3. Tektronix's interpretation gives effect to the requirements of ORS 314.330(2)(a)(B)(i). That provision generally requires a taxpayer to make a report to the Department if the taxpayer (a) files an original or amended return that is accepted by the IRS that (b) changes Oregon taxable income. The Department's position would render this provision absurdly unworkable by delaying the filing requirement until the taxpayer knows that the IRS has substantively agreed with all positions on the return. Since the IRS does not normally inform a taxpayer that it agrees to all substantive claims made in a return (either the IRS audits the return or the limitations period expires), the Department's interpretation of "accepted" would allow a taxpayer whose return had not been selected for audit to never file the report required by ORS 314.380(2)(a)(B)(i).[15]

(...continued)
Department itself is aware that it can make a change or correction to a return even after it has been accepted. This Court uses the word "accepted" in a similar way. For example, on June 11, 2013, Tektronix filed a motion to extend the deadline for this answering brief. That same day, Tektronix received an email from the Court confirming that the motion "has been accepted." This did not mean that the Court granted the motion, which occurred when the Court issued an order dated June 12, 2013.

[15] We anticipate that the Department may respond by asserting that Tektronix did not timely comply with the ORS 314.380(2)(a)(B)(i) filing obligation. Such an assertion would be incorrect. Tektronix responded to that argument below by explaining its substantive compliance with ORS 314.380(2)(a)(B)(i). (*See* Tektronix's Tax Court Opening Brief at 18 n 7.)

4. ORS 314.380(a) and (b) demonstrate a legislative understanding that "acceptance" refers to processing requirements and not substantive agreement with all numbers listed on a return.

Tektronix's Form 1139 satisfied all of the procedural requirements related to such a form so that the IRS "accepted" the form. In fact, the IRS issued a tentative refund based on that very form. (*See* Stip Facts ¶ 13.) This means that ORS 314.410(3)(c) applies.

IV. The Department's Failure to Audit the 1999 Tax Year Until 2005 Does Not Justify Allowing It a Windfall Opportunity

The Department notes that the Tax Court incorrectly referred to the Department as having already audited Tektronix's return for the 1999 Tax Year by 2005, when Tektronix notified the Department of the IRS's change to the 2002 Tax Year. (*See* Appellant's Opening Brief at 30 n 14.) While the Department is correct that it only actually audited Tektronix's return in 2005, that fact is a red herring. The Tax Court's larger point, which the Department does not refute, is that the Department had two clear opportunities to audit the 1999 Tax Year before it finally chose to do so in 2005. The Department first had the usual three-year period following the filing of the original return for the 1999 Tax Year. This period expired March 15, 2004. The Department then gained an additional nine months, until December 13, 2004, because the IRS audited Tektronix's federal return for the 1999 Tax Year and Tektronix reported the IRS's changes to the Department. (Tektronix's Opening Brief at 11:17-21.) The Tax Court's point is that the Department now seeks to seize upon an unexpected and attenuated chain of events[16] to reopen the 1999 Tax Year in order to challenge data that had been available to it all along on the original return filed for the 1999 Tax Year.

V. Conclusion

For the foregoing reasons, the Court should uphold the Tax Court's decision that the notice of deficiency was time-barred and affirm the Tax Court's judgment.

ANSWER TO DEPARTMENT'S SECOND ASSIGNMENT OF ERROR

The Department failed to preserve the argument that a separate income producing activity analysis applies to the different intangible items constituting the Goodwill. Accordingly, no material fact is in dispute. In addition, the Tax Court properly decided that, for purposes of calculating Tektronix's Oregon sales factor for the 1999 Tax Year, neither ORS

[16] This issue is before the Court only because (1) Tektronix incurred a net capital loss in a later tax year, an event that the Tax Court assumed neither Tektronix nor the Department expected, (2) there was sufficient income in the earlier year to absorb at least some of that loss as a carryback, and (3) Tektronix availed itself of the expedited "tentative refund" provision available under federal law.

314.665(6)(a) nor ORS 314.665(6)(b) required including the gross proceeds from the sale of the Goodwill. Finally, the Tax Court properly decided that, even if an amount arising from the sale of the Goodwill were potentially includable in the Oregon sales factor, the throw-out rule applies.[17]

SUMMARY OF THE ANSWERING ARGUMENT

The Department claims that a question of material fact exists concerning identification of the relevant income producing activity for the Goodwill. This is incorrect. Further, the Department failed to preserve this issue. As summarized in the "Preservation of Error" section of the Department's Second Assignment of Error, in the Tax Court the Department limited its income producing activity argument to the assertion that a "specific sale transaction" was the only relevant income producing activity. (Appellant's Opening Brief at 32.) The Department had the opportunity, but never asserted, that there was a question of material fact if the Tax Court

[17] The Department seems to suggest that the Tax Court applied the throw-out rule "[i]nstead" of ORS 314.665(6)(a). (Appellant's Opening Brief at 31.) Any such suggestion is incorrect. The Tax Court exhaustively analyzed whether ORS 314.665(6)(a) applied, concluded it did not, and went on to consider application of the throw-out rule as an alternative basis for ruling for Tektronix. (*See* Order at ER 15-23.) In other words, even if the Tax Court had ruled in the Department's favor with respect to ORS 314.665(6)(a), it nonetheless would have excluded the gross proceeds pursuant to the throw-out rule.

agreed with Tektronix that the relevant income producing activity consisted of all of Tektronix's activities related to the printer division.

The Department's substantive argument is that Tektronix's Oregon sales factor includes the gross proceeds from the sale of the Goodwill. For the Department's position to prevail, two things must be true. First, ORS 314.665(6)(a) must include the gross proceeds in the sales factor because the receipts were derived from Tektronix's primary business activity, and second, the throw-out rule provided in OAR 150-314.665(4)(3)(b) must not apply. But neither of these things is true, for the following reasons:

- ORS 314.665(6)(a) treats gross proceeds from the disposition of an intangible asset as a "sale" for sales factor purposes only if the "receipts are derived from the taxpayer's primary business activity." Tektronix's primary business activity is the sale of tangible personal property and not intangible assets like the Goodwill. Accordingly, ORS 314.665(6)(a) does not include the gross proceeds from the sale of the Goodwill in Tektronix's Oregon sales factor.
- The throw-out rule applies because the relevant income producing activity cannot be readily identified. For an asset like the Goodwill, the applicable income producing activity consists of all of Tektronix's transactions and activities related to the printer division, which occurred throughout the world and over a period exceeding 20 years.

Contrary to the Department's argument, the income producing activity is not limited to the negotiation of the sale of the Goodwill.

If the Court accepts either of these arguments, it must necessarily reject the Department's sales factor position.

ARGUMENT

I. Preservation of Error: The Department Failed to Preserve Its Ability to Assert That There Is an Unresolved Question of Material Fact

The summary judgment record demonstrates that the Department failed to preserve its first argument in support of its Second Assignment of Error. In cross-motions for summary judgment in the Tax Court, the parties addressed two issues: whether the Department's notice of deficiency was timely and whether the Department properly excluded the gross receipts from the sales of Goodwill from its Oregon sales factor. As to the sales factor issue, Tektronix made three alternative arguments for why the Goodwill receipts should be excluded from the sales factor. In its third argument, Tektronix asserted that the throw-out rule required exclusion because those receipts "cannot be <u>readily</u> attributed to any <u>particular</u> income producing activity." (SER 7, 8 (emphasis added).) This result flowed from the fact that the Goodwill was the result of all of Tektronix's transactions and activity related to the printer division or its unitary business since the early 1980s—a virtually innumerable number of transactions and activity that would make identifying the particular income producing activity impossible, much less capable of *ready* identification. (SER 8.) As described at Part IV.G of the Order, the Tax Court agreed.

Tektronix's position invited the Department to identify any disputes of material fact that would preclude summary judgment on this point. If the Department believed the Goodwill income *could* be isolated or traced to a particular business activity over some time frame, then the Department could have identified that factual dispute. At a minimum, the Department could have asserted that more discovery was needed on that issue before summary judgment could be granted. *See* TCR 47 F. Furthermore, if the Department believed that the line items comprising the Goodwill allocation—trademarks, assembled workforce, etc.—needed to be addressed individually, then the Department could have alerted the Tax Court that such individualization was necessary.

The Department, however, chose not to make those arguments. (SER 18-26.) In fact, in its Cross-Motion for Summary Judgment, the Department conspicuously disclaimed that any material factual dispute existed. (*See* SER 19 ("To the extent these facts are material, we may have a dispute of fact that precludes summary judgment. <u>Defendant is, however, not persuaded of the relevance or materiality of these facts to the issues actually in dispute</u>." (emphasis added)).) Instead, the Department argued that all of the Goodwill receipts originated not from Tektronix's business activities in creating and furthering the printer division over time, but rather from the one-time act of selling the printer division. (SER 24-26.) According to the Department, that sale of assets constituted the "readily identifiable income producing activity" to which the receipts were attributable.[18] (*Id.*) In making this argument, the Department, like Tektronix, discussed Goodwill generally, without distinguishing between the different allocable items.

The fact that the Department cross-moved for summary judgment confirms that it did not believe that any disputes of material fact existed. Indeed, the parties' positions presented the Tax Court with a binary legal choice: Was the income producing activity for the receipts from the Goodwill attributable to all of Tektronix's transactions and activity related to the printer division, which was a part of Tektronix's unitary business since the early 1980s, in which case, as Tektronix argued, ready attribution to any particular income producing activity would be impossible, or was the income producing activity for the Goodwill receipts attributable to the 2000 asset sale, in which case, as the Department argued, there could be no dispute that the activity occurred in Oregon? In presenting these conflicting

---

[18] The Department's description of its position below is consistent with this view. (*See* Appellant's Opening Brief at 33-34.)

legal theories, each party effectively waived the ability to raise factual issues if the Tax Court agreed with the other party's theory. Tektronix explicitly pointed out this concession in its Reply and Response at 26:8-11, stating:

> "Importantly, the Department does not contest that the throw-out rule would apply if the applicable income producing activity also includes developmental and operational transactions related to the Goodwill. Instead, the Department limited its argument to the scope of the income producing activity."

The Department did not dispute this in its Tax Court Reply, and instead reasserted that a "particular sale transaction" was the only applicable income producing activity. (SER 32.)

The Department now raises a qualitatively different argument than the argument presented to the Tax Court. In its Opening Brief, the Department for the first time argues that the Tax Court should have individually considered each item of Goodwill to which the sales price was allocated.[19] Furthermore, the Department now argues that the Tax Court should have made individual findings as to the income producing activity applicable to

---

[19] The Department's contention that the Tax Court limited its ruling to "goodwill," as one of seven line items, rather than the Goodwill has no merit. The Tax Court defined "goodwill" for purposes of its decision to include all of the Goodwill at issue in this case. (*See* Order at ER 2 ("Taxpayer recognized taxable gain of $589,834,393 related to the sale of goodwill. (*Id.* at ¶ 14; Stip.Facts at ¶ 5.) That goodwill, of prime importance in this case, will be referred to as 'the goodwill.'" (emphasis added)).)

each item of Goodwill. Thus, the Department now asserts what it never asserted below—and, indeed, expressly disclaimed—that, assuming the Tax Court rejected its legal position, material factual questions about the individual Goodwill items should have precluded summary judgment.

This argument comes much too late and runs afoul of the preservation principles that this Court has consistently articulated. As this Court recently explained:

> "[T]he rule of preservation 'gives a trial court the chance to consider and rule on a contention, thereby possibly avoiding an error altogether or correcting one already made, which in turn may obviate the need for an appeal.' * * * The rule also ensures fairness to opposing parties, by requiring that 'the positions of the parties are presented clearly to the initial tribunal' so that 'parties are not taken by surprise, misled, or denied opportunities to meet an argument.'"

State v. Walker, 350 Or 540, 548, 258 P3d 1228 (2011) (citations omitted); *see also* ORAP 5.45(4)(a) (outlining requirements for demonstrating preservation); *State ex rel. Juvenile Dep't of Multnomah County*, 346 Or 592, 604, 215 P3d 847 (2009) (explaining goals of preservation requirement and concluding that party's claim was not preserved).

Here, as previously described, the Department's sole contention was that the Goodwill receipts (considered as a whole) were derived from the 2000 sale of assets. Conversely, before the Tax Court, the Department failed to raise its present, alternative contention that, even if the Goodwill receipts were not derived from the sale of assets, summary judgment was inappropriate because insufficient or disputed facts surrounded the individual items of Goodwill. *State v. Wyatt*, 331 Or 335, 343, 15 P3d 22 (2000) (explaining that, where a party "does not deny at trial that it is subject to some sanction, its failure to object to the particular sanction imposed by the judge or, in the alternative, to argue for some other sanction, fails to preserve a claim on appeal that the judge erred in failing to consider the availability of a less onerous sanction"). The Department's silence denied Tektronix the opportunity to explain why the Department's contentions surrounding Goodwill were false or to make a record accordingly, and also failed to alert the Tax Court to arguments that could have been considered and addressed at the summary judgment stage.

As telling evidence of this complete lack of preservation, the only portion of the record cited in the Department's Opening Brief with respect to preservation is page 5 of the Department's Tax Court Reply. (*See* Appellant's Opening Brief at 32.) The Reply, however, only contains the following statement, which has nothing to do with TCR 47 or material disputes of fact: "The gain from this specific sale transaction is attributable to this particular income producing activity." (SER 32.) The Reply did not cite TCR 47, did not refer to any actual or potential material dispute of fact, and did not make the alternative argument that, if the 2000 Oregon asset sale was not the income producing activity, then issues of fact precluded summary judgment. The Department does not cite any other statement in the record in which its first argument is preserved, nor is there one. For the reasons outlined above, the first argument is unpreserved, and the Court should not review it.

II. Apportionment Issue: Introduction

A. Significance of the Apportionment Issue

The second issue in this case is about how to properly apportion the income earned by Tektronix during the 1999 Tax Year, which included the net gain from Tektronix's sale of a major business division that had been operating in numerous states and countries for more than 20 years. The sale of the printer division was an extraordinary event in the life of Tektronix, generating substantial profit, or "gain," from the sale of the assets comprising the division. There is no question that Oregon is entitled to tax the gain from the sale of the assets, as with the rest of Tektronix's income for the year, to the extent of Oregon's lawful apportioned share. The only dispute is the size of that share, which is determined by multiplying Tektronix's 1999 Tax Year income by a percentage composed of a "sales factor" percentage and two other factors not at issue here. If the disputed gross receipts from the sale of the assets of the printer division are added to the numerator and denominator of the sales factor, as the Department urges, the size of Oregon's share of the taxable income will increase.

B. The Tax Court's Approach

The Tax Court analysis of the apportionment issue started with ORS 314.665(6). First, the Tax Court agreed with Tektronix that ORS 314.665(6)(a) and (b), a pair of laws adopted in the 1990s, did not require Tektronix to include in the sales factor any part of the receipts from the sale of the Goodwill. The Tax Court found that those statutes, which require inclusion of gross receipts or net gain from the sale of intangibles, were directed at securities sales and do not apply to Tektronix's Goodwill. (*See* Order at ER 20 ("Goodwill is not the type of intangible property that those statutory provisions [ORS 314.665(6)(a) and (b)] address.").)

Second, the Tax Court reviewed ORS 314.665(6)(c), which sets forth an "occasional sale" rule. *See also* OAR 150-314.665(1)-(A)(2)(a). The occasional sale rule is among the model allocation and apportionment regulations adopted by the Multistate Tax Commission. *See* MTC Regulation IV.18.(c)(1). The theory behind the occasional sale rule is that any particular state's share of the gain would be distorted if the gross receipts from the sale of high-value production assets were allowed to increase that share, because those assets affect a business's sales everywhere, not solely in the production state.[20] The parties agreed that the occasional sale rule applied to a portion of the receipts from Tektronix's sale of the printer division, namely the receipts derived from the sale of the plant and equipment and other real and tangible personal property. The parties disagreed about whether the occasional sale rule also applied to the sale of the Goodwill, as reported on Tektronix's Oregon tax return. (SER 13 (Affidavit of Mark Modjeski ¶ 21).) The Department contended that the Goodwill was not a fixed asset, and because Oregon's occasional sale rule referred to fixed assets, the rule could not apply. The Tax Court declined to rule on the application of the occasional sale rule because it agreed with Tektronix that the Goodwill was excludible under an alternative theory, namely the longstanding "throw-out rule." (*See* Order at ER 21.) If the Court determines that the proceeds from the sale of the Goodwill are otherwise included in Tektronix's Oregon sales factor, Tektronix reasserts the arguments it made before the Tax Court concerning the occasional sale rule. (Tektronix's Opening Brief at 57:1-63:4.)

---

[20] This is demonstrated, for example, by the fact that the Department originally promulgated the occasional sale rule in 1973 as former OAR 150-314.670-(C)(1) (1974). The Department's issuing the occasional sale rule pursuant to ORS 314.670 demonstrates that the Department exercised its legislative grant of authority to adopt rules "to effectuate an equitable allocation and apportionment of the taxpayer's income." *Former* ORS 314.670(4) (1973).

Finally, the Tax Court considered the "throw-out rule" of OAR 150-314.665(4)(3)(b). Like the occasional sale rule, the throw-out rule has been adopted by Multistate Tax Commission. *See* MTC Regulation IV.18.(c)(3). Generally, receipts from the sale of intangible property are assigned to the state where the greatest proportion of the income producing activity of the business occurs. *See* ORS 314.665(4). However, where the receipts cannot readily be attributed to any particular income producing activity, the throw-out rule requires that the receipts be excluded from the sales factor. *See* OAR 150-314.665(4)(3)(b). The Tax Court held that the throw-out rule applied because the Goodwill was attributable to all of the business activities of the printer division in all the places throughout the world where it operated.[21]

---

[21] Solely for illustration purposes, the apportionment issues could logically be approached in a different order, namely:

1. **ORS 314.665(1):** As a threshold matter, are the proceeds from the disposition of the Goodwill derived from a "sale" for purposes of the sales factor as provided in the general definition found in OAR 150-314.665(1)-(A)(1) (Tektronix asserted that the answer is no. (Tektronix's Opening Brief 48:24-49:7.) The Tax Court did not address this issue, presumably because it determined that, even if the answer were yes, the proceeds would be excluded because of the throw-out rule.)

2. **ORS 314.665(4):** Assuming that the proceeds are from a "sale," did the plurality of the income producing activity related to the Goodwill occur in Oregon? (Tektronix and the Tax Court concluded that the Goodwill is the kind of asset for which sourcing the applicable income

III. Applicable Law

The sales factor disputes are (1) whether ORS 314.665(6)(a)[22] includes the gross proceeds from the sale of the Goodwill in the sales factor and, if it does, (2) whether OAR 150-314.665(4)(3)(b) applies.

ORS 314.665(6)(a) provides that the term "sales" "[e]xcludes gross receipts arising from the sale, exchange, redemption or holding of intangible assets, including but not limited to securities, unless those receipts are derived from the taxpayer's primary business activity." If the gross proceeds from the sale of the Goodwill are not derived from Tektronix's

---

(...continued)
producing activity to a particular state is fundamentally impracticable, so that the throw-out rule applies.)

3. **ORS 314.665(6):** Assuming that the location of the income producing activity for the Goodwill could be readily identified, do the special rules for sales of intangible assets in ORS 314.665(6)(a) and (b) or occasional sales in ORS 314.665(6)(c) impact the analysis? (Tektronix argued that the special rules for intangible assets did not apply because those rules were intended to address only certain types of intangible assets (*i.e.*, liquid assets). Tektronix also argued that the occasional sale rule applied. (The Tax Court agreed with Tektronix with respect to the special rules for intangible assets, but the Tax Court declined to resolve the occasional sale question.)

The Tax Court approached the issue in a different sequences (as did the Department), but either approach leads to the same result: the receipts from the Goodwill should be excluded from Tektronix's sales factor.

[22] The Department acknowledged after the filing of Tektronix's Opening Brief that part (b) of ORS 314.665(6) does not apply. (*See* Order at ER 5 n 4.) The Tax Court nevertheless included ORS 314.665(6)(b) in its analysis, and Tektronix agrees with that analysis.

primary business activity, ORS 314.665(6)(a) does not include those receipts in the sales factor.

The throw-out rule provides, in relevant part, that "[w]here business income from intangible property cannot readily be attributed to any particular income producing activity of the taxpayer, such income cannot be assigned to the numerator of the sales factor for any state and must be excluded from the denominator of the sales factor." OAR 150-314.665(4)(3)(b). Accordingly, if Tektronix's income from the sale of the Goodwill cannot readily be attributed to a particular income producing activity, the throw-out rule excludes those receipts from the sales factor. For purposes of applying the throw-out rule, OAR 150-314.665(4)(2) defines "income producing activity" as "the transactions and activity directly engaged in by the taxpayer in the regular course of its trade or business for the ultimate purposes of obtaining gains or profit."

IV. ORS 314.665(6)(a) Does Not Include the Gross Receipts from the Sale of the Goodwill in the Sales Factor

A. The Gross Proceeds from the Sale of the Goodwill Did Not Derive from Tektronix's Primary Business Activity

1. Tektronix Was Not Engaged in the Business of Selling Intangible Assets Like the Goodwill

Tektronix submitted as part of the summary judgment record a sworn affidavit from Mark Modjeski, the Tax Director of Tektronix since August 2000. Modjeski testified in part:

> Tektronix was not engaged in the business of selling intangible assets like the Goodwill. Nonetheless, because Tektronix used the Goodwill in its trade or business operations, Tektronix treated the gain from the sale of the Goodwill as apportionable business income on the original and amended Oregon returns for the 1999 Tax Year.

(SER 13.) The Department did not contradict that statement with any admissible evidence. The Department did not contend that Modjeski's statement was inadmissible for any reason. Accordingly, citing Modjeski's testimony, the Tax Court found in its decision that

> "[t]axpayer was not engaged in the business of selling intangible assets like the goodwill (rather, as described above, taxpayer generally was engaged in the manufacture and sale of tangible personal property). Nonetheless, because taxpayer used the goodwill in its trade or business operations, taxpayer treated the gain from the sale of the goodwill as apportionable business income on the original and amended Oregon returns for the 1999 tax year." (Order at ER 3.)

Substantial evidence (in the form of sworn testimony) supports that conclusion. *See* ORS 305.445 (scope of review limited to "lack of substantial evidence in the record to support the tax court's decision or order").

The Department has not shown any grounds on which to reverse the court's conclusion pursuant to ORS 305.445. In addition, the Department's position is inconsistent with the familiar burden-shifting framework on summary judgment. Under TCR 47 a party responding to a motion for summary judgment may not rest on the allegations or denials in the pleadings. TCR 47 D. Nor can the Department simply assert that the evidence should not be credited. *Tolbert v. First National Bank*, 312 Or 485, 495, 823 P2d 965 (1991) ("[F]lat disbelief * * * is not an inference that plaintiffs may invoke on summary judgment[.]"); *see also Hickey v. Settlemier*, 318 Or 196, 204-07, 864 P2d 372 (1993) (citing ORCP 47 D) (summary judgment proper on issue when plaintiff failed to contradict defendant's sworn deposition testimony with admissible evidence). Rather, the Department was obligated to respond by producing evidence setting forth specific facts that showed a genuine issue as to any material fact. TCR 47 D.

Here, with respect to the sale of Goodwill and its role in Tektronix's business, the Department failed to provide any such response.[23] The

---

[23] The Department now claims that it "maintained [in the Tax Court] that the receipts from the sale of intangible property must be included in the sales factor because under ORS 314.665(6)(a), the receipts were 'derived from' Tektronix' primary business activity." (Appellant's Opening Brief at 38.) This is incorrect. In the Tax Court, the Department asserted that "the goodwill that was sold by Tektronix in 2000 was an intangible asset derived from the primary business activity of the taxpayer." (Department's Tax Court Opening Brief at 35:5-6.) That is, the Department maintained that the Goodwill derived from the primary trade or business activity, not the proceeds from the sale of the Goodwill. Tektronix pointed out this

Department did not dispute then and cannot dispute now the fact that Tektronix was not engaged in the business of selling intangible assets like the Goodwill. As a result, the Tax Court properly accepted that uncontradicted fact as true for purposes of summary judgment. *E.g.*, *John v. City of El Monte*, 515 F3d 936, 941 (9th Cir 2008) ("[T]he movant's uncontradicted factual allegations ordinarily are accepted."). In the absence of any showing that the Tax Court was faced with an issue of material fact, much less that the Tax Court's decision was unsupported by substantial evidence, this Court should reach the same result.

2. ORS 314.665(6)(a) Does Not Include the Gross Proceeds in Tektronix's Oregon Sales Factor

The Tax Court properly determined that Tektronix "was not engaged in the business of selling intangible assets like the goodwill." (Order at ER 3.) As a result, the proceeds from the sale of the Goodwill could not have derived from Tektronix's "primary trade or business activity" as required by ORS 314.665(6)(a). Therefore, regardless of whether ORS 314.665(6)(a) applies to all intangible assets or only liquid treasury function assets, it does not include amounts from the sale of the Goodwill in the sales factor because those amounts did not derive from Tektronix's primary business activity.

(...continued)
fundamentally flawed reading of ORS 314.665(6)(a). (*See* Tektronix's Reply and Response at 21:20-22:2.)

B. The Court Does Not Need to Determine Whether ORS 314.665(6)(a) Applies Only to Liquid Assets

The portions of Appellant's Opening Brief discussing ORS 314.665(6)(a) primarily focus on the Tax Court's conclusion

> "that the proper construction of subsection (6) is that the statute deals only with the type of intangibles outlined in the MTC regulation and the examples provided by the department in Example 1 and Example 2 of OAR 150-314.665(6). Those intangibles are so-called liquid assets or financial instruments." (Order at ER 19.)

Tektronix agrees with the Tax Court's conclusion, and Tektronix argued as much in the Tax Court. (Tektronix's Opening Brief at 45:17-50:8.) Nonetheless, the Court need not decide this point for two reasons. First, even if ORS 314.665(6)(a) were not limited to liquid assets, the provision would include the gross receipts from the sale of the Goodwill in Tektronix's Oregon sales factor only if those receipts derived from Tektronix's "primary business activity." As discussed above, it is obvious that the receipts from the sale of the Goodwill did not derive from Tektronix's primary business activity. Therefore, even if ORS 314.665(6)(a) applied to intangible property other than liquid assets, it still would not apply to the Goodwill.

Second, Tektronix does not rely on the exclusion rule in ORS 314.665(6)(a). There is a more fundamental basis for excluding the gross receipts from the sale of the Goodwill, namely the Department's own, pre-existing rule in OAR 150-314.665(1)-(A)(1), which limits the definition of "sale" to gross receipts derived from "transactions and activity in the regular course of [a taxpayer's] trade or business."[24] Nothing in the adoption of ORS 314.665(6)(a) (or (b), for that matter) undermined the continuing validity of this rule (Tektronix's Opening Brief at 50:3-5), and the rule clearly applied to Tektronix's facts. As discussed in II.A.1 above, the Tax Court agreed with Tektronix (without any objection from the Department) that the sale of the Goodwill was not a transaction or activity in the regular course of its trade or business. (Order at ER 3 (Tektronix "was not engaged in the business of selling intangible assets like the goodwill").) This means that the income was functional test business income, rather than transactional test business income. Because the receipts from the sale of the Goodwill are not transactional test business income, OAR 150-314.665(1)-(A)(1) does not include them in the sales factor in the first place.[25]

---

[24] The Tax Court did not address this issue, presumably because it determined that, regardless of the application of OAR 150-314.665(1)-(A)(1), the throw-out rule applied.

[25] Tektronix does not believe that the Department disputes this. First, the Department never argued that OAR 150-314.665(1)-(A)(1) included the Goodwill receipts in the sales factor. Instead, the Department relied entirely on ORS 314.665(6)(a). Second, in Appellant's Opening Brief, the Department implicitly acknowledges that the sale of the Goodwill generated

C. The Tax Court Properly Considered an MTC Model Regulation in Determining the Scope of ORS 314.665(6)(a)

Should the Court find it necessary to consider whether ORS 314.665(6)(a) applies only to liquid assets, the Court should reject the Department's criticism of the Tax Court's reference to the MTC model rule adopted in 1997. The Department asserts that the MTC model rule lacks relevance because it was adopted two years after the 1995 enactment of ORS 314.665(6)(a), declaring that "[i]t is axiomatic that an MTC rule adopted two years after the statute was enacted may not restrict the plain meaning of an earlier enacted statute." (Appellant's Opening Brief at 39.) This ignores the national context in which Oregon adopted ORS 314.665(6)(a) and the MTC adopted MTC Regulation IV.18.(c)(4)(A).

As the Tax Court explained, ORS 314.665(6)(a) and MTC Regulation IV.18.(c).(4)(A) both "dealt with the problem of the proper sales factor treatment of so called 'treasury function' gross receipts." (Order at ER 16.) This more limited scope of ORS 314.665(6)(a) is demonstrated by the

---

(...continued)
only functional test business income when it asserts that "acquisitions and sales of assets to develop the Tektronix electronics business, both technologically and operationally, were transactions and activities directly engaged in by Tektronix in the regular course of its trade or business <u>for the ultimate purpose of obtaining gains or profit</u>." (Appellant's Opening Brief at 42 (emphasis added).) The Tax Court has explained that the emphasized clause refers to functional test business income. *See Crystal Commc'ns, Inc. v. Dept of Rev.*, TC 4769, slip op at 28 (Or Tax Reg Div July 19, 2010).

legislative history of the provision. For example, citing to that legislative history, the Tax Court found:

> "The department represented to the legislature that the legislative change was to provide legislative authority for the department's then existing practices. The legislative record does not contain any indication that department proposal went beyond treatment of treasury function receipts or addressed the receipts from all sales of intangible property." (Order at ER 16 (citations omitted).)

Moreover, the issue in this case is not the intent of the 1995 legislature that enacted ORS 314.665(6)(a), but rather the intent of the 1999 legislature that added ORS 314.665(6)(b) in light of the MTC's 1997 adoption of the model regulation. As the Tax Court pointed out:

> "A comparison of the MTC proposed rule with the substance of paragraphs (a) and (b) of subsection (6) of ORS 314.665 shows that what the MTC accomplished in one rule was accomplished in paragraphs (a) and (b) of ORS 314.665(6)." (Order at ER 18.)

By the time of the sale of the Goodwill on January 1, 2000, the Oregon legislature had enacted ORS 314.665(6)(a) and (b) so that the two provisions, taken together, would have the same effect as MTC Regulation IV.18.(c).(4)(A). Accordingly, with respect to the 1999 Tax Year, the purpose of MTC Regulation IV.18.(c).(4)(A) provides guidance for determining the scope of ORS 314.665(6)(a) and (b).

V. Amounts Derived from the Sale of the Goodwill Cannot Be Readily Attributed to a Particular Income Producing Activity

A. For Purposes of the Throw-Out Rule, All of Tektronix's Activities Related to the Printer Division, and Not Just the Sale of the Printer Division, Are the Applicable Income Producing Activity

The dispute about the application of the throw-out rule involves which transactions constitute the applicable income producing activity (*i.e.*, "the transactions and activity directly engaged in by [Tektronix] in the regular course of its trade or business for the ultimate purposes of obtaining gains or profit"). OAR 150-314.665(4)(2).

- Tektronix asserts that the activity consists of all of Tektronix's transactions and activity related to either (1) the printer division as a separate division, or (2) all divisions in the unitary business of which the printer division was a part since Tektronix first developed the printer division in the early 1980s. The throw-out rule applies because these transactions are too numerous, and took place in too many locations throughout the world, to allow the gross receipts from the sale of the Goodwill resulting from those transactions to "<u>readily</u> be attributed to any <u>particular</u> income producing activity" within the meaning of the throw-out rule. OAR 150-314.665(4)(3)(b) (emphases added).

- The Department, on the other hand, asserts that the activity consists of "one particular sale" and that the throw-out rule does not apply because transactions related to the sale primarily occurred at Tektronix's headquarters in Oregon. (Appellant's Opening Brief at 41.)

The Tax Court agreed with Tektronix and rejected the Department's argument.

Applying the income producing activity definition and rule to the Goodwill, the court determined that the Goodwill

> "reflects the value of the combination of all the assets and activities of a business, and, under the accepted definition for accounting purposes, is the amount paid by a purchaser in excess of the aggregate fair market value of other assets purchased." (Order at ER 22.)

The court further concluded that the Goodwill "is a composite of all of the business activities of a taxpayer over time and in all locations where the business of the taxpayer is carried on." (Order at ER 22.) The court thus rejected the Department's sale-only position.

This holding is consistent with the Tax Court's analysis of a similar issue (not considered on appeal to this Court) in *Crystal Commc'ns, Inc.*, slip op at 28. That case involved an intangible asset that, like the Goodwill, (1) grew in value over the years because of the various operations of the taxpayer, but (2) was sold in a particular transaction. The Tax Court rejected the taxpayer's assertion that the only relevant income producing activity was the sale. Instead, the court determined that the OAR 150-314.665(4)(2) definition includes all "the transactions and activity directly engaged in by the taxpayer in the regular course of its trade or business for the ultimate purpose of obtaining gains or profit." OAR 150-314.665(4)(2). The Tax Court's analysis also is consistent with the decisions by the California State Board of Equalization in the Staff Summary and Recommendation Section 25137 *Petition of Silog, Inc.* (June 19, 2006) ("*Silog*"), and the *Summary Decision in the Matter of Imperial, Inc.* (July 13, 2010) ("*Imperial*"). (*See* Tektronix's Opening Brief at 64:13-65:7.)

Nothing in Appellant's Opening Brief discusses the Tax Court's reasoning. In addition, the Department fails to mention, let alone analyze, *Crystal*, *Silog*, or *Imperial*. Instead, the Department simply asserts that the Tax Court should have limited the income producing activity to the sale and then applied the rule of OAR 150-314.665(4)(3)(a) because the sale was an activity that could be readily identified. In doing this the Department largely repeats, without material modification, the arguments it made in its Tax Court Opening Brief to the effect that the sale was the only applicable income producing activity. The Department never explains, however, how its narrow focus in this case on the sale comports with the broad definition in

OAR 150-314.665(4)(2), which requires taking into account all transactions related to the Goodwill undertaken by Tektronix "for the ultimate purpose of obtaining gains or profit."

The income producing activity related to the sale of the Goodwill consisted of all of Tektronix's activities related to the printer division, and not solely the sale of the printer division.

B. The Throw-Out Rule Applies

The Department does not contest that the throw-out rule applies if the applicable income producing activity also includes developmental and operational transactions related to the Goodwill. Instead, the Department limited itself based on the assertion that "the income came from the sale." (Appellant's Opening Brief at 44.) Because the applicable income producing activity encompasses far more than just the sale, "the amount paid by the purchaser to taxpayer in this case cannot 'readily' be attributed to any particular income producing activity." (Order at ER 22-23.) Thus, the throw-out rule applies. As noted by the Tax Court, this result is consistent with the overall purposes of the sales factor "to determine the nature and extent of a taxpayer's presence in and utilization of governmental services and the infrastructure of a state."[26] (Order at ER 23.)

---

[26] The Department never disputes or rebuts this conclusion.

VI. Conclusion

For the foregoing reasons, the Court should uphold the Tax Court's decision that Tektronix's Oregon sales factor did not include the receipts attributable to the Goodwill and affirm the Tax Court's judgment.

DATED: June 21, 2013.

STOEL RIVES LLP

/s/ Robert T. Manicke
Robert T. Manicke, OSB No. 954648
Brad S. Daniels, OSB No. 025178
Eric J. Kodesch, OSB No. 032508
Stoel Rives LLP
900 SW Fifth Avenue, Suite 2600
Portland, OR 97204

Attorneys for Respondent

CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

I certify that this brief complies with the word count limitation in ORAP 5.05(2)(b), with a count of 12,742 words.

I certify that font size in this brief is Times New Roman 14-point for both the text of the brief and footnotes, as required by ORAP 5.05(4)(f).

/s/ Brad S. Daniels
Brad S. Daniels 025178
Of Attorneys for Plaintiff-Respondent

CERTIFICATE OF FILING AND SERVICE

I certify that on June 21, 2013, I filed the foregoing Respondent's Answering Brief with

Rebecca Osborne
Appellate Court Administrator

using the Oregon appellate Court electronic filing system.

I further certify that on June 21, 2013, I served the foregoing Tektronix's Answering Brief on

Marilyn J. Harbur
Douglas M. Adair
Oregon Department of Justice

using the Oregon appellate court electronic filing system.

Dated June 21, 2013.

/s/ Brad S. Daniels
Brad S. Daniels 025178
Of Attorneys for Plaintiff-Respondent
Tektronix, Inc. and Subsidiaries