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

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**APPELLANT'S OPENING BRIEF**

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

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## I. STATEMENT OF THE CASE

### A. Nature of the Action or Proceeding

The Department of Revenue (department) made corporation excise tax adjustments to Tektronix, Inc. and subsidiaries' **(**Tektronix) second amended Oregon return for the 1999 tax year, which Tektronix appealed to the Oregon Tax Court. Tektronix raised issues concerning the statute of limitations and the legal basis for one of the department's adjustments. The Oregon Tax Court issued an order granting Tektronix' partial-motion for summary judgment, and denying the department's cross-motion for summary judgment. Other issues not decided by the tax court were resolved through settlement. The department appeals from the tax court's adverse decision on both issues, and requests that this court reverse that decision to correct errors of law and fact.

### B. Nature of the Judgment

General Judgment was entered after motions and oral argument, incorporating the tax court's order, as well as the parties' settlement of other issues.

### C. Statutory Basis of Appellate Jurisdiction

This appeal is brought pursuant to ORS 305.445. Under that statute, this court may affirm, modify, or reverse the order or decision of the tax court appealed from, with or without remanding the case for further hearing, as justice may require.

**D. Entry of Judgment and Timely-Filed Notice of Appeal**

The General Judgment was entered on November 19, 2012, and the department's Notice of Appeal was served and filed on December 12, 2012, within the statutory time period for appeal. ORS 305.445 and ORS 19.255.

**E. Questions Presented on Appeal**

1. Did the Internal Revenue Service's (IRS's) 2005 Revenue Agent Report (RAR) make a "change or correction" with respect to Tektronix' 1999 tax year liability under a provision of the Internal Revenue Code (IRC), for purposes of ORS 314.410(3)(b), thus allowing the department to make adjustments in 2006 to Tektronix' second amended return for the 1999 tax year?

2. Did the tax court err in failing to apply ORS 314.665(6)(a) and instead determining under OAR 150-314.665(4)(3)(b) that Tektronix' sale of "goodwill" must be excluded from the numerator and denominator of Tektronix' 1999 tax year sales factor for purposes of apportioning corporate excise tax because it could not be readily attributed to a particular income producing activity, and further err in failing to determine the income producing activity for

each of the seven items of intangible property that constituted the so-called "goodwill"?

**F. Summary of the Arguments**

The first issue in this case is whether the IRS's 2005 issuance of an RAR authorized the department to make an adjustment to Tektronix' 1999 amended return in 2006. The tax court held that the RAR did not make a "change or correction" within the meaning of ORS 314.410(3)(b), so the department could make no adjustment. Instead, the tax court concluded that the department could make only a limited assessment under ORS 314.410(3)(c), which applies to returns "accepted" by the IRS. But the tax court misconstrued those statutes.

Tax returns that are "changed or corrected" by the IRS under ORS 314.410(3)(b), are treated differently from tax returns that are "accepted" by the IRS under ORS 314.410(3)(c). Under ORS 314.410(3)(b), a change or correction made by the IRS under *any* provision of the IRC opens the statute of limitations for the department to issue a notice of deficiency making any adjustment to arrive at the correct amount of Oregon taxable income or tax liability. Under ORS 314.410(3)(c), where the return is "accepted" by the IRS, the department may make only a limited adjustment up to the amount of the refund claimed by the taxpayer. Because the issuance of the RAR in this case reduced the amount of taxable income shown on Tektronix' amended return, it constituted a "change or correction" under a provision of the IRC. Thus, ORS 314.410(3)(b) was, by its plain terms, the applicable statute.

In concluding to the contrary, the tax court concluded that the legislature did not intend ORS 314.410(3)(c) to apply to the particular type of assessments that the IRS imposed on Tektronix' 1999 amended return. But nothing in the text of ORS 314.410(3)(b) limits the department's adjustment authority to the type of change or correction that the IRS is permitted to make under the IRC, so long as a provision of the IRC permits the IRS to make an assessment of tax or issue a refund. All that is required is that a provision of the IRC permits the IRS to make an assessment of tax or issue a refund. That is what happened here.

The second issue in this case is whether the tax court miscalculated the sales factor because it misconstrued the provisions of ORS 314.665(6)(a) and OAR 150-314.665(4)(3)(a) and (b) pertaining to the determination of the income producing activity where intangible assets are sold. Receipts from the sale of intangible assets derived from the taxpayer's primary business activity are appropriately included in the numerator and denominator of the sales factor under ORS 314.665(4)(3)(b)(a) and OAR 150-314.665(4)(3)(b). Instead, the tax court excluded the "goodwill" receipts because they were not readily attributable to a particular income producing activity.  Even if it was proper to look just at goodwill when only one percent of the sales receipts from the intangible assets came from goodwill, the tax court incorrectly applied the statute and rules to "goodwill."

The tax court also erred by failing to address all seven items of intangible property sold by Tektronix.  The tax court made a determination only as to an aggregate "goodwill" item.  Even under the tax court's application of OAR 150-314.665(4)(3)(b), some of the intangible assets may have been readily attributable to an income producing activity and others not.  But the tax court did not address the other six items of intangible property.  This leaves genuine issues of material fact undecided, requiring reversal of summary judgment and remand for further proceedings.

**G. Summary of the Facts**

**a. Statute of Limitations**

The three events of most significance for the statute of limitations issue are:

- On February 27, 2004, Tektronix filed an amended tax return with the IRS, Federal Form 1139 for tax year 1999, requesting a refund of tax, due to a reduction of taxable income for that year from a carryback of a net capital loss from tax year 2002. (Rev. 1st Stip ¶ 8 - Attachment 10).

- On March 28, 2005, the IRS issued a Revenue Agent's Report ("RAR") (321 pages) changing or correcting Tektronix's taxable income for tax year 1999, as filed in its February 27, 2004, Form 1139, and assessed a "Deficiency – Increase in Tax" of $7,788,872. (Rev. 1st Stip ¶ 12, former Ex H - Attachments 10 and 11, and 2nd Stip Joint Ex D-4). Page 9 of the RAR decreased the capital gain net income by $14,438,752 for tax year 1999 (fiscal year end 5/2000).
- On May 12, 2006, after its first and only audit of the 1999 tax year, the department issued its Notice of Deficiency ("NOD") for tax year 1999. (2nd Stip Ex A-1).

Under IRC § 6501(h) and (k), for the 1999 tax year, the IRS was permitted to assess a deficiency "attributable to the application to the taxpayer of a * * *capital loss carryback" "at any time before the expiration of the period within which a deficiency for the taxable year of the * * * net capital loss which results in such carryback may be assessed" up to the amount of the refund claimed.

**b. Sales Factor Sourcing**

The seven items of intangible property at issue are:

| | |
|---|---|
| Installed base | $224,800,000 |
| Distribution channel | $143,100,000 |
| Existing technology | $125,000,000 |
| In-Process R&D | $26,500,000 |
| Tradename/trademarks | $24,800,000 |
| Assembled workforce | $52,619,119 |
| Goodwill | ($6,984,726) |
| Total | $589,834,393 |

These allocated amounts were reported in the affidavit of Tektronix representative, Mark Modjeski, attached to Tektronix' Motion for Partial Summary Judgment. The department did not contest the allocation or the amounts.

Facts concerning sourcing of the sales income from the seven intangible personal property items are taken from Tektronix' 10-Ks:

- Tektronix is an Oregon corporation organized in 1946. Its principal executive offices are located at 26600 S.W. Parkway Avenue, Wilsonville, Oregon 97070, approximately 18 miles south of Portland. Tektronix manufactures and distributes electronic products within three broad segments through three major business divisions: Measurement, Color

Printing and Imaging, and Video and Networking. Measurement products include a broad range of instruments designed to allow an engineer or technician to view, measure, test or calibrate electrical circuits, mechanical motion, sound or radio waves. Color Printing and Imaging products include a comprehensive line of computer network capable color printers, ink and related supplies. Video and Networking products include video distribution, production, storage and newsroom automation products. On June 24, 1999, Tektronix, Inc. announced that its Board of Directors approved a plan to separate the Company into two independent publicly traded companies. One was planned to contain Tektronix' Measurement Business Division, and the other was to contain the Color Printing and Imaging Division. Tektronix planned an initial public offering for approximately 15% of the new color printing and imaging company prior to the end of the May 29, 1999, fiscal year. The remaining shares were to be distributed to Tektronix shareholders at some time after the offering. Joint Exhibit G-7, p 2 (1998 10-K)

- Tektronix' plan for the separation of the company later changed to a sale of assets, which was announced in June 1999. On January 1, 2000, Tektronix closed its sale of substantially all of the assets of the Color Printing and Imaging Division to Xerox Corporation. Joint Exhibit H-8, p 2 (1999 10-K).

- Tektronix owns substantially all of its manufacturing facilities. Its primary manufacturing facilities are located in or near the Portland, Oregon metropolitan area. Joint Exhibit G-7, p 6 (1998 10-K).
- Tektronix owns an industrial park (the “Howard Vollum Park”) near Beaverton, Oregon. The Howard Vollum Park includes 20 buildings arranged in a campus-like setting and containing an aggregate of approximately 2.2 million gross square feet of enclosed floor space. A substantial portion of the Company’s product manufacturing and administrative activities are located at Howard Vollum Park. Joint Exhibit G-7, p 9 (1998 10-K).
- Tektronix’s Color Printing and Imaging Division and corporate headquarters occupied four buildings containing approximately 800,000 square feet on property owned by the Company in Wilsonville, Oregon, approximately 16 miles south of Howard Vollum Park. Joint Exhibit G-7, p 10 (1998 10-K).

## FIRST ASSIGNMENT OF ERROR

The tax court erred in granting plaintiff's motion for partial summary judgment and denying defendant's cross-motion for summary judgment based on the court's determination that the IRS was not permitted to make an "assessment of tax" or "issue a refund" under an IRC provision, for purposes of ORS 314.410(3)(b), and thus made no change or correction to the federal amended return filed by Tektronix for the 1999 tax year, as a result of which the department could assess a deficiency. (ER 6–8).

### A. Preservation of Error

The department argued in briefing and oral argument that IRC § 6501(h) and (k) permitted the IRS to assess a deficiency of tax to Tektronix for the 1999 tax year satisfying the requirement in ORS 314.410(3)(b)(A), and thus the department was authorized to make its deficiency assessment of tax. The department further argued that Tektronix filed an amended return for tax year 1999, which the IRS changed or corrected resulting in a deficiency assessment. *See* Defendant's Cross-Motion for Summary Judgment and Response to Plaintiffs' Motion for Summary Judgment, at pp 5-7; 2nd Stip of Facts ¶ 15; Defendant's Reply to Plaintiffs' Response to Plaintiffs' Cross-Motion for Summary Judgment, at pp1-3.

### B. Standard of Review

This court reviews a decision of the tax court for "errors or questions of law or lack of substantial evidence in the record to support the tax court's decision." ORS 305.445.

## ARGUMENT

### I. ORS 314.410(3)(b) Authorizes the Department's Notice of Deficiency Within Two Years of the Issuance of a Federal Change or Correction Where an IRC Provision Authorizes the IRS to Make an Assessment of Tax or Issue a Refund.

#### A. The text of ORS 314.410(3)(b) does not restrict the IRS's "change or correction" to those made under some provisions of the IRC but not others.

ORS 314.410(3)(b) is one of the exceptions to the general rule under ORS 314.410(1) that the department must give notice of deficiency within three years after the return was filed. ORS 314.410(3)(b) [1] authorizes the department to determine the correct amount of income and tax liability for a tax year if, for that tax year, the taxpayer filed a federal original or amended return asserting a particular amount of taxable income, but the IRS "changed or corrected" that taxable income as described in ORS 314.380(2)(a)(A), and as a result of that

[1] All references to the Oregon Revised Statutes ("ORS") are to the 2005 version unless otherwise indicated.

federal change or correction the IRS was permitted to make an assessment of tax or issue a refund under "any" provision of the IRC.

ORS 314.410(3)(b) (2005) provides:

> (b)(A) If the Commissioner of Internal Revenue or other authorized officer of the federal government or an authorized officer of another state's taxing authority 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 or applicable law of the other state, or pursuant to an agreement between the taxpayer and the federal or other state taxing authority that extends the period in which an assessment of federal or other state tax may be made, 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 or other tax official of the correction, or within the applicable three-year or five-year period prescribed in subsections (1) and (2) of this section, whichever period expires later.
>
> (B) A notice of deficiency mailed pursuant to this paragraph may assert any adjustment necessary to arrive at the correct amount of Oregon taxable income and Oregon tax liability for the tax year for which the federal or other state change or correction is made.

ORS 314.380(2)(a)(A) (2005) provides:

> (A) The Internal Revenue Service or other competent authority has changed or corrected the amount of a taxpayer's taxable income, tax credit or other amount taken into account in determining the taxpayer's tax liability as reported on a federal income tax return or an income tax return of another state for any taxable year.

(Emphasis added).

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 § 6501(h) and (k).[2]

When interpreting a statute, a court must give effect to the legislature's intent. *PGE V. Bureau of Labor and Industries*, 317 Or 606, 610, 859 P2d 1143 (1993). The first level of analysis is to examine the text and context of the statute. *Id*. at 610. The court may also look at legislative history, to the extent it is helpful, and, if necessary, to maxims of statutory construction. *Id.* at 611-612; *State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009).[3] Each word and term in a statute is to be given effect if possible. ORS 174.010.

By its plain terms, the provisions of ORS 314.410(3)(b) apply to Tektronix. It filed a return (Form 1139) with the IRS asserting an amount of taxable income for tax year 1999, the IRS changed or corrected the taxable income on that return, and, as a result of that change or correction, the IRS

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[2] There is no dispute that if the answer to this question is yes, then the department is authorized under ORS 314.410(3)(b)(A) and (B) to make any assessment of tax necessary to correct the tax liability of the taxpayer.

[3] As discussed below, the significant amendments were made in 2001. The legislative history from that Session is unhelpful, however, because the discussion does not address this issue.

properly assessed a tax deficiency under a provision of the IRC.[4] That change or correction was made under IRC § 6501(h) and (k), which permitted the IRS to make an assessment of tax or issue a refund up to the amount of the refund claimed by Tektronix on the return.

The Federal Form 1139 that Tektronix filed for tax year 1999 is a type of amended return.[5] Like any amended income tax return, a Form 1139 reflects the taxpayer's amended position regarding taxable income, the amount of tax on that income, and the tax balance due or amount to be refunded. Tektronix's tax year 1999 Form 1139 (2nd Stip Joint Exhibit D-4) reduced the company's taxable income from $384,207,582 to $347,514,987 (lines 11(a) and 15(b)), reduced the resultant federal income tax from $134,472,654 to $121,630,245 (line 16 (a) and (b)), reduced the total tax liability from $76,992,133 to $64,149,724 (line 25 (a) and (b)), and asserted a decrease in tax and an equivalent refund request of

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[4] Under the plain language of ORS 314.410(3)(b), the IRS changes or corrections that open the statute of limitations are not conditioned on a particular effect on Oregon income or tax liability.

[5] Federal Form 1139, a Corporation Application for Tentative Refund, provides an opportunity for a taxpayer to restate its income for a prior tax year under certain circumstances and receive an expedited refund. IRC § 6411(b) (providing for refund or credit to issue within 90 days of filing). The same result, albeit over a longer time frame, could be achieved by filing a form 1120X. As with any amended return, the IRS is authorized to later adjust the taxable income and resultant tax, as occurred in this case on Tektronix' Form 1139.

$12,842,409 (line 27(a)). The IRS automatically issued the refund requested on Tektronix's tax year 1999 Form 1139. (2nd Stip ¶ 13).

On March 28, 2005, following an audit, the IRS issued a Revenue Agent's Report (RAR) making adjustments to tax year 1999. (See Rev. 1st Stip ¶ 12, Attachment 11). The taxable income was corrected to $369,768,830 (line 4), the tax liability was corrected to $129,419,090 (line 8), the total tax liability was corrected to $71,938,596 (line 12) instead of the $64,149,724 shown on the Form 1139 return (line 13), the result being a "Deficiency – Increase in Tax" of $7,788,872 (line 15).[6] (See *Id.*). The IRS was authorized to assess the deficiency for tax year 1999 pursuant to IRC § 6501(h) and (k).[7] On April 21, 2005, Tektronix signed a Federal Form 870 accepting the March 28, 2005, RAR adjustments, including the tax deficiency assessed for tax year 1999. Thus, the parties' stipulated facts show that the factual requirements of ORS

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[6] The federal changes and corrections are from the amounts stated on Tektronix's Form 1139 amended return. (2nd Stip Joint Ex. D-4).

[7] The amount of the 1999 tax year deficiency assessable to Tektronix by the IRS in the extended time period prior to 2008, as provided in IRC § 6501(k), "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. The limitation on the amount of the assessment permitted does not in any way alter the fact that it is "an assessment of tax" "permitted under any provision of the Internal Revenue Code" under the text of ORS 314.410(3)(b)(A).

314.410(3)(b)—an amended return, a federal change or correction in taxable income and tax liability, and an assessment of tax under an IRC provision—were met in this case, thereby allowing the department to issue its Notice of Deficiency for tax year 1999 on May 12, 2006, well within two years of July 27, 2005, the date it learned of the federal correction.

In reaching the contrary conclusion, the tax court decided that the adjustment made by the IRS to the amended return for tax year 1999 and the subsequent deficiency assessment were not the type of adjustment and deficiency assessment contemplated by the language of ORS 314.410(3)(b).

> The court has no difficulty concluding, given the overall statutory context in which ORS 314.410(3)(b) finds itself, that when the legislature refers to an 'assessment of tax' whether an assessment by Oregon or by another government, the reference is to a demand for a payment limited by nothing other than the facts present in any given year. It is not a demand limited by relevant law to some lesser amount such that, for example, the assertion of tax due serves only as a reduction, off-set or elimination of a claimed refund.

(ER 6).

But that analysis is incorrect because it ignores the statute's plain text. Whereas the statute says "<u>makes a change or correction as described in ORS 314.380(2)(a)(A)</u> and, <u>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</u>" (emphasis added), the tax court's decision finds that the legislature did not intend to include capital loss carryback adjustments and deficiency assessments under IRC § 6501(h) and (k) of the Internal Revenue Code. In other words, the tax court concluded that the legislature did not mean what it plainly said when using the words "any" "return" and "assessment of tax."

The language of ORS 314.380(2)(a)(A), incorporated in ORS 314.410(3)(b), also plainly does not contain the limitation imposed on it in the tax court's decision. That statute refers to "<u>change[s] or correct[ions to] the amount of a taxpayer's taxable income</u>, tax credit or other amount taken into account in determining the taxpayer's tax liability as reported on a federal income tax return." (Emphasis added). Nothing in the statute begins to suggest that changes to taxable income because of a carryback loss reported on a prior tax year's amended return do not count as "changes" that allow the department to make whatever adjustments and assessments are allowed under ORS 314.410(3)(b)(A) and (B).

In concluding that the statute of limitations was not open for the department's adjustment in this case, the tax court purported to rely on the this court's decision in *Swarens v. Dept. of Revenue*, 320 Or 326, 883 P2d 853 (1994). However, that case is factually distinguishable. In *Swarens*, the IRS did not issue an assessment for additional tax or even make a change or correction to taxable income for the year at issue—the Service acknowledge that the year was limited by statute and declined to issue a requested refund thereby leaving the taxpayer's prior position unchanged. 320 Or at 328-9. By contrast, in the instant case, the IRS changed or corrected Tektronix' taxable income and issued an uncontested assessment for a "Deficiency – Increase in Tax" of $7,788,872. (See Rev. 1st Stip ¶ 12, Attachment 11). Thus, in *Swarens*, this court did not address the situation in the present case where an IRS assessment of tax was actually made under a provision of the IRC, i.e., the IRS's correction under IRC §6501(h) and (k) of a carryback loss claimed on an amended return for the year to which the loss is carried back.[8]

Under the plain language of ORS 314.410(3)(b), the department's ability to assess a deficiency is not restricted to the scope of the IRS's assessment authority or any particular change or correction made by the IRS. The department may issue a NOD "<u>under any Oregon law</u>" if, as a result of a federal change or correction, "* * * an assessment of tax or issuance of a refund is

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[8] Moreover, the statute was amended after *Swarens* was decided in 1994. As discussed below, significant changes to ORS 314.410(3)(b) and ORS 314.380(2) were made after 1994.

permitted under any provision of the Internal Revenue Code * * *." ORS 314.410(3)(b)(A) (emphasis added); *see also*, OAR 150-314.410(4)(5).[9] IRC § 6501(h) extends the period of time for the IRS to assess a deficiency for a tax year for which a refund has been made under IRC § 6411 (Form 1139), and authorizes such assessments, but limits the extent of any assessment to the amount of the refund requested on Form 1139.[10] The IRS's action under IRC §6501 changed the tax liability as shown on that amended return. Thus, not only did a provision of the IRC permit the IRS to assess tax for tax year 1999, on March 28, 2005, the IRS assessed a deficiency of $7,788,872, which assessment was not contested by Tektronix. Because of this assessment, ORS 314.410(3)(b) authorized the department to mail a notice of deficiency under any Oregon law within two years. The department's adjustment authority is not limited by what

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[9] OAR 150-314.410(3)(4) provides that the department may not mail a Notice of Deficiency based on a federal RAR if, at the time of the change or correction, the tax year was closed to adjustment for Oregon purposes and also for adjustment under federal tax law, which reflects the import of the phrase in ORS 314.410(3)(b)(A): "permitted under any provision of the Internal Revenue Code." Here, Tektronix' 1999 tax year was open to adjustment under federal provisions, IRC §6501(h) and (k).

[10] The effect of these provisions in the present case was to extend the statute of limitations within which the IRC could assess a 1999 tax year deficiency to Tektronix for three years past the 2005 tax year (the year of the capital loss carried back to 1999), to 2008.

type of adjustment the IRS has made; under ORS 314.410(3)(b), the IRS change or correction simply triggers the department's authority.

### B. The text of ORS 314.410(3)(c) Does Not Apply And Thus Does Not Limit the Amount of the Assessment.

For the reasons stated above, the tax court should have concluded that the department was authorized under ORS 314.410(3)(b) to issue a deficiency. Instead, however, the tax court concluded that a different provision, ORS 314.410(3)(c), was applicable, and that under that provision the department was authorized to make only a limited assessment up to the amount of the refund claimed by Tektronix on its Oregon amended return for tax year 1999. But the tax court's reliance on that provision was misplaced.[11]

[11] In concluding that the department may make its assessment under ORS 314.410(3)(c), but only up to the amount of the claimed refund, the tax court's decision makes two fact errors. First, the tax court concludes that the IRS took no action with respect to the federal amended return for tax year 1999, which is contradicted by the facts, and specifically paragraph 15 of the 2nd Stipulation of Facts. Second, the tax court erroneously concludes that the IRC "accepted" an amended return for tax year 1999, which is contradicted by the fact that the IRS issued a Revenue Agent's Report (RAR) making adjustments for 1999, as stated in paragraphs 15 and 16 of the 2nd Stipulation of Facts. As a result of these two fact errors, the tax court's decision contradicts itself in allowing the department to reduce the claimed refund under ORS 314.410(3)(c) with the same assessment it could not make at all under ORS 314.410(3)(b).

ORS 314.410(3)(c) (2005) provides, in pertinent part:

> If the taxpayer files an original or amended federal or other state 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 or other state return, 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.

(Emphasis added).

ORS 314.380(2)(a)(B) (2005), referred to in ORS 314.410(3)(c), provides, in pertinent part:

> (B) The taxpayer:
>
> (i) Files an original or amended return that is accepted by the Internal Revenue Service or the taxing authority of another state[.]

(Emphasis added).

ORS 314.410(3)(c) only applies to Tektronix under the facts of this case if, as provided in ORS 314.380(2)(a)(B), it both filed an amended return with the IRS and that amended return was "accepted" by the IRS. With respect to the first element, as discussed above, the Federal Form 1139 that Tektronix filed for tax year 1999 is a form of amended return.[12] However, that amended return was <u>not</u> “accepted” by the IRS but, rather, it was adjusted by the IRS by and through the RAR dated March 28, 2005, which changed or corrected Tektronix’s tax year 1999 taxable income and asserted a tax deficiency. Because the return was not accepted as required by ORS 314.380(2)(a)(B), the provisions of ORS 314.410(3)(c) should not apply.

The word “accepted” referring to and qualifying the return in ORS 314.380 (2)(a)(B) is not expressly defined in that statute. However, ORS 314.380(3)(b) provides that “[t]he date on which an original or amended return is accepted by the Internal Revenue Service or other state taxing authority is the date the original return is filed <u>if the return is subsequently accepted</u> by the Internal Revenue Service or other state taxing authority.” (Emphasis added). This subsection confirms that “accepted” cannot simply mean “filed” because after filing the return must then be “subsequently accepted.” Webster defines “accepted” as: “generally approved: widely used or found: generally agreed

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[12] As noted in paragraph 8, footnote 1, of the Revised First Stipulation of Facts, Attachment 10, the parties did not agree as to whether Federal Form 1139 is an original or amended return, or something else. However, because Tektronix argues for the application of ORS 314.410(3)(c), it must necessarily assert that Form 1139 is either an original or an amended return. Because Tektronix had already filed an original federal return for tax year 1999 (2nd Stip, Joint Ex B-2, 13-62), the Form 1139 for 1999 must be an amended federal return.

upon: UNCHALLENGED." *Webster's Third New Int'l Dictionary,* 11 (unabridged ed 2002). In this context, "accepted" must mean "approved," "agreed upon," or "unchallenged."

The text and context of ORS 314.380 support the conclusion that if a return is "accepted" it cannot also have been "changed or corrected." ORS 314.380(2) requires that the taxpayer report to the department any change to its income or tax liability under three circumstances: (2)(a)(A), a "change or correction" is made by the IRS or another state; (2)(a)(B)(i), a return is filed that is "accepted" by the IRS or another state; and (2)(a)(B)(ii), assessment by the IRS or another state for failure to file a return. Of these three factually distinct circumstances, the obvious contrast is between (2)(a)(A), which requires a change or correction (which, in turn, requires that a return has been filed, otherwise there is nothing to "change or correct"), and (2)(a)(B)(i), which requires that a return be "accepted." In this context, "accepted" must refer to a return that is neither changed nor corrected, because if it had been "changed or corrected," it would fall under (2)(a)(A).

The text of ORS 314.410(3) further supports this conclusion. Subsection (3)(b) refers to and applies to circumstances where, under ORS 314.380(2)(a)(A), a "change or correction" has been made by the IRS or another state, and provides that the department's authority to adjust and assess is not limited. In contrast, subsection (3)(c) refers to a return that has been "accepted" under ORS 314.380(2)(a)(B), and substantially limits the department's authority to adjust. Subsection (3)(c) does not include a qualifier or term of limitation such as "notwithstanding (3)(b)," thus, there is no legislative signal that these categories overlap. These two subsections must operate in concert over two distinctly different classes of returns: (1) those that have been "accepted," and (2) those that have been "changed or corrected." If a "change or correction" has been made, subsection (3)(b) applies. When the return is accepted as filed and no "change or correction" is made, then (3)(c) applies. Conversely, when a "change or correction" is made, the return has not been "accepted" and subsection (3)(c) does not apply.

By its terms, the limitations of ORS 314.410(3)(c) only apply to changes in Oregon tax liability "related to the original or amended federal or other state <u>return</u>." (Emphasis supplied). Such changes would be those that naturally flow from the accepted federal or other state return such as a credit for taxes paid to another state. Consistent with this reading, there is absolutely no mention in subsection (3)(c) of changes in Oregon tax liability due to a "change or correction" at the state or federal level. This fact is not surprising because changes in Oregon tax liability due to a “change or correction” at the federal or state level are the subject of subsection (3)(b). Consequently, if a federal or other state return is filed that is not accepted but, rather, changed or corrected after it is filed, there are changes to Oregon tax liability unrelated to the federal or other state return, so subsection (3)(b) applies and subsection (3)(c) does not.

Another problem with the tax court’s interpretation and application of ORS 314.410(3)(c) in the circumstances of this case is that it effectively eviscerates ORS 314.410(3)(b)(A). ORS 174.010 requires that a court give full effect to all provisions or particulars of a statute if it is possible to do so, and not insert what has been omitted or omit what has been inserted.

As discussed above, based both on the plain language of subsections ORS 314.410(3)(b) and (3)(c), and their respective references to different classes of changes as described in ORS 314.380(2)(a)(A) and (2)(a)(B), the only construction that gives full effect to all of the language in ORS 314.410 as well as the pertinent portions of ORS 314.380 is one that applies (3)(b) and (3)(c) to the different circumstances that they describe. Situations where a taxpayer’s return has been subjected to a federal change or correction ((3)(b)) are different from situations where taxpayers have filed a federal or other state return that has been “accepted” ((3)(c)). We are cautioned not to read statutes in context in a way that "renders one statute ineffective." *Vaughn v. Pacific Northwest Bell Telephone*, 289 Or 73, 83, 611 P2d 281 (1980). The distinct portions of both ORS 314.380 and 314.410(3) must be given full and reasonable effect.

### C. The context of prior versions of the statute confirms that the legislature intended (3)(b) to apply here, but not (3)(c).

The text and context of ORS 314.410(3)(b) and ORS 314.410(3)(c), as explained above, demonstrate that (3)(b) is the applicable statute, not (3)(c) as the tax court concluded.

The legislature amended ORS 314.380 and 314.410(3) in 2001, making significant changes to both statutes. (The 1999 and 2001 versions of these statutes are attached for the court's convenience in ER 24 – 30). As discussed earlier in this brief, ORS 314.380 is referenced in ORS 314.410(3). In 2001, the legislature created two separate provisions in ORS 314.380(2)(a): (A) for changed or corrected returns, and (B) for accepted returns. Previously, as shown in the 1999 version of ORS 314.380, the statute did not address "accepted" returns, and ORS 314.380(4) specified only the date that a change or correction of a taxpayer's taxable income is deemed to be made, i.e., the date of the audit report making the change or correction.

Subsequently, in 2001, ORS 314.380(2) was amended to add (2)(a)(B) pertaining to returns "accepted" by the IRS. Also in 2001, the legislature added

ORS 314.380(3)(b), providing that the "date on which an original or amended return is accepted by the [IRS] * * * is the date the original or amended return is filed if the return is subsequently accepted by the [IRS] * * *." (Emphasis added). If the legislature had considered the mere filing with the IRS to be "acceptance" for purposes of ORS 314.380(2)(a)(B), it would not have defined the date of filing as conditioned upon the return being "subsequently accepted by the IRS." In ORS 314.380(2)(a)(B), the legislature clearly intended to address only those returns that the IRS "subsequently accepted," not those returns that it later changed or corrected.

Also in 2001, the legislature amended ORS 314.410 in two significant respects. First, ORS 314.410(3)(a)(B) was added to the statute, as follows:

> (B) A notice of deficiency mailed pursuant to this paragraph may assert any adjustment necessary to arrive at the correct amount of Oregon taxable income and Oregon tax liability for the tax year for which the federal or other state change or correction is made.

In enacting (B), the legislature re-emphasized that the department could assert "any adjustment necessary to arrive at the correct amount of the Oregon tax" "for the tax year for which the federal * * * change or correction is made." Here, the IRS made a change to the federal Form 1139 amended return filed for the 1999 tax year and the department also made adjustments to the 1999 tax year's tax in order to arrive at the correct Oregon tax liability for that tax year.[13]

Prior to 2001, the only description of the types of adjustments that could be made by the department under ORS 314.410(3)(b) was: "notice of deficiency under any Oregon law imposing tax upon or measured by income for the corresponding tax year may be mailed * * *." ORS 314.410(3)(b)(A). That language continues to appear in the statute, but it was substantially bolstered in 2001 by the addition of the above-quoted (B) language. The legislature unequivocally intended that the department should be able to determine the correct Oregon tax liability by making "any adjustment necessary" within a certain period of time after the IRS or another state made a change or correction to a return.

Second, in 2001, the legislature added subsection (c) to ORS 314.410(3). The new ORS 314.410(3)(c) acknowledged the new language in ORS 314.380(2)(a)(B) pertaining to returns "accepted" by the IRS. The legislature

[13] Contrary to the tax court's decision, the IRS's change or correction to the 2002 tax year's return had no significance beyond the fact that the 2002 carryback loss caused Tektronix to file an amended return with the IRS for 1999. However, only the IRS's change or correction to the 1999 amended return is relevant for purposes of defendant's action under ORS 314.410(3)(b).

provided significantly more limited adjustment authority to the department for these "accepted" returns:

> If the taxpayer files * * * [an] ORS 314.380(2)(a)(B) [return], 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 or other state return, but may not give notice of a deficiency or an adjustment to Oregon tax liability [except in the normal time periods].

ORS 314.410(3)(c).

Because these changes were all made in the same legislative session it is clear that the legislature was introducing the concept of limited adjustment authority in ORS 314.410(3)(c) for those circumstances where the IRS made no change or correction that would open up the statute of limitations for all purposes, in contrast with the circumstances addressed in ORS 314.410(3)(b) where the IRS or another state made a change or correction. At the same time, by enacting ORS 314.410(3)(b)(B), the legislature emphasized the broad scope of the department's adjustment authority under ORS 314.410(3)(b) where the IRS had made a change or correction.

### D. The Department's Authority Under (3)(b) Differs From Federal Authority

Another reason stated by the tax court in applying ORS 314.410(3)(c) in this case was that doing so would limit the department's authority to the same extent that federal authority is limited and thereby prevent the department from turning a carryback beneficial refund claim into a drastic burden.[14] (ER 14). But that is a policy decision for the legislature, not the tax court. And the legislature has not seen fit to make the department's authority identical to that of the IRS. The department's authority to make an adjustment to a taxpayer's return begins when it is notified that a federal change or correction has occurred. ORS 314.410(3)(b). However, no comparable provision exists in the Internal Revenue Code to automatically extend the time for a federal adjustment when a state changes or corrects a taxpayer's income subject to federal tax. Also, the department's authority to make an adjustment to a taxpayer's return begins when it is notified that another state has made a change or correction. ORS 314.410(3)(b). Again, no comparable provision exists in the Internal Revenue Code to automatically extend the time for a federal adjustment on this basis. The federal adjustment authority and the Oregon department's adjustment authority are simply different. Furthermore, federal authority to make assessments may be more limited (e.g., IRC §6501(k)) than the department's assessment authority. By its terms, ORS 314.410(3)(b)(A) neither conditions the exercise of its

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[14] The tax court also mistakenly concludes that "[t]he department had opportunity to audit 1999 and did" and "[w]hat the department is seeking here is a windfall ability to reopen 1999 for a second audit because of a change in the 2002 year." (ER14). On the contrary, the parties' stipulated facts state that the department commenced its audit of the 1999 tax year after receiving the federal RAR in 2005. *See* 2nd Stip, ¶ 17. That was the first and only audit of the 1999 tax year.

authority on the nature or extent of federal assessment authority nor does it limit the department's assessment authority to the extent of the applicable federal assessment authority. Instead, under ORS 314.410 (3)(b)(B), the department may assert any adjustment necessary to arrive at the correct amount of Oregon taxable income and Oregon tax liability for the tax year for which the federal change or correction is made. Thus, the tax court wrongly limited the department's assessment authority to mirror the IRS's assessment.

## SECOND ASSIGNMENT OF ERROR

The tax court failed to apply ORS 314.665(6)(a) according to its plain terms. Instead, it erroneously concluded that OAR 150-314.665(4)(3)(b) required the receipts from the sale of Tektronix' "goodwill" to be excluded from the numerator and denominator of the sales factor because it could not be readily attributed to any particular income producing activity of Tektronix. The court further erred in failing to determine the income producing activity for each of the seven items of intangible property, described in aggregate as "the goodwill" (ER 22), leaving undecided genuine issues of material fact.

### A. Preservation of Error

The department argued in briefing that ORS 314.665(6)(a) required inclusion of the "goodwill" gains, and that "plaintiff's argument that the gains from the sale of goodwill that was only recognized as a result of this particular sale transaction should be "thrown out" under OAR 150-314.665(4)(3)(b), does not square with that rule. The gain from this specific sale transaction is attributable to this particular income producing activity." See Defendant's Reply To Plaintiff's Response To Cross-Motion For Summary Judgment, p 5. Tektronix' Affidavit of Mark Modjeski, attached to Plaintiff's Motion for Partial Summary Judgment, shows that the "goodwill" consisted of seven items, and one of those seven items is "negative" goodwill amounting to only one percent of the total sales receipts for all seven items.

### B. Standard of Review

This court reviews a decision of the tax court for "errors or questions of law or lack of substantial evidence in the record to support the tax court's decision." ORS 305.445. Under TCR 47 C, a genuine issue of material fact exists when the record is viewed in a manner most favorable to the department as the adverse party because an objectively reasonable trier-of-fact could return a verdict for the department.

## ARGUMENT

### I. Genuine Issues of Material Fact—The Income Producing Activity for the Sales Receipts from the Other Six Items of Intangible Property—Were Not Determined By The Tax Court, Preventing Summary Judgment.

In the 1999 tax year, Tektronix sold its Color Printing and Imaging Division to Xerox. In accounting for the sales proceeds from the real and personal, tangible and intangible property, Tektronix separately allocated receipts to seven items of intangible property, which the tax court refers to as "goodwill."[15] Tektronix excluded the "goodwill" receipts from its sales factor on its 1999 Oregon return as part of "the occasional sale of fixed assets" excluded under ORS 314.665(6)(c). The department's audit adjustment included the gains from the intangible "goodwill" on the theory that it did not constitute a fixed asset under the meaning of that term in ORS 314.665(6)(c).[16]

In briefing its cross-motion for summary judgment, the department reframed the issue bringing it under ORS 314.665(6)(a). Stated simply, the department argued that the income producing activity for the receipts from the sale of the "goodwill" was the "sale" and because the receipts were "derived from" Tektronix' primary business activity, under ORS 314.665(6)(a), the

[15] The parties' stipulations of fact filed prior to briefing on cross-motions for summary judgment also referred to a lump sum "goodwill" amount. However, Tektronix presented the seven item allocation in its first brief and the department did not contest the fact or amounts of the allocation.

[16] The department continued to assert, however, that intangible property such as goodwill is not a "fixed asset" as that term is used in ORS 314.665(6)(c). The tax court did not consider it necessary to resolve the parties' disagreement. (ER 21).

receipts must be included in the numerator and denominator of the sales factor for purposes of apportioning business income.

The tax court determined that the "goodwill" was not attributable to any particular income producing activity, thus, under OAR 150-314.665(4)(3)(b), the receipts from the sale of the "goodwill" must be excluded from the numerator and denominator of the sales factor. (ER 22-23). The tax court's determination erred in focusing solely on "goodwill" when seven items of intangible property were identified by Tektronix as having been sold.

When Tektronix sold the assets of its Color Printing and Imaging Division (CPID) on January 1, 2000, a substantial amount of the sales price was allocated to intangible assets. According to the Affidavit of Mark Modjeski, Tax Director for Tektronix, the "goodwill" was actually composed of the following:

| | |
|---|---|
| Installed base | $224,800,000 |
| Distribution channel | $143,100,000 |
| Existing technology | $125,000,000 |
| In-process R&D | $26,500,000 |
| Tradename/trademarks | $24,800,000 |
| Assembled workforce | $52,619,119 |
| Goodwill | ($6,984,726) |
| Total | $589,834,393 |

The tax court does not address any of these specific items. Only aggregate "goodwill" is discussed.[17] This defect in the tax court's decision is significant because it leads the court to: (1) an incorrect "income producing activity" determination, and (2) application of the wrong subsection of OAR 150-314.665(4)(3).

The tax court's failure to look at each of the seven items of intangible property before concluding that the entire aggregate amount of receipts from "goodwill" indicates that no basis in fact existed for opining that "the goodwill at issue here 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." (ER 22). The tax court states that "[t]he factual record shows that these activities occurred throughout the world and over a significant number of years." (ER 22). But nothing in the tax court's opinion indicates that any type of intangible property other than "goodwill" was considered. Indeed, in concluding that ORS 314.665(6)(a) could not be the basis for including some or all of the receipts from taxpayer's disposition of goodwill in the computation of the sales factor, the tax

[17] The decision further fails to acknowledge that the small amount of actual goodwill—about one percent of the total—is "negative ."

court states that "[g]oodwill is not the type of intangible property that those statutory provisions address." (ER 20) (Emphasis added).

The fact that the tax court did not examine "trademarks," for example, separate and distinct from "goodwill," is inconsistent with the approach the tax court took in *Crystal Communications, Inc. v. Dept. of Revenue,* 19 OTR 524 (2008), *aff'd* on other grounds *Crystal Communications, Inc. v. Department of Revenue,* ___P3d ___, 2013 WL 856138, Or, March 7, 2013 (SC S059271). There, the tax court distinguished goodwill or going concern value, which can be created by the conduct of a trade or business, from separately existing intangible property such as a patent, trademark, ownership interest, (such as stock), or contract right, which can be used in a trade or business. *Id.* at 537.

The department contends below that the tax court was incorrect in concluding that the small portion of the intangible property receipts from the sale of (negative) goodwill was not attributable to any particular income producing activity, and thus excludable from the sales factor under OAR 150-314.665(4)(3)(b). But, even if that were the correct analysis for goodwill receipts, the tax court failed to determine that the receipts from each of the other six items of intangible personal property were not attributable to any particular income producing activity. The tax court failed even to make a finding that all seven items of intangible property should be considered exactly the same. The tax court simply treated the "goodwill" as a single type of intangible property, stating that "[g]oodwill is not the type of intangible property that those statutory provisions address." (ER 20).

Because the income producing activity that produced the sales receipts for each of the seven items of intangible property was not determined, at least six material facts were left undecided and in dispute. The department argued that the "sale" of the Color Printing and Imaging Division headquartered in Oregon was the income producing activity that produced all of the receipts. Tektronix disagreed. The tax court resolved that genuine issue of material fact, at best, for only one of the seven items of intangible property. Thus, the conditions for summary judgment in TCR 47C have not been met and the tax court's decision granting summary judgment must be reversed and remanded for further proceedings.

On review of a summary judgment, this court determines whether there is a genuine issue as to any material fact and whether the moving party is entitled to judgment as a matter of law. *Stoeger v. Burlington Northern R. Co.*, 323 Or 569, 572, 919 P2d 39 (1996), citing ORCP 47 C; *Fields v. Jantec, Inc.*, 317 Or 432, 437, 857 P2d 95 (1993). Whether the question of the "income producing activity" for each of the seven items of intangible property is considered a "fact" or an "ultimate fact," the requisite determinations were not made. On remand, these determinations should be made, but under the correct legal analysis of ORS 314.665(6)(a) and OAR 150-314.665(4)(3)(a) and (b).

## II. ORS 314.665(6)(a), Enacted in 1995, May Not Be Construed By Importing a 1997 MTC Rule Into Its Terms, And OAR 150-314.665(4)(3)(b) Does Not Apply.

### A. ORS 314.665(6)(a) Applies to All Intangible Assets.

The department maintained 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, under ORS 314.665(6)(a). In declining to apply to intangible property such as "goodwill,"[18] the tax court describes at some length how the "trading" and "treasury function" language used in the 1997 MTC Model Rule to address those specific activities must have been the intended meaning of ORS 314.665(6)(a), enacted by the Oregon Legislature in 1995. But, as is evident from the words used in the statute, ORS 314.665(6)(a) is not so limited:

For purposes of this section, "sales"

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[18] The tax court's decision states that ORS 314.665(6) "is the relevant statute." (ER 15). Yet, inconsistently, the tax court determines that the statute applies only to "trading" and "treasury function." (ER 16).

> (a) Excludes gross receipts arising from the sale, exchange, redemption or holding of intangible assets, <u>including but not limited to securities</u>, unless those receipts are derived from the taxpayer's primary business activity.
>
> (Emphasis added).

"Trading" and "treasury function" are not terms used in subsection (a) of the statute, which instead applies to "the sale, exchange, redemption, or holding of" all "intangible assets," without exclusion. The language of ORS 314.665(6)(a) is expressly not limited to "securities, not is it limited to "trading" and "treasury function."[19]

It 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. For its narrow construction of ORS 314.665(6)(a), the tax court also relies on a department witness' description of a particular problem when explaining House Bill 2203 to the House State and School Finance Committee in 1995. (ER 16, citing Plf's Ex 25, pp 1-2). But this reliance is misplaced. When the express terms of a statute "indicate such broader coverage, it is not necessary to show that this was its conscious purpose." *South Beach Marina, Inc. v. Dept. of Rev.*, 301

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[19] In the construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all. ORS 174.010.

Or 524, 531 (1986) (holding that, in the absence of an affirmative showing that a narrower meaning was intended by the legislature, the term "watercraft" is given its ordinary, broad meaning). For example, in *Hamilton v. Paynter*, 342 Or 48 (2006), the defendants argued that a statutory reference to "persons" was limited to insurers, because the Insurance Commissioner had testified before the legislature about how the statute would affect insurers. This court rejected that argument: "[T]he statutory text shows that, even if the legislature had a particular problem in mind, it chose to use a broader solution." *Id.* at 55.

The tax court's decision also relies on the "Examples" given with OAR 150-314.665(6) (adopted in 2000) to support its conclusion that the proper construction of ORS 314.665(6) is that the statute deals only with the type of intangibles outlined in the MTC regulation, those intangibles being only so-called "liquid assets or financial instruments" and not an intangible asset such as goodwill. (ER 19). Flaws in this analysis are readily apparent: (1) the legislature could not have intended to use language that was not adopted until five years later, (2) the intent of the legislature is not found by looking to the department's interpretation of it, and (3) rule "examples," by definition, do not define the limits of the rule much less a statute. By failing to give full effect to the words "intangible assets" as used in ORS 314.665(6)(a), simply because the department's examples show hypothetical applications of the rule that have not exhausted every possible meaning of the language used in the statute, the court violated ORS 174.010.

**B. OAR 150-314.665(4)(3)(a) applies to sales of all intangible assets; OAR 150-314.665(4)(3)(b) should not have been applied.**

The tax court decided that the receipts from "goodwill" must be thrown out of both the numerator and denominator because the receipts could not be readily attributed to any particular income producing activity under OAR 150-314.665(4)(3)(b). However, the facts show that the "goodwill" receipts were derived from one particular sale. That sale is the "income producing activity" for purposes of ORS 314.665(4), as interpreted in OAR 150-314.665(4)(2) (in effect in 1999), as follows:

> (2) *Income Producing Activity*; *Defined*. The term "income producing activity" applies to each separate item of income and means 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. Such activity does not include transactions and activities performed on behalf of a taxpayer, such as those conducted on its behalf by an independent contractor. Accordingly, income producing activity includes but is not limited to the following:
>
> * * *
> (d) the sale, licensing or other use of intangible personal property.

Here, we have a "sale" of intangible personal property in the regular course of Tektronix' trade or business. Tektronix planned a separation of the company to create two publicly created companies, but later changed this plan to a sale of certain assets, which was announced in June 1999. (Joint Exhibit G-7, p 2 (1999 10-K)). On January 1, 2000, Tektronix closed its sale of the assets of the Color Printing and Imaging Division to Xerox. (Joint Exhibit G-7, p 2 (1999 10-K)). Certain asset acquisitions were also reported in the 1999 10-K. On February 1, 1999, Tektronix acquired the assets of the Network Monitoring and Mobile Test Systems business of Necsy Network Control Systems, S.p.A. (Necsy), a Padova, Italy based, wholly owned subsidiary of Italtel, an Italian telecommunications manufacturer, which is a joint venture between Telecom Italia and Siemens AG. (Joint Exhibit G-7, p 72 (1999 10-K)). Tektronix acquired Siemens' Communications Test Equipment GmbH (CTE), a wholly owned subsidiary of Siemens AG based in Berlin, Germany, for a reported purchase price of $46.6 million, which included intangibles in the amount of $23 million. *Id.* at 73.[20] These activities show 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 for the ultimate purpose of obtaining gains or profit—in these instances both gains and profit. Thus, the income producing activity, to

[20] Tektronix' 2000 10-K describes other "Strategic Acquisitions." (Joint Exhibit H-8, p 70).

which the "goodwill" receipts from the seven intangible property items is most readily attributable and identifiable, is the sale that closed on January 1, 2000.

Because Tektronix' substantial headquarters presence is in Oregon, as described in the Facts section of this brief and the 1999 10-K (Joint Exhibits G-7 and H-8), and the sale of the "goodwill" was approved by management as the headquarters, the sale was performed wholly within Oregon, or, if not wholly within, then at least the greatest proportion of the income producing activity was performed in Oregon. The "goodwill" sales receipts, whether considered as separate income items or in the aggregate, can be readily attributed to a particular income producing activity: the sale in Oregon. Thus, the receipts from the sale of the intangible personal property should be reflected in the Oregon sales factor numerator and denominator.[21]

The tax court implicitly rejects the department's argument that the sale was the income producing activity by concluding that "the goodwill at issue here 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." (ER 22). The tax

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[21] In the alternative, all the costs giving rise to the goodwill were from income producing activities and, based on Tektronix' location in Oregon, it is likely that more of the income producing activity occurred in Oregon than in any other single state. *See Crystal Communications v. Dept. of Revenue*, 19 OTR 524 (2008), *aff'd* on other grounds *Crystal Communications, Inc. v. Department of Revenue*, ___P3d ___, 2013 WL 856138, Or, March 7, 2013 (SC S059271).

court concludes that “the amount paid by the purchaser to taxpayer in this case cannot ‘readily’ be attributed to any particular income producing activity.” (ER 22).

Because the income came from the sale, the tax court should have looked to OAR 150-314.665(4)(3)(a) rather than OAR 150-314.665(4)(3)(b). But the court misreads subsection (3)(a), stating: “The rule, in subparagraph (a), describes as usually identifiable activity interest income on an intangible arising from a particular sale of a particular asset.” (ER 23). What the rule actually says is:

> Where the income producing activity in respect to business income from intangible personal property can be readily identified, the income is included in the denominator of the sales factor and, if the income producing activity occurs in this state, in the numerator of the sales factor as well. <u>For example, usually the income producing activity can be readily identified in respect to interest income</u> received on deferred payments on sales of tangible property (OAR 150-314.665(1)-(A)) <u>and income from the sale, licensing or other use of intangible personal property</u>.

OAR 150-314.665(4)(3)(a) (Emphasis added).

The tax court’s construction of the rule does not square with its language. First, the last sentence in subsection (3)(a) merely provides examples. The examples inform but should not eviscerate the broader operative language in the first sentence. Second, “income from the sale * * * of intangible personal property" is not tied to the interest income from sales of tangible property in the first part of the sentence. Thus, where, as here, a sale transaction involving intangible personal property produces a certain amount of income, that income producing activity can be readily identified under the language of OAR 150-314.665(4)(3)(a)—and the income should be appropriately included in the numerator and denominator of the sales factor.[22]

**CONCLUSION**

The department requests that this court (1) reverse the decision of the tax court with regard to the statute of limitations, and (2) reverse the decision of the tax court with regard to the statute and rules applicable to the sales factor issue, but remand the sales factor issue to the tax court for further factual determination.

[22] The tax court decision contrasts the court's reading of subsection (3)(a) as applying to a particular sale of a particular asset with (3)(b), which applies to "dividends and interest resulting from the mere holding of intangible personal property—stocks or bonds. Such dividends and interest are stated to be not attributable to any particular income producing activity." (ER 23). However, the list of seven items of intangible property in Mark Modjeski's Affidavit does not include stocks or bonds, which admittedly may generate dividends and interest income from the mere holding of them. The seven items in the Modjeski list generated income only from their "sale."

CERTIFICATE OF COMPLIANCE
WITH ORAP 5.05(2)(d)

Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 10,264 words.

Type size

I certify that the size of this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

Dated this 8th day of April, 2013.

By: /s/ Marilyn J. Harbur______________
Marilyn J. Harbur, #802517
Of Attorneys for Defendant-Appellant

CERTIFICATE OF SERVICE

I certify that on April 8, 2013, I directed the original DEFENDANT-APPELLANT'S OPENING BRIEF to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and served upon Eric J. Kodesch and Robert T. Manicke, of attorneys for respondents, by electronic mail and regular United States Mail and addressed to the following:

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