IN THE SUPREME COURT OF THE STATE OF OREGON

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

APPELLANT'S REPLY BRIEF

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

ROBERT T. MANICKE, # 032508
BRAD S. DANIELS, #025178
ERIC J. KODESCH, #032508
Stoel Rives LLP
900 SW Fifth Avenue, Suite 2600
Portland, OR 97204
Telephone: (503) 294-9964
Fax: (503) 220-2480

Of Attorneys for Plaintiff-Appellant
TEKTRONIX, INC., AND SUBSIDIARIES

ELLEN F. ROSENBLUM, #753239
Attorney General
MARILYN J. HARBUR, #8025177
DOUGLAS M. ADAIR, #951959
Senior Assistant Attorneys General
Department of Justice
1162 Court Street NE
Salem, OR 97301
Telephone: (503) 947-4342
Fax: (503) 378-3784

Of Attorneys for Defendant-Respondent
DEPARTMENT OF REVENUE, State of Oregon

July 19, 2013

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Tektronix poses alternative questions or positions for this court to consider with respect to the statute of limitations issue consistent with its arguments. But those questions and the department's question regarding the statute of limitations issue lead to the same fundamental question: What is the correct interpretation of ORS 314.410(3)(b) and (c)? Regardless of the arguments made by the parties regarding that interpretation, when faced with a question of statutory construction this court is responsible for identifying the correct interpretation. *Stull v. Hoke*, 326 Or 72, 77, 948 P2d 722 (1997).

With regard to the sales factor apportionment issue, both the alternative questions presented by Tektronix and by the department ask this court to construe a statute—ORS 314.665(6)—and rule, OAR 150-314.665(4)(3)(a) and (b). But, the department also has asked this court to determine whether remand is required because the tax court's decision with regard to the sales factor apportionment issue failed to consider the income producing activity of all seven items of income. OAR 150-314.665(4)(2)(d) requires consideration of "each separate item of income" for purposes of determining the income producing activity for

sales of intangible personal property. The tax court did not determine these ultimate facts, leaving the parties' conflicting positions in dispute.

II. Oregon Statute Of Limitations Is Opened By IRS's Change Or Correction Of Amended Return If Assessment Of Tax Or Issuance Of Refund Is Allowed Under Any Provision Of IRC.

Tektronix incorrectly argues that the IRS took no action to assess tax for the carryback year, 1999, because the IRS only acted to reduce the amount of the carryback loss for 2002. This argument ignores the facts of this case and the plain language of IRC §6501(k): The IRS changed Tektronix's 1999 amended return and issued a deficiency assessment for tax due for 1999.

A. IRC §6501(k) Extends the Period for Assessing a Deficiency Under the General Limitation in IRC §6501(a).

IRC §6501(k) states: "In a case where an amount has been * * * refunded under section 6411 (relating to tentative carryback and refund adjustments) by reason of a * * * capital loss carryback * * * to a prior taxable year, the period described in subsection (a) of this section for assessing a deficiency for such prior taxable year shall be extended to include the period described in subsection (h) * * * except that the amount which may be assessed solely by reason of this subsection shall not exceed the amount so * * * refunded under section 6411, reduced by any amount which may be assessed solely by reason of subsection (h) * * *." Two points concerning this code provision are noteworthy. First, IRC

§6411(d) provides that a "tentative refund of tax" may be claimed for the tentative carryback adjustment. This means that the IRS's receipt of a Form 1139[1] and expedited issuance of a refund under IRC §6411 is not "acceptance," it is tentative in nature. Second, the tentative refund under section 6411was a refund of "tax" for the 1999 tax year. Thus, to correct the amount of tax that had been refunded based on Tektronix's erroneous 1999 reporting, the IRS issued a tax deficiency assessment for the 1999 tax year.

On February 27, 2004, Tektronix filed federal amended return—Form 1139—for the 1999 tax year in order to claim a capital loss carryback and receive a tentative refund under IRC § 6411. (Rev. 1st Stip, ¶8, Attachment 10). The IRS later corrected the amount claimed on the 1999 Form 1139, and assessed a deficiency to Tektronix. (Joint Ex E-5, RAR Forms 4549A, p 1, and Form 4549B). This action all took place with regard to the 1999 amended return—not the 2002 return. IRC §6501(k) provides that in the case of correction of a capital loss carryback the general statute of limitations period for assessing a deficiency under IRC §6501(a) is "extended" to include the three years following the taxable year of the capital loss, as described in IRC §6501(h). The IRS's action assessing a tax deficiency for the 1999 tax year was within that period as reflected on the

[1] *See* Treas. Reg. §1.6411-1; Joint Ex D-4 (Form 1139).

March 28, 2005 RAR, which was later provided to the department. Thus, the conclusion of the tax court and Tektronix that the IRS took no action with respect to the 1999 tax year is clearly wrong.

B. Assessment of Deficiency Is Assessment of Tax

Tektronix further claims that the legislature did not intend an assessment of a deficiency to be the same thing as an assessment of tax, because only the latter is mentioned in ORS 314.410(3)(b). This sophistry is easily disproved by the definition of "deficiency." Because the legislature has required that the terms used in ORS chapter 314 have the same meaning as when used in a comparable context in the federal income tax laws, we look to the definition of "deficiency" in IRC §6211. Stated simply, the term "deficiency" means the amount by which the **tax** imposed exceeds the excess of the amount shown as the **tax** by the taxpayer upon his return. IRC §6211(a); ORS 314.011(2)(a). Thus, when the IRS—or the department—makes an assessment of a deficiency they are making an assessment of tax. If Tektronix had not claimed more tax refund than it was due on its 1999 amended return, the IRS would have had no reason to make a tax deficiency assessment. This is no different from any original or amended return filing by a taxpayer where less tax than is due is claimed to be owed and the IRS must make an assessment of the deficiency to collect the remainder of the tax that is due. There is no reason to believe that the Oregon legislature intended

anything in ORS 314.410(3)(b) by using the phrase "assessment of tax or issuance of a refund" other than the commonly understood concepts of assessment of tax deficiencies and issuance of tax refunds.

Curiously, Tektronix's other argument that, in substance, there was no assessment of tax, but merely a reduction in the amount of refund claimed, fails to acknowledge the second half of the phrase "assessment of tax or issuance of a refund." The issuance of a reduced refund amount would have been made pursuant to IRC §6501(k), a provision of the IRC, and because a "reduction" necessarily implies a "change or correction" of the refund claimed, the Oregon statute of limitation would have been opened by this action under the terms of ORS 314.410(3)(b). But here, in fact, the IRS assessed a deficiency of tax as shown in the RAR.

To bolster its argument that reduction of a refund could not be what the legislature had in mind in ORS 314.410(3)(b) for "assessment of tax or issuance of a refund under any provision of the IRC," Tektronix, relying on the tax court's opinion, looks to ORS 305.270 and the various terms used in that statute—particularly the word "adjustment."[2] This is a curious argument because it fails to

[2] Tektronix argues that the department did not address this part of the tax court's opinion. Although the department did not mention ORS 305.270, the department clearly refuted the idea that the tax court's analysis of words used in ORS 305.270 finds any support in the language of ORS 314.410(3) and IRC §6501(k). A "word

recognize that "adjustment" and "change" are synonyms. In the context of ORS 305.270, an "adjustment" may be either an increase or decrease in the tax claimed to be due on the return. If the "change" decreases the tax it results in a refund, if it increases the tax it results in a deficiency. And, if the refund has already been issued—as in the case of a Form 1139 tentative carryback adjustment under IRC §6501(k) and §6411—the additional tax due must be assessed as a deficiency.[3] The use of words in ORS 305.270 proves nothing as to the legislature's intent for "assessment of tax" in ORS 314.410(3)(b).

Both the tax court and Tektronix claim to focus on the substance of the IRS's action with respect to the 1999 and 2002 tax years, but even if substance rather than form determined the correct construction of ORS 314.410(3)(b), their so-called substance overlooks the key point: ORS 314.410(3)(b) opens the statute of limitations where the IRS makes a "change or correction" to the taxpayer's taxable income or tax liability, as a result of which the IRS is

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for word" refutation of each argument offered in support of a conclusion was not believed to be necessary where the department demonstrated that the conclusion itself is inconsistent with the text and context of the statute at issue.

[3] The tax court introduced the concept of a "positive" or "affirmative" assessment of tax or deficiency, a concept not heretofore recognized in the law. (ER 6-7). This court should reject this new concept for two reasons. First, "tax" and "deficiency" are not two separate things; a deficiency is tax. Second, a "positive" or "affirmative" assessment of tax implies that an assessment of tax could also be "negative," but there is no such thing.

permitted to make an assessment of tax or issue a refund under any provision of the IRC. The IRC changed or corrected Tektronix's taxable income and tax liability from what Tektronix reported on its 1999 amended return, and as a result of that change or correction the IRC was permitted to make a tax deficiency assessment under IRC §6501(h) and (k). This opened the statute of limitation under ORS 314.410(3)(b).

The legislature contrasted "change or correction" in subsection (b) of ORS 314.410(3), by reference to ORS 314.380(2)(a)(A),with "accepted" in subsection (c) of ORS 314.410(3), by reference to ORS 314.380(2)(a)(B). This distinction is largely ignored by the tax court (ER 12), but it is a significant point in properly construing the statute because it shows that the legislature intended completely different action by the department depending on whether the IRS changed or corrected a federal return, or accepted the return as correct. If the IRS had accepted Tektronix's 1999 amended return rather than changing or correcting it, there would have been no RAR; there would have been only Tektronix's 1999 amended Oregon return claiming a refund and any deficiency assessment would have been limited by ORS 314.410(3)(c) to the amount of the refund claimed. But, under the stipulated facts in this case, there was an IRS "change or correction," there was an IRS RAR, and there was an IRS "assessment of a tax

deficiency" under IRC §6501(h)(k).[4] These facts all pertain to the 1999 tax year—not the 2002 tax year—so the "corresponding year" for purposes of opening the statute of limitations under ORS 314.410(3)(b) is 1999.

III. Sales Factor – Court's Error In Failing To Determine Income Producing Activity For Each Of The Seven Items Of Income Is "Preserved" In The Decision.

Ultimate facts are still in dispute. The tax court did not determine the income producing activity for all seven items of income. Nothing in the tax court's decision mentions the other six items of intangible property; the court only addresses goodwill. We can do no more than speculate as to what the tax court would have determined the income producing activity to be for the receipts from sale of the other six items of intangible property, e.g, installed base[5] and trademarks. Thus, if this court does not decide the sales factor apportionment issue under one of the provisions in ORS 314.665(6), and instead looks to OAR 150-314.665(4), as the tax court did, that rule requires that an income producing

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[4] The tax court and Tektronix purport to focus on the "substance" of Tektronix's capital carryback loss refund request, repudiating the actual facts. *Cf. Gregory v. Helvering*, 293 US 465, 55 S Ct 266 (1935) (the Court looked at the actual facts to determine the substance of the transaction).

[5] The only definition the department has located for "installed base" is: "Installed Base: a measure of the number of units of a particular type of product, often computers, that have been sold and are being used: The company now has an installed base of more than 1,000 systems at customer sites around the world." *Cambridge Business English Dictionary* (online).

activity be determined for each separate item of income and the tax court failed to do that. (Tektronix itself introduced the facts showing seven items of income—not one.) The department urges the court to decide the issue under ORS 314.665(6)(a), or remand.

Tektronix is unjustifiably critical of the department for failing to mention or analyze the Staff Summary and Recommendation Section 25137 *Petition of Silog, Inc.* (June 19, 2006) and the *Summary Decision in the Matter of Imperial, Inc.* (July 13, 2010).[6] (Resp's Answering Br 53). The staff recommendation is not a decision. The summary decision may not be cited as precedent even before that same tribunal.[7] Moreover, these actions are distinguishable because they relied on a California Regulation, which, like ORS 314.665(6)(c), excludes sales from the sales factor where substantial amounts of gross receipts arise from an

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[6] Tektronix also criticizes the department for not discussing *Crystal Commc'ns, Inc.v. Dept. of Rev.*, TC 4769, slip op at 28 (Or Tax Reg Div July 19, 2010); specifically, the tax court's treatment of the sale of "an intangible asset that, like the Goodwill, (1) grew in value over the years because of the various business operations * * *, but (2) was sold in a particular transaction." (Resp.'s Answering Br 52-53). However, *Crystal* does not advance Tektronix's argument. The intangible asset in *Crystal* was an FCC license, which according to the tax court in the present case, is distinguishable from the "more general intangible such as goodwill," which reflects "the value of the combination of all the assets and activities of a business." (ER 22).

[7] "*Please note that Summary Decisions may not be cited as precedent in any appeal or other proceeding before the Board of Equalization." (Cal. Code Regs., tit. 18, § 5451, subd. (d).)

incidental or occasional sale of a fixed asset used in the regular course of the taxpayer's trade or business. *Imperial* at 4-5. But the California Regulation was expressly extended to intangible property in FTB Legal Ruling 97-1, unlike anything in Oregon.

Here, Tektronix did argue that ORS 314.665(6)(c) should apply, but the department disagreed that "fixed asset" under ORS 314.665(6)(c) could include intangible property. The tax court "[did] not consider it necessary to resolve this disagreement." (ER 21).

IV. Conclusion

The department asks this court for a correct interpretation of ORS 314.410(3)(b) and a reversal of the tax court's decision on the statute of limitations issue. The department further asks this court for a decision in its favor on the sales factor apportionment issue, or a remand to the tax court.

DATED this 19th day of July 2013.

Respectfully submitted,

ELLEN F. ROSENBLUM
Attorney General

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

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 2,051 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 19th day of July, 2013.

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

CERTIFICATE OF SERVICE

I certify that on July 19, 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 Robert T. Manicke and Brad S. Daniels, of attorneys for respondents and upon Eric J. Kodesch of attorneys for respondents, by electronic mail pursuant to written agreement.

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