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How Oregon Taxes Its Visiting Workforce

By Jeremy Babener[1]

I. Introduction

The modern work force is creative and mobile. Fewer and fewer individuals expect to work for a single employer, or even in a single state, throughout their working lives.

Workers who visit Oregon may be surprised to learn that, among the 50 States and the District of Columbia, Oregon imposes the third highest marginal tax rate on personal income (9.9% on income exceeding $125,000), after Hawaii (11% on income exceeding $200,000) and California (13.3% on income exceeding $1,000,000).[2]

This article discusses the Oregon income taxation of workers who visit Oregon temporarily, indefinitely, or as part of a process that ultimately leads to Oregon residence, using the following 2013 cases for illustration:[3]

1. ***Harper***, a professional soccer player with the Seattle Sounders, played against the Portland Timbers in Portland several times in 2013. He also received regular royalty payments from ShoeCo on sales of soccer shoes bearing his name.
2. ***Riley***, a sole practitioner lawyer living in New York, conducted depositions in Portland for five days in 2013. Riley bills by the hour.
3. ***Sara – Alternative 1***. Sara, a software engineer who has been working in SoftCo's San Francisco office, moved to Oregon on June 14, 2013, after SoftCo assigned her to SoftCo's Portland office to work on three discrete projects. Sara's manager told her that, after she completes the projects, she can either return to the San Francisco office or move to the Seattle office. The manager expected the projects to take about a year. As of December 31, 2013, Sara had completed two of the projects. While working in Portland, Sara (a) rented out her San Francisco condo, but (b) kept her California bank account and driver's license, and (c) did not obtain an Oregon bank account or driver's license. During 2013, SoftCo paid Sara wages and granted her nonqualified options on SoftCo stock. She also received deferred compensation from a prior job and derived net rental income from the tenant of her San Francisco condo.
4. ***Sara – Alternative 2***. The facts are the same as in Alternative 1 except that Sara's manager assigned Sara to SoftCo's Portland office for a fixed period of 16 months and told her that, after that period, she can return to San Francisco or move to SoftCo's Seattle office.
5. ***Sara – Alternative 3***. The facts are the same as in Alternative 2, except that Sara moved to Oregon on June 16, 2013, and, before the end of 2013, SoftCo offered Sara a permanent job in Portland, and Sara accepted the offer. Also in 2013, Sara sold her San Francisco condo as well as stock in her investment portfolio, realizing gains from both sales.

II. The Tax Consequences of Status as an Oregon Resident, Nonresident, or Part-Year Resident

The amount of an individual's Oregon income tax depends on her status as a full-year resident, full-year nonresident, or part-year resident.

A full-year resident is taxable on *all* of her taxable income, regardless of the source.[4] A full-year resident's taxable income is equal to her federal taxable income with certain adjustments.[5]

A full-year nonresident is taxable *only* on her taxable income "derived from sources within [Oregon]."[6] In general, a full-year nonresident's taxable income equals the net amount of her items of income, gain, loss, and deduction "derived from or connected with" Oregon sources that entered into her federal adjusted gross income.[7] A full-year nonresident may deduct (a) the amount of her standard or itemized deductions multiplied by (b) the fraction determined by dividing her federal adjusted gross income from Oregon sources by her federal adjusted gross income from all sources.[8]

A part-year resident's tax is equal to (a) the tax that would be imposed on her if she were a full-year resident multiplied by (b) the fraction determined by dividing her federal adjusted gross income from Oregon sources by her federal adjusted gross income from all sources.[9]

Thus, in order to determine the Oregon taxable income for a full-year nonresident or part year resident, it is essential to determine whether each of her items of income, gain, loss, and deduction is derived from an Oregon source. A part-year resident generally treats all income as Oregon-source income during the portion of the year in which she is an Oregon resident.[10]

This article does not discuss general rules for determining whether items of income, etc., are derived from Oregon sources. The source of specific items relevant to Harper, Riley, and Sara is discussed in Section IV below.

III. Determining an Individual's Status as an Oregon Resident, Nonresident, and Part-Year Resident[11]

In most cases, an individual is an Oregon "resident" for Oregon income tax purposes on any given day if (a) she is domiciled in Oregon on that day or (b) that day falls within a tax year in which she spends more than 200 days in Oregon. Both of these concepts can depend on whether the individual has (c) a "permanent place of abode" in Oregon.

However, regardless of domicile or days spent in Oregon, an individual is not an Oregon resident if she is (a) a "qualified individual" under Code Section 911(d), (b) a resident alien under Code Section 7701(b) who would be a qualified individual if she were a U.S. citizen, or (c) a spouse of an individual described by either (a) or (b) if the spouse has a "principal place of abode" for the tax year outside Oregon.[12] Code Section 911(d) defines a "qualified individual" as an individual whose tax home

Seeking Nominations For The Award Of Merit

The Executive Committee of the OSB Taxation Section would like to recognize and honor those among us who exemplify professionalism in the practice of tax law in the State of Oregon. In 2009, we presented the Taxation Section's first Award of Merit to David Culpepper. Subsequently, the award has been presented to Robert Manicke (2010), John Draneas (2012), and the Honorable Henry C. Breithraupt (2013). We are now accepting nominations for the Taxation Section's fifth Award of Merit. Nominations must be received by April 15, 2014. There is no guarantee that an Award will be presented during 2014; the Executive Committee is striving to ensure that the Award is only given to candidates who truly deserve it. The Award will be granted to the candidate the Committee believes to best personify the Oregon State Bar's Statement of Professionalism, and best serves as a role model for other lawyers. Factors considered include competence, ethics, conduct with others and the courts, and pro bono contributions to the Bar and tax system. The candidate's accomplishments must fall within the tax field. If a recipient is selected, the Award will be presented at the 14th Annual Oregon Tax Institute.

More information about the criteria for the award and the nomination form is available online at www.osbartax.com/Award-of-Merit.

Please send your completed nomination form to me at the e-mail address below (please do not respond to this list serve e-mail with your nomination). If you have any questions, feel free to contact me by e-mail or phone.

Regards,

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is in a foreign country and who (a) spends at least 330 days in a foreign country or countries during any 12-month period or (b) establishes that she is a "bona fide resident" of a foreign country or countries for an entire tax year.

A. Oregon Residence Based on Domicile

In general, an individual who is domiciled in Oregon is an Oregon resident *unless* she (a) spends less than 31 days in Oregon during the tax year, (b) does not maintain a "place of abode" in Oregon, *and* (c) does maintain a place of abode outside Oregon.[13]

An individual can have only one domicile at any given time.[14] The Oregon Administrative Rules (the "OARS") define "domicile" as "the place an individual considers to be the individual's true, fixed, permanent home. An individual can only have one domicile at a given time. It continues as the domicile until the individual demonstrates an intent to abandon it, to acquire a new domicile, and actually resides in the new domicile. Factors that contribute to determining domicile include family, business activities and social connections."[15]

An individual's intent to abandon one domicile and acquire another is subjective, and the Oregon Tax Court has placed the burden on the taxpayer to establish her intent based on the facts and circumstances. In determining whether the individual intended to establish domicile in Oregon, or to abandon her Oregon domicile and establish domicile elsewhere, the Court relies heavily on overt actions.[16] The Court has considered a variety of overt actions, including (a) the purchase of a house in Oregon, (b) the operation of a home business in Oregon, (c) the acquisition of an Oregon driver's license, and (d) the registration of personal automobiles in Oregon.[17]

B. Oregon Residence Based on Time Spent in Oregon

In general, an individual who is *not* domiciled in Oregon is an Oregon resident for a tax year if she (a) "spends" more than 200 days in Oregon during the tax year and (b) maintains a permanent place of abode in Oregon, *unless* she (c) proves that she is in Oregon only for a "temporary or transitory purpose."[18]

An individual's presence in Oregon is considered to be "temporary or transitory" if it is "not permanent and is not expected to last indefinitely."[19] According to an example in the OARs, the Oregon presence of two individuals who are domiciled in Minnesota is considered to be "temporary or transitory" in a tax year in which (a) they stay at the Oregon coast for 200 days at a house that they purchased, (b) they maintain their family residence in Minnesota, (c) they continue some involvement in their personal and business activities in Minnesota, and (d) they have no business activities in Oregon other than renting their Oregon house when they are not using it.[20]

An individual domiciled in another state who is present in Oregon for a "short period" to "complete a particular transaction" is treated as being in Oregon for temporary or transitory purposes.[21]

An individual domiciled in another state who is assigned to work in Oregon for a "fixed and limited period," after which she is to return to a permanent location, is not deemed a resident.[22] Applying this rule, an example in the OARs states that the Oregon presence of a New York domiciled individual is "temporary and transitory" where (a) he accepts an employment position in Oregon with the expectation that the work will take one and one-half years, (b) he spends almost the entirety of that period in Oregon living in a house built by his employer, (c) his family lives with him during the summer, (d) he votes and maintains his bank accounts in New York, and (e) he intends to move back to New York when his work is complete.[23] Another example in the OARs states that a California-domiciled individual becomes a resident of Oregon where (a) she accepts an *indefinite* transfer to her employer's Oregon office, and (b) she rents an apartment in Oregon, even though (c) her family remains in California, and she believes that she may be transferred back to California within three years.[24]

C. Permanent Place of Abode.

The OARs define "permanent place of abode" as "a dwelling place permanently maintained by the taxpayer, whether or not owned by the taxpayer, and generally includes a dwelling place owned or leased by the taxpayer's spouse. To constitute a permanent place of abode, the taxpayer must maintain a fixed place of abode over a sufficient period of time to create a well-settled physical connection with a given locality. It is distinguishable from 'domicile' in that an individual may have several residences (or abodes), but only one domicile, at any given time."[25]

An individual is not considered to be maintaining a "permanent place of abode" merely by reason of owning residential property in Oregon if the individual and her family *never* use that property as a dwelling.[26] However, use of the property by the individual during the tax year, even for one day, may be sufficient for it to be considered a "permanent place of abode" if it is also used by the individual's family "for a sufficient period of time to create a well-settled physical connection."[27]

IV. Do Harper, Riley, and Sara Owe Oregon Income Tax?

A. Harper – The Soccer Player

Full-year Nonresident. During 2013, Harper lived in Washington and had no connection to Oregon other than playing at the Portland Timber's Jeld-Wen Field on six occasions. Therefore, he was a full-year nonresident taxable only on income derived from Oregon sources.

Income of a Professional Athlete. The OARs provide specific rules to identify the source of income of each nonresident "member of a professional athletic team" (e.g., active players, players on the disabled list, coaches, managers, and trainers).[28] Such an athlete's Oregon-source income includes an amount equal to (a) the athlete's total compensation (including certain types of bonuses) for services rendered as a member multiplied by (b) a fraction, determined by dividing the number of days that the athlete spent in Oregon "rendering services" to the team by the total number of "duty days" spent in and outside Oregon.[29]

"Duty days" generally include all days from the beginning of the team's official pre-season through the last game day, plus days on which the athlete "renders a service" for his team (e.g., participation in instructional leagues or promotional events). A travel day that does not include some kind of team event is a duty day, but is not treated as a duty day spent in Oregon.

During 2013, Harper was a nonresident member of a professional athletic team who played in Oregon. Therefore, a portion of his compensation is Oregon-source income. If Harper played in Portland on six days, and had 200 duty days, three percent of his compensation would be Oregon-source income.

Royalty Income. In general, "income from the use of" a nonresident individual's intangible property (e.g., royalties) is Oregon-source income only if the property is "used in the conduct of the [individual's] business, trade, or profession in Oregon."[30] A 2008 ruling by the Oregon Tax Court indicates that, in general, property is "used" in the conduct of a business if the business (a) creates or enhances the property's value rather than (b) merely maintaining the property and waiting for external market forces to increase the property's value.[31]

During 2013, Harper continuously received royalty payments from ShoeCo based on sales of soccer shoes bearing his name. Harper's only business, trade, or profession in Oregon was playing soccer. The intangible property that he licensed to ShoeCo was not used in the conduct of that business. Therefore, his royalty income is not Oregon-source income.

B. Riley – The Sole Practitioner

Full-year Nonresident. During 2013, Riley lived in New York and had no connection to Oregon other than conducting depositions in Portland for five days. Therefore, she was a full-year nonresident taxable only on her net income derived from Oregon sources.

Independent Contractor Services Income. In general, a nonresident individual's income from services not performed for an employer (i.e., performed as an independent contractor) is Oregon-source income if it is "from the [individual's] business, trade, profession or occupation carried on in this state."[32]

Since Riley bills by the hour, it is relatively easy to determine the amount of income she received from her work in Oregon. Had she charged her client on some other basis (e.g., a flat fee or a success-based fee), further analysis would be needed to determine the portion of her compensation that is "from" her work in Oregon.

C. Sara – The Software Engineer

Sara's situation, and her alternative situations, are more complex than those of Harper and Riley. Section C.1 discusses whether Sara was a full-year nonresident or part-year resident during 2013 under the three alternative scenarios. Section C.2 discusses whether each of her items of income is Oregon-source income.

1. Determining Sara's Residency

a. Alternative 1 – Indefinite Assignment in Oregon

In the first alternative, Sara moved to Portland on June 14, 2013, after SoftCo assigned her to SoftCo's Portland office indefinitely (i.e., until she completes three projects). Under the OARs, the purpose of her presence in Oregon was not "temporary or transitory" because her assignment was "not for a fixed and limited period." Because she also spent more than 200 days in Oregon during the tax year (201, in fact) and maintained a permanent place of abode in Oregon, she was a full-year resident in 2013.[33]

Had Sara planned better, she might have reduced the number of days that she spent in Oregon (i.e., to less than 200 days). In that case, she would have been a full-year nonresident, and therefore taxable only on her Oregon-source income, *unless* she established Oregon domicile. Her overt actions suggest that she has not done so: (a) she kept her California condo, bank account, and driver's license, and (b) she did not obtain an Oregon bank account or driver's license.

As a full-year resident, Sara is taxable on all of her taxable income, regardless of the source.[34]

b. Alternative 2 – Sixteen-Month Assignment in Oregon

In the second alternative, Sara moved to Portland on June 14, 2013, after SoftCo assigned her to SoftCo's Portland office for sixteen months. Under OARs, the purpose of her presence in Oregon was "temporary or transitory" because her assignment was for a "fixed and limited period."[35]

Therefore, Sara was a full-year nonresident and taxable only on her Oregon-source income *unless* she established Oregon domicile.[36] As noted in the Alternative 1 analysis, her overt actions suggest that she has not done so.

c. Alternative 3 – Sixteen-Month Assignment in Oregon, Followed by Acceptance of a Permanent Oregon Job Offer

In the third alternative, like the second, SoftCo assigned Sara to SoftCo's Portland office for sixteen months. However, Sara moved to Oregon on June 16, 2013, and, before the end of 2013, SoftCo offered Sara a permanent job in Portland, and Sara accepted the offer.

Also in 2013, Sara sold her San Francisco condo and stock in her investment portfolio.

In this case, Sara established Oregon domicile during 2013 by demonstrating a clear intent to move to Oregon for an indefinite period. Therefore, she was a part-year resident in 2013.[37] Because she only spent 199 days in Oregon during 2013, she could not be a full-year resident under the 200-day rule.[38]

It is unclear *when* Sara abandoned her California domicile and established her Oregon domicile and therefore became an Oregon resident. The Oregon Department of Revenue might point to the date on which she accepted SoftCo's new job offer. Arguably, however, she did not abandon her California domicile until *after* she sold her San Francisco condo. Hopefully, she considered whether she would pay more tax on the gain from her sale of stock by establishing Oregon domicile *before* or *after* selling the stock.

As a part-year resident in 2013, Sara's Oregon income tax is equal to (a) the tax that would be imposed on her if she were a full-year resident, multiplied by (b) the fraction determined by dividing her federal adjusted gross income from Oregon sources by her federal adjusted gross income from all sources.[39]

2. Sourcing Sara's Income

For the portion of the year in which Sara was a resident, all of her income was Oregon-source income.[40] Below, this article discusses whether the items of income that Sara recognized during the time she was a nonresident are Oregon-source items.[41]

In-State Employee Wages and Out-of-State Severance Pay. In general, a nonresident's employment-related income is Oregon-source income if it is attributable to services performed in Oregon, regardless of whether the income is regular wages, unemployment compensation, or severance pay.[42] In general, the portion of wages attributable to services performed in Oregon equals the individual's compensation multiplied by a fraction, determined by dividing the number of days worked in Oregon by the total number of days worked in and outside Oregon.[43]

During 2013, Sara received wages for her services performed in Portland. If she worked 144 days in Portland, and a total of 262 days in Portland and San Francisco, 55 percent (144/262) of her wages would have been Oregon-source income.

Sara's Oregon-source income did not include any of her severance pay because it was attributable to services performed outside Oregon.

Nonqualified Stock Options. Under Code Section 83(a) and Treasury Regulations Section 1.83-7(a), an employee who receives a nonqualified stock option with a readily ascertainable value recognizes income at the time the recipient's rights to the option are freely transferable or no longer subject to substantial risk of forfeiture (or possibly earlier, if the employee makes a Code Section 83(b) election). If the option does not have a readily ascertainable value at the time of the grant, no income is recognized until the option is exercised or otherwise disposed of.

Under the OARs, an employee's income from the grant of a nonqualified stock option *with* an ascertainable fair market value is treated as Oregon-source income based on the portion of the tax year that the employee worked in Oregon *during the year of the grant*.[44]

Also under OARs, if an employee is granted a nonqualified stock option *without* an ascertainable fair market value during a tax year in which the employee worked in Oregon, the income from exercise or disposition of the option is treated as Oregon-source income based on the fraction determined by dividing (a) the number of days the taxpayer worked in Oregon from the date of the grant to the date income from the option is recognized by (b) the number of days worked everywhere during that period.[45]

Thus, if SoftCo granted Sara nonqualified stock options *with* a readily ascertainable value in 2013 before *or* after she moved to Portland, 55 percent (201 days divided by 365 days) of the stock's value will be included in her Oregon-source income when she recognizes it for federal tax purposes.

If SoftCo granted stock options *without* a readily ascertainable value (which is much more likely to be the case), the Oregon-source percentage of the income that Sara eventually realizes from exercising the option will increase the longer she stays in Oregon.

Out-of-State Rental Income and Out-of-State Real Property Sale Proceeds. Income attributable to the ownership or disposition of real or tangible property in Oregon is Oregon-source income.[46] Although the rules do not state so explicitly, there is a strong implication that income attributable to the ownership or disposition of real or tangible property outside Oregon is Oregon-source income *only if* the income is attributable to a business carried on in Oregon.

Therefore, Sara's rental income and sale proceeds from her San Francisco condo were not Oregon-source income.

Proceeds from the Sale of Stock. Gain from the sale or exchange of stock in a C corporation or an S corporation, bonds, or other securities generally is not Oregon-source income unless the securities are "used in the conduct of the taxpayer's business, trade, or profession in Oregon."[47] As discussed in Section IV.A, the Oregon Tax Court has indicated that property is "used" in the conduct of a business if the business (a) creates or enhances the property's value rather than (b) merely maintaining the property and waiting for external market forces to increase the property's value.[48]

Therefore, Sara's Oregon-source income does not include the gain she recognized from selling stock.

Conclusion

The Oregon income tax treats visitors differently based on (a) their intentions, (b) the length of their stay in Oregon, and (c) the type of income they earn. Individuals who expect to work in Oregon temporarily or indefinitely must pay careful attention to the applicable rules to determine their potential Oregon tax liabilities, and, possibly, plan their affairs to minimize those liabilities.

Endnotes

1 Jeremy Babener is an attorney in the Tax Practice Group at Lane Powell PC.
2 Tax Foundation, *Facts & Figures 2013: How Does Your State Compare?*, Table 12, http://taxfoundation.org/sites/taxfoundation.org/files/docs/ff2013.pdf.
3 Except in this footnote, this article does not discuss withholding and reporting by employers. In general, an employer must withhold a portion of each employee's "wages" and no portion of an independent contractor's compensation. ORS 316.167; ORS 316.162(2)(j). An employer may elect to use "an alternate method of filing, reporting or calculating tax liability for payroll earned in Oregon by [full-year] nonresident employees for a payroll period not to exceed 200 days in one calendar year." OAR 150-316.223(1).
4 ORS 316.037(1)(a). Unless otherwise indicated, references to "ORS" are to the 2013 edition of the Oregon Revised Statutes. References to "OAR" are to the Oregon Administrative Rules as of January 1, 2014. References to the "Code" are to the Internal Revenue Code of 1986, as amended.
5 ORS 316.048.
6 ORS 316.037(3).
7 ORS 316.130(1); ORS 316.127(1).
8 ORS 316.117(1); OAR 150-316.117-(A).
9 ORS 316.037(2); ORS 316.117.
10 *See* OAR 150-316.117-(A)(11); OAR 150-316.048.
11 For a discussion of residency and domicile issues, *see* John Gadon et al., *Personal Income Tax Issues Related to Residency and Domicile*, Practical Tax Lawyer, at 9-23 (Spring, 2009), *available at* http://www.lanepowell.com/wp-content/uploads/2013/05/PTXL1205_Gadon1.pdf.
12 ORS 316.027(1)(b).
13 ORS 316.027(1)(a)(A).
14 *Zimmerman v. Zimmerman*, 175 Or 585 (1945); OAR 150-316.027(1)(a). The federal constitution does not bar courts in different states from simultaneously determining that an individual is domiciled in their respective states. *See Cory v. White*, 457 U.S. 85 (1982). Oregon law gives some protection to taxpayers in this situation by providing tax credits for taxes paid to another state on income earned in that state. ORS 316.082; ORS 316.131.
15 OAR 150-316.027(1)(1)(a).
16 *See, e.g.*, *Bleasdell v. Dept. of Rev.*, 18 Or. T.C. 354 (Mag. Div. 2004) (concluding that the taxpayer established Oregon domicile but abandoned it and established Florida domicile two years later); *Ashby v. Dep't of Rev.*, No. TC 5024, 2012 WL 5448193 (Nov. 5, 2013) (concluding that the taxpayer did not abandon his Oregon domicile).
17 *Bleasdell*, 18 OTR-MD at 359-360.
18 ORS 316.027(1)(a)(B).
19 OAR 150-316.027(1)(2).
20 OAR 150-316.027(1)(2), Example 5.
21 OAR 150-316.027(1)(2).
22 OAR 150-316.027(1)(2)(a) and (b).
23 OAR 150-316.027(1)(2)(b), Example 7; *see Butler v. Dep't of Rev.*, No. TC-MD 050687C (May 11, 2006).
24 OAR 150-316.027(1)(2)(b), Example 8.
25 OAR 150-316.027(1)(1)(b).
26 OAR 150-316.027(1)(1)(b)(B).
27 *Id.*
28 OAR 150-316.127-(F).
29 OAR 150-316.127-(F)(1)(a).
30 OAR 316.127-(D)(1)(a); ORS 316.127(3).
31 *Crystal Commc'ns v. Dep't of Rev.*, 19 Or. Tax 524, 545-46 (2008, *as amended in* 2009).
32 *See* OAR 150-316.127-(C)(1)(a). Under OAR 150-316.127-(C)(1)(a), "net income" is determined "in a manner consistent with" Oregon's version of the Uniform Division of Income Tax Purposes Act ("UDITPA"). Oregon's UDITPA generally apportions and allocates "business income" between multiple states if the income is taxable in those states. ORS 314.615. A portion of such income is apportioned to Oregon by multiplying (a) the taxpayer's business income by (b) the fraction determined by dividing "gross receipts attributable to this state and derived by the taxpayer from transactions and activity in the regular course of its trade or business" by "total gross receipts derived by the taxpayer from transactions and activity in the regular course of its trade or business." OAR 150-314.665(1)-(A)(5), -(B)(2).
33 OAR 150-316.027(2)(b). *See* ORS 316.027(1)(B); ORS 316.022(5).
34 ORS 316.037(1)(a).
35 OAR 150-316.027(2)(a).
36 OAR 150-316.027(2).
37 *See* OAR 150-316.027(1)(a); ORS 316.022(5).
38 ORS 316.027(B).
39 ORS 316.037(2); ORS 316.117.
40 *See* OAR 150-316.117-(A)(11); OAR 150-316.048.
41 This article does not discuss deductions in depth. However, as it is particularly relevant for Sara, it is noted here that Oregon allows a full-year nonresident or part-year resident to deduct moving expenses paid in order to work in Oregon. OAR 150-316.127(3)(a).
42 OAR 150316.127-(A)(1)(a), -(A)(3)(e), and (A)(3)(f). Compensation for personal services provided by a nonresident outside Oregon is not Oregon-source income *unless* such services are "connected with the management or conduct of a business" in Oregon (i.e., compensation paid by an Oregon company to an individual who manages the company from another state). OAR 150-316.127-(A)(1)(b).
43 The OARs provide several methods to determine the portion of a nonresident individual's wages that are attributable to services performed in Oregon. Alternative methods apply for nonresident individuals who (a) earn commissions on sales made, (b) sometimes work in and outside of Oregon on the same day, (c) accrue income based on mileage or (d) accrue income on some other basis. OAR 150-316.127-(A)(3).
44 OAR 150316.127(A)(3)(d)(A).
45 150316.127(A)(3)(d)(B).
46 ORS 316.127(2)(a); OAR 150-316.127-(C)(2), -(D)(2)(a).
47 OAR 150316.127-(D)(1)(a), (D)(2)(b), and -(D)(2)(c).
48 *Crystal*, 19 Or. Tax at 545-46.

Citizens United and Its Aftermath: A 501(c)(4) Quagmire

*By Kate M. H. Kilberg and Justine C. Thede**

Earlier this year, allegations that the IRS improperly targeted conservative groups applying for tax exemption under section 501(c)(4) of the Code[1] sparked a full-fledged Washington scandal that played out in the media and in Congressional hearings. In early May, the Treasury Inspector General for Tax Administration released a report stating that the IRS had used inappropriate criteria to flag exemption applications from "Tea Party"-affiliated groups for heightened scrutiny. In the following weeks, it was revealed that, beginning in 2010, the IRS had been screening applications for 501(c)(4) exemption to determine the applicants' level of political activity, and had developed several "be on the look-out" or "BOLO" lists of terms to flag applications for additional scrutiny. These BOLO lists included conservative buzzwords such as "Tea Party," "patriots," and "9/12 Project," as well as terms with liberal connotations, such as "progressive," "medical marijuana," and "occupy." Nevertheless, a spokesperson for the Inspector General noted that IRS employees were instructed to send "Tea Party" applications to other agents for additional review. No similar procedure was in place for applications containing the liberal BOLO terms.

The stage for this scandal was set on January 21, 2010, when the Supreme Court issued its ruling in *Citizens United v.* FEC, 558 U.S. 310 (2010). In that case, the Court lifted limits on "independent expenditures" by corporations (and unions) to influence federal elections.[2] As a result of *Citizens United*, corporations are permitted to contribute unlimited funds to "independent expenditure committees" or "super PACs," which are regulated under Code section 527 and are required to disclose information about their donors under federal election law.

Political operatives on both sides of the aisle took the cue and established super PACs to facilitate the process of making corporate-funded independent expenditures. And they took political fundraising one step further with the creation of 501(c)(4) "social welfare" organizations that, unlike section 527 organizations, are not required to publicly disclose donor identities. As Carl Forti, political director for Karl Rove's section 527 super PAC, American Crossroads, explained after the 2010 elections, "[s]ome donors didn't want to be disclosed, and, therefore, a (c)(4) was created."[3] In June 2010, American Crossroads established its sister organization, Crossroads GPS ("Grassroots Policy Strategies"), a section 501(c)(4) organization. Similarly, Priorities USA Action, a 527 founded by former Obama campaign officials, founded its own sister (c)(4), Priorities USA, in 2011.

The elimination of restrictions on corporate independent expenditures coupled with the donor anonymity provided by 501(c)(4)s proved to be a charmed combination, and in the two years following *Citizens United*, applications for exemption under section 501(c)(4) more than doubled,[4] and spending by such organizations increased from $92 million in the 2010 election cycle to $256 million in the 2012 election.[5]

This article will summarize the current rules governing political activity by tax-exempt organizations, will discuss recent attempts at reform (including the IRS's impolitic efforts to identify abusers), and will conclude that ultimately, new and clearer regulations are needed before the IRS can effectively combat improper political activity by tax-exempt organizations.

Overview of Political Tax Law

A major factor contributing to this year's "Tea Party" scandal is the murky legal framework governing the tax consequences of political activity by tax-exempt groups, particularly 501(c)(4)s. This article will attempt to shed some light on the applicable rules, including some recent developments.[6]

At the outset, it is important to note that the Code and Treasury regulations generally divide political activity into two separate categories: (1) "issue advocacy" or "lobbying," and (2) "political campaign" or "political intervention" activities. "Issue advocacy" or "lobbying" involves "carrying on propaganda, or otherwise attempting, to influence legislation,"[7] by "any attempt to affect the opinions of the general public or any segment thereof," or "any attempt to influence any legislation through communication with any [person] who may participate in the formulation of the legislation."[8] As will be discussed in more detail below, what constitutes "political campaign" or "political intervention" activities is much less clear, but seems to include activities associated with elections and support of (or opposition to) particular parties or candidates.

Furthermore, the rules regarding the nature and extent of permissible political activities differ among the categories of tax-exempt organizations. For the sake of simplicity, this article will focus on the rules and limitations applicable to 501(c)(3), 527, and 501(c)(4) organizations.[9]

501(c)(3) Organizations

Section 501(c)(3) organizations are prohibited from engaging in any political campaign activities, and are greatly restricted in their lobbying activities. A 501(c)(3) organization will qualify for tax-exempt status only if (1) "no substantial part of the activities of [the organization] is carrying on propaganda, or otherwise attempting, to influence legislation," and (2) the organization "does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office."[10] A 501(c)(3) may therefore engage in lobbying

activities to the extent such activities do not constitute a "substantial part" of the organization's overall activities, but may not engage in any political campaign activities.

The "substantial part" test is necessarily ambiguous, and early attempts by the Service and the courts to develop a quantitative approach were abandoned in favor of a facts-and-circumstances balancing test (although organizations that limit their lobbying expenditures to less than 5 percesnt of their overall annual expenditures are typically found to be in compliance). To avoid the uncertainties of the "substantial part" test, most 501(c)(3) organizations wishing to engage in significant lobbying activities make an election under section 501(h), which provides higher and more certain limits on lobbying expenditures, with a sliding scale (found in section 4911) based on the organization's total exempt purposes expenditures for the year.[11]

Donors to 501(c)(3) organizations generally may deduct their contributions for federal income and gift tax purposes under sections 170(c) and 2522(a) respectively.

Section 527 Organizations

Unlike section 501(c)(3) organizations, which are not permitted to participate in political campaigning, a section 527 political organization is operated "primarily for the purpose of directly or indirectly accepting contributions or making expenditures" to influence campaigns for public office.[12] The organizations are exempt from income tax on contributions, but net investment income is taxable at the highest corporate rate.

Unlike donors to 501(c)(3) organizations, contributors to 527s may not deduct their donations for income tax purposes. Code section 2501(a)(4), however, expressly excludes contributions to 527s from federal gift tax.

Section 527 political organizations are subject to stringent Federal Election Commission disclosure requirements, which include filing periodic reports of contributions and expenditures. These disclosure requirements, and particularly the obligation to release the identity of any donor that contributes $200 or more in a calendar year, inspired donors to turn to alternative methods of contributing funds while maintaining anonymity.

Section 501(c)(4) Organizations

Under the specific language of the Code, section 501(c)(4) organizations must operate "exclusively for the promotion of social welfare." The regulations state that a 501(c)(4) organization is one that "is primarily engaged in promoting in some way the common good and general welfare of the people of the community. An organization embraced within this section is one which is operated primarily for the purpose of bringing about civic betterments and social improvements."[13] This has long been interpreted to allow a 501(c)(4) to engage in unlimited lobbying activities (which qualify as a "social welfare activity") provided the lobbying is related to the organization's tax-exempt purpose.

Intervention or participation in political campaigns, however, does not qualify as "social welfare activity."[14] Under a literal reading of section 501(c)(4), a social welfare organization should not be permitted to engage in *any* political campaign activities (the organization must operate "exclusively" for the promotion of social welfare). However, the regulations provide that an organization may qualify for 501(c)(4) status if it is "primarily" engaged in promoting social welfare. This has been interpreted to allow a 501(c)(4) organization to engage in some political campaign activities, provided they are not the organization's "primary activities."

Beyond these general rules, there is little law clarifying the proper limits for political campaign activities of 501(c)(4)s. In contrast to lobbying activities, which have been clearly defined in sections 501(h) and 4911 and related Treasury regulations, neither the regulations nor case law provide a clear definition of what constitutes political intervention. Instead, Revenue Ruling 2007-41 sets forth a "facts and circumstances" test for determining whether an organization has engaged in prohibited political activity. That ruling provides seven "key factors" to consider in determining whether a particular communication amounts to political campaign intervention, but states that "*all* [emphasis added] the facts and circumstances need to be considered." This broad facts and circumstances test leaves tax-exempt organizations to divine for themselves what activities constitute political intervention.[15]

Adding to the confusion is a lack of clarity regarding the "primary activity" requirement. Taking advantage of the absence of any bright-line rule, practitioners have interpreted the "primary activity" requirement to allow 501(c)(4) organizations to spend up to 49 percent of their total annual expenditures on campaign activities without violating the Treasury regulations.

This interpretation directly conflicts with court opinions on the issue. In *Contracting Plumbers Coop. Restor. Corp. v. U.S.*, for example, the Second Circuit Court of Appeals held with regard to a section 501(c)(4) organization, that "the presence of a single substantial non-exempt purpose precludes exempt status regardless of the number or importance of the exempt purposes."[16] In *American Ass'n of Christian Sch. Vol. Emp. v. U.S.*, the Eleventh Circuit held that "the presence of a substantial non-exempt purpose precludes exemption under section 501(c)(4)."[17] Under these court rulings, a section 501(c)(4) organization cannot engage in more than an insubstantial amount of campaign activity and comply with the statutory standard for tax exempt status under section 501(c)(4).

IRS Involvement and Recent Developments

Against this background of ambiguity arose the "Tea Party" scandal of earlier this year. As discussed above, the general lack of guidance provided fertile ground for

the aggressive use of 501(c)(4) organizations to engage in political campaign activity without disclosing the identities of their donors, and hampered the ability of the IRS to provide effective oversight of 501(c)(4)s. But the widely publicized BOLO screening of 501(c)(4) applications for exemption was not the Service's only attempt at enforcement.

Gift Tax

In May 2011, it was revealed that five donors to a conservative 501(c)(4) had received audit letters from the IRS informing them that gift taxes may be due on their contributions.[18] This revelation immediately triggered allegations of partisanship, and the ensuing media storm resulted in strong political opposition from Congressional Republicans. The agency denied allegations of improper motivations, but shortly thereafter the IRS announced that it had dropped the audits, that resources would no longer be used to pursue the issue, and that any future action would be "prospective and after notice to the public."[19]

Under existing law, the gift tax is imposed on lifetime transfers of wealth not made for adequate and full consideration.[20] Gifts to 501(c)(3) organizations are deductible under section 2522(a), and contributions to section 527 political organizations are excluded from the gift tax under section 2501(a)(4). No similar statutory authority exists for the exclusion of contributions to 501(c)(4)s (or any other 501(c) organization), and most tax practitioners have long informed their clients that contributions to 501(c)(4) organizations may be subject to gift tax.

Indeed, the IRS ostensibly takes the position that the gift tax has always been applicable to contributions to a 501(c)(4) social welfare organization.[21] But, as described in a recent Congressional Research Service report, the gift tax question is complicated by two issues. First, the IRS "has not been enforcing [its] position for many years," and second, "some have argued that while contributions to 501(c)(4) groups may be generally subject to the gift tax, those contributions made for advocacy-related purposes (e.g., issue advocacy or lobbying) are exempt."[22]

Application for Exemption

In January 2013, the IRS published Rev. Proc. 2013-9, which substantially altered the requirements for recognition of tax exemption under section 501(c)(4). Previously, when an organization applied for exemption under 501(c)(4), assuming the organization met the requirements of 501(c)(4), the IRS would recognize the organization as tax-exempt from the date of formation, no matter how long the interval between the date of formation and the date of application. Under Rev. Proc. 2013-9, an organization will be recognized retroactively as exempt under section 501(c)(4) only if (1) its purposes and activities prior to the date of the determination letter or ruling have been consistent with the 501(c)(4) requirements, (2) it has not failed to file required Form 990s, and (3) *it has filed its application for recognition within 27 months of being organized.* Accordingly, a 501(c)(4) organization that has long been in existence can no longer apply now for recognition of exemption retroactive to the date of its formation. Instead, the organization can apply for recognition only prospectively as of the date of its application. This does not necessarily mean that the organization was not tax-exempt from the date of formation, and 501(c)(4) organizations are still not required to file applications for recognition, but the organization will not have the benefit of IRS recognition of its tax-exempt status prior to the date of its application. Practically, this could become a problem if an organization is audited for another reason and the IRS argues that the organization was never tax-exempt to hold the organization responsible for past due taxes, interest, and penalties.

It is uncertain what impact Rev. Proc. 2013-9 ultimately will have. The statutory authority for the procedure is unclear, and to date the IRS has yet to issue new instructions for Form 1024, the application filed by organizations seeking recognition of 501(c)(4) status.[23]

Expedited Processing: the 501(c)(4) "Safe Harbor"

In June 2013, the IRS announced a new expedited application process for 501(c)(4) applications. Intended to reduce the backlog of applications (and coinciding with the height of the 2013 media frenzy), the expedited process creates a "safe harbor" option for organizations with applications pending for more than 120 days. The optional process provides approval within two weeks to an organization that certifies that its political campaign intervention amounts to less than 40 percent of its total annual spending and time during past, current, and future years.[24] This administrative 60/40 threshold does not preclude organizations with a higher percentage of political activities from obtaining exempt status as a 501(c)(4). Whether the IRS will offer additional guidance remains to be seen.

Calls for Reform

Neither the attempted imposition of gift tax nor the new guidelines for filing applications for exemption, however, address the real abuse – the aggressive use of section 501(c)(4) organizations to engage in political campaign activity while shielding the identities of their donors. The application screening procedure at issue in the "Tea Party" scandal came closer to hitting the mark. Nevertheless, it is clear that the IRS should be evenhanded in how it applies the law, regardless of political leanings.

The recent appearance of 501(c)(4) organizations on the election scene, as well as the substantial increase in expenditures by such organizations, have resulted in calls for reform by politicians and government watch-dog groups.[25] In July 2011, the Campaign Legal Center and Democracy 21, two nonpartisan nonprofit organizations, filed a petition calling for the IRS to adopt new regula-

tions designed to provide bright-line standards to clarify the rules. On August 21, 2013, Congressman Chris Van Hollen joined these two organizations in filing a lawsuit against the IRS, seeking to compel the IRS to bring the regulations in line with statutory language and provide a bright-line standard limiting campaign expenditures. The complaint also seeks a declaration that the new 60/40 "safe harbor" is contrary to law.

Like these groups, the authors believe that clear rules regarding what constitutes political campaign intervention and how much of such activity is permitted under the "primary purpose" standard applicable to 501(c)(4) organizations is necessary to curb abuses. Without such rules, the IRS lacks firm ground on which to stand when challenging the activities of any organization, and any attempts at enforcement are likely to result in further allegations of partisan-based wrongdoing.

[After this article was submitted but prior to publication, the IRS announced that it would issue new guidance regarding political activity by 501(c)(4) organizations. The proposed guidance, which appeared in the Federal Register on November 29, replaces the facts-and-circumstances test by introducing and defining the term "candidate-related political activity," and would amend the regulations to state that such activity does not qualify as social welfare activity.[26] The Treasury Department and the IRS are seeking public comment on (1) the proposed new term, (2) whether to similarly amend the regulations under sections 501(c)(5) and 501(c)(6), and (3) what proportion of a 501(c)(4) organization's activities must promote social welfare for the organization to qualify as tax-exempt.]

Endnotes

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1 Unless otherwise specified or clear from context, references to the "Code" are to the Internal Revenue Code of 1986, and references to a "section" or "sections" are to sections of the Code.

2 In election law parlance, an "independent expenditure" is an expenditure on a political communication that expressly advocates the election or defeat of a clearly identified candidate that is not made in cooperation, consultation, or concert with or at the request or suggestion of a candidate, candidate's authorized committee, or a political party. If a candidate, his agent, his authorized committee, his party, or an "agent" for one of these groups becomes "materially involved," the expenditure is not independent. *See* 11 CFR §100.16.

3 Peter Overby, *Group Behind Elections Ads Weighs In On Tax Deal*, National Public Radio (Dec. 14, 2010), http://m.npr.org/story/132060878.

4 Kevin Drawbuagh & Kim Dixon, *IRS kept shifting targets in tax-exempt groups scrutiny: report*, Reuters (May 13, 2013, 7:56 PM EDT), http://www.reuters.com/article/2013/05/13/us-usa-tax-irs-criteria-idUSBRE94C03N20130513.

5 Center for Responsive Politics, http://www.opensecrets.org/outsidespending/nonprof_summ.php.

6 For additional information on political activity by tax-exempt organizations, see http://www.campaignlegalcenter.org/attachments/CLC_501c_disclosure_chart.pdf.

7 Code §501(c)(3).

8 Code §4911(d)(1).

9 The same guidelines regarding permissible political activities that apply to 501(c)(4)s are largely applicable to 501(c)(5) labor organizations and 501(c)(6) business leagues, which may become the next campaign finance battleground. The media has already begun following the rapid increase in the use of 501(c)(6) organizations for political spending purposes. For example, Freedom Partners, a 501(c)(6) business league established in November 2011 with ties to the conservative Koch brothers, raised $256 million in 2012. *See* Nicholas Confessore, *Tax Filings Hint at Extent of Koch Brothers' Reach*, N. Y. Times (Sept. 12, 2013), http://www.nytimes.com/2013/09/13/us/politics/tax-filings-hint-at-extent-of-koch-brothers-reach.html?_r=0.

10 Code §501(c)(3). This is the rule for 501(c)(3) "public charities." 501(c)(3) "private foundations" within the meaning of section 509(a) are in effect prohibited from engaging in any issue advocacy by the taxable expenditure rules of section 4945(d)(1).

11 Interestingly, the limitation on lobbying activities originated with limitations on organizations whose purposes were to disseminate "controversial or partisan propaganda" that the Service did not consider to be "educational" within the meaning of section 501(c)(3). The "no substantial part" limitation on lobbying was added to section 501(c)(3) in 1934. The regulations defined the term "educational" as "the instruction or training of the individual for the purpose of improving or developing his capabilities; or the instruction of the public on subjects useful to the individual and beneficial to the community." The regulations further state: "An organization may be educational even though it advocates a particular position or viewpoint so long as it presents a sufficiently full and fair exposition of the pertinent facts as to permit an individual or the public to form an independent opinion or conclusion. On the other hand, an organization is not educational if its principal function is the mere presentation of unsupported opinion." Treas. Reg. §1.501(c)(3)-1(d)(3)(i).

12 *See* Code §527(e).

13 Treas. Reg. §1.501(c)(4)-1(a)(2)(i).

14 Treas. Reg. §1.501(c)(4)-1(a)(2)(ii).

15 Interestingly, the facts and circumstances test of Rev. Rul. 2007-41 may be so broad as to amount to an unconstitutional "chilling" of political speech under *Citizens United*. *See* Gregory Colvin, *Political Tax Law After Citizens United: A Time for Reform*, at http://www.adlercolvin.com/attorneys/documents/sugarman.pdf.

16 488 F.2d 684, 686 (2d. Cir. 1973).

17 850 F.2d 1510, 1516, (11th Cir. 1988).

18 *See* Stephanie Strom, *I.R.S. Moves to Tax Gifts to Groups Active in Politics*, N.Y. Times (May 12, 2011), http://www.nytimes.com/2011/05/13/business/13gift.html.

19 *See* I.R.S. website, *IRS statement on applicability of gift tax on 501(c)(4) organization contributions*, http://www.irs.gov/uac/IRS-statement-on-applicability-of-gift-tax-on-501(c)(4)-organization-contributions.

20 *See* Code §2501(a)

21 *See* Rev. Rul. 82-216, 1982-2 C.B. 220 ("The service continues to maintain that gratuitous transfers to persons other than organizations described in section 527(e) of the Code are subject to the gift tax absent any specific statute to the contrary, even though the transfers may be motivated by a

desire to advance the donor's own social, political, or charitable goals").

22 John R. Luckey & Erika K. Lunder, Cong. Research Serv., R42655, *501(c)(4)s and the Gift Tax: Legal Analysis* (Aug. 10, 2012).

23 Form 1024 and the accompanying instructions were most recently revised in September 1998.

24 I.R.S. FS-2013-8, *available at* http://www.irs.gov/uac/Newsroom/IRS-Offers-New-Streamlined-Option-to-Certain-501c4-Groups-Caught-in-Application-Backlog.

25 In July, Oregon became the sixteenth state to call on Congress to introduce an amendment to overturn *Citizens United*. *See* Nick Wing, *Oregon Adopts Resolution Calling for Congressional Amendment to Overturn Citizens United*, The Huffington Post (July 4, 2013), http://www.huffingtonpost.com/2013/07/04/oregon-citizens-united_n_3546841.html.

26 Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities, 78 Fed. Reg. 71,535 (Nov. 29, 2013) (to be codified at 26 C.F.R. pt. 1).

New Tax Lawyer Committee (NTLC)

The NTLC provides professional development, leadership, and educational opportunities to lawyers new to the tax law practice. The NTLC has several work groups that organize speaker presentations, social gatherings, and other programs and events.

The NTLC meets at noon on the first Monday of each month to discuss the NTLC's upcoming and ongoing programs. Typically, there is also time for an open discussion of issues that members are currently considering in their practice. The conference number for these calls is 888-891-0496, pass code 787403. Meetings are open to all members of the Section and provide a chance for new tax lawyers to get more involved in the Section.

The NTLC also hosts a happy hour on the second Tuesday of each month that is open to all members of the Section. The date and location of each happy hour is available on the website and is announced by email on the Tax Section's listserv. No rsvp is required.

In addition to the monthly meeting and happy hour the NTLC also operates a mentor program that pairs experienced tax lawyers with newer members of the Section. The NTLC also hosts a series of brown bag CLEs where lawyers can learn about entry-level tax topics. Watch the website and listserv for more details about these programs.

Participating in the NTLC can be a great opportunity to network with other practitioners, develop leadership skills, and gain exposure to substantive tax issues. Getting involved is as simple as attending monthly meetings or events or signing up for the mentor program. Visit the website (www.osbartax.com) or contact NTLC Chair Jeremy Babener at *babenerj@lanepowell.com* for more information.

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Portland
Presenter: Cynthia Cumfer

May 05, 2014
New Tax Lawyer Committee: New Tax Lawyer Meeting
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May 15, 2014
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Portland
Presenter: Scott Schiefelbein, Deloitte Tax LLP

May 20, 2014
Mid-Valley Tax Forum Luncheon Series: ODR Collection Process
Salem
Presenter: Jeff Wong, Attorney

May 21, 2014
New Tax Lawyer Committee: New Tax Lawyer Social
Portland
5:30 - 6:30 p.m. at Tilt

Jun 02, 2014
New Tax Lawyer Committee: New Tax Lawyer Meeting
Portland
Host TBD

Jun 18, 2014
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Portland
Host TBD

June 05, 2014
Portland Tax Forum: Partnerships
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Oregon Tax Institute
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Jun 19, 2014
Portland Luncheon Series: Income and Estate Tax Planning for Same-Sex Couples
Portland
Presenter: Heather Kmetz, Sussman Shank LLP

Jul 22, 2014
Mid-Valley Tax Forum Luncheon Series: Tax and Non-Tax Planning Strategies to Maximize College Financial Aid
Salem
Presenter: Dennis Twenge, JHS Capital Advisors

Sep 16, 2014
Mid-Valley Tax Forum Luncheon Series: Retirement Plan Update/ Affordable Care Act
Salem
Presenters: Dave Roth, Heltzel Williams PC, Christine Moehl, Saalfeld Griggs PC

Sep 18, 2014
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Presenter: Gwendolyn Griffith, Tonkon Torp LLP

Oct 16, 2014
Portland Luncheon Series: Department of Revenue Update
Portland
Presenter: James Bucholz, Oregon Department of Revenue

Nov 18, 2014
Mid-Valley Tax Forum Luncheon Series: Circular 230
Salem
Presenter: Larry Brant, Garvey Schubert Barer

Nov 20, 2014
Portland Luncheon Series: Oregon Tax Court Magistrate Division Update
Portland
Presenter: Presiding Magistrate Jill A. Tanner, Oregon Tax Court