



Annual Report to the Oregon Legislature on Administrative Rules

January 25, 2021

Report

ORS 183.403 requires state agencies to submit a report no later than February 1 of each year regarding all rules that the agency adopted, amended, repealed, or suspended during the preceding 12-month period. This is the Department of Revenue's report covering rulemaking activity during calendar year 2020.

Rules adopted, amended or repealed in accordance with ORS 183.335 (2) and (3)

During calendar year 2020, the department adopted 33 rules, amended 21 rules and repealed four rules.

Temporary rules adopted, amended or suspended in accordance with ORS 183.335(5)

During calendar year 2020, the department adopted 10 and amended three temporary administrative rules in accordance with ORS 183.335(5). Those rules are as follows:

Adopt:

150-317-1130, Property Brought into Oregon

150-317-1140, Wholesale Sale of Groceries Exclusion

150-317-1150, Retail Sale of Groceries Exclusion

150-317-1400, Determining Property Resold Out of State, and Methods of Determining

150-317-1410, Motor Vehicle Resale Certificate – Documentation Required

150-317-1120, Exclusion for Subcontracting Payments

150-317-1220, Employee Compensation: Labor Cost Subtraction

150-317-1500, Good Faith Effort

150-320-0012, Location of Amusement Devices

150-305-0070, Interest Waivers Due to COVID-19 Pandemic Emergency

Amend:

150-305-0160, Penalty for Dishonored Checks

150-305-0396, Signature Gathering Period

150-305-0460, Verification of Returns, Statements, or Documents Filed Under Tax Law

Below is the statement of need and justification for each temporary rule adopted in 2020.

150-317-1130

This rule is one of several new rules that provide guidance relating to the Corporate Activity Tax (CAT) established under Oregon Laws 2019, chapter 122, sections 58 to 76 (enrolled HB 3427) as amended by Oregon Laws 2019, chapter 579, sections 50 to 60 (enrolled HB 2164), which became effective January 1, 2020. The rules clarify terms and processes applicable to the new tax. Taxpayers need guidance in order to be compliant with the new laws.

The rule provides guidance on when property brought into this state is included in taxable commercial activity for purposes of the Oregon Corporate Activity Tax (CAT) under Oregon Laws 2019, chapter 122, section 61, as amended by Oregon Laws 2019, chapter 579, section 51.

This filing corrects "statutes implemented" to provide accurate statutory references for taxpayers relying on the rule. Without guidance, taxpayers may not be able to determine or know, before the first quarterly estimated tax payment due on April 30, 2020 whether property brought into this state is included in taxable commercial activity for purposes of Oregon Laws 2019, chapter 122, section 61, as amended by Oregon Laws 2019, chapter 579, section 51. A correction to the original "statutes implemented" will provide accurate statutory references for taxpayers relying on the rule.

Persons who are subject to the Corporate Activity Tax will suffer the above consequences on account of lack of published guidance about when they are subject to the tax, what activity is included or excluded in commercial activity, and how to determine that commercial activity is sourced to Oregon. The Department of Revenue would bear the burden of answering taxpayers' questions and providing education and outreach to taxpayers.

Without temporary rules, taxpayers will not have the information necessary to determine if they are subject to the Corporate Activity Tax, to determine what is necessary for record keeping, to make estimated payments, or to file correct CAT returns. Promulgating temporary rules effective January 1, 2020 provides guidance for taxpayers as of the effective date of the new Corporate Activity Tax and before the first quarterly estimated tax payment deadline of April 30, 2020.

150-317-1140, 150-317-1150, 150-317-1400, 150-317-1410

These rules provide guidance relating to the Corporate Activity Tax (CAT) established under Oregon Laws 2019, chapter 122, sections 58 to 76 (enrolled HB 3427), as amended by Oregon Laws 2019, chapter 579, sections 50 to 60 (enrolled HB 2164), which became effective January 1, 2020.

These rules clarify the scope of several exclusions from commercial activity and related procedures. Taxpayers need guidance in order to be compliant, including determining when to register and how much quarterly estimated tax is due starting with the first estimated tax payment due on April 30, 2020.

The Corporate Activity Tax requires quarterly estimated payments beginning April 30, 2020. Taxpayers also must register if they have commercial activity in excess of \$750,000, even if no tax will be due. Without guidance, taxpayers may not be able to determine:

- correct amounts of excluded corporate activity from receipts of wholesale sales of food items;
- correct amounts of excluded corporate activity from receipts of retail sales of food items;
- correct amounts of receipts excluded from corporate activity when selling products to a wholesaler that will subsequently be sold out of state.
- whether vehicles traded by dealerships are to be included in their commercial activity.

Persons who are subject to the Corporate Activity Tax will suffer the above consequences on account of lack of published guidance about receipts subject to the tax. The Department of Revenue would bear the burden of answering taxpayers' questions and providing education and outreach to taxpayers.

Without temporary rules, taxpayers may not have the information necessary to determine the correct amount of Corporate Activity Tax, whether and when to register with the department, pay estimated taxes due quarterly (with the first payment due on April 30, 2020), and to determine what is necessary for record keeping. Promulgating temporary rules effective February 1, 2020 will provide guidance for taxpayers before the first quarterly estimated tax payment deadline of April 30, 2020.

150-317-1120, 150-317-1220

These rules provide guidance relating to the Corporate Activity Tax, chapter 317A which became effective January 1, 2020. These rules clarify the definitions of "single-family residential construction" for purpose of the subcontractor labor exclusion as well as "employee" and "compensation" for purpose of labor cost subtraction. Taxpayers need to know the definitions of "single-family residential construction" to determine the 15 percent exclusion of payments made to subcontractors for labor cost pursuant to a contract for single-family residential construction. In addition, taxpayers need to know the definitions of "employee" and "compensation" for purpose of the labor cost subtraction to determine taxable commercial activity.

A subtraction of 35 percent of labor cost or cost inputs is allowed against commercial activity. In addition, a 15 percent exclusion of payments made to subcontractors for labor costs pursuant to a contract for single-family residential construction is allowed under ORS Chapter 317A. These rules provide guidance to taxpayers to determine their cost inputs amount and exclusion from commercial activity of payments to subcontractors. Without guidance, taxpayers may not be able to determine or know, before the first quarterly estimated tax payment due on April 30, 2020:

- what is considered a “single-family residential construction” for purpose of the 15 percent exclusion of payments to subcontractors.
- who is considered an “employee” for the labor cost subtraction;
- who is not considered an “employee” for purpose of the labor cost subtraction
- what amounts are considered “compensation” for purpose of the labor cost subtraction;
- what amounts are not considered “compensation” for purpose of the labor cost subtraction.

Persons who are subject to the Corporate Activity Tax will suffer the above consequences on account of lack of published guidance to determine the correct amount of exclusion attributable to subcontractor payments and the correct subtraction against commercial activity and subsequently total Corporate Activity Tax. Taxpayers will not be able to determine what amount will provide them a greater tax benefit, a subtraction of labor cost or a subtraction of cost inputs. The Department of Revenue would bear the burden of answering taxpayers’ questions and providing education and outreach to taxpayers.

Without a temporary rule, taxpayers may not have the information necessary to determine which payments to subcontractors are eligible for the 15 percent exclusion or determine labor cost for the subtraction against commercial activity for filing their CAT returns and calculating estimated payments. In addition, taxpayers’ first estimated payment is due April 30, 2020 and without this rule, they will not have the necessary information to be able to estimate their tax liability and make estimated payments as required by chapter 317A.

Promulgating a temporary rule effective March 6, 2020 will provide guidance for taxpayers before the first quarterly estimated tax payment deadline of April 30, 2020.

150-305-0160

The state’s response to mitigate the propagation of COVID-19 has resulted in economic hardship to individuals and entities in Oregon, creating an inability for some to follow thru with financial obligations. ORS 305.228 requires the department to impose a penalty for dishonored payments (NSF penalty) unless the department adopts a rule pursuant to ORS 305.229 specifically setting forth circumstances or conditions under which this penalty will not be imposed. ORS 305.228 also

authorizes the department to waive all or part of an NSF penalty, but it is not sufficiently clear that the department can waive the penalty due to hardship related to COVID-19, without this amendment. The amendment to the rule invokes that authority under ORS 305.229 to not impose or waive an already imposed NSF penalty for a dishonored payment that occurs during the State of Emergency related to COVID-19 and 90 days after the emergency is lifted.

Not amending the rule may create additional hardship when a payee is unable to honor a payment due to financial hardship related to COVID-19. Without an amendment to this rule, ORS 305.228 requires the department to assess an NSF penalty when certain conditions are met. The same statute also limits when the department may waive an NSF penalty and is not sufficiently clear as to allow easy application to the circumstances arising because of COVID-19.

The rule affects individuals and entities in Oregon who are unable to meet their financial obligation due to having been financially impacted because of the COVID-19 crises. The COVID-19 crisis has created an immediate need to provide financial relief to Oregonians impacted financially by the crisis. Failure to take immediate action may create additional financial hardship which may contribute to further propagation of the virus. Temporary action will provide immediate financial relief to individuals and businesses who have lost income due to COVID-19. Taking immediate action will serve to support the state's efforts to mitigate the propagation of the virus.

150-317-1500

ORS 317A.137(2) requires Corporate Activity Tax (CAT) taxpayers to make quarterly estimated payments on or before the last day of January, April, July, and October of each year for the previous calendar quarter. This rule establishes what circumstances constitute a good faith effort to comply with the required quarterly estimated payments for tax years beginning January 1, 2020 to avoid penalty on underpayment of estimated tax. On April 24, 2020, Governor Brown directed DOR to refrain from assessing underpayment charges against taxpayers who do not pay at least 80 percent of their quarterly payment based on their total annual liability, or fail to make a payment for the 2020 tax year, if the taxpayer can show they made a "good faith" effort to comply with ORS 317A.137(2). Further, the Governor directed DOR to consider certain factors specific to the COVID-19 pandemic when determining whether a taxpayer made a "good faith effort." The rule provides guidance specifically for the tax year beginning January 1, 2020 and ending before January 1, 2021. The rule provides that a penalty will not be imposed under ORS 317A.161(2) for nonpayment, underpayment, or underreporting of the estimated tax installment for any quarter of the tax year 2020 provided that the taxpayer was negatively impacted by the COVID-19 pandemic and made a good faith effort to accurately estimate and pay the quarterly installment as required under ORS 317A.137(2), OAR 150-317-1300, 150-317-1310, and 150-317-1320.

The department needs to adopt a temporary administrative rule to establish that no penalty will be imposed under ORS 317A.161(2) provided that the taxpayer made a good faith effort to accurately estimate and pay the quarterly installment as required under ORS 317A.137(2), OAR 150-317-1300, 150-317-1310, and 150-317-1320. Adopting a temporary rule will provide the taxpayers with guidance on what constitutes a good faith effort before the second quarterly payment is due on July 31, 2020. In addition, adopting a temporary rule will reaffirm the Governor's directive to the department of revenue regarding penalties and the COVID-19 pandemic.

Without guidance, taxpayers may not be able to determine the factors that constitute a good faith effort before the second quarterly estimated tax payment is due on July 31, 2020. In addition, taxpayers may not know that it is necessary to keep documentation to show that good faith effort were made, and taxpayers may not be aware that the department may require documentation to substantiate they made a good faith effort when calculating and making installments of estimated quarterly payments. The temporary rule provides the following:

- which circumstances constitute a good faith effort for all tax years beginning January 1, 2020;
- a good faith effort is shown if the taxpayer cannot reasonably determine, at the time the quarterly payment installment is due, whether the taxpayer will have a tax liability for the tax year beginning January 1, 2020 and ending before January 1, 2021, due to the negative impact of COVID-19;
- a good faith effort is shown if the taxpayer did not have sufficient funds to pay the required quarterly payment installment or annual tax liability for tax year 2020, due to the impact of the COVID-19 pandemic on the taxpayer's business;
- a good faith effort is shown if the taxpayer cannot reasonably calculate the required quarterly payment installment or annual tax liability for tax year 2020, due to the impact of the COVID-19 pandemic on the taxpayer's business;
- no penalty will be assessed for an installment of quarterly estimated payments if the taxpayer made a good faith effort to comply with the law;
- that the taxpayer must retain documentation showing the good faith effort that the department may request at a later date.

Taxpayers who are subject to the Corporate Activity Tax and are required to calculate and pay in quarterly installments of estimated payments will suffer the above consequences on account of lack of published guidance.

Without guidance, taxpayers may not be able to determine the factors that constitute a good faith effort before the second quarterly estimated tax payment due on July 31, 2020, taxpayers may not know that it is necessary to keep documentation to show that a good faith effort was made, and

taxpayers may not be aware that the department may require documentation to substantiate they made a good faith effort when calculating and making estimated quarterly payments.

Promulgating a temporary rule effective June 1, 2020 will provide guidance for taxpayers before the second quarterly estimated payment deadline of July 31, 2020.

150-320-0012

Without the rule, video lottery game terminal operators may be subject to increased amusement device tax for each device that was disabled by Oregon Lottery prior to net receipts exceeding the statutory threshold and remaining at the operator's premises because Oregon Lottery has not yet removed the device. The rule is necessary to ensure increased tax is not imposed on devices that are nonoperational, due to Lottery's actions under the Governor's Emergency Order, at the time the statutory threshold for net receipts is exceeded and the increased tax imposition is triggered.

Not adopting the rule will result in approximately \$17,250 (total) in increased amusement device tax charged to approximately 130 video lottery operators for devices that were disabled by the Oregon Lottery pursuant to the Governor's Emergency Order at the time net receipts exceeded the statutory threshold that triggered the increased tax.

The rule affects approximately 130 video lottery operators. The increased tax is collected by Oregon Lottery on behalf of the Department of Revenue and is due quarterly. Delaying adoption of the temporary rule would result in Oregon Lottery collecting the increased tax on disabled devices. The temporary rule will provide timely guidance to Oregon Lottery for accurate imposition and collection of the increased tax.

150-305-0396

To provide guidance for entities wishing to be on the Charitable Checkoff list for the length of time they have to acquire signatures.

Due to the restrictions of COVID-19, it has become increasingly difficult to gather the required number of signatures in the existing timeframe. Entities attempting to be listed on the Charitable Checkoff list wish to be listed as soon as possible. The restriction due to COVID-19 may delay or even make impossible certain entities from being listed.

Non-profit entities wanting to provide taxpayers an efficient way of donating to their cause may be impacted without this temporary rule. Some entities are in the process of attempting to obtain signature right now and their allowed time frame will or has recently expired. Without this temporary rule allowing for more time, those efforts will be lost and the entities may not qualify

for the list. The temporary rule will give immediate assurance to those entities that they may continue their signature gathering effort beyond the timeframe currently in rule.

150-305-0460

This temporary rule amendment to OAR 150-305-0460 is needed to allow paper returns, statements or documents to be signed through a facsimile method. As a result of COVID-19, it is more difficult for paper tax returns, statements or documents prepared by practitioners to be hand signed by taxpayers. OAR 150-305-0460 needs to be amended to allow paper returns, statements, or documents to be signed through a facsimile method. This temporary rule is specifically needed because tax returns for personal income and corporation taxpayers filing on extension are due October 15, 2020 and November 15, 2020, respectively.

Corporation and personal income tax filers would be affected.

Unless this rule is temporarily amended, facsimile signatures to sign paper tax returns for the upcoming October 15th and November 15th extension filing deadline will be unauthorized for personal income and corporation taxpayers.

By temporarily amending the rule, personal income tax and corporation taxpayers will be able use facsimile signatures when filing paper returns on October 15th and November 15th.

150-305-0070

To provide interest waiver relief to business income taxpayers who owe tax year 2019 income tax because of financial hardship related to the COVID-19 pandemic emergency. The rule is necessary to grant waivers under ORS 305.145.

The department would not have the authority to waive interest without a rule authorizing the interest waiver. Business owners with financial hardships due to the COVID-19 emergency would not be able to file for relief without this temporary rule.

Business income taxpayers who would otherwise qualify for the interest waiver announced by the Governor, would not be eligible. The department currently has statutory authority to waive interest by rule under ORS 305.145, however a rule must be in place for a waiver to be granted. A temporary rule will allow the department to begin immediately approving interest waiver requests and provide guidance to business owners.