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Delta, PacifiCorp Cases Question if Oregon's Tax Laws Outdated
By Perry Cooper
Argument Preview

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- Oregon, Arkansas are outliers for still imposing such taxes

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A pair of cases involving Delta Airlines Inc. and PacifiCorp that are set be argued Thursday will give the Oregon Supreme Court the opportunity to consider whether the state tax code has kept up with the expanding universe of intangible assets.

The cases ask the justices to consider whether the state constitution requires Oregon to tax goodwill, intellectual property, and other intangible property uniformly no matter if the owner is locally or centrally assessed.

The state revenue department wants the court to overturn a 2023 tax court ruling in the Delta case that taxing the intangible property of industries that are centrally assessed—when it doesn't tax intangible property owned by locally assessed competitors—violates the Oregon Constitution's uniformity clauses and the US Constitution's equal protection clause.

PacifiCorp is challenging a related tax court ruling that the same logic doesn't apply to utilities because they are regulated public entities without comparable locally assessed competitors.

Oregon's law is a "vestige of 19th century ideas around property taxation," Seattle-based Fox Rothschild LLP partner Michelle DeLappe said. "Assessors started realizing that trying to tax the intangible property of businesses is a mess and it's not really feasible," she said, explaining that only Oregon and Arkansas still impose property taxes on the intangibles of centrally assessed taxpayers.

Skyrocketing Value

As in most states, industries with property that runs through multiple Oregon counties are subject to central assessment by the state revenue department, rather than on a county-by-county basis. Centrally assessed taxpayers, including utilities and transportation companies, are taxed on their intangible property in Oregon while locally assessed companies are not.

This disparity stems from historic practice when tax laws were written with railroads' rights of way in mind, said Eric Kodesch, a Lane Powell PC shareholder based in Portland, Ore. A right of way is something more concrete that you can assign, transfer, or sell, which can't be done with goodwill and other "more intangible intangibles," he said.

The share of companies' value attributable to intangible assets has skyrocketed just over the past few decades. The intangible share of S&P 500 companies increased from 68% to 84% between 1995 and 2015, and intangible assets commanded 90% of the S&P 500 market value, according to a 2020 analysis by management consulting firm Ocean Tomo.

It's hard for the revenue department to leave that kind of money on the table, DeLappe said. But if the court takes away that source of revenue, Oregon will manage just as other states have, she said.

For tax year 2019-2020, the state revenue department determined a real market value of $50 million for Delta's worldwide property and allocated a value of more than $212 million for the airline's property in Oregon.

The state valued PacifiCorp's worldwide property at $19.5 billion and its in-state property at $3.2 billion as of Jan. 1, 2020. The values would be much lower if intangible property were excluded, although the parties haven't given specific figures.

Ripple Effect

The state's tax court found that Delta's locally assessed competitors in the bus and shipping industries aren't taxed on intangibles.

"If you look at similarly situated taxpayers that provide the same service, then it looks like the legislature is putting its thumb on the scale in favor of trucking companies by giving them a lower property tax rate," Kodesch said.

It's not enough to show that Delta's intangibles are taxed while a restaurant's aren't. "You have to compare apples to apples" to show meaningful discrimination, he said.

The revenue department defended the state's laws, telling the court that the legislature is allowed to tax different classes of taxpayers differently as long as every taxpayer within a class is taxed uniformly and the state has a rational basis for the classifications.

"Central assessment originated from the need to reliably and fairly assess business property whose value derived from special characteristics, namely from the operation of large, networked services stretching over county and state boundaries, all of which derive significant value from intangible property," the state said in its opening brief in the Delta case.

If the court upholds the *Delta* ruling, prepare for a ripple effect, Kodesch said.

"Every centrally assessed taxpayer is going to say, 'Hey wait a minute, I have locally assessed competitors in my industry, too,'" he said.

A PacifiCorp lawyer and Crapo Deeds PLLC represent the utility. Stoel Rives LLP represents Delta.

The cases are PacifiCorp v. Dep't of Revenue, Or., No. S070564, oral arguments scheduled 9/26/24 ; and Delta Air Lines, Inc. v. Dep't of Revenue, Or., No. S070593, oral arguments scheduled 9/26/24 .

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