IN THE OREGON TAX COURT
MAGISTRATE DIVISION
Personal Income Tax

STEVEN E. SPEER AND SARAH H. SPEER, Plaintiffs, v. DEPARTMENT OF REVENUE, State of Oregon, Defendant.	Case No. 220449G DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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MOTION

Pursuant to TCR-MD 13 B and TCR 47 B and C, the Department of Revenue moves the court for an order (1) granting Defendant's Cross-Motion for Summary Judgment ("Cross-Motion"), (2) denying Plaintiffs' Motion for Summary Judgment ("Motion"), (3) determining that the department properly interpreted ORS 316.082 (1)[1] in OAR 150-316-0084 when it reduced the credit claimed by plaintiffs to the amount of tax they actually paid to Wisconsin, (4) determining that ORS 316.082(1) and OAR 150-316-0084 are constitutionally valid, and (5) upholding the department's assessment of taxes for the 2018 tax year, plus penalties and interest.

There are no genuine issues of material fact. In support of its Cross-Motion, the department relies on the Joint Stipulation of Facts and Stipulated Exhibits filed May 1, 2023, the following points and authorities, and the Declaration of Belle Na accompanying this Cross-Motion.

POINTS AND AUTHORITIES

STANDARD OF REVIEW

Summary judgment should be granted "if the pleadings, depositions, affidavits, declarations, and admissions on file show that there is no genuine issue as to any material fact and that the moving party is entitled to prevail as a matter of law." TCR 47 C. "No genuine issue of material fact exists if, based upon the record before the court viewed in a manner most favorable to the adverse party, no objectively reasonable juror could return a verdict for the adverse party on the matter that is the subject of the motion for summary judgment." *Id.*

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[1] All references to the Oregon Revised Statutes ("ORS") and the Oregon Administrative Rules are to the 2017 edition, unless otherwise noted.

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SUMMARY OF MATERIAL FACTS

Plaintiffs were part-year Oregon residents in 2018, living in Oregon for eleven out of twelve months. *See* Stip ¶¶ 1 and 8; Stip Ex 4 at 1. At all relevant times, Steven Speer was a minority shareholder of New Glarus Brewing Company, Inc. ("NGB"), a Wisconsin corporation that is an S corporation for purposes of federal and Oregon income tax. Stip ¶ 3. Mr. Speer was an original shareholder of NGB. Stip ¶ 3. At the time he made his investment in NGB in 1993, Mr. Speer reviewed the Private Placement Memorandum ("Memorandum"), along with Exhibits A, B, and C to the Memorandum as signed by him, indicating that he understood the Memorandum and its effect. Stip ¶ 4; Stip Ex 1. In 1993, NGB made a valid S corporation election pursuant to IRC § 1362[2] and the accompanying Treasury Regulations as then in effect. Stip ¶ 3.

Plaintiffs filed their 2018 Non-Resident and Part-Year Resident Wisconsin Income Tax Return, Form 1NPR ("Wisconsin tax return") as nonresidents of Wisconsin. Stip ¶ 6; Stip Ex 2. On their Wisconsin tax return, plaintiffs reported $1,110,967 in Wisconsin adjusted gross income—all of which had passed through from NGB to Mr. Speer—and calculated $79,669 in Wisconsin taxes before tax credits. Stip Ex 2 at 4; Stip ¶ 6. Plaintiffs claimed a total of $78,546 in Wisconsin tax credits, consisting of a $491 itemized deduction credit, a $350 research credit, and a $77,705 manufacturing and agricultural credit (collectively, "Wisconsin credits"). Stip Ex 2 at 4-12; Stip ¶ 6. The manufacturing and agricultural credit ("MAC") and the research credit were income tax credits passed through from NGB to Mr. Speer as a shareholder of the S corporation. Stip Ex 2 at 7-12; Stip ¶ 6. After applying the Wisconsin credits in reduction of

[2] IRC § 1362(a) at all pertinent times generally provides that a small business corporation may elect to be an S corporation and that such election is valid "only if all persons who are shareholders in such corporation on the day on which such election is made consent to such election."

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their Wisconsin tax, plaintiffs had a Wisconsin net tax of $1,123, which they paid on or before filing their Wisconsin tax return. Stip Ex 2 at 5; Stip ¶ 6.

Plaintiffs timely filed their 2018 Oregon Individual Income Tax Return for Part-Year Residents, Form OR-40-P ("Oregon tax return"). Stip Ex 4; Stip ¶ 8. On their Oregon tax return, plaintiffs claimed a credit of $63,601 under ORS 316.082(1) for Wisconsin income taxes attributable to the eleven months they were Oregon residents in 2018.[3] Stip Ex 4 at 3; Stip ¶ 8.

On audit, the department reduced the credit under ORS 316.082(1) and OAR 150-316-0084(1)(c) and (3) for Wisconsin income taxes to $1,123, the amount of the net tax paid to Wisconsin. Stip ¶ 10; Stip Ex 5 at 3. The department determined that plaintiffs had a deficiency of $62,478 in Oregon income taxes and issued a notice of deficiency. Stip Ex 5. Following a conference, the department issued a conference decision letter upholding the notice of deficiency. Stip Ex 8. The department then issued a notice of assessment, which plaintiffs have timely appealed to the Magistrate Division. Stip Ex 9.

ARGUMENT

The text, context, and legislative history of ORS 316.082(1) unambiguously support the department's interpretation, reflected in OAR 150-316-0084, that an Oregon resident is allowed a credit for no more than income taxes actually paid to another state on income taxed by both states.[4] Even if the meaning of ORS 316.082(1) remained ambiguous after consideration of its text, context, and legislative history, general maxims of construction support the department's

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[3] ORS 316.117(1) and OAR 150-316-0084(1)(c) and (3) require the credit under ORS 316.082(1) to be calculated based on the portion of the year the individual was an Oregon resident. The $63,601 credit claimed by plaintiffs on their Oregon tax return is the portion of the total Wisconsin credits of $78,546 attributable to the eleven months that plaintiffs were Oregon residents.

[4] If the other state's net tax (tax after credits) on mutually taxed income is higher than Oregon's net tax (tax after all other credits) on the same income, the credit under ORS 316.082 is further limited to the amount of Oregon net tax attributable to that income. *See* ORS 316.082(2); OAR 150-316-0084(2)-(3).

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interpretation. Tax credit statutes, if ambiguous, must be construed strictly but reasonably in favor of the department. In addition, the department's construction avoids both an absurd or unreasonable result and an interpretation that would raise serious constitutional concerns. Plaintiffs' reading would—without any reasonably conceivable basis—treat Oregon resident individuals claiming a credit under ORS 316.082 more favorably than Oregon residents who have income from another state that has adopted a provision like ORS 316.131 such that the Oregon resident must claim a credit on the other state's return for tax paid to their state of residence under the nonresident state's analog of ORS 316.131.

Moreover, contrary to plaintiffs' assertions, allowing an Oregon resident a credit under ORS 316.082(1) only for tax actually paid to another state on the same income readily passes muster under the Due Process Clause and the dormant Commerce Clause. Plaintiffs' arguments to the contrary are without merit.

I. The text, context, and legislative history of ORS 316.082(1) support the department's interpretation that a credit is allowed for no more than taxes actually paid to another state.

The central legal issue here turns on whether ORS 316.082(1) allows a credit for no more than taxes actually paid to another state on income taxable by Oregon and the other state. OAR 150-316-0084(3) states: "An Oregon resident figures the credit as the lesser of: (a) [t]he Oregon tax based on mutually taxed income; or (b) [t]he tax actually paid to the other state." OAR 150-316-0084(2)(g) defines "Oregon tax based on mutually taxed income" as "that portion of Oregon net tax that is attributable to mutually taxed income." "Net tax" refers to "state income tax liability * * * after all credits except the credit for taxes paid to another state." OAR 150-316-0084(2)(f).

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Plaintiffs contend that the department's interpretation of ORS 316.082(1), as reflected in OAR 150-316-0084(3), is invalid. Resolution of this issue requires statutory interpretation. "When interpreting a statute, our goal is to determine the legislature's intent by examining the statutory text in context along with any legislative history that appears useful to our analysis." *State v. Colgrove*, 370 Or 474, 481 523 P3d 456 (2022). Context includes other provisions of the same statute, related statutes, and other statutes enacted simultaneously with the statute at issue. *PGE v. Bureau of Labor & Indus.*, 317 Or 606, 611, 859 P2d 1143 (1993); *State v. Gaines*, 346 Or 160, 177 n 16, 206 P3d 1042 (2009). Context also includes predecessor statutes and uniform or model law on which the statute is based. *See, e.g., Dept. of Rev. v. Faris*, 345 Or 97, 102, 190 P3d 364 (2008) (examining ORS 314.405(1), predecessor statute to ORS 305.265, as part of statutory context); *Powerex Corp. v. Dept. of Rev.*, 357 Or 40, 47, 346 P3d 476 (2015) (comparing ORS 314.665 with Uniform Division of Income for Tax Purposes Act, § 16 (1957)).

A. The statutory text in context shows that "imposed" means "paid" the amount required by law after credits.

1. The plain text of ORS 316.082(1) supports the department's reading.

We start with the text of ORS 316.082(1). ORS 316.082(1) provides, in relevant part:

> A resident individual shall be allowed a credit against the tax otherwise due under [chapter 316] for the amount of any income tax *imposed* on the individual * * * for the tax year by another state on income derived from sources therein and that is also subject to tax under this chapter.

(Emphasis added.)

The term "imposed" is not defined in the statute. We therefore consider the ordinary definition of "impose" in play in 1969, the year of the statute's enactment. *Blachana, LLC v. Bureau of Labor and Indus.*, 354 Or 676, 688, 318 P3d 735 (2014) (noting that "in construing

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statutes that were enacted many years ago, we consult dictionaries that were in use at the time") (citation omitted)).

The definition of the verb "impose" has several senses with subsidiary senses (i.e., subsenses). The pertinent subsense is as follows:

> [**3**] **b** (1)**:** to make, frame, or apply (as a charge, tax, obligation, rule, penalty) as compulsory, obligatory, or enforcible <~ a duty on a city official> <the obligations *imposed* by international law –*Encyc. Americana*> **:** LEVY <~ a tax on all unmarried men> * * *.[5]

Webster's Third New International Dictionary 1136 (unabridged ed 1961).[6] *See also American Heritage Dictionary* 661 (1969) (defining "impose" as "[t]o establish or apply as compulsory; to levy : *The amount of duties imposed now constitutes a protective tariff*") (emphasis in original); *Black's Law Dictionary* 888 (rev 4th ed 1968) (defining "impose" as "[t]o levy or exact as by authority; to lay as a burden, tax, duty or charge").

"Levy" is a synonymous cross-reference for "impose." The example accompanying the word "levy" uses "tax" to illustrate the use of "levy," showing that "levy" can substitute "impose" in the context of a tax.

The definition of the verb "levy" also has several senses, one which is relevant because it uses "tax" to illustrate its meaning:

> **1.** To raise or collect, as by assessment, execution or other legal process, etc.; to exact or impose by authority; as, to *levy* taxes, toll, tribute, or contributions * * *.

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[5] "A cross-reference following a symbolic colon is a synonymous cross-reference. It may stand alone as the only definitional matter for a boldface entry or for a sense or subsense of an entry. It may be one of a group of definitions joined in series by symbolic colons. In either case the cross-reference means that the definitions at the entry cross-referenced to are substitutable as definitions for the boldface entry or the sense or subsense at which the cross-reference appears * * *." *Webster's Third New International Dictionary*, Explanatory Notes, 20a (note 16.2) (unabridged ed 1961).

[6] "Impose" has the same definition today. *Webster's Third New International Dictionary* 1136 (unabridged ed 2002).

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Webster's Third New International Dictionary 1423 (unabridged 2d ed 1961) (emphasis in original). *See also American Heritage Dictionary* 752 (1969) (defining "levy" as "**1.** To impose or collect (a tax, for example)"). Using this sense, "levy" means "to collect or exact taxes as by assessment or other legal process."

Because "collect" and "exact" are part of the meaning of "levy," we examine their definitions. The definition of the verb "collect" has several senses, only one of which is relevant as it uses "tax" to help explain its meaning: "**4 a** To demand and obtain payment of, as an account, or other indebtedness; as, to *collect* taxes. **b** To obtain from a number of persons (contributions, subscriptions, etc.)." *Webster's Third New International Dictionary* 525 (unabridged 2d ed 1961) (emphasis in original). *See also American Heritage Dictionary* 261 (1969) (defining "collect" as "**3.** To call for and obtain payment of: *collect taxes*") (emphasis in original); *Ballentine's Law Dictionary* 216 (3d ed 1969) (defining "collect" as "[t]o receive payment; to do that which may be lawfully done by the holder of the obligation to secure its payment or liquidation after its maturity").

Like the definition of the verb "collect," the definition of the verb "exact" includes several senses. The pertinent sense is "**1.** To demand or require authoritatively or peremptorily; to enforce the payment of, or a yielding of * * *." *Webster's Third New International Dictionary* 887 (unabridged 2d ed 1961). *See also American Heritage Dictionary* 455 (1969) (defining "exact" as "[t]o force the payment or yielding of" or "[t]o call for; require; to demand").

Looking at all the relevant definitions helps provide a more comprehensive understanding of the word "impose." From these definitions, "impose" reasonably means "to require and obtain payment of taxes."

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Plaintiffs contend that, under its present definition, "impose" simply means "levy" or "exact" without a payment requirement. But they fail to consider the meanings of "levy" and "exact" that were part of the definition of "impose" in effect in 1969. In doing so, plaintiffs fail to provide a complete and accurate definition of "impose" that reflects the common understanding of the word at that time. Governments do not raise and collect revenues by granting statutory tax credits to reduce tax liabilities.

2. The context of ORS 316.082(1) supports the department's reading.

We next turn to the context. *See Elk Creek Mgmt. Co. v. Gilbert*, 353 Or 565, 574, 303 P3d 929 (2013) (stating that correct construction of a statute does not focus only on dictionary definition but also considers context in which legislature used word). And there is significant context that signals that the legislature intended ORS 316.082(1) to mean that taxes must be paid to the other state to claim the credit.

The phrasing in ORS 316.082(5) provides such context.[7] ORS 316.082(5) sets out the exception to ORS 316.082(1). While subsection (1) allows a credit to Oregon residents for taxes paid to another state, subsection (5) disallows a credit to Oregon residents for taxes paid to another state if that state allows its nonresidents a credit against its taxes for taxes paid to Oregon as the resident state. Specifically, ORS 316.082(5) provides:

> Credit shall not be allowed under this section for income taxes paid to a state that allows a nonresident a credit against the income taxes imposed by that state for taxes paid or payable to the state of residence. It is the purpose of this subsection to avoid duplicative taxation through use of a nonresident, rather than a resident, credit for taxes paid or payable to another state.

ORS 316.082(5) indicates that the purpose of both ORS 316.082(1) and (5) is the same: to prevent duplicative taxation for taxes paid by an Oregon resident to another state. The only

[7] Plaintiffs do not use ORS 316.082(5) as context.

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difference is whether an Oregon resident may claim the credit against Oregon tax under ORS 316.082(1) or must claim the credit against the nonresident state's tax under the nonresident state's version of ORS 316.131, if applicable.

To be sure, subsection (5) is not direct context for subsection (1) since subsection (5) was enacted in 1991, twenty-two years after subsection (1) was enacted.[8] *See Halperin v. Pitts*, 352 Or 482, 490, 287 P3d 1069 (2012) (stating that adoption of subsections (3) through (5) to ORS 20.080 in 2009 does not provide context for ORS 20.080(2), enacted in 1955). Still, the phrasing in subsection (5) is highly relevant in that it shows what the legislature intended subsection (1) to mean. *See id.* at 490 (noting that courts often refer to later-enacted statutes to show the consistency or inconsistency in word usage over time as indirect evidence of the enacting legislature's intent). Subsection (5) reprises subsection (1) by stating that "[a] credit shall not be allowed *under this section* for income taxes *paid* to a state * * *." (Emphasis added.) In doing so, subsection (5) strongly suggests that the 1991 legislature understood subsection (1) to mean. The plain language of subsection (5) indicates that the legislature understood subsection (1) to allow a credit for taxes actually paid.

Additional context lies in ORS 316.292. ORS 316.082(4)[9] references both ORS 316.082 and 316.292 without distinction,[10] and both statutes were enacted in 1969.[11]

ORS 316.292 allows a credit to a resident estate or trust. Currently, ORS 316.292(2) provides, in pertinent part:

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[8] Or Laws 1991, ch 838, § 6.

[9] ORS 316.082(4) provides:

> No credit allowed under this section or ORS 316.292 shall be applied in calculating tax due under this chapter if the tax upon which the credit is based has been claimed as a deduction, unless the tax upon which the credit is based in restored to income on the Oregon return.

[10] Individuals, estates, and trusts all pay personal income taxes on income.

[11] Or Laws 1969, ch 493, §§ 17(1), (4), and 45.

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> Notwithstanding the limitations contained in ORS 316.082 and 316.131, if an estate or trust is a resident of this state and also a resident of another state, the estate or trust shall be allowed a credit against the taxes imposed under this chapter for income taxes imposed by and paid to the other state * * *.

ORS 316.292 did not include "paid" when it was enacted in 1969. In fact, it simply referenced the credit set out in ORS 316.082(1), tying ORS 316.292 to ORS 316.082(1). Thus, they were intended to apply in the same manner. As originally enacted, ORS 316.292 provided:

> A resident estate or trust shall be allowed the credit provided in [Section 17, later codified as ORS 316.082(1)] * * * (relating to an income tax imposed by another state or foreign country) except that the limitation shall be computed by referenced to the taxable income of the estate or trust.[12]

Although the statute went through several substantial changes in 1991, bringing it to its present form, there is no indication the 1991 legislature understood ORS 316.082(1) to lack a payment limitation. Rather, like the same legislature's amendment to ORS 316.082(5), the amendments to ORS 316.292 show that the legislature understood that ORS 316.082(1) already was limited to a credit for tax actually paid another state. Specifically, the legislature modified ORS 316.292(2), as follows:

> **Notwithstanding the limitations contained in ORS 316.082 and section 5 of this 1991 Act, if an** [*A resident*] estate or trust **is a resident of this state and also a resident of another state, the estate or trust** shall be allowed [*the*] **a** credit [*provided in ORS 316.082 (relating to an income tax imposed by another state) except that the limitation shall be computed by reference to the taxable income of the estate or trust*] **against the taxes imposed under this chapter for income taxes imposed by and paid to the other state, subject to the following conditions:**
> **(a) Credit shall be allowed only for the proportion of the taxes paid to the other**

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[12] Since its enactment, ORS 316.292(2) has only been amended twice, once in 1985 and again in 1991. The 1985 legislature deleted "or foreign country." Specifically, the 1985 amendment provided:

> A resident estate or trust shall be allowed the credit provided in ORS 316.082 (relating to an income tax imposed by another state [*or foreign country*]) except that the limitation shall be computed by reference to tha taxable income of the estate or trust.

Or Laws 1985, ch 802, § 10. By convention, deleted text in an amendment is shown in bracketed italics, and boldfaced text indicates new wording.

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> **state as the income taxable under this chapter and also subject to tax in the other state bears to the entire income upon which the taxes paid to the other state are imposed.**
> **(b) The credit shall not exceed the proportion of the tax payable under this chapter as the income subject to tax in the other state and also taxable under this chapter bears to the entire income taxable under this chapter.**

Or Laws 1991, ch 838, § 7.

Plaintiffs posit that because the legislature added the phrase "imposed by and paid to the other state" to ORS 316.292(2) but did not add this phrase to ORS 316.082(1), it must have intended that ORS 316.082(1) does not contain a payment requirement. And to be sure, the legislature made no change at all to ORS 316.082(1) in 1991.[13] *See* Or Laws 1991, ch 838, § 6.

But plaintiffs' purposeful omission argument is not the key to understanding the 1991 legislature's intent, nor does it show that the 1969 legislature intentionally left out a payment requirement. The 1991 changes demonstrate that the 1991 legislature believed there already was a payment requirement under ORS 316.082(1) and did not see the need to add "paid" to ORS 316.082(1).[14] The fact that the 1991 legislature did not amend ORS 316.082(1) to mirror ORS 316.082(5) and 316.131 does not mean that it believed that ORS 316.082(1) applied without regard to whether tax was actually paid to the other state. *See, e.g., Lake Oswego Preservation Soc'y v. City of Lake Oswego*, 360 Or 115, 129, 379 P3d 462 (2016) (noting that, although

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[13] In fact, ORS 316.082(1) went through only minor amendments over the years. *See* Or Laws 1981, ch 801, § 3; Or Laws 1987, ch 647, § 11; Or Laws 1999, ch 74, § 5; Or Laws 2001, ch 9, § 1.

[14] Plaintiffs point out that the heading of ORS 316.082 states, in relevant part, "Credit for taxes paid another state * * *." And it is true that statute headings are not part of the law. *See* ORS 174.540 (providing, in pertinent part, that "title heads, chapter heads, division heads, section and subsection heads or titles * * * in parts of the Oregon Revised Statutes * * * do not constitute any part of the law."). Still, the 1991 legislature may have been aware of this heading when it amended ORS 316.292(2) and enacted ORS 316.082(5) and 316.131 in 1991, which may help further explain why the legislature did not think it necessary to amend ORS 316.082(1) when it used the word "paid" in ORS 316.082(5), 316.131, and 316.292(2). And, as a particular matter, the person(s) who drafted ORS 316.082(5), 316.131, and 316.292 in 1991 likely read the 1989 version of chapter 316 and, from this, may have reasonably understood that "imposed" meant "paid."

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legislature knows how to include qualifying language in statute when it wants to, fact that legislature did not do it in particular case "is far from definitive proof of its intent."). Rather, the 1991 legislature did not see a need to insert the word "paid" in ORS 316.082(1) since it was already part of the definition of "impose," as we explained above. The 1991 legislature adopted ORS 316.082(5) and 316.131 and made the amendment to ORS 316.292 in the same bill.

In short, the legislature's changes in 1991 indicate that the legislature believed that ORS 316.082(1), 316.131, and 316.292 all worked in the same way. The fact that the legislature added subsection (5) to clarify subsection (1) of ORS 316.082 when it adopted ORS 316.131 and amended ORS 316.292 demonstrates that it thought that the credit statutes all allowed a credit based on tax paid to the other state. There is nothing in the 1991 legislative history indicating that it intended ORS 316.082(5), 316.131, and 316.292 to be narrower than ORS 316.082(1) with respect to a payment limitation.

ORS 315.095(1) (1953)[15] and 316.080 (1953) (renumbered 316.475(1) in 1957),[16] the predecessors to ORS 316.082(1), provide further context. ORS 315.095(1) provided, in relevant part: "Residents of this state shall be allowed a credit against the taxes imposed by ORS 315.005 to 315.845 for income taxes *imposed by and paid to* another state or country on income taxed under ORS 315.005 to 315.845 * * *." (Emphasis added.) ORS 316.080 (1) (1953) and 316.475(1) (1957) mirrored ORS 315.095(1), except that it replaced "ORS 315.005 to 315.845" with "this chapter."

[15] Oregon Laws 1965, chapter 26, section 9 repealed ORS chapter 315 in its entirety.

[16] ORS 316.475(1) was originally numbered as ORS 316.080 (1), which was enacted in Oregon Laws 1953, chapter 304, section 12 as part of the Oregon Personal Income Tax Act of 1953. ORS 315.095(1) (OCLA § 110-1605a before the 1953 creation of the ORS) applied to periods before the 1953 Act.

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Unlike ORS 316.082(1), these predecessor statutes use both "imposed" and "paid." It is entirely plausible that, when the 1969 legislature enacted ORS 316.082(1), the legislature thought including "paid" was redundant and unnecessary since the plain meaning of "impose" includes the payment or collection of tax. Indeed, plaintiffs' interpretation of ORS 316.082(1) would be a radical policy change from the way that the resident tax credit had been administered since its enactment. In the absence of other evidence, the plain meaning of "impose" in effect in 1969 suggests that the legislature did not believe that omitting "paid" from ORS 316.082(1) was a departure from the then-current policy as reflected in ORS 316.475(1) (1967).

Still, the change in language raises a fair question as to why the 1969 legislature decided to use different wording when ORS 316.475(1) was repealed and replaced with ORS 316.082(1). The answer is that the 1969 legislature intentionally based ORS 316.082 on Section 11 of the Uniform Personal Income Tax Statute set out in the 1967 and 1968 State Legislative Programs of the federal Advisory Commission on Intergovernmental Relations ("ACIR").[17] Section 11 of the Uniform Personal Income Tax Statute provided, in relevant part:

> Section 11. Credit for Income Tax Paid to Another State.
> (a) Resident Individual. A resident individual shall be allowed a credit against the tax otherwise due under this act for the amount of any income tax imposed on him for the taxable year by another state of the United States or a political subdivision thereof or the District of Columbia on income derived from sources therein and which is also subject to tax under this act. (Underlined in original.)

[17] The ACIR regularly made legislative recommendations to the states in the form of draft bills that were published in its State Legislative Program. The Advisory Commission on Intergovernmental Relations, Report M-46, Oct 1969. Na Decl, ¶ 5; Na Decl, Ex C. The ACIR distributed its State Legislative Program to governors, legislators, and other state officials and strove "to encourage favorable consideration [of these legislative recommendations] by the state legislative bodies." The Advisory Commission on Intergovernmental Relations, Report M-46, Oct 1969. Both the 1967 and 1968 State Legislative Programs published by ACIR contained the Uniform Personal Income Tax Statute, among other draft bills. 1967 State Legislative Program of the Advisory Commission on Intergovernmental Relations, Report M-33, Sept 1966; 1968 State Legislative Program of the Advisory Commission on Intergovernmental Relations, Report M-35, Sept 1967. Na Decl, ¶ 5; Na Decl, Ex A and Ex B.

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1967 State Legislative Program of the Advisory Commission on Intergovernmental Relations, Report M-33, Sept 1966, 15; 1968 State Legislative Program of the Advisory Commission on Intergovernmental Relations, Report M-35, Sept 1967, 15. Na Decl, ¶ 5; Na Decl, Ex A and Ex B.

Comparing ORS 316.082(1), as enacted in 1969, with Section 11 of the ACIR's model Uniform Personal Income Tax Statute, it is clear from the wording alone that the 1969 legislature modeled ORS 316.082(1) on Section 11.[18] And while statute headings in the ORS may not be part of Oregon law, the model law's heading for Section 11, of which the Oregon legislature may be presumed to have been aware, clearly indicates that ACIR intended to prescribe a model law allowing residents a credit for tax "paid" to another state.

B. The legislative history demonstrates that ORS 316.082(1) is a credit for taxes paid.

Legislative history confirms that the 1969 legislature patterned ORS 316.082(1) after Section 11 of the ACIR's Uniform Personal Income Tax Statute. In the minutes of the 1967 Legislative Tax Study Committee, Carlisle Roberts, then Chief Counsel of the State Tax Commission, explained that "essential parts of the wording in the [Oregon income tax] law [had been] adopted from the [ACIR's] Uniform State Income Tax Act."[19] Minutes, Legislative Tax Study Committee, Oct. 16-17, 1967, at 9. Na Decl, ¶ 6; Na Decl, Ex E. The next year, Mr. Roberts again referenced the ACIR's Uniform Personal Income Tax Statute, stating that "[m]any

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[18] Notably, the Oregon legislature copied other provisions of the ACIR's Uniform Personal Income Tax Statute. Compare ORS 316.037 (1969) and 316.012 (1969) with Section 1(a) and the alternative form of Section 4 of the ACIR's Uniform Personal Income Tax Statute, respectively. The Oregon legislature's adoption of these sections of the ACIR's Uniform Personal Income Tax Statute in ORS chapter 316 also demonstrates that the legislature modeled ORS 316.082(1) on Section 11.

[19] According to Paul Lininger, Acting Chairman of the State Tax Commission (the department's predecessor), the governor had asked for the State Tax Commission's help in drafting the tax bills, including the bill for income tax. Minutes, Legislative Tax Study Committee, Oct. 16-17, 1967, at 4.

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sections [of the Oregon income tax law] are taken from the proposed 'model income tax act' of the Advisory Commission on Intergovernmental Relations, 1967." Minutes, Legislative Tax Study Committee, Oct. 1-3, 1968, at 20. Na Decl, ¶ 7; Na Decl, Ex F.

Notably, since at least 1965, the legislature was aware of the ACIR and its publications. For example, during his testimony before the Legislative Tax Study Committee, Fred H.W. Hoefke, Commissioner of the State Tax Commission, referenced a report from the ACIR on state income taxes. Minutes, Legislative Tax Study Committee, July 22, 1965, at 7-8. Na Decl, ¶ 8; Na Decl, Ex G. Another time, John Carkin, temporary chairman of the Legislative Tax Study Commission's Subcommittee on State Taxation, mentioned that he had reviewed the ACIR's report, Federal-State Coordination of Personal Income Tax. Minutes, Legislative Tax Study Committee, Subcommittee on State Taxation, Mar. 23-24, 1966, at 1-2. Na Decl, ¶ 9; Na Decl, Ex H.

The legislative history plainly shows that the legislature referenced and relied on the ACIR's publications as it considered new personal income tax legislation. Given this, we look to the ACIR's publications themselves to ascertain whether the credit under ORS 316.082(1) for taxes "imposed" is for taxes paid. Ample statements in the ACIR's publications indisputably reinforce the department's interpretation.

In its 1967 and 1968 State Legislative Programs, the ACIR explained that Section 11 was a provision "crediting residents of the state for income tax *paid another state*, a practice now followed by two-thirds of the income tax states in the interest of consistency with tax collection at the source and the avoidance of double taxation of the same income." 1967 State Legislative Program of the Advisory Commission on Intergovernmental Relations, Report M-33, Sept. 1966,

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at 7 (emphasis added); *see also* 1968 State Legislative Program of the Advisory Commission on Intergovernmental Relations, Report M-35, Sept. 1967, at 7 (same).

A 1965 ACIR report, Federal-State Coordination of Personal Income Taxes, similarly described the operation of the credit as follows:

> It is a well established principle in State personal income taxation that a State can tax its residents on all their income, wherever it is earned, and can tax the income of nonresidents earned within its borders. Strict adherence to this principle, where both States employ income taxes, would necessarily subject any income an individual earns in a State other than where he resides to double taxation—by his State of residence and by the State in which he earns his income.
>
> To avoid double taxation, the States have devised a system of resident and nonresident credits * * *. All of the income tax States but Alaska allow credits to their residents for taxes *paid to other States*, and in most instances this residence credit is allowed whether or not the State of employment reciprocates. * * *
>
> Clearly, this system of resident and nonresident credits and exemptions meets the objective of minimizing, if not entirely eliminating, double taxation. However, it gives rise to a number of complications.
>
> With almost universal adoption of withholding, the State income taxes of most individuals residing in one income tax State and employed in another are withheld in the State of employment and paid over to that State. Such a taxpayer is then required to file income tax returns with both States. If his residence State's income tax is higher than that of his State of employment, he will pay the difference between the two tax liabilities to his own State (*having paid the other State*, through withholding, the total amount he owes it under its income tax law).
>
> The usual situation is for a State to credit its own residents for taxes *they pay to another State*, in effect shifting their income tax liability from their own State to their States of employment. * * *

Federal-State Coordination of Personal Income Taxes, Report A-27, Oct. 1965, at 142, 144 (emphases added). Na Decl, ¶ 5; Na Decl, Ex D.

Given that the legislature modeled ORS 316.082(1) on Section 11 and the Oregon Legislative Study Committee members and those appearing before them mentioned their reliance on the ACIR's model Uniform Personal Income Tax Statute, there is no reason to believe that the

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1969 legislature meant to depart from the ACIR's understanding of how the credit worked. And the ACIR publications clearly show that "impose" means "paid" in the context of ACIR's uniform personal income tax credit statute.

In arguing that an Oregon resident may claim a credit based on tax before credits, plaintiffs rely on the State Tax Commission Memorandum, dated August 19, 1968, from Carlisle Roberts ("Roberts Memo"). Specifically, plaintiffs quote the following statement from page 1 of the Roberts Memo: "The rates of tax are imposed upon the taxable net income and against the result of this calculation there may be offset statutory 'tax credits.'"

But plaintiffs overlook what the Roberts Memo also states. On page 5, the Roberts Memo mentioned that the "[a]llowance of deductions or credits for taxes paid to other states or countries" was a point that needed further study before Oregon could adopt the federal taxable income base. This statement casts doubt on plaintiffs' argument that Mr. Roberts, much less the 1969 legislature, intended "impose" to mean taxes before credits.

Given that ORS 316.475 (1957) used the words "imposed and paid," it would be strange for counsel for the State Tax Commission not to note such a radical change in Oregon policy in his memorandum, if that were the intent. But in fact, it was not the intent. The Roberts Memo in August 1968 was written in between his October 1967 and 1968 appearances to the legislative committee studying personal income tax reform. In both those appearances, Mr. Roberts explicitly mentioned the ACIR model as the basis for many of the proposed legislative provisions.

Aside from the Roberts Memo, plaintiffs do not refer to any other legislative history that supports their view that the 1969 legislature intended to work a radical change in the operation of credits for taxes paid to other states when it repealed ORS 316.475 and adopted Section 11 of the

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ACIR's model Uniform Personal Income Tax Statute. As evinced by the legislature's adoption of Section 11 of that uniform statute and the ACIR's publications, not only does nothing in the legislative history indicate that the 1969 legislature intended "impose" in ORS 316.082(1) to mean tax before credits rather than taxes actually paid, but the legislative history plainly shows that the credit for taxes "imposed" meant a credit for taxes "paid."

II. Even if the meaning of ORS 316.082(1) remained unclear after examining its text, context, and legislative history, general maxims of statutory construction establish that the legislature intended the credit to be for taxes actually paid to another state.

If there was any ambiguity in the text and context of ORS 316.082(1), the legislative history resolves it. But even if there were any remaining ambiguity, three general maxims of statutory construction support the department's interpretation.

A. Credits are strictly construed against taxpayers.

A credit against a state tax is essentially "an exemption from liability for a tax already determined and admittedly valid." *Keyes v. Chambers*, 209 Or 640, 645, 307 P2d 498 (1957). Given that "[t]axation is the rule and exemption from taxation is the exception," *Dove Lewis Mem'l Emergency Veterinary Clinic, Inc. v. Dept. of Rev.*, 301 Or 423, 426, 723 P2d 320 (1986), and credits are matters of legislative grace, *Keyes*, 209 Or at 646, credit statutes are strictly construed against taxpayers and in favor of the taxing authority. *Id.*; *see also Keller v. Dept. of Revenue*, 12 OTR 381 (1993)**Error! Bookmark not defined.**, *aff'd* 319 Or 73, 872 P2d 414 (1994) (applying the rule of strict construction in a tax credit case under ORS 316.082(1)).

A strict construction of ORS 316.082(1) necessitates a reduction of the credit claimed by plaintiffs to the tax they actually paid to Wisconsin. Given the policies above, the legislature did not intend plaintiffs to receive a windfall in the form of an Oregon credit greater than the amount of their actual Wisconsin tax paid to Wisconsin. There is no basis to infer that the Oregon

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legislature intended plaintiffs to receive an Oregon tax benefit based on decisions of other states to offer tax credits for business activities in those other states.

B. Statutes should be construed to avoid constitutional issues.

"[I]n choosing between alternative interpretations of an ambiguous statute, [courts] must choose the interpretation which will avoid any serious constitutional difficulty." *State v. Duggan*, 290 Or 369, 373, 622 P2d 316 (1981). While plaintiffs claim that their construction of ORS 316.082(1) avoids purported constitutional issues under the Due Process Clause and dormant Commerce Clause, the department's construction does not, in fact, present any constitutional issue under those provisions, as explained below. However, because plaintiffs agree that the credit allowed under ORS 316.131 applies only to taxes imposed and paid, plaintiffs' interpretation of ORS 316.082(1) would create a serious constitutional issue under the Uniformity Clause of the Oregon Constitution and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, as well as the nondiscrimination prong of the dormant Commerce Clause.

Without any reasonably conceivable basis for the classification, plaintiffs' interpretation of ORS 316.082(1) would treat Oregon personal income taxpayers differently depending on which nonresident state Oregon resident individuals receive income that is also taxable by the other state. Under plaintiffs' interpretation, if the nonresident state has a statute similar to ORS 316.131, then an Oregon resident is not allowed a credit under ORS 316.082, and the Oregon taxpayer may claim a nonresident credit in the other state for tax imposed and paid the other state. Whereas—according to plaintiffs—an Oregon resident with income from a state that does not have a statute similar to ORS 316.131 would be allowed a credit under ORS 316.082 for tax imposed by the other state, regardless of whether tax is ever paid.

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There is no good reason to believe the legislature intended to make such a distinction. But if it did, such a distinction likely would be discriminatory because it treats Oregon residents differently depending on whether or not they have income taxable in a state that has adopted a reciprocal nonresident credit statute like ORS 316.131. Such a difference does not appear to be based on any genuine differences among Oregon residents themselves.[20] And when the income is derived from commerce conducted in the nonresident state, plaintiffs' construction would discriminate against some Oregon residents in favor of others based on the tax credit policies of other state legislatures. The department's interpretation, by contrast, is in keeping with the legislature's intent to allow a credit based on tax paid to the other state.

ORS 316.131(1)(B) allows an Oregon nonresident to claim a credit "against the taxes otherwise due under [ORS chapter 316] for income taxes imposed by and paid to the [nonresident's] state of residence," so long as the nonresident's state of residence allows Oregon residents "a credit against income taxes imposed by that state on income tax paid or payable under [ORS chapter 316]."[21] Assume, contrary to fact, that Wisconsin had a nonresident credit provision like ORS 316.131 that allowed Wisconsin nonresidents to claim a credit for tax paid to the resident state. In that situation, ORS 316.082(1) would not apply to plaintiffs because both Oregon and Wisconsin would have adopted a provision like ORS 316.131. *See* ORS 316.082(5).

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[20] Indeed, the *same* Oregon resident might suffer unequal treatment simply depending on which states the resident received income. Suppose Mr. Speer also owned stock in another S corporation that did business entirely in Arizona and that Arizona offered tax credits similar to Wisconsin's and imposed income tax on S corporation shareholders at the same rates as Wisconsin. Also suppose both the Wisconsin and Arizona businesses generated the same amount of pass-through income and were able to claim the same amount of incentive tax credits. According to Mr. Speer, he would be able to claim a credit of $63,601 under ORS 316.082(1) with respect to tax "imposed" before credits on pass-through income attributable to the Wisconsin business, $0 under ORS 316.082 for the Arizona business by reason of ORS 316.082(5), and only $1,123 of credit on his Arizona return under Arizona's analogy of ORS 316.131.

[21] Arizona, California, Indiana, and Virginia offer a reciprocal credit to Oregon residents. For these states, the tax must be paid to claim the credit. *See* Ariz Rev Stat Ann § 43-1096.A.1 (West 2023); Cal Rev & Tax Code § 18002(a)(1) (West 2023); Ind Code § 6-3-3-3(b) (West 2023);Va Code Ann § 58.1-332.B (West 2023).

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Instead, plaintiffs would pay tax to Oregon on their entire taxable income with no credit for Wisconsin tax whatsoever, whether calculated before or after Wisconsin credits. On their Wisconsin return, plaintiffs would claim a credit (under Wisconsin's analog of ORS 316.131) for tax paid to Oregon as their resident state. But since plaintiffs' nonresident Wisconsin tax after other Wisconsin credits and before the nonresident credit would be only $1,123, plaintiffs could claim a Wisconsin nonresident credit that would reduce their Wisconsin tax only by their remaining $1,123 of Wisconsin liability after other credits.

Yet, according to plaintiffs, because Wisconsin does not have a provision like ORS 316.131 that would apply to Oregon residents with income taxed by Wisconsin, the Oregon legislature somehow intended that plaintiffs should get a credit under ORS 316.082(1) for Wisconsin taxes before credits, putting them in a far more favorable position than they would be if Wisconsin had simply adopted a provision like ORS 316.131. Only the department's construction of ORS 316.082(1) preserves the equal and nondiscriminatory tax treatment of Oregon residents under ORS 316.082(1) and 316.131, with the applicable statute depending only on whether the nonresident state has a credit provision like ORS 316.131 that applies to Oregon residents.

C. Statutory language should be construed to avoid an absurd or unreasonable result that is inconsistent with the apparent policy of the legislation.

When a statute is ambiguous after consideration of text, context, and legislative history, courts must avoid the interpretation that would lead to an absurd or unreasonable result that is inconsistent with the apparent policy of the legislation. *State v. Vasquez-Rubio*, 323 Or 275, 282-83, 917 P2d 494 (1996). One must adopt a construction of the statute that "is reasonable

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and workable and consistent with the legislature's general policy." *McKean-Coffman v. Emp't Div.*, 312 Or 543, 549, 824 P2d 410 (1992).

For the same reasons that plaintiffs' construction of ORS 316.082(1) likely leads to viable claims of unequal treatment of Oregon resident individuals depending on which nonresident state they also may be taxable in, so too it is unlikely that the legislature intended resident individuals to be entitled to more favorable treatment under ORS 316.082(1) than Oregon residents would get if Wisconsin had adopted a provision like ORS 316.131 applicable to Oregon residents with Wisconsin source income. In fact, the legislature appears to have adopted ORS 316.082(5) and 316.131 to encourage other states to adopt similar provisions in which the nonresident state yields tax revenue to the resident state. Yet plaintiffs' reading would result in worse treatment of Oregon residents who have income from sources in states that adopt those very provisions.

The text, context, and legislative history of ORS 316.082(1), considered together, unambiguously demonstrate that ORS 316.082(1) provides a credit for tax paid another state, not tax liability to the other state before other state tax credits. And even if ORS 316.082(1) were ambiguous after review of text, context, and history, general maxims of construction all militate in favor of the department's reading.

III. Plaintiffs raise precedential and constitutional arguments in their Motion that are unsupported by the case law.

In their Motion, plaintiffs advance several arguments that are unrelated to the statutory analysis of ORS 316.082(1). Specifically, plaintiffs assert that case law from Oregon and other jurisdictions shows that the credit for tax of other states is for tax imposed before credits. Alternatively, they argue that if the credit is only for taxes imposed and paid the other state, then

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the other state's tax credits constitute a tax payment. They further contend that the department's interpretation of ORS 316.082(1) is unconstitutional because it violates the Due Process Clause and the dormant Commerce Clause. As we explain below, plaintiffs' arguments are meritless.

A. Plaintiffs misread Oregon case law and other states' laws regarding the credit for tax of other states.

Relying on *LaDeRoute v. Dept. of Rev.*, TC 2508, 1987 Ore Tax LEXIS 60 (Or Tax, Apr 21, 1987), plaintiffs argue that the amount of allowable credit under ORS 316.082(1) is the amount of their Wisconsin tax imposed before Wisconsin credits. Plaintiffs misread *LaDeRoute*. The issue in *LaDeRoute* was whether the taxpayers were entitled to a credit under ORS 316.082(1) for income taxes that Alaska required them to pay, and which taxpayers actually paid, at the time the return was due, when Alaska later retroactively repealed the tax. *Id.* at 2. After the retroactive appeal, they unsuccessfully sought a refund from Alaska. The tax court determined that the taxpayers were entitled to a credit under ORS 316.082(1) because, as to the taxpayers, the Alaska income tax remained "imposed" because Alaska refused to refund the taxpayers the repealed income tax. *Id.* at 6. The case simply does not present the issue that plaintiffs raise here either as to facts or law.

In footnote 3 of their Motion, plaintiffs cite the second sentence of Missouri's resident credit statute, Mo Rev Stat § 143.081(1), as purported support for their assertion that "impose" means tax before credits. But they omit pertinent context and administrative construction. Mo Rev Stat § 143.081(1) provides, in its entirety:

> A resident individual, resident estate, and resident trust shall be allowed a credit against the tax otherwise due pursuant to sections 143.005 to 143.998 for the amount of any income tax imposed for the taxable year by another state of the United States (or a political subdivision thereof) or the District of Columbia on income derived from sources therein and which is also subject to tax pursuant to sections 143.005 to 143.998. For purposes of this subsection, the phrase "income tax imposed" shall be that amount of tax

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> before any income tax credit allowed by such other state or the District of Columbia if the other state or the District of Columbia authorizes a reciprocal benefit for the residents of this state.

Plaintiffs contend that the second sentence of this provision indicates that the use of "impose" in a credit statute "presupposes a state's initial income tax before credits are applied." Motion at 14:17-20. However, they misunderstand the purpose of the conditional clause in the second sentence. The conditional clause shows that the meaning of "income tax imposed" is expanded to tax before credits only if the conditional clause is satisfied. In other words, if the other state does not authorize a "reciprocal benefit" for Missouri residents, the phrase "income tax imposed" does not mean tax before credits.

A letter ruling, 2015 STT 100-24 (Doc 2015-12272, May 5, 2015), issued by the Missouri Director of Revenue shows that plaintiffs are drawing the wrong inference from the Missouri statute. Na Decl, ¶ 10; Na Decl, Ex I. In the letter ruling, the Missouri Director of Revenue addressed a taxpayer's question about whether she could claim a credit against her Missouri income tax based on 100% of her Georgia income tax liability before she used her Georgia tax credits. The Missouri Director Revenue determined that the taxpayer could not claim such a credit.

In reaching her decision, the Missouri Director of Revenue reviewed amendments made to Mo Rev Stat § 143.081(1). Initially, when the statute was enacted, it only contained the first sentence. The Missouri legislature later added the second sentence to clarify that "the credit was only for taxes actually paid and for certain credits allowed by the other state, if the other state allowed a reciprocal benefit."

After examining the changes to Mo Rev Stat § 143.081(1), the Missouri Director of Revenue determined that the reciprocity language contained therein concerned those states that

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allowed "Missouri residents to deduct the amount of income tax imposed before taking advantage of a tax credit in the other state and not to the income tax paid to the other state." She went on to say that, if the other state barred Missouri residents from claiming a credit against that state's income tax for tax imposed by Missouri before the application of the credit, then Missouri could only allow a credit for income taxes actually paid to the other state. The Missouri Director of Revenue then looked at Georgia's credit statute and found that Georgia only allowed a credit for tax paid to another state and that its credit statute was not reciprocal to the Missouri statute. The Missouri Director of Revenue concluded that the taxpayer could claim a credit only for the taxes actually paid to Georgia (i.e., tax after credits).

The Missouri letter ruling underscores two points. First, when a legislature wants to allow a credit for taxes imposed before credits, it can adopt qualifying language to do so. The Oregon legislature has not included such qualifying language in ORS 316.082(1). Second, in adding the reciprocity language to its resident credit statute, Missouri limited its own credit for other state tax-before-credits to situations where the other state did the same with respect to Missouri residents taxable by the other state. If the other state did not reciprocate, then Missouri still limited the credit to the amount actually paid.

To the extent that plaintiffs have looked to other states' statutes other than Missouri, they cannot point to any state that has adopted the broad reading that plaintiffs would give to ORS 316.082(1). But they fail to acknowledge administrative decisions of other states that are consistent with the department's reading of ORS 316.082(1). In Virginia administrative ruling PD 96-8, 1996 WL 172065 at *1 (Va Tax Dept, Mar 4, 1996), the Virginia tax commissioner considered the issue of whether North Carolina's dependent child tax credit constituted income

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tax actually paid to North Carolina for purposes of determining the credit for taxes paid to other states under Va Code Ann § 58.1-332(A).

The Virginia tax commissioner determined that, because the dependent child credit would reduce the amount of income tax that North Carolina imposed on a Virginia resident, the amount of tax actually paid by a Virginia resident to North Carolina does not include the amount of the credit claimed against North Carolina tax. *Id.* at *2. To do otherwise, he concluded, would grant a Virginia resident a credit for income tax paid to another state for an amount in excess of the tax actually paid to the other state, which would exceed the limitations set out under Va Code Ann § 58.1-332(A). *See also* Va Dept of Tax'n, PD 11-50, 2011 WL 1404927 at * 1 (Va Tax Dept, Apr 4, 2011) (same).

Plaintiffs also make the fanciful claim that "impose" makes comparison of tax amounts "straightforward" whereas "paid" requires one to look at whether the payments are more than the tax due. However, it is also straightforward to look at the tax "imposed and paid" as net tax (i.e., the tax due after credits). Absent clear and unambiguous language to the contrary, there is no reason to believe that the Oregon legislature intended to reduce Oregon revenue based on tax credits enacted by other states.

B. The credit plaintiffs received in Wisconsin is not an amount of tax they actually paid to that state.

Plaintiffs also assert that a tax credit functions as a tax payment that is applied to pay the tax after the gross tax liability is imposed. They rely on *Con-Way Inc. & Affiliates v. Dept. of Rev.*, 353 Or 616, 302 P3d 804 (2013), to support their argument that a tax credit is a payment of tax. But *Con-Way* is readily distinguishable from the present matter.

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First, *Con-Way* concerned only whether a credit under ORS 315.354 available against a tax "otherwise due" under ORS chapter 317 could be applied against the "minimum" corporate excise tax due under ORS 317.090. The court noted that there were other tax credit statutes that explicitly disallowed those credits against the minimum tax under ORS 317.090. Because the legislature omitted such a prohibition from ORS 315.354, the court reasoned that the legislature intended to allow the credit against the minimum tax as a tax "otherwise due" under ORS chapter 317. *Con-way* does not address the issue in this case.

Second, plaintiffs selectively quote *Con-Way*. In *Con-Way*, the department contended, in part, that because credits and payments were distinct concepts, a credit could not be allowed against the "minimum" that ORS 317.090 directed taxpayers to "pay." Plaintiffs maintain that the *Con-Way* court "explained tax credits and actual payments 'function in the same manner in * * * that * * * they both satisfy, in part or whole, the amount of tax owed.'" Motion at 10:5-6 (quoting *Con-Way*, 353 Or at 623). But to say they "function in the same manner" in a particular respect does not mean that credits are payments. In fact, the court never rejected the department's premise; it only declined to accept the department's inference that the credit under ORS 315.354 explicitly allowed against an amount "otherwise due * * * under ORS chapter 317" was not allowed when the minimum tax was an amount otherwise due under ORS 317.090. The court's statement explicitly acknowledged that payments and credits were "distinct concepts." *Con-Way*, 353 Or at 623. Hence, *Con-Way* is not a blanket holding that tax credits granted by state law are tax payments to the state.

Contrary to plaintiffs' assertion, a tax credit is not the same as an actual payment of tax in the context of ORS 316.082(1). Under its ordinary definition in 1969, "credit" meant "a deduction from an amount otherwise due <a tax ~ for dividends received> <a ~ for returned

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goods>."[22] *Webster's Third New International Dictionary* 533 (unabridged ed 1961). Parsing the definition of "credit" further, "deduction" was defined as the "[a]ct of deducting, or taking away; subtraction * * *." *Webster's Third New International Dictionary* 684 (unabridged 2nd ed 1961).[23] *See also American Heritage Dictionary* 344 (1969) (defining "deduction" as "[t]he act of deducting; subtraction."); *Black's Law Dictionary* 502 (revised 4th ed 1968) (defining "deduction" as "[t]hat which is deducted; the part taken away * * *."). "Deduct" meant "[t]o take away, separate, or remove, in numbering or estimating; to subtract * * *."[24] *Webster's Third New International Dictionary* 684 (unabridged 2nd ed 1961).

"Payment" means something else. Under its ordinary definition in 1969, "payment" meant "the act of paying or giving compensation: the discharge of a debt or an obligation <prompt ~ of debts> <~ of a fine>" and "something that is paid: something given to discharge a debt or obligation or to fulfill a promise: PAY * * * <amortize a debt with monthly ~s> * * *." *Webster's Third New International Dictionary* 1659 (unabridged ed 1961).[25]

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[22] The definition of "credit" is the same today. *Webster's Third New International Dictionary* 533 (unabridged ed 2002). *See also Black's Law Dictionary* 463 and 1762 (11th ed 2019) (defining "credit" as "a deduction from the amount due * * *" and "tax credit" as "[a]n amount subtracted directly from one's total tax liability, dollar for dollar, as opposed to a deduction from gross income. – Often shortened to *credit*.") (emphasis in original).

[23] The current definition of "deduction" is similar. Deduction means "an act or process of deducting or deducing: as an act of taking away: DIMINUTION, SUBTRACTION <~ of all legitimate business expenses>." *Webster's Third New International Dictionary* 589 (unabridged ed 2002).

[24] Today's definition of "deduct" is similar. "Deduct" means "to take (an amount) away from a total: take off: REMOVE <the tax is ~ed from the paycheck> – compare SUBTRACT." *Webster's Third New International Dictionary* 589 (unabridged ed 2002).

[25] Under its present definition, "payment" means "the act of paying or giving compensation: the discharge of a debt or obligation <prompt ~ of debts> <~ of a fine>" and "something that is paid: something given to discharge a debt or obligation or to fulfill a promise: PAY * * *." *Webster's Third New International Dictionary* 1659 (unabridged ed 2002) *See also Black's Law Dictionary* 1363 (11th ed 2019) (defining "payment" as the "[p]erformance of an obligation by the delivery of money or some other valuable thing accepted in partial or full discharge of the obligation" and "[t]he money or other valuable thing so delivered in satisfaction of an obligation"). Similarly, "pay" was defined in 1969 as "to discharge indebtedness for: SETTLE <~ a bill> <~ a tax> <~ a debt> <~ a bet> <~ rent for the house>." *Id. See also Black's Law Dictionary* 1285 (revised 4th ed 1968) (defining "pay" as "to discharge a debt; to deliver to a creditor the value of a debt, either in money or goods, for his acceptance * * *" and "payment" as "[a] discharge of an obligation or debt * * *" and "[i]n a more restricted legal sense payment is the * * * discharge of a debt or liability, by the delivery of money or other value by the debtor to a creditor, where

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When we compare the definitions of "credit" with the definitions of "payment" and "pay," we see that a credit is not the same as a payment in the context of ORS 316.082(1). A credit is a *subtraction from* or *a reduction of* an amount that would be due whereas a payment is money, or some other valuable thing, given to *discharge or extinguish* an amount that is due. Put a little differently, a credit is not something given by the taxpayer to settle or discharge an amount due; it is something simply taken away from the amount due by operation of law. It is state law that provides for a credit, not the taxpayer who transfers money or other valuable consideration to the state. The credit—as that word is used in ORS 316.082(1)—is not a payment to Oregon but an acknowledgement of taxes paid to another state to relieve a taxpayer from double taxation. ORS 316.082(1) only has practical meaning and effect in relieving a taxpayer from paying Oregon what the taxpayer paid to the other state.

Plaintiffs claim that other Oregon courts have considered a tax credit as a form of payment after the tax is imposed. They cite several cases that supposedly support this proposition. These cases have no precedential value, however, because they do not deal with the same issue before us here; those cases involve taxes imposed and paid, not taxes imposed before the credit. That is, the cases cited by plaintiffs do not examine the issue of whether "impose" in ORS 316.082(1) means taxes before credits or taxes levied and actually paid.

Moreover, at least one other state revenue agency shares the department's understanding that a credit is not a tax payment. In Virginia administrative ruling PD 12-7, 2012 WL 767406 at *1 (Va Tax Dept, Feb 23, 2012), the taxpayers requested reconsideration of the Virginia tax

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the money or other valuable thing is tendered and accepted as extinguishing debt or obligation in whole or in part"). "Pay" currently means "to discharge indebtedness for: SETTLE <~ a bill> <~ a tax> <~ a debt> * * *." *Webster's Third New International Dictionary* 1659 (unabridged ed 2002). *See also Black's Law Dictionary* 1362 (11th ed 2019) (defining "pay" as "[t]o transfer money that one owes to a person, company, etc. <pay the utility bill>").

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commissioner's ruling in PD 11-50. The taxpayers argued that they had purchased the credit from the other state, so it should be considered as property that may be used as a form of payment for the Virginia income tax. *Id.*

The Virginia tax commissioner rejected this argument, repeating the long-standing policy set out in PD 11-50 that, regardless of whether the taxpayer earned a credit through a required activity or purchased a credit from another taxpayer, the tax credit is a reduction of liability, not an actual payment of tax. *Id.* The Virginia tax commissioner pointed out that the control of a tax credit was "ultimately limited to the reduction of a liability imposed by a taxing authority against which such tax credit [was] available." *Id.* at *2. Because of this, a tax credit earned against another state's income tax could not be used to offset Virginia income tax. *Id.* Thus, the Virginia tax commissioner concluded, the Virginia Department of Revenue did not look at the transfer of a tax credit as gaining additional rights of property simply by being transferred. *Id.*

C. The department's interpretation of ORS 316.082(1) does not violate the Due Process Clause.

Plaintiffs contend that the department's interpretation of ORS 316.082(1) violates the Due Process Clause because Oregon does not have the requisite connection to NGB. But this argument is a red herring. NGB is not the taxpayer here. The department does not contend that NGB itself is subject to tax by Oregon, nor has the department attempted to tax plaintiffs with respect to Mr. Speer's income attributable to the portion of the year that he was a nonresident of Oregon.

With respect to the portion of the year to which ORS 316.082 applies, the only taxpayers here are plaintiffs as Oregon resident individuals. Oregon may tax its residents on all their income received while a resident in the state. *See Keller v. Dept. of Revenue*, 319 Or 73, 78, 872

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P2d 414 (1994) ("The state's taxing authority extends to all of the income earned by its residents, including income earned outside the state."). Thus, their argument regarding NGB and its connections to Oregon are irrelevant.

NGB is not subject to Oregon taxation through plaintiffs. Plaintiffs are ignoring the fundamentals of the income taxation of an S corporation and its shareholders. And they fail to explain why plaintiffs' distributive share of an S corporation's income should not be taxed to plaintiffs while they are residents of Oregon.

Oregon generally ties to federal income tax treatment with respect to S corporations and their shareholders. *See generally* ORS 314.732, 314.734, 314.736, and 314.744. An S corporation "is an entity separate and distinct from its shareholders." *Griffin v. Comm'r*, TC Memo 1995-246); *see also, e.g., ATL & Sons Holdings, Inc. v. Comm'r*, 152 TC 138, 146 (2019) (same). But as elected by the shareholders and the corporation, an S corporation generally does not pay income taxes as an entity. ORS 314.732; ORS 314.744; *Beard v. United States*, 992 F2d 1516, 1518 (11th Cir 1993) (citing IRC §1363(a)). Rather, its items of income, gain, loss, deduction, and credits are passed through on a pro rata basis to its shareholders, who report them on their personal income tax returns. *Id.*; *see also* ORS 314.734. "For tax purposes, the income of an S corporation is deemed the personal income of the shareholders, 26 U.S.C. § 1366." *Rogers v. Comm'r*, 728 F3d 673, 673 (7th Cir 2013); *see also Kulick v. Dept. of Rev.*, 290 Or 507, 510-11, 624 P2d 93 (1981) (stating that an S corporation and its shareholders "elect personal taxation of the shareholders in lieu of the corporate income tax.").

Through this pass-through taxation system elected by NGB and its shareholders, including Mr. Speer, a portion of NGB's income is passed through to become plaintiffs' taxable income. *See Maloof v. Comm'r*, 456 F3d 645, 647 (6th Cir 2006) (stating that, through a pass-

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through system, "the S corporation's income and losses *become* the individual shareholder's income and losses") (emphasis added); *Nathel v. Comm'r*, 615 F3d 83, 85 (2d Cir 2010) ("S corporation profits are not taxed on the corporate level; instead, they are passed through as taxable income to shareholders on a pro rata basis"). As part-year residents, plaintiffs' taxable income, including their distributive share of income from NGB, is subject to Oregon tax. Oregon is taxing plaintiffs, not NGB.

By shifting focus from Mr. Speer to NGB, plaintiffs ignore the well-established principle that a state has the power to tax all its residents' income, including income derived from sources outside the state. As the Court explained in *New York ex rel. Cohn v. Graves*, 300 US 308, 312-13, 57 S Ct 466, 81 L Ed 666 (1937):

> That the receipt of income by a resident of the territory of a taxing sovereignty is a taxable event is universally recognized. Domicil itself affords a basis for such taxation. * * * The tax, which is apportioned to the ability of the taxpayer to pay it, is founded upon the protection afforded by the state to the recipient of the income in his person, in his right to receive the income and in his enjoyment of it when received. These are rights and privileges which attach to domicil within the state. * * * Neither the privilege nor the burden is affected by the character of the source from which the income is derived. For that reason[,] income is not necessarily clothed with the tax immunity enjoyed by its source. A state may tax its residents upon net income from a business whose physical assets, located wholly without the state, are beyond its taxing power.

See also Lawrence v. State Tax Comm'n of Miss., 286 US 276, 279, 52 S Ct 556, 76 L Ed 1102 (1932) (stating that domicile establishes a basis for taxation since state government offers its residents protection of its laws and must raise revenue to defray its expenses); *Herndon v. West*, 393 P2d 35, 37 (Idaho 1964) (holding that Idaho resident who had income from Oklahoma partnership must include her share of partnership income in calculating her Idaho taxable income).

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Plaintiffs cite *North Carolina Dept. of Rev. v. Kimberly Rice Kaestner 1992 Family Trust*, 139 S Ct 2213, 204 L Ed 2d 621 (2019) ("*Kaestner*") to support their contention that Oregon has no minimum connection to the income earned by NGB in Wisconsin. That case is inapplicable here, because Oregon is not seeking to tax NGB.

In *Kaestner*, the Court considered the issue of whether the Due Process Clause prohibited North Carolina from taxing a trust as an entity based only on the in-state residency of the trust beneficiaries. *Id.* at 2219. As part of its analysis, the Court had to determine whether North Carolina had the requisite minimum connection with the trust. *Id.* at 2220. To make this determination, the Court employed the test under *International Shoe Co. v. Washington*, 326 US 310, 66 S Ct 154, 90 L Ed 95 (1945), which stated that a state had authority to impose a tax "only when the taxed entity [had] certain minimum contacts with the state such that the tax [did] not offend traditional notions of fair play and substantial justice." *Kaestner*, 139 S Ct at 1220 (quoting *International Shoe Co.*, 326 US at 316) (internal quotation marks omitted).

Kaestner is not relevant, however, because the minimum contacts test does not apply to the taxation of resident individuals like plaintiffs. There is no need for a connection to the state in which the S corporation earns its income when an S corporation shareholder is an Oregon resident. Indeed, the taxation of residents is akin to general jurisdiction. *See Ford Motor Co. v. Montana Eighth Judicial District Court*, 141 S Ct 1017, 1024, 209 L Ed 2d 225 (2021) (explaining that "[a] state court may exercise general jurisdiction only when a defendant is essentially at home in the State") (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 US 915, 919, 131 S Ct 2846, 180 L Ed 2d 796 (2011)) (internal quotation marks omitted).

Plaintiffs further argue that Oregon cannot tax their income from NGB because or to the extent that it has not been actually distributed to them and claim that, as a minority shareholder,

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Mr. Speer has no right to demand distributions from NGB nor has any control over NGB and its distributions. Plaintiffs' argument lacks merit.

In *Kulick*, the department assessed personal income taxes against New Jersey residents for their shares of distributed and undistributed income from an Oregon S corporation. 290 Or at 509. The nonresident shareholders argued that the fact that the corporation's income accrued to them or was distributed to them did not give Oregon a sufficient connection to tax them. *Id.* at 512. The Oregon Supreme Court disagreed, focusing on the practical effect of the tax in determining that Oregon did not violate the Due Process Clause in taxing their distributed and undistributed income. *Id.* at 517. According to the Oregon Supreme Court, "the practical effect of the tax imposed here [was] identical as if it were imposed on the shareholders' gains in the hands of the corporation." *Id.*

The tax court came to a similar conclusion in *O'Neil v. Dept. of Rev.*, 6 OTR 467 (1976). In *O'Neil*, nonresidents, who were shareholders in an Oregon S corporation, received dividends from the corporation and reported their proportionate share of the corporation's undistributed taxable income in their federal tax return. *Id.* at 468. In challenging Oregon's taxation of the dividend income, the nonresident shareholders argued that Oregon did not have the power to tax the distributed and undistributed income because the tax situs of the income was their domicile outside of Oregon. *Id.* at 470. They also argued that their ownership of the corporation's stock was their only connection with Oregon. *Id.*

The tax court held that nonresident shareholders' distributed and undistributed income passed through from an S corporation was subject to Oregon's personal income tax. *Id.* at 474. In that case, the S corporation did business partly in Oregon, which allowed Oregon to tax the nonresident shareholders on their Oregon-source income. The Due Process connection is much

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stronger here because plaintiffs are Oregon residents and Oregon may tax plaintiffs' income, regardless of its source.

Furthermore, for purposes of the Due Process Clause, pass-through income does not need to be actually distributed to pass-through owners to be taxed. The fact that partners or S corporation shareholders privately agree to arrangements that limit actual distributions to partners or shareholders is of no relevance to whether they may be taxed on their distributive shares of income as realized by the pass-through entity.[26] *See Heiner v. Mellon*, 304 US 271, 280-81, 58 S Ct 926, 82 L Ed 1337 (1938) (stating that fact that partner's proportionate share of a partnership's net income was not currently distributable, whether by parties' agreement or operation of law, was not material as to whether it could be taxed); *Helvering v. Horst*, 311 US 112, 115-16, 61 S Ct 144, 85 L Ed 75 (1940) ("[T]he rule that income is not taxable until realized has never been taken to mean that the taxpayer, even on the cash receipts basis, who has fully enjoyed the benefit of the economic gain represented by his right to receive income, can escape taxation because he has not himself received payment * * *."). Oregon therefore has not violated the Due Process Clause in taxing plaintiffs on their undistributed income from NGB.

D. The department's interpretation of ORS 316.082(1) does not violate the dormant Commerce Clause.

Plaintiffs also challenge the validity of ORS 316.082(1) under the dormant Commerce Clause. Specifically, plaintiffs contend that, under *Complete Auto Transit, Inc. v. Brady*, 430 US

[26] Though not material to the department's Cross-Motion, for purposes of the department's response to plaintiffs' Motion concerning plaintiffs' Due Process Clause argument, we note that Mr. Speer had the right to receive actual distributions to pay his share of income tax that was attributable to his distributive share of NGB's taxable income. That includes, or should include, Oregon taxes. Additionally, Mr. Speer has the right to sue NGB and its management, to the extent they fail to comply with those provisions. In fact, Mr. Speer is currently in litigation with NGB and its management.

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274, 97 S Ct 1076, 51 L Ed 2 326 (1977), ORS 316.082(1) and OAR 150-316-0084 as applied to plaintiffs violates the requirements that Oregon personal income tax (1) apply to an activity that has substantial nexus with Oregon, (2) be fairly apportioned, (3) not discriminate against interstate commerce, and (4) be fairly related to services provided by Oregon. Plaintiffs are wrong on all counts.

1. As part-year residents, Plaintiffs have a substantial nexus with Oregon and taxing income is fairly related to services provided by Oregon.

As with their Due Process argument, plaintiffs' dormant Commerce Clause arguments focus wrongly on NGB instead of plaintiffs as residents of Oregon. Plaintiffs, not NGB, were subject to Oregon taxation. Plaintiffs clearly had a substantial nexus with Oregon because they were part-year residents during the tax year at issue. *See Brillenz v. Dept. of Rev.*, TC-MD 150518C, 2016 WL 4585899 at * 3 (Or Tax M Div, Sept 2, 2016) (determining that taxpayers had substantial nexus because they became Oregon residents). Moreover, given that they were part-year residents, Oregon's taxation of plaintiffs was fairly related to the services Oregon provided. *See Greenough v. Tax Assessors of City of Newport*, 331 US 486, 493, 67 S Ct 1400, 91 L Ed 1621 (1947) (stating that, in his state of residence, a resident "exercises certain privileges of citizenship and enjoys the protection of his domiciliary government"). Oregon may tax plaintiffs based on their entire taxable income realized while they were residents here.

2. The department's interpretation of ORS 316.082(1) as only allowing a credit for taxes imposed and paid to other states is not discriminatory and is fairly apportioned.

Plaintiffs' dormant Commerce Clause arguments based on the nondiscrimination prong of *Complete Auto* and the internal consistency test for fair apportionment also lack merit. The dormant Commerce Clause generally prohibits states from treating in-state and out-of-state

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economic interests in a way that "benefits the former and burdens the latter." *Oregon Waste Sys., Inc. v. Dept. of Envtl. Quality of Ore.*, 511 US 93, 99, 114 S Ct 1345, 128 L Ed 2d 13 (1994); *see also Comptroller of the Treasury of Md. v. Wynne*, 575 US 542, 549, 135 S Ct 1787, 191 L Ed 2d 813 (2015) (stating that dormant Commerce Clause "precludes States from discriminat[ing] between transactions on the basis of some interstate element") (quoting *Boston Stock Exch. v. State Tax Comm'n*, 429 US 318, 332, n 12, 97 S Ct 599, 50 L Ed 2d 514 (1977) (internal quotation marks omitted)). A state cannot "tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State" or "impose a tax which discriminates against interstate commerce either by providing a direct commercial advantage to local business or by subjecting interstate commerce to the burden of multiple taxation." *Wynne*, 575 US at 549-50 (quoting, respectively, *Armco Inc. v. Hardesty*, 467 US 638, 642, 104 S Ct 2620, 81 L Ed 2d 540 (1984) and *Northwestern States Portland Cement Co. v. Minnesota*, 358 US 450, 458, 79 S Ct 357, 3 L Ed 2d 421 (1959) (internal quotation marks omitted)).

The internal consistency test for fair apportionment under the dormant Commerce Clause dovetails with the nondiscrimination prong. In particular, the internal consistency test helps identify tax schemes that discriminate against interstate commerce by looking "to the structure of the tax at issue to see whether its identical application by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate." *Wynne*, 575 US 542, 562, 135 S Ct 1787, 191 L Ed 2d 813 (2015) (citing and quoting *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 US 175, 185, 115 S Ct 1331, 131 L Ed 2d 261 (1995) (internal quotation marks omitted)). The internal consistency test isolates the effect of a state's tax scheme "by hypothetically assuming that every State has the same tax structure," which helps "distinguish between (1) tax schemes that inherently discriminate against interstate commerce

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without regard to the tax policies of other States, and (2) tax schemes that create disparate incentives to engage in interstate commerce (and sometimes result in double taxation) only as a result of the interaction of two different but nondiscriminatory and internally consistent schemes." *Wynne*, 575 US at 562. Tax schemes that fall into the first category fail the internal consistency test and thus are impermissibly discriminatory. *Id.* at 563. Those that fall into the second are not.

Plaintiffs mistakenly rely on *Wynne*, which is readily distinguishable. In *Wynne*, Maryland imposed both a state income tax and a county income tax on its residents. Maryland allowed its residents a credit against the state income tax if they paid income tax to another state for income earned therein but did not allow a credit against the county income tax for tax paid another state on the same income. The Court held that this taxing scheme flunked the internal consistency test because it discriminated against some residents by failing to provide a credit against the county tax if they paid income taxes to another state. *Id.* at 564. The Court noted, however, that Maryland could cure this constitutional infirmity if it offered "a credit against income taxes paid to other States." *Id.* at 568. *See also* Hellerstein, State Taxation, ¶ 4.16[1][b] (3d ed 2023) ("The provision of a tax credit for taxes paid to other states on the same tax base will generally provide a complete defense to any allegation that a tax is internally inconsistent.").

Here, ORS 316.082(1) passes the internal consistency test under *Wynne* because it allows residents a full credit for taxes actually paid to other states on mutually taxed income. Assuming every state taxed its residents on their income wherever earned but allowed them a credit for income taxes they actually paid to other states on the same income, there would be no double taxation.

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Consider the following basic example: Assume that the taxpayer is a resident of State B and has income from a business that operates only in State A. State A imposes a 1% tax on all income earned in State A. State B imposes a 1% tax on their residents on income wherever earned but allows a credit for income tax they paid to other states on the same income. In 2018, the taxpayer received $1,000 in income from the business conducted solely in State A. The taxpayer paid $10 in income taxes to State A and $10 in income taxes to State B. The taxpayer receives a $10 credit from State B for paying $10 in income taxes to State A. As a result, the taxpayer only had to pay a total of $10 in income taxes on the same income. That is, because of the credit that State B provided for taxes paid to other states, the taxpayer only had to pay tax once to State A. If every other state had the same tax credit statute as State B, no taxpayer would pay tax to two states on the same income. This example illustrates that ORS 316.082(1), as applied by the department, is internally consistent because, by providing a credit, it enables the resident to avoid paying tax twice on the same income.

Plaintiffs argue that because ORS 316.082(1) and OAR 150-316-0084 do not allow a credit against Oregon tax for the *credits* Wisconsin allows against its own tax, Oregon's statute is discriminatory. But that is not because ORS 316.082(1) is "inherently discriminatory without regard to the tax policies of other states." *Wynne*, 575 US at 562. It is because of the interaction of two different states' internally consistent, nondiscriminatory tax systems. Oregon does not discriminate by limiting the credit for tax of other states to tax actually paid those states. It is not up to Oregon whether Wisconsin offers tax incentives to Wisconsin business in the form of tax credits instead of exemptions, exclusions, deductions, or subtractions from income.

Plaintiffs also contend that ORS 316.082(1) fails the external consistency test because, in allowing a credit only for the net Wisconsin taxes actually paid instead of the gross Wisconsin

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taxes before reduction through credits, Oregon is taxing more than its share of income that is attributable to NGB's activity in Oregon.

The external consistency test looks "to the economic justification for the State's claim upon the value taxed, to discover whether a State's tax reaches beyond that portion of value that is fairly attributable to economic activity within the taxing State." *Jefferson Lines, Inc.*, 514 US at 185 (citations omitted). A state's taxing scheme fails the external consistency test if it creates the risk of multiple taxation. *See id.* (stating "the threat of real multiple taxation * * * may indicate a State's impermissible reaching").

ORS 316.082(1) passes the external consistency test because it does not raise the risk of multiple taxation. Oregon residents are allowed a credit for income taxes paid to another state on out-of-state income that is taxed by both Oregon and the other state. Because Oregon provides a credit to residents for their income earned out of state, Oregon effectively apportions the income subject to its personal income tax, unlike the situation in *Wynne*. *See Maryland State Comptroller v. Wynne*, 431 Md 147, 172 64 A3d 453 (Md 2013), *aff'd* 575 US 542 (determining that Maryland's county tax flunked the external consistency test because it created risk of multiple taxation by failing to provide a credit for the county tax imposed on income earned out-of-state).

We must also consider the practical effect of the tax credits Wisconsin allows. A tax credit is, in many ways, like a deduction or exemption from income. Instead of granting a credit, Wisconsin could have provided an exclusion or subtraction from NGB's Wisconsin income, which would have lowered or eliminated Wisconsin taxable income that passed through to NGB's shareholders.

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Had Wisconsin offered NGB incentives in the form of an exclusion or subtraction from income instead of a credit, the Wisconsin tax "imposed" on Mr. Speer before credits may have been the same as he actually paid here—$1,123. Depending on how Wisconsin decides to promote investment in Wisconsin, as an exemption or deduction from income or as a tax credit, Oregon, according to plaintiffs, would either be constitutionally justified in allowing only $1,123 as a credit under ORS 316.082(1) (if the Wisconsin incentive were an exemption or deduction) or acting unconstitutionally by disallowing a credit equal to the amount of credit allowed by Wisconsin. It makes no sense, though, to base a rule of constitutionality for credits against another state's tax on whether another state enacts a tax incentive through exemptions or deductions from income or tax credits against tax on taxable income.

Plaintiffs complain that, under the department's interpretation of ORS 316.082(1), they are not getting the benefit of Wisconsin's credit against their Wisconsin tax. They assert that the credit allowed under ORS 316.082(1) should include the MAC and research credit, which are part of their Wisconsin income. But if the shoe were on the other foot and plaintiffs were Wisconsin residents with NGB operating only in Oregon, Wisconsin would not give plaintiffs a credit against Oregon tax because they did not pay a net income tax to Oregon. *See* Wis Stat § 71.07(7)(b)(1) (2018) (providing, in relevant part, "if a resident individual * * * pays a net income tax to another state, that resident individual * * * may credit the net tax paid to that other state on that income against the net income tax otherwise payable to this state on income of the same year").[27]

[27] Wis Stat § 71.07(7)(a)(1) (2018) defines "net Wisconsin income tax" as "the gross Wisconsin income tax less all nonrefundable credits that may be claimed by that taxpayer, except the credit for taxes paid to other states."

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Moreover, plaintiffs' argument is unreasonably broad.[28] Many other states have credit statutes that apply only to taxes actually paid to another state. If the court were to accept plaintiffs' contention, nearly all these other states' statutes allowing residents a credit for income taxes of other states on mutually taxed income would similarly be unconstitutional.[29]

IV. The department properly imposed penalties against plaintiffs under ORS 314.400 (1) and 314.402(1) and (2).

A. The 5-percent failure-to-pay penalty was properly imposed.

The department determined there was an understatement of tax of $62,478 when it adjusted the credit claimed by plaintiffs from $63,601 to $1,123. As required under ORS 314.400 (1), the department assessed a 5 percent penalty of the amount of the deficiency. *See Pelett v. Dept. of Rev.*, 11 OTR 364, 365 (1990) (stating that ORS 314.400 is mandatory). Plaintiffs paid the deficiency of taxes, interest, and penalties in full only on August 31, 2022. Stip ¶ 14. Since there is no question that plaintiffs did not pay the tax deficiency within 30 days of the notice of deficiency, the department properly imposed the five percent penalty against them. ORS 314.400(10).

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[28] Many states, like Wisconsin, expressly limit the credit to the tax actually paid another state. Plaintiffs' argument therefore is not really about a unique situation.

[29] In challenging ORS 316.082(1), plaintiffs essentially demand that Oregon defer to Wisconsin's taxing scheme. But Oregon does not need to follow Wisconsin's taxing scheme when Oregon is taxing its own residents. *Cf. Moorman Mfg. v. Bair*, 437 US 267, 277-80, 98 S Ct 2340, 57 L Ed 2d 197 (1978) (determining that, because the Commerce Clause does not prohibit overlapping taxation, each state may adopt its own formula in calculating the portion of a corporation's income that is attributable to the state); *Container Corp. of America v. Franchise Tax Board*, 463 US 159, 171, 103 S Ct 2933, 77 L Ed 2d 545 (1983) (noting that "[i]n the absence of a central coordinating authority, absolute consistency, even among taxing authorities whose basic approach to the task is quite similar, may just be too much to ask" and stating that eliminating all overlapping taxation would require the court to establish "a single constitutionally mandated method of taxation.") (citing *Moorman Mfg.*, 437 US at 278-80).

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B. The substantial understatement penalty was properly imposed.

The department also assessed a 20 percent substantial understatement penalty as required under ORS 314.402. ORS 314.402(1) requires the department to impose a penalty equal to twenty percent of the amount of the understatement of net tax when the taxpayer understates the tax by more than the amount specified in the statute. *Routledge v. Dept. of Rev.*, 24 OTR 103, 110 (2020). An understatement occurs when no substantial authority existed at the time for the tax treatment of the item that the taxpayer claimed on the return or when the taxpayer failed to adequately disclose the relevant facts for the tax treatment of the item on the Oregon return and the taxpayer did not have a reasonable basis for the tax treatment of the item. ORS 314.402(4)(b); OAR 150-314-0209(2).

Here, because plaintiffs did not disclose their position on their Oregon return, the only issue is whether they had substantial authority for what they claimed on their return. "Congress's Joint Committee on Taxation has reported a 'general consensus of scholars and practitioners' that the substantial authority standard requires an approximately 40-percent likelihood of success and that the reasonable basis standard requires an approximately 20-percent likelihood of success." *Dept. of Rev. v. Wakefield*, TC 5404 (slip op. Sept. 22, 2023).

As explained earlier, the text, context, and legislative history of ORS 316.082(1) clearly establish that a credit is allowed only for taxes actually paid to another state. Moreover, the department's rule construing ORS 316.082(1) as credit for tax imposed and actually paid has been in force for three decades. No Oregon case law supports plaintiffs' assertion that the credit under ORS 316.082(1) is for taxes imposed before credits. Whether or not plaintiffs' intentional omission argument might provide some "reasonable basis" to avoid penalties had plaintiffs adequately disclosed their position when they filed their return, there is not "substantial

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authority" to avoid the penalty in the face of the department's long-standing construction of an unambiguous statute and no case law from Oregon (or any other state with the same statutory language) that supports taxpayer's position. Additionally, plaintiffs' constitutional arguments are not based on any cases with similar facts or issues. *See, e.g., Fisher Broadcasting v. Dept. of Rev.*, 22 OTR 69, 85 (2015) (noting that, although the taxpayer brought forward cases that related to the issue in a general way, the taxpayer's position was not supported by substantial authority). In sum, plaintiffs have failed to provide any persuasive legal authority in support of their position sufficient to avoid the substantial understatement penalty.

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CONCLUSION

Under OAR 150-316-0084, the department properly construed ORS 316.082(1) as allowing a credit only for taxes imposed and actually paid to another state. Plaintiffs' arguments that ORS 316.082(1) violates the Due Process Clause and dormant Commerce Clause are without merit. Plaintiffs are entitled to a credit only for the Wisconsin net tax they actually paid—$1,123. The department therefore requests an order granting its Cross-Motion, denying plaintiffs' Motion, and sustaining the department's assessment.

DATED this 29th day of September 2023.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 29th day of September, 2023, I directed the foregoing CROSS-MOTION FOR SUMMARY JUDGMENT to be served upon the parties hereto by the method indicated below, and addressed to the following:

Joseph Henchman
122 C. St. NW, Suite 700
Washington, DC 20001

Nikki Dobay
10260 SW Greenburg Rd, Suite 400
Portland, OR 97223

____ HAND-DELIVER
_X__ U.S. MAIL
____ OVERNIGHT MAIL
____ FACSIMILE
_X__ ELECTRONIC MAIL
_X__ ELECTRONIC SERVICE

and prepaying the postage thereon.

_/s/ *Belle Na*_____
Belle Na, #176107
Assistant Attorney General
Of Attorneys for Defendant

Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
(503) 947-4530 / Fax: (503) 378-3784

ELLEN F. ROSENBLUM
Attorney General

LISA M. UDLAND
Deputy Attorney General

DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

October 2, 2023

Magistrate Poul F. Lundgren
Oregon Tax Court
1163 State St.
Salem, OR 97301

Re: *Steven E. Speer and Sarah H. Speer v. Department of Revenue*
TC-MD No. 220449G
DOJ File No. 150111-GT2588-22

Dear Magistrate Lundgren:

Due to technical difficulties in our word processing program, the table of contents and the table of authorities that were filed with the court on September 29, 2023, contain several errors. Enclosed are the corrected table of contents and table of authorities that will be filed with the court today.

Sincerely,

/s/ *Belle Na*
Belle Na
Assistant Attorney General
Tax & Finance Section

BN1:klp/913006556
c: Nikki Dobay
Joseph Henchman
Darren Weirnick – Department of Justice
David Armstrong – Department of Revenue
Mona Henry – Department of Revenue

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