IN THE SUPREME COURT OF THE STATE OF OREGON

MICROSOFT CORPORATION,

Plaintiff-Respondent, Cross-Appellant,

v.

DEPARTMENT OF REVENUE, STATE OF OREGON,

Defendant-Appellant, Cross-Respondent.

Supreme Court No. S072126

Tax Court No. 5413

BRIEF OF *AMICUS CURIAE* COUNCIL ON STATE TAXATION IN SUPPORT OF MICROSOFT CORPORATION

Appeal from the Judgment of the Oregon Tax Court
The Honorable Judge Robert T. Manicke, Judge
Tax Court Judgment filed: April 29, 2025

NIKKI E. DOBAY, OSB NO. 071155
Greenberg Traurig, LLP
10260 SW Greenburg Road, Suite 400
Portland, OR 97223
(916) 442-1111
Nikki.Dobay@gtlaw.com
Attorney for Amicus Curiae Council On State Taxation

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I.

INTEREST OF AMICUS CURIAE AND ASSISTANCE PROVIDED BY AMICUS BRIEF

The Council On State Taxation ("COST") is a nonprofit trade association based in Washington, D.C. COST was originally formed in 1969 as an advisory committee to the Council of State Chambers of Commerce.[1] Today COST has grown to an independent membership of over 450 major corporations engaged in interstate and international business. Many of COST's members conduct activity subject to taxation in Oregon and, taken together, they employ a substantial number of Oregonians.

COST's mission is to preserve and promote the equitable and nondiscriminatory state and local taxation of multijurisdictional business entities, a mission it has steadfastly pursued since its inception. In furtherance of this mission, COST has consistently prioritized ensuring equitable apportionment of income by the states.

COST has a compelling interest in this case because its members include multinational businesses that are directly impacted by the Tax Court's ruling regarding how a multinational business must apportion its income for Oregon

[1] No counsel for any party authored this brief in whole or in part, and no person or entity aside from amici and its counsel funded its preparation or submission.

corporate income tax purposes when the corporate income tax base includes income earned outside the unitary reporting group, *e.g*. income repatriated under Internal Revenue Code section 965 ("IRC § 965"). Specifically, whether the U.S. Constitution requires the sales that generated the repatriated income to be included in the sales factor. This decision has ramifications beyond Oregon as other states continue to expand their corporate income tax bases to include foreign source income earned outside the unitary reporting group.

COST members are extensively engaged in interstate and international commerce and share a vital interest in ensuring states do not impede the rights of businesses engaged in interstate and international commerce to fairly compete in the global economy. To that end, it is important to COST members that states impose their taxes in a manner consistent with the protections provided by the U.S. Constitution's Due Process and Commerce Clauses and the clear statutory language, including the requirements for the fair apportionment of income.[2] The Tax Court, in compliance with the U.S. Supreme Court's guidelines, recognized the formula used to apportion Microsoft's income to Oregon must reflect the fact

[2] The Commerce Clause "regulate[s] commerce with foreign nations, and among the several states, and with the Indian tribes." U.S. Const. art. I, § 8, cl. 3. The Due Process Clause "…nor shall any State deprive any person of life, liberty or property, without due process of law." U.S. Const. Amendment XIV, Section 1.

that 20 percent of the IRC § 965 repatriated income was included in Oregon's corporate income tax base. However, the Tax Court limited the inclusion to the repatriated income rather than the corresponding sales that generated that income. Limiting the inclusion in the sales factor to 20 percent of the repatriated income rather than using the underlying sales that created the income is inconsistent with how Microsoft's domestic income is apportioned to Oregon.

As a nationally recognized organization representing multistate and multinational businesses, COST has a strong interest in ensuring that the established constitutional guidelines for determining the fairness of a state's apportionment formula for such businesses are not violated. COST, as *amicus*, is uniquely positioned to provide this Court with the analytical underpinnings to determine the fairness of Oregon's apportionment formula; specifically, the constitutional guidelines set forth by the U.S. Supreme Court to ensure that a state tax scheme does not result in extraterritorial taxation, and the income being taxed is fairly related to the business activities performed in the taxing state.

COST has submitted *amicus* briefs to this Court where significant state and local tax issues impacting businesses operating in multistate and international commerce are under consideration. COST filed *amicus* briefs in *Level 3 Communications, LLC v. Department of Revenue,* 368 Or. 303 (2021) and *Health Net Inc. v. Department of Revenue,* 362 Or. 700 (2018).

II.

INTRODUCTION

The principle of fair apportionment is a cornerstone of state corporate income taxation, ensuring that a state taxes no more than its fair share of a multistate business enterprise's income. Although income attribution is inherently a statutory function, that function is subject to constitutional restraints. The underlying constitutional principles must be incorporated into any analysis and application of an apportionment formula. Under Due Process Clause principles, a state may not tax a corporation's property, income, or gross receipts unless there is "some definite link, some minimum connection" between the state and the corporation's activities within the state. *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 344-45 hn.7 (1954). Thus, income cannot be subject to tax if the state lacks a "minimum connection" or "definite link" with the taxpayer's activities and the income related to those activities in the taxing jurisdiction. *Id.*; *see also Wisconsin v. J. C. Penney Co.*, 311 U.S. 435 (1940). The Commerce Clause also limits a state's ability to tax the income of a multistate and/or multinational corporation. To satisfy the Commerce Clause requirements, a tax must: (a) be applied to an activity with a substantial nexus with the taxing state; (b) be fairly apportioned; (c) not discriminate against interstate commerce; and (d) be fairly related to the service

provided by the state. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977).

This matter arose because the Tax Cuts and Jobs Act ("TCJA") (enacted in 2017) changed federal taxation of foreign source income. P.L.115-97 (Dec. 22, 2017). One of the changes enacted by Congress was the imposition of a one-time backward-looking tax on the income accumulated by controlled foreign corporations ("CFCs") and not yet distributed to their U.S. shareholders.[3] To accomplish the repatriation of this accumulated untaxed income, Congress mandated that for the last tax year beginning prior to January 1, 2018, the earnings and profits of a CFC accumulated after 1986 but neither taxed as subpart F income nor distributed to the U.S. shareholder be included in the shareholders' federal taxable income in proportion to their interest in the CFC. PL115-97, §14103, 131 Stat 2054, 2195 (amending IRC § 965). The effect of this change was to tax the U.S. shareholders as if the deferred income was repatriated as a dividend in the last tax year beginning prior to January 1, 2018.

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[3] Subpart F of the Internal Revenue Code generally deems the earnings and profits of a controlled foreign corporation that have not been subject to federal income tax to have been annually distributed to their domestic shareholder and included in federal gross income. IRC § 951. A CFC is defined as a foreign corporation in which more than 50 percent of either: (1) the total combined voting power of all classes of stock entitled to vote, or (2) the total value of the corporation's stock is owned, directly, indirectly, or constructively under the ownership rules of IRC § 958, by United States shareholders.

Microsoft, because of this change, recognized approximately $159 billion of gross repatriated income from its CFCs. *See Microsoft v. Dep't of Rev.*, 25 OTR 699, 708 (Apr. 29, 2025). Microsoft, for Oregon corporate excise tax purposes, included the gross repatriated income in taxable income and subtracted 80 percent of the gross repatriated income as a dividend.[4] *Id.* at 702; ORS 317.267(2)(b). A multistate corporation apportions its taxable income to Oregon using a single sales factor. ORS 314.650. The numerator of the factor is the total sales in the state, and the denominator is the total sales everywhere. ORS 314.665. Microsoft, seeking a refund, filed an amended return including the remaining 20 percent of the gross repatriated income in the denominator of the sales factor. *Microsoft*, 25 OTR at 714. The Oregon Department of Revenue ("Department") denied the refund concluding that the repatriated income was not received from a primary business activity.[5] *Id.*

Microsoft timely appealed to the Tax Court arguing that the gross repatriated income constituted gross receipts from a primary business activity and should be

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[4] Approximately, $31.9 billion was included in the tax base after the 80 percent dividends received deduction.

[5] IRC § 965 income is subject to apportionment in the same manner as a dividend, which requires a taxpayer to exclude from the apportionment formula any amount subtracted under the dividend received deduction. ORS 317.267(a). The Department has taken the position that all IRC § 965 income must be excluded from the sales factor unless the repatriated amounts are derived from the taxpayer's primary business activity. Oregon Tax Bulletin No. 2018-01.

included in the computation of the sales factor pursuant to ORS 314.665(6)(a).[6] *Microsoft*, 25 OTR at 714. Microsoft also argued it was entitled to use an alternative apportionment method under ORS 314.667. *Id.* at 702-03. The Tax Court concluded that ORS 314.665(6)(a) required 20 percent of the gross repatriated amount to be included in the computation of the sales factor denominator. *Id.* at 703. With respect to the alternative apportionment argument, the Tax Court rejected the argument that the formula does not fairly reflect business activity conducted in Oregon. *Id.* at 703-04.

This case involves the fundamental constitutional principles of fair apportionment. The question before this Court is whether Oregon may enlarge the tax base by including income generated from activities outside the Microsoft Oregon reporting group while excluding corresponding factor representation to apportion that income. The Tax Court answered the question in the negative because the Tax Court recognized the principles of fair apportionment required a correlation between the tax base and factors apportioning that base. This Court, applying those same constitutional principles of fair apportionment, must affirm the Tax Court's decision that foreign factor representation is required. In affirming

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[6] ORS 314.610(7) generally defines "sales" as all gross receipts of the taxpayer not allocated under ORS 314.615 through 314.645. Because IRC § 965 income constitutes gross receipts included in the Oregon tax base and is not separately allocated, it falls within the statutory definition of sales unless expressly excluded.

the Tax Court's decision, this court should also determine that the required factor representation must include the foreign sales relating to the 20 percent of the gross repatriated income included in the tax base.

III.

STATEMENT OF THE CASE

COST adopts the Statement of the Case as set forth by Microsoft in its Combined Respondent's Answering Brief and Cross-Appellant's Opening Brief (hereinafter referred to as "Plaintiff-Respondent, Cross Appellant's Brief"). Plaintiff-Respondent, Cross Appellant's Brief at 6, 39.

IV.

ASSIGNMENT OF ERROR

A. Preservation of Errors and Standards of Review.

COST adopts the Preservation of Errors and Standards of Review as set forth in Plaintiff-Respondent, Cross Appellant's Brief at 43-45.

V.

ARGUMENT

1. CONSTITUTIONAL FAIR APPORTIONMENT REQUIRES SUMMETRY BETWEEN THE TAX BASE AND THE APPORTIONMENT FACTORS.

A. The Oregon Position Violates Due Process and Commerce Clause Standards

The principle of fair apportionment is a cornerstone of state corporate income taxation ensuring that a state taxes no more than its fair share of a multistate/multinational enterprise's income. Income attribution is an inherently statutory function. However, the U.S. Supreme Court has repeatedly held that income attribution to a state is subject to constitutional restraints. Under Due Process Clause principles, a state may not tax a corporation's property, income, or gross receipts unless there is "some definite link, some minimum connection" between the state and the corporation's activities within the state. *Miller Bros.*, 347 U.S. at 344-345 (1954). Income cannot be subject to tax if the state lacks a "minimum connection" or "definite link" with the taxpayer's activities and the income related to those activities in the taxing jurisdiction. *Id*.; *see Wisconsin v. J. C. Penney*, 311 U.S. 435 (1940). A state tax scheme must also pass Commerce Clause muster. To satisfy the Commerce Clause requirements, the tax must: (a) be applied to an activity with a substantial nexus with the taxing state; (b) be fairly apportioned; (c) not discriminate against interstate commerce; and (d) be fairly

related to the service provided by the state. *Complete Auto Transit, Inc.*, 430 U.S. at 279.

At issue in this matter are the Due Process Clause principles and the second (fair apportionment), third (discrimination), and fourth prongs (fairly related to the services provided by the state) of the *Complete Auto* test. Under the U.S. Supreme Court's precedents, fair apportionment includes both an internal and external consistency requirement. *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 169-70. A fairly apportioned tax must be internally consistent; it must operate so that if it were adopted by every state, no more than 100 percent of the income of the taxpayer would be apportioned to the state. The internal consistency test is not directly at issue in this case.

External consistency examines the economic justification for the state's claim to the income being taxed and asks whether the tax reaches beyond that portion of value fairly attributable to economic activity within the taxing state. *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 185 (1995). The Supreme Court has explained that external consistency requires an apportionment formula to reflect "a reasonable sense of how income is generated." *Container Corp. of Am.*, 463 U.S. at 169-70 (1983). The inquiry focuses on whether there is a rational relationship between the taxpayer's business activity and the apportionment formula's factors so that the formula reflects the activities that

generated the taxpayer's income in the state. *Id.* at 170. The external consistency test is aligned with the Due Process requirement that the income attributed to a state must be rationally related to the taxpayer's values or activities within the taxing state and the fourth prong of *Complete Auto*, *e.g.* fairly related to the services provided by the state. *Norfolk and W.R. Co. v. Missouri State Tax Comm.*, 390 U.S. 317, 325 (1968), reh'g. denied, 390 U.S. 1046 (1968).

Finally, the apportionment formula must not discriminate against interstate or foreign commerce, either facially or in its effect. *Container Corp. of Am.*, 463 U.S. at 170. In the context of foreign commerce, the test for determining whether a formula impermissibly discriminates against foreign commerce starts with the four-part test for determining whether a formula discriminates against interstate commerce and adds two additional components. Specifically, whether the actions of the state interfere with the need for the United States to speak with one voice in foreign affairs and whether there is an increased risk of multiple taxation in the international sphere. *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 449-51 (1979).

The Department's denial of factor representation for the repatriated income runs afoul of the constitutional fair apportionment standards and discriminates against foreign commerce. Further, the Tax Court's limited inclusion of only the repatriated income in the sales factor and not the corresponding foreign sales that

generated that income, also discriminates against foreign commerce because the apportionment formula utilized for apportioning domestic income includes all of the sales related to the generation of that income, and not just the amount of the taxable income.

B. The Asymmetry Between the Tax Base and the Sales Factor Violates External Consistency

Particularly relevant here is the fair apportionment external consistency requirement, which examines "the economic justification for the State's claim upon the value taxed" and asks whether the tax "reaches beyond that portion of value that is fairly attributable to economic activity within the taxing State." *Jefferson Lines, Inc.*, 514 U.S. at 185. The Supreme Court has explained that external consistency requires the factors used in an apportionment formula to reflect "a reasonable sense of how income is generated." *Container Corp. of Am.*, 463 U.S. at 169-70. Stated differently, although states possess flexibility in selecting apportionment formulas, the tax base and the apportionment formula must remain aligned so that the income subject to tax (both domestic and foreign) bears a rational relationship to the activity represented by the formula.

Oregon's treatment of Microsoft's repatriated income violates that principle. Oregon included approximately $31.9 billion of IRC § 965 repatriated income in the tax base while excluding from the sales factor the receipts and foreign business activity (*i.e.,* receipts) that generated that income. *Mircosoft*, 25 OTR at 713. The

Supreme Court has repeatedly stated state tax imposed on a multistate business must "be fairly apportioned to reflect the business conducted in the State." *Armco Inc. v. Hardesty*, 467 U.S. 638, 644 (1984). The Oregon apportionment formula as applied here is devoid of any of the factors that contributed to the generation of the repatriated income. By including the income but excluding the associated receipts, the Department created a structural mismatch between the tax base, and the apportionment formula used to apportion that tax base. The result is that the Department seeks to include income and attribute value to Oregon that is generated by foreign operations without providing any representation of those operations in the apportionment formula. Such an approach fails the external consistency requirement because it does not reflect a reasonable sense of how the income subject to tax was generated. *Container Corp.*, 463 U.S. at 169-70.

The Supreme Court's jurisprudence consistently requires a rational relationship between the income included in the tax base and the formula used to apportion that income. *See MeadWestvaco Corp. v. Ill. Dep't of Revenue*, 553 U.S. 16, 24 (2008); *Norfolk and W.R. Co.*, 390 U.S. at 325. When a state expands the tax base to include additional income, the apportionment formula must continue to reflect the activities that produced that income. Oregon expanded the tax base by including 20 percent of the repatriated income but simultaneously excluded the receipts generated by the foreign operations that produced that income. That

asymmetry between the tax base and the apportionment formula results in mismatch between the income attributed to Oregon and Microsoft's economic activities within the State. The result of the asymmetry is an overstatement of income attributable to Oregon. The Supreme Court has recognized that an apportionment methodology is unconstitutional when it attributes income to a state that is "out of all appropriate proportion" to the business transacted there. *Hans Rees' Sons, Inc. v. North Carolina*, 283 U.S. 123, 135 (1931). The Department's approach suffers from precisely that defect. By taxing the repatriated income while ignoring the foreign sales that generated that income, Oregon attributes value to itself that bears no reasonable relationship to Microsoft's Oregon activities.

The constitutional defect is further confirmed by the Supreme Court's decisions addressing the taxation of extraterritorial value; the Due Process and Commerce Clauses prohibit a state from taxing "value earned outside its borders." *ASARCO Inc. v. Idaho State Tax Comm'n*, 458 U.S. 307, 315 (1982). Likewise, there must be "a rational relation between the income attributed to the taxing State and the intrastate value of the corporate business." *Allied-Signal, Inc. v. Director, Div. of Taxation*, 504 U.S. 768, 772 (1992). Oregon's inclusion of the repatriated income without factor representation for the foreign activity producing that income violates these principles. The income attributed to Oregon is disconnected from the business activity reflected in the sales factor. The Department's formula therefore

reaches value beyond that "fairly attributable to economic activity within the taxing State." *Jefferson Lines*, 514 U.S. at 185. The Tax Court recognized that the refusal by the Department to adjust the sales factor to include the repatriated income ignored the basic tenets of state taxation enunciated by the Court, *e.g.* to ensure taxes are fairly attributed to a taxpayer's business activity in a state, there must be a correlation between the tax base and the apportionment formula.

C. Oregon's Disparate Treatment of Foreign-Source Income Unconstitutionally Discriminates Against Foreign Commerce

In the Commerce Clause context, discrimination means differential treatment that burdens out-of-state commerce relative to comparable in-state commerce. It is well established that a state law is discriminatory if it "simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *See Oregon Waste Systems, Inc. v. Department of Environmental Quality*, 511 U.S. 93, 99 (1994). The Supreme Court has made clear that a state tax that discriminates against foreign commerce is particularly suspect because of the United States' need to maintain uniformity in foreign economic relations. *See Japan Line, Ltd.*, 441 U.S. 434.

In *Kraft General Foods, Inc. v. Iowa Department of Revenue & Finance*, 505 U.S. 71 (1992), the Court held that Iowa violated the Foreign Commerce Clause by treating dividends received from foreign subsidiaries less favorably than dividends received from domestic subsidiaries. *Id.* at 79-82. The Court emphasized

that a state preference for domestic commerce over foreign commerce is unconstitutional even where the taxing state itself receives no direct economic benefit. Oregon's failure to include the repatriated income (or sales related to that income) in the apportionment formula treats foreign source income less favorably than domestic income in violation of the third prong of *Complete Auto* and the Supreme Court's test of fair apportionment. *Container Corp. of Am.*, 463 U.S. at 169-70.

Oregon imposes a corporate excise tax measured by net income for the privilege of doing business in Oregon. ORS 317.010(5). Corporations that are engaged in the same unitary business that file a consolidated return for federal tax purposes and have either one member that is doing business in Oregon or have Oregon-source income must file a consolidated return for Oregon purposes. ORS 317.710(5)(a); OR. Admin. R. 150-317-0550(1). The starting point for the Oregon unitary business group is the federal filing group, which by default is required to use the water's-edge reporting method, *e.g.* unitary foreign affiliates are excluded from the Oregon consolidated return.[7] ORS 317.705. Thus, the Oregon corporate excise tax scheme includes the income of domestic affiliates in the tax base and

[7] *US West, Inc. v. Oregon Dept. of Rev.*, 20 Or. Tax 342 (Or. Tax. Ct. 2011); *Costco Wholesale Corp. v. Oregon Dept. of Rev.*, 20 Or. Tax 537 (Or. Tax. Ct. 2012); *StanCorp Fin. Grp., Inc. v. Oregon Dept. of Rev.*, 21 Or. Tax 120 (Or. Tax. Ct. 2013).

correspondingly apportions that tax base by including the receipts (sales) of those domestic affiliates in the computation of the apportionment formula.

Oregon's inclusion of the repatriated income without a corresponding adjustment to the apportionment formula underscores the discriminatory nature of the Department's position. As a matter of federal law, IRC § 965 accumulated foreign earnings are deemed to have been repatriated and included in the income of the United States shareholder. Oregon likewise treats those amounts as dividend income by allowing an 80 percent dividends received deduction under ORS 317.267(2)(b), while taxing the remaining 20 percent. Thus, Oregon affirmatively chose to include a portion of the foreign earnings in the corporate excise tax base. Having included that income in the tax base, Oregon cannot have it both ways and disregard the foreign business activity generating that income when apportioning the income.

Oregon's treatment of domestic and foreign-source income is materially different. While the income earned through domestic unitary affiliates is reflected in both the tax base and the apportionment formula (*e.g.* the unitary affiliates' receipts are included in the sales factor).[8] By contrast, IRC § 965 income generated

[8] It is recognized that domestic dividends and IRC § 965 income, which is regarded as a dividend for Oregon purposes, are treated the same under the ORS 317.267. The discrimination does not occur as a result of the treatment of these items as dividends but rather it is a result of the differential treatment of the underlying income. If income was earned by a domestic unitary affiliate, the receipts that

by foreign unitary affiliates is included in the tax base, but the receipts and business activity producing that income is excluded from the apportionment formula. As a result, foreign-source income bears a greater Oregon tax burden than similarly situated domestic-source income.

This disparate treatment mirrors the constitutional defect identified in *Kraft*. Oregon taxes income generated through foreign operations while denying the factor representation afforded to comparable domestic operations. The resulting asymmetry discriminates against foreign commerce and violates the third prong of *Complete Auto*. It also increases the risk of international multiple taxation because the earnings underlying the IRC § 965 income were previously subject to foreign taxation. *See Japan Line, Ltd.*, 441 U.S. at 446-451. Accordingly, the Department's formula fails both the discrimination and fair-apportionment requirements of the Commerce Clause.

2. THE DEPARTMENT'S POSITION IS CONTRARY TO THE UNITARY BUSINESS PRINCIPLE.

Oregon's apportionment statutes contemplate that income included in the tax base will generally be reflected by related receipts included in the sales factor unless specifically excluded. ORS 314.650 provides that income of a taxpayer

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generated that income would have been included in the computation of the sales factor. The Department's position denies similar treatment for the receipts that generated the IRC § 965 income.

conducting a unitary business within and without Oregon shall be apportioned using the state's single-sales-factor formula. ORS 314.650(1). The purpose of the formula is to measure the portion of the taxpayer's business activity attributable to Oregon. The sales factor is determined under ORS 314.665. That statute measures Oregon's share of the taxpayer's total receipts by comparing Oregon receipts in the numerator with total receipts in the denominator.

The Department's rationale for excluding the receipts - that the repatriated income was not from Microsoft's primary business activities - improperly treats the foreign subsidiaries' separate corporate status as dispositive even though the IRC § 965 amount reflects income generated through Microsoft's integrated, unitary worldwide software business. This rationale conflicts with the fundamental unitary business principles that have been incorporated into the Oregon statute.[9] ORS 314.665(6)(a) excludes receipts arising from the holding of intangible assets unless the receipts are derived from the taxpayer's primary business activity. IRC § 965 required a one-time inclusion of previously deferred foreign earnings. Congress's timing for the repatriation of that income did not alter how those earnings were generated. The fact that accumulated earnings were recognized in one year does not mean those earnings ceased to be derived from Microsoft's primary business activity. The operative inquiry under ORS

[9] ORS 317.705(3)(a).

314.665(6)(a) is the character and source of the receipts, not whether federal law required their recognition in a single tax year or whether the mechanism for receiving the repatriated income was a dividend or deemed dividend.

The Department, in contravention of the fundamental unitary principles and the economic reality of Microsoft's unitary business, rewrites the relevant statutory inquiry to ask whether Microsoft's primary business is "holding CFC stock." The stipulated facts establish that Microsoft, its domestic affiliates, and its foreign affiliates operated a single unitary enterprise. *Microsoft*, 25 OTR at 708. That single enterprise is devoted to developing, manufacturing, marketing, distributing, licensing, selling, and supporting Microsoft products and services. The repatriated income is not a passive return from a disconnected investment portfolio. Rather, the repatriated income is deferred earnings from foreign affiliates integrated into Microsoft's worldwide operating business. The Department's reliance on Microsoft's foreign affiliates' separate legal identity and their exclusion from the water's-edge return elevates form over the substance of the underlying business activity. Oregon's water's-edge reporting requirement does not convert the foreign operations into economically unrelated investments or erase their unitary relationship with Microsoft's primary business activity.[10] The water's-edge

[10] Oregon defines a unitary business group as a corporation or group of corporations engaged in business activities that constitute a unitary business. ORS 317.705(2). A unitary business is a business enterprise in which there exists

requirement governs which entities are included in the Oregon consolidated return; it does not answer the statutory question of whether a deemed dividend from unitary affiliates was derived from Microsoft's primary business activity. The Department's attempt to treat corporate separateness as dispositive is contrary to the statute as it would make the statutory exception unavailable whenever a unitary business is conducted through a foreign subsidiary, even where the receipts plainly reflect the taxpayer's core operating business.

The Supreme Court's decision in *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425 (1980) supports the conclusion that the underlying business activity is what controls not the form of the investment. The Court in *Mobil* held where dividends reflect profits from a functionally integrated enterprise, they are income earned in the unitary business. *Id.* at 441. While *Mobil* addressed apportionability, the core principle enunciated by the Supreme Court remains directly relevant to the meaning of "derived from."[11] A unitary dividend "derives from" the integrated

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directly or indirectly between the members or parts of the enterprise a sharing or exchange of value as demonstrated by: (1) centralized management or a common executive force; (2) centralized administrative services or functions resulting in economies of scale; or (3) flow of goods, capital resources or services demonstrating functional integration. ORS 317.705(3)(a).

[11] ORS 314.665(1) excludes from the computation of the sales factor gross receipts arising from the sale, exchange, redemption or holding of intangible assets unless the receipts "are derived from the taxpayers primary business activity."

business activity that generated the underlying earnings, not merely from the parent's technical ownership of stock.

The Department's rationale is contrary to the statute and the unitary business principle as it elevates form over substance. IRC § 965 income is not from investment activity or a speculative gain from selling an asset. Rather the purpose of IRC § 965 was to attribute to Microsoft accumulated earnings that its controlled foreign corporations had already realized while conducting Microsoft's ongoing worldwide business. The federal law's use of a deemed-dividend mechanism does not sever the receipts from the business operations that produced them.

Finally, the Department's argument that ORS 314.665(6)(c), relating to the occasional sales of fixed assets, supports the exclusion of the repatriated income from the apportionment formula is unrelated to the facts at issue. That statutory provision addresses gross receipts from incidental or occasional asset dispositions. The repatriated income is not a receipt from an occasional sale of an asset. The repatriated income reflects operating earnings accumulated from Microsoft's unitary business activities. Applying the fixed-asset rule by analogy would improperly extend an exclusion beyond the statute.

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VI.

CONCLUSION

The constitutional defect in the Department's position is straightforward. Oregon chose to include billions of dollars of IRC § 965 income in Microsoft's tax base. Having done so, Oregon is constitutionally required to utilize an apportionment formula that reflected the business activity that generated that income. Instead, the Department included the income but excluded the associated foreign receipts in determining how much of that income should be attributed to Oregon. That asymmetry causes the formula to overstate Oregon's share of the income, attributes extraterritorial value to Oregon, produces distortion that is out of all appropriate proportion to Microsoft's Oregon activities, and discriminates against foreign commerce. Accordingly, the Department's failure to include foreign receipts related to the included IRC § 965 income in the apportionment formula violates the Due Process Clause, the Commerce Clause, and the Foreign Commerce Clause.

The Department's position is also inconsistent with the unitary business principle. Oregon elected to tax a portion of Microsoft's repatriated income by allowing only a partial dividend received deduction under ORS 317.267(2)(b). Having included the remainder of that repatriated income in the tax base pursuant to Oregon's corporate excise tax provisions, the Department cannot sever the

connection between that income and the receipts generating the income. The Department's actions improperly distort the apportionment formula. The resulting mismatch between the tax base and the sales factor violates Oregon's statutory framework and overstates Oregon's share of the income.

For the foregoing reasons, this court should affirm the holding of the Oregon Tax Court and also require the inclusion of the sales that generated the repatriated income to be included in the apportionment formula.

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GREENBERG TRAURIG, LLP

By: */s/ Nikki E. Dobay*

NIKKI E. DOBAY
OSB No. 071155
10260 SW Greenburg Road
Suite 400
Portland, OR 97223
Telephone: (916) 442-1111
Nikki.Dobay@gtlaw.com

Attorney for Amicus Curiae
Council On State Taxation

CERTIFICATE OF SERVICE

I hereby certify that on November 9, 2026, I served the foregoing BRIEF OF *AMICUS CURIAE* COUNCIL ON STATE TAXATION IN SUPPORT OF MICROSOFT CORPORATION on the following names persons(s) by the method indicated below, addressed to the following, and prepaying the postage thereon:

DEPARTMENT OF JUSTICE
DARREN WEIRNICK
DARREN.WEIRNICK@DOJ.OREGON.GOV
PEENESH SHAH
PEENESH.H.SHAH@DOJ.OREGON.GOV
1162 COURT STREET NE
SALEM, OR 97301-4096
TELEPHONE: 503-947-4530
FACSIMILE: 503-378-3784

Counsel for Defendant
DEPARTMENT OF REVENUE

K&L GATES LLP
ELIZABETH WHITE
ELIZABETH.WHITE@KLGATES.COM
ROBERT B. MITCHELL
ROB.MITCHELL@KLGATES.COM

EVERSHEDS SUTHERLAND US LLP
TED W. FRIEDMAN
TEDFRIEDMAN@EVERSHEDS-SUTHERLAND.COM
JEFFREY A. FRIEDMAN
JEFFFRIEDMAN@EVERSHEDS-SUTHERLAND.COM
DANIEL H. SCHLUETER
DANSCHLUETER@EVERSHEDS-SUTHERLAND.COM

Counsel for Plaintiff
MICROSOFT CORPORATION

_____ HAND DELIVER
_____ U.S. MAIL
_____ OVERNIGHT MAIL
_____ FACSIMILE
__X__ ELECTRONIC SERVICE

Greenberg Traurig, LLP

/s/ Nikki E. Dobay

NIKKI E. DOBAY
OSB No. 071155
10260 SW Greenburg Rd, Ste 400
Portland, OR 97223
Nikki.Dobay@gtlaw.com
Telephone No. 916.442.1111

Attorney for Amicus Curiae
COUNCIL ON STATE TAXATION