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April 15, 2021

Senator Ben Chipman, Chair
Representative Maureen Terry, Chair
Joint Committee on Taxation
Maine State Legislature

Via E-mail

Re: COST's Opposition to L.D. 428, H.P. 308, An Act To Prevent Tax Haven Abuse

Dear Chair Chipman, Chair Terry, and Members of the Committee:

On behalf of the Council On State Taxation (COST), I am writing to oppose legislation, L.D. 428, H.P. 308, which would include entities formed or incorporated in certain listed countries within the unitary business group subject to Maine corporate income tax, regardless of where the entity's business activities are conducted. These listed countries are jurisdictions that are perceived as offering businesses low or no tax liabilities, also known as "tax havens."

COST has a long-standing policy position in opposition to state tax haven legislation. The tax haven "blacklist" approach is arbitrary and misleading and fraught with Constitutional infirmities. And in light of the federal response to partially tax foreign source income through the Tax Cuts and Jobs Act of 2017 (TCJA) global intangible low-taxed income (GILTI) provision or the proposed Made in America tax plan, adopting a tax haven list would lead to double taxation and is severely out-of-step with federal and state tax policy.

About COST

COST is a nonprofit trade association based in Washington, D.C. COST was formed in 1969 as an advisory committee to the Council of State Chambers of Commerce, and today COST has an independent membership of over 500 major corporations engaged in interstate and international business representing every industry doing business in every state. COST's objective is to preserve and promote the equitable and nondiscriminatory state and local taxation of multijurisdictional business entities—a mission it has steadfastly maintained since its creation. Many COST members have operations in Maine that would be negatively impacted by this legislation.

Misguided Tax Policy

The COST Board of Directors has approved a policy position opposed to all state tax haven provisions which provides in part:

> *State "tax haven" designations are arbitrary and overly broad, reflect a discarded "worldwide" approach to state taxation, and are inappropriate to address income shifting or other tax avoidance concerns. Punitive treatment of multinational businesses with affiliates in countries designated by states as "tax havens" interferes with the U.S. Government's ability to "speak with one voice" on foreign affairs and is constitutionally suspect. States should limit their income tax base to the domestic "water's-edge" and not tax foreign income with little or no connection with the United States.*[1]

In addition to the policy position, the State Tax Research Institute (STRI), a 501(c)(3) research organization founded by COST, undertook a significant research project relating to state tax haven legislation. In 2016, STRI published its report, entitled "State Tax Haven Legislation: A Misguided Approach to a Global Issue," that provides a detailed analysis of why states should not adopt tax haven legislation.[2]

Detrimental Impact on the State's Economy

The blacklisting of foreign countries as tax havens and inclusion in the state tax base of income from businesses operating in these countries contravenes the approach taken by virtually all other U.S. states and nations in the world.[3] Branding foreign nations as tax havens has been widely rejected as an arbitrary and illegitimate means for dealing with tax avoidance. The U.S. federal government has never adopted the tax haven list approach as a means for defining its income tax base. Neither state legislatures nor state revenue departments are equipped to make determinations the U.S. federal government has declined to exercise. A tax haven provision will clearly deter international businesses from operating in Maine, undermining the State's ability to attract jobs and capital investment that would improve the State's overall economy. To date, only Montana maintains a blacklist approach to the inclusion of foreign income in the corporate income tax base, as similarly contemplated under this bill.

Further, when a state arbitrarily penalizes taxpayers for doing business in specific countries—which is the effect of the proposed requirement that the Revenue Services update the blacklist based on specified tax haven criteria—that state also violates the foreign Commerce Clause. The constitutional standard set forth in *Japan Line, LTD v. County of Los Angeles*, 441 U.S. 434 (1979), is clear: state tax measures may not impose a risk of multiple taxation at the international

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[1] COST's policy position on this issue is available at: https://cost.org/globalassets/cost/state-tax-resources-pdf-pages/cost-policy-positions/cost-state-tax-haven-policy-statement-final-4-16-15.pdf.

[2] Karl Frieden and Ferdinand Hogroian, *State Tax Haven Legislation: A Misguided Approach to a Global Issue*, State Tax Research Inst. (Feb. 2016), https://www.cost.org/globalassets/cost/state-tax-resources-pdf-pages/cost-studies-articles-reports/state-tax-haven-legislation--a-misguided-approach-to-a-global-issue.pdf.

[3] COST recognizes that six states (Alaska, Connecticut, Kentucky, Montana, Rhode Island and West Virginia) continue to maintain tax haven provisions in their state tax laws. All of these states, but for Montana, however, have rejected the blacklist approach and instead utilize a criteria approach.

level and may not prevent the federal government from "speaking with one voice" on international policy matters.

Arbitrary and Overly Broad Approach

Branding foreign nations as tax havens has been widely rejected as a legitimate means for dealing with tax avoidance. The tax haven lists (such as that proposed in L.D. 428, H.P. 308) are derived largely from a list created over 15 years ago by the Organization for Economic Cooperation and Development (OECD) to encourage countries to adopt greater transparency and information sharing about tax issues, not to broaden the tax base of member countries. Presently, no countries remain on the OECD's list of uncooperative tax jurisdictions. Moreover, no country, including the United States, has ever adopted the tax haven list approach as a means for defining their income tax base. Rather than providing a viable solution to the issue of foreign income sourcing, the adoption of a tax haven list creates new problems by arbitrarily targeting sovereign nations.

Out-of-Step with the State Trends for Taxing Foreign Source Income

Prior to 2018, Oregon imposed a blacklist approach similar to the bill's proposal for determining foreign income included in its corporate income tax base. During its 2018 legislative session, however, Oregon repealed its tax haven blacklist provision and created a credit for taxpayers previously subject to tax haven provisions.[4] Oregon realized that the passage of the TCJA provided an opportunity to abandon its tax haven provisions and align itself more closely with the approach taken by the federal government. The TCJA forced the Oregon Legislature to deal with the potential of double taxation of income previously taxed under its tax haven provisions that would now be included in Oregon taxable income pursuant to the TCJA, including both the repatriation transition tax (for tax years prior to 2018) and GILTI (for tax years 2018 and forward). To avoid double taxation, the Legislature opted to fully repeal its tax haven provisions in light of the complexities and potential litigation that would result from retaining the provisions.

Maine is in a strikingly similar position to Oregon. Maine has also conformed in part to the TCJA, changing how it taxes foreign source income by including the repatriation transition tax (for tax years prior to 2018) and GILTI (for tax years 2018 and forward) in its corporate income tax base, subject to the State's deduction equal to 50 percent of apportionable GILTI. This is generally more than the portion of foreign source income that Oregon currently includes in its tax base.[5] We strongly urge Maine to follow suit and not rely on the arbitrary and constitutionally infirm blacklist approach that is utilized by Montana alone.

Out-of-Step with the Proposed Federal Tax Plan for Taxing Foreign Source Income

On March 31, President Biden presented the American Jobs Plan—a more than $2 trillion infrastructure spending plan. Although still in flux, the current proposal raises revenue through a tax reform plan, the Made in America tax plan, that would significantly increase corporate

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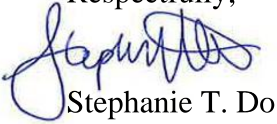
[4] Oregon S.B. 1529 (2018), https://olis.leg.state.or.us/liz/2018R1/Downloads/MeasureDocument/SB1529/Enrolled.
[5] Oregon applies its 80 percent dividend received deduction to GILTI.

income taxes, in part by expanding the GILTI tax base. This is accomplished partly by applying GILTI on a country-by-country basis, and partly by eliminating the qualified business asset investment (QBAI) deduction.[6] The proposed Biden administration approach, while broadening the impact of GILTI, is consistent with prior federal legislation that steered clear of the tax haven blacklist approach. Moreover, the Biden administration proposals, if enacted, may significantly impact Maine's corporate income tax system such that adoption of a tax haven list will exacerbate existing concerns over double taxation and protracted litigation.

Conclusion

COST opposes L.D. 428, H.P. 308 and urges Maine to reject this tax haven legislation. Please let us know if we can provide additional information or assistance.

Respectfully,



Stephanie T. Do

cc: COST Board of Directors
Douglas L. Lindholm, COST President & Executive Director

[6] The plan also proposes to increase the tax rate on GILTI to 21%.