Oregon Business Lawyer

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Corporate Activity is Still Taxing: The CAT is Out of the Bag

By Valerie H. Sasaki[1], Samuels Yoelin Kantor LLP

When we last met, we talked about the basics of Oregon's new Corporate Activity Tax. I wanted to start with a brief recap of that article, which you can find in the Business Law Section's archived newsletters. In tax parlance, a tax base is the amount you multiply the rate against to get to the tax you have to pay. The Oregon Corporate Activity Tax (CAT) is imposed on a company's "taxable commercial activity" (more or less gross business receipts minus a few things), which is a different tax base from net income.

Gross receipts taxes (or quasi-gross receipts taxes) tend to have a wider base and a lower rate. In a sense, it is similar to the Washington Business and Occupation tax. However, the CAT differs from that tax by allowing certain subtractions from receipts (35% of the greater of cost inputs or allowable labor costs). Because it does allow these subtractions, some practitioners think it is still subject to the Public Law 86-272 safe harbors we talked about last time.

I agree with one of the reviewers of this article: the name is confusing. It is the "Corporate" activity tax imposed on the "taxable commercial activity" base of a business. It is not just imposed on corporations. Ohio's tax is called the Ohio Commercial Activity Tax, so maybe they didn't want to copy that, even though portions of the act are based on the Ohio model? Or maybe, if we're being terribly cynical, the drafters wanted to call it something they thought that Oregonian voters would see as only applying to big (read: evil and opposed to puppies and kittens) business?[2] I'm sure that's not the case.

The Oregon CAT is in effect for all periods starting on or after January 1, 2020. Which is to say, it is in effect now. I hope that everyone's been tracking whether you had to make estimated payments?[3]

The Oregon Department of Revenue has been very busy writing administrative rules and, prior to being benched by the COVID-19 global pandemic, was traveling all over the state (except to downtown Portland) to have listening sessions with taxpayers and practitioners to iron out some of the concerns we had with the tax, and address some of the rules that were in temporary and draft form. The slides that they were using as well as a video from their March 10 session in Ashland, are available on its website.[4]

The revenue department has promulgated rules, several of which were issued in temporary form given the short fuse before the effective date of the tax. As many of you know or have experienced, I could blither on and on about this topic. In the interest of keeping this article under a hundred pages, I will focus on a few of the issues that have come up as we start to live with—and advise clients on how to live with—the new tax. These are: how to source a dollar, what is a unitary group, and the problem of agents. These are areas where the department has drafted rules to help taxpayers navigate through those issues. I conclude with one of my favorite soapbox items that is seemingly unrelated, but really isn't: We should not be building a sales tax piecemeal. Rather, we should have a bigger discussion about what Oregon tax should look like. With that roadmap in place, let us begin!

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In this Issue

Valerie Sasaki is a partner with Samuels Yoelin Kantor in Portland. Specializing in jurisdictional tax consulting, she works closely with companies involved in complex audits before the Oregon or Washington Departments of Revenue. Valerie also works with business owners on tax, business, and estate-planning issues in Oregon and Southwest Washington.

How do you source receipts?

The idea of sourcing is important in state tax practice generally because states can only constitutionally tax dollars that have a connection to the state. In the earlier article, I said that the question of whether a particular receipt is sourced to Oregon appeared to be interpreted under general historic sourcing rules and throwback rules.

This year, the revenue department promulgated temporary Oregon Administrative Rule (OAR) 150-317-1030. This rule states that a sale of tangible personal property will be sourced to the jurisdiction where the purchaser is located. Oregon moved to this so-called "market sourcing" for income-tax purposes relatively recently (2018).

However, if a purchaser is located in a jurisdiction that doesn't use the same sourcing rule and the transaction would otherwise escape taxation,[5] that transaction would be "thrown back" to Oregon. Sales that are thrown back are included in Oregon sales for income-tax apportionment purposes and increase the Oregon income tax the taxpayer has to pay. These sales will not be thrown back for CAT purposes.

Where the rubber really meets the road, though, is where you look at how things other than sales of tangible personal property are taxed—i.e., stuff that isn't "stuff." The department promulgated OAR 150-317-1040 that adopts market-based sourcing to source receipts not related to sales of stuff in most cases. So if someone is performing a service for an Oregon client, if the services are "delivered" in Oregon, the receipts related to that service will be sourced to Oregon. The main exception to this is in the case of real property. When someone is leasing or renting out property, if the property is in Oregon, the receipt is sourced to Oregon.

The best advice you can give your clients is to keep good records about where their clients/customers are located and where they receive the benefit of whatever your client is selling/doing. I've had a number of discussions with Oregon businesses whose primary customers are located outside of the state of Oregon. For income tax purposes, those sales may be pulled back to Oregon. However, for CAT purposes, they may not be "thrown back." For many of our small business clients, this means that they are not subject to the CAT at all because their Oregon taxable corporate activity receipts are less than $1 million.

What constitutes a unitary group?

The main idea of a unitary group is that you have related entities that work together and achieve greater efficiencies than a group of unrelated entities would be able to achieve. Because of these efficiencies, states like to tax a unitary group as a single taxpayer.

For income tax, the definition of "unitary group" is defined as the extremely (un)helpful "a corporation or group of corporations engaged in business activities that constitute a unitary business."[6] The statute has some criteria that it looks at, but the focus is on whether there is an "exchange of value" between the corporations.[7] For CAT purposes, a unitary group must have 50% or greater common ownership. Beyond that, the CAT focuses on the same criteria for unitary group as a unitary group for income-tax purposes.

Additionally, the income tax is only imposed on unitary groups of corporations. Because the CAT is also imposed on taxpayers other than corporations, you could have a unitary group that includes partnerships, trusts/estates, individuals, or other types of taxpayers.

From a practical perspective, what this means is that your clients may have very different unitary groups for CAT and income tax purposes. The revenue department has promulgated additional guidance on what constitutes a unitary group with proposed OARs 150-317-1020 and 105-317-1025. Draft OAR 150-317-1025 is particularly interesting, because it addresses what to do when your clients have a unitary group with non-USA members.

The problem of agents

I think many of us have a favorite Restatement. Mine is definitely the Restatement of Agency.[8] There are a lot of interesting practical wrinkles to the question of when "someone else doing something" is essentially "you" doing that thing. In the business context, we often employ agents to act on our behalf and facilitate transactions that otherwise would not happen. The agent can even collect funds for us. When I pay my dog walker by Venmo, I am not paying Venmo for walking my dog. I'm paying my dog walker. Venmo just happens to be the conduit that easily gets money from me to her. Venmo wouldn't have to pay income tax on the gross transaction because it would have paid out my dog-walking fees to my dog walker and deducted them from the money I

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sent to Venmo. If the CAT is a tax on gross receipts, and Venmo takes in a lot of money from Oregon payers, should it have to pay CAT on all of those proceeds? The common-sense answer would be no, because it is just acting as my dog walker's agent.

The CAT statutes recognize the importance of these conduit-type relationships and so the definition of "commercial activity" subject to tax excludes (among other things): "Property, money and other amounts received or acquired by an agent on behalf of another in excess of the agent's commission, fee or other remuneration."[9] The revenue department's administrative rule at OAR 150-317-1100 goes into greater detail about when a party can exclude amounts collected for a principal from their CAT base. It is worth noting that the examples given in this rule are the easy situations—e.g., Company A receives a dollar from B and transmits a dollar to subcontractor C. The rule states that this is a conduit payment to C and excludable from A's CAT base. In this example, it is clear that A is C's agent and also what portion of the payment should be considered a conduit payment to C. Real business transactions are sometimes less clear and will have to be evaluated based on the facts and circumstances surrounding the relationship.

What this means for you, as a practitioner, is that it is more important than ever to understand how your client does business and what its different revenue sources are. The accounting firms have made money for years by identifying places where a client had mis-characterized a revenue stream; e.g., is that really your money or are you collecting it for someone else outside of your unitary group? It's better for the client if that discussion happens now, as systems are being set up to capture amounts subject to the CAT, than in the context of an expensive refund project.

Valerie's soapbox about terrible[10] tax policy

What is good tax policy? The answer to that is a class that I have always wanted to teach. The AICPA has a great introductory guide that I commend to your attention.[11] In brief, though, I have always thought of it as the right mix of tax tools and rates to fund the government services that we as a society deem important in each stage of the economic cycle. It would be stable, so that businesses can engage in long-term planning, and it would be responsive to the different economic contributions of segments of society.

In the state tax arena, the mix of property tax, income tax, and sales tax (or a general excise tax) are referred to as a "three legged stool," because having all three allows a government to tax wealth, income, and economic activity. Since an economic downturn typically has a different impact on the various parts of the economy as it progresses, the right combination of taxes—which I think of as tools in the toolbox—can provide greater long-term stability to overall revenue. As a core concept though, the systems have to be viewed in tandem, not in isolation.

One of the sacred cows of Oregon tax is that we will never, ever, absolutely not *ever* have a retail sales tax. Voters, in fact, consistently reject statewide attempts to implement a retail sales tax.[12] Except on bikes.[13] And cars.[14] And heavy equipment leases.[15] Local voters, who presumably like to eat and drink at home, were willing to implement taxes on prepared food in Ashland and Yachats.[16] But no, no retail sales tax or corresponding use tax other than those under-the-radar sales taxes. So far. And yet, the CAT may be a back door to us having a sales tax.

One of the fun things about the CAT is that the anti-tax activists have attempted to characterize it as a "hidden sales tax," because they know Oregonians hate all things sales tax. Since businesses that try to pass the tax along to their customers are required to pay CAT on the amounts collected,[17] it functions more like a general cost-of-doing-business increase. That is, my costs to operate go up, so I have to charge more for my goods and services. While I am never in favor of paying more, this doesn't make the tax a sales tax. It just means that the business at which I am shopping has had an increase in its costs of production.

However, much as we are creating item-specific sales taxes, one piece of infrastructure that the CAT requires is required for a statewide retail sales tax. A retail sales tax is imposed on the sale at retail of tangible personal property and certain enumerated services. Tax is not imposed on wholesale sales of those same goods and services. When you are in a state that has a validly enacted sales tax, there are things that people have to generate and collect called exemption certificates. So if I'm a wholesaler who is buying a widget for resale to my customers, I give my widget vendor a certificate showing that the sale is exempt and I don't have to pay the sales tax.

The CAT provides that sales to wholesalers, where the wholesaler certifies that the item will be sold out of state, may be excluded from the CAT base. The wholesaler must provide a certificate to the vendor that contains this "to be sold out of state" certification.[18] The revenue department's temporary administrative rule also allows a wholesaler to approximate the amount of purchased items that it will eventually resell out of state. This approximation can be done by using a ratio that the rule describes. The information contained on these certificates is substantially similar to the information required on a typical sales tax resale exemption certificate. Our clients, who are absolutely not collecting and remitting a sales tax, now have to build and maintain the infrastructure to preserve and validate these certificates in the event that they are audited. This is an expensive proposition, since the third-party software vendors charge a lot to implement and maintain these systems.

Good tax policy fundamentally requires a thoughtful approach to what a particular tax contributes to the overall mix of tax tools in the toolbox. It requires coherent implementation, which may not be possible in the fractured political times that we live in. Above all, it requires being responsive to the expressed values of the folks bearing the burden of the tax. Oregon voters do not support a general sales tax

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and never have. However, the infrastructure requirements of the CAT, together with the hodgepodge of item-specific, location-specific sales taxes, may be moving us out on a slippery slope without much of a plan. We need a thoughtful plan now, more than ever, for what a sustainable revenue system looks like in this state and how to get there.

Conclusion

This section is like the "secret ingredient" in Li Shan's soup.[19] That is, there is no conclusion. There are several important legislative tweaks to the CAT that need to happen, which were not passed during the 2020 session because of the general chaos of that session.[20] Hopefully, we will see them brought forward in an emergency session or in the 2021 long legislative session. The regulatory guidance surrounding the CAT is a rapidly evolving area with some of the smartest people on both the public and private side of the revenue question trying to figure out what works in the real world. I anticipate that we'll see litigation in the next few years. Until then, stay tuned! ◆

Notes

1. Please be advised that any opinions expressed in this article are not those of the American College of Tax Counsel, Oregon State Bar, Oregon State Bar Business Law Section, Oregon State Bar Taxation Section, my firm, your firm, you, my fourth grade teacher, my University of Washington, LLM State and Local Tax professors (hi guys!), Idris Elba, Jason Momoa, cats, dogs, chickens, or anyone other than me. These are MY opinions, bad jokes, interpretations, and misintepretations of law, policy, folklore, and myth. Obviously. I barely even listen to my mother when she tries to foist off her opinions on me; do you really think I'd listen to anyone else?
2. See note 1.
3. An exciting thing to be tracking, as the rules have been evolving as payments come due. Sadly, not the subject of this article.
4. https://www.oregon.gov/dor/programs/businesses/Pages/corporate-activity-tax.aspx
5. Thus attempting to escape to the magical, tax-free place called "nowhere income."
6. Oregon Revised Statute (ORS) 317.705(2). To wit, "Centralized management or a common executive force; Centralized administrative services or functions resulting in economies of scale; or Flow of goods, capital resources or services demonstrating functional integration."
7. I have seen some guidance on the Internets from professional firms that the entities have to have 80% common ownership. This is not correct.
8. See note 1.
9. ORS 317A.100(1)(b)(M)
10. See, note 1.
11. https://www.aicpa.org/advocacy/tax/downloadabledocuments/tax-policy-concept-statement-no-1-global.pdf
12. One of my favorite memories from working in public accounting was when some of us went to a national state tax training. The instructors assigned one person per state to talk about that state's sales tax to the group. My colleague was selected and his presentation consisted of reading his slide listing the nine times that Oregon voters have rejected a statewide sales tax. Good times.
13. ORS 320.415
14. ORS 320.410
15. ORS 307.872
16. Ashland Municipal Code §4.34.020; Yachats Municipal Code §3.12.020
17. Senator Hass sent Director Ray a letter inquiring about whether it would be possible to pass the tax along to customers, so the department clarified this point.
18. OAR 150-317-1400
19. The duck dad in *Kung Fu Panda*. Spoiler alert: There is no secret ingredient. Not an opinion.
20. Seriously. This year, 2020, has really been the year that seems like it is lasting a full decade and we're not even halfway through it yet. (See Note 1)

UPDATE

The public hearing for the second set of permanent rules for the Corporate Activity Tax will take place via conference call 9:00 to 11:00 AM, Tuesday, June 23. To participate in the hearing, interested parties should call (541) 465-2805 and enter the conference PIN 234470 when prompted. Those wishing to testify at the hearing must register beginning at 8:45 AM on the conference call line. Those needing to make alternate arrangements for registration should contact the Department of Revenue (DOR) rules coordinator before 8:45 AM June 23.

Legislative Subcommittee News

The Business Law Section legislative subcommittee is working closely with the Oregon Laws Commission to examine Oregon's relationship to the model acts, and has successfully sponsored legislation to help practitioners fix corporate documentation situations discovered after the fact.

Reach out to Kara Tatman at Perkins Coie if you are interested in being involved with the Section's legislative subcommittee. ◆

What Business Lawyers Need to Know About the Tax Aspects of Fixing Mistakes

By Gwendolyn Griffith, Tonkon Torp LLP

Gwendolyn Griffith is a partner at Tonkon Torp LLP, Her practice includes advice to individuals, businesses, nonprofit entities, and local governments on federal and state tax issues.

She is experienced in corporate, partnership, and individual taxation matters, as well as the income tax and transfer tax issues of trusts and estates.

Gwen also addresses international tax issues, including foreign investment in businesses and assets.

Mistakes: Sometimes we inherit them; sometimes we make them; sometimes they just pop up out of nowhere. Experienced business lawyers are good at finding ways to fix mistakes. But before breathing a big sigh of relief that all is well, consider an often-overlooked issue: What are the tax consequences of correcting a mistake?

This article will not address pure tax issues, such as an invalid S election or incorrectly reported income or deductions. Instead, it addresses the tax aspects of correcting mistakes in business transactions. The typical situation arises when a business lawyer discovers a problem with an entity's creation or with a transaction after it has closed and must find a solution. From a business lawyer's point of view, the Oregon Legislature has made corrections easier with its enactment of Senate Bill 359. This bill allows correction, by ratification or court approval, of certain imperfect actions taken by corporations and nonprofit corporations.

In the tax world, taxpayers may almost always make corrections with prospective tax effect, but that is usually unsatisfactory because, for most corrections, retroactive effect is desired. A fundamental tax principle—the "annual accounting principle"—often stands in the way of this goal. Under the annual accounting principle, tax events that occur in one year are reported on the facts as they exist in that year. Events that happen in a subsequent tax year are reported in that year. The prior year is not reopened. In other words, each tax year stands alone.

When the imperfect action involves the creation of a legal entity, the Internal Revenue Service (IRS) has long taken the taxpayer-friendly position that not every formality must be observed for an entity to be recognized for tax purposes. However, the organizers must have accomplished the bare minimum required under state law for the entity to be recognized as such under state law[1] and must have carried on some industrial, commercial, or other activity beyond mere tax avoidance.[2] While this case law evolved in the corporate context, it likely applies to the creation of any type of entity.

As a diligence matter, a business lawyer who contemplates correcting an imperfectly created entity should confirm that the entity met those minimum requirements and carried on business. It also is advisable to obtain the tax returns, if any, filed by the entity and its owners.

At the other end of the business life cycle, problems may arise with the dissolution and liquidation of an entity. For example, some forms of corporate liquidation require the corporation to adopt a formal "plan of liquidation." However, failure to adopt a formal plan is not usually fatal from a tax point of view. What matters to the IRS is the demonstrated intent of a corporation to wind up its affairs and distribute net assets to shareholders.[3] When this problem arises, the business lawyer must seek objective proof of that intention.

The most difficult tax issues arise when a change or adjustment is made to a transaction after it closes. Perhaps the transaction as documented did not reflect the parties' true intentions, or they did not understand the implications of the original transaction. Or perhaps changed circumstances require an adjustment.

If the mistake arises solely from a scrivener's error, the IRS recognizes retroactive correction through the remedy of reformation based on mutual mistake of fact. Reformation may occur either by agreement of the parties or by state court action through a nunc pro tunc or similar order of retroactivity. For reformations by agreement, the IRS inquires whether state law would allow reformation under the circumstances. If so, the correction can have retroactive tax effect.[4] However, if the mistake arises from a mistake of law, such as a party's misunderstanding of the legal effect of the transaction (including tax consequences) or the correction changes the legal relationships among the parties, the IRS resists retroactivity, even when a state court approves it.[5] In tax law, as elsewhere, distinguishing between mistakes of fact and mistakes of law is never as easy as it seems. In all of these situations, the

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This article is adapted from a presentation given to the OSB Business Law Section on Nov. 8, 2019, entitled "Oops and Oh My! What Business Lawyers Should Know About Fixing Past Tax Errors and the New Commercial Activity Tax."

IRS will be particularly skeptical of situations in which the parties appear to be gaming the tax effects of a transaction using hindsight. The business lawyer should share that skepticism when designing correction mechanisms.

In 1980, the IRS published its views on one type of adjustment: rescission of a transaction.[6] In this ruling, A sold Blackacre to B, with the proviso that if B could not obtain rezoning for the parcel within a specified time frame, B would return the parcel to A and the purchase price would be refunded. The IRS ruled that if the sale and return of Blackacre/purchase price refund occurred in the same tax year, neither transaction would be given tax effect. However, if the rescission occurred in a later tax year, the sale would be given tax effect in its year, and the later rescission would also be given tax effect in its year.

This ruling has generally been interpreted to mean that transactions unwound within the same taxable year will be treated as "tax nothings" if (1) rescission would be available under applicable state law; and (2) the parties are placed back in the positions that they would have been in had the original transaction never occurred. During the ensuing years, the IRS was lenient, allowing taxpayers to apply its principles in a wide variety of contexts, including mergers[7] and partnership conversions.[8] More recently, the IRS has backed off this interpretation, restricting tax rescission doctrine to the four corners of the original ruling and declining to issue private letter rulings on the subject.[9] Not only must rescission occur within the same tax year as the original transaction, but the parties must be placed back in their pre-transaction positions. This is easier said than done, particularly in complex business transactions.

Just as any business law correction requires documentation, the tax aspects of a correction usually require careful implementation. The first step is determining whether any of the IRS-provided streamlined procedures for certain common corrections are available. In some situations, correction will require the filing of one or more amended returns. If so, the correlative effects of these filings must be considered. In other cases, obtaining a private letter ruling may be advisable. In circumstances where the IRS will consider issuing a ruling, it can provide certainty, but this pathway is neither inexpensive nor necessarily quick.

Despite lawyers' best efforts, a transaction might not qualify for retroactive tax correction. Yet all is not lost. The IRS Code contains myriad statutory provisions that can mitigate the impact of the annual accounting concept when retroactive correction is impossible.[10] These typically complex rules allow adjustments in the year of correction that take into account the prior year's transaction without reopening that year.

Finally, as with most tax matters—*don't try this alone*. Confer with an experienced tax professional to explore both correction options and implementation. ◆

Notes

1. *Harry Wardman*, 24 BTA 102 (1931).
2. *Moline Properties, Inc. v. Commissioner*, 319 US 436 (1943). See, e.g., *Dillier v. Commissioner,* 41 TC 762 (1964). (Corporations were formed but were merely shells during tax year. No stock was issued, and the partnership continued the business through the tax year; income not taxable to corporations).
3. *Shore v. Commissioner*, 286 F.2d 742 (5th Cir. 1961).
4. See, e.g., *Richard C. Brown*, TC Memo 1980-267. (Parties agreed loan was non-recourse, but documentation mistakenly made it recourse; reformation would have been allowed under state law).
5. *Dorothy Turkoglu*, 36 TC 552 (1961). (Correction of mistake made through inadvertence will be given tax effect; order that changes legal status will not be given effect).
6. Rev. Rul. 80-58, 1980-1 CB 181.
7. PLR 200952006 (12/24/09).
8. PLR 201113023 (4/11/11).
9. See Elliott, "IRS Halts Rescission Rulings Pending Study, Guidance," 2012 TNT 5-5 (1/9/12).
10. For example, IRC §1341 provides mitigation for situations in which a taxpayer must include amounts in gross income in a year, but must later pay back those amounts; IRC §108(e)(5) provides a taxpayer-friendly rule when a purchase price adjustment occurs in a later year.

CLE Programs

Oregon Sales Taxes? The New Oregon and Portland Taxes on Gross Receipts
Friday, June 12, 2020/2:00–4:00 PM
MBA Seminar via Zoom
Click to Register

My Client's Commercial Real Estate Mortgage is Due, Now What?
Tuesday, June 16, 2020/10:00–11:00 AM
OSB Audio Webcast
Click to Register

Working Remotely: Ethical & Practical Guidance During & After COVID-19
Tuesday, June 16, 2020/10:00–1:00 AM
OSB Webinar
Click to Register

Preventive Law and Coronavirus Series: Contracts
Wednesday, June 17, 2020/10:00–11:30 AM
OSB Seminar
Click to Register

Governance and Management Agreements for Nonprofit Organizations
Thursday, June 18, 2020/10:00–11:00AM
OSB Audio Webcast
Click to Register

Holding Business Interests in Trusts
Friday, June 19, 2020/10:00–11:00 AM
OSB Audio Webcast
Click to Register

Opportunity Zones: The New Wave of Real Estate Finance
Monday, June 22, 2020/10:00–11:00 AM
OSB Audio Webcast
Click to Register

The UCC Made Easy
Tuesday June 23, 2020/6:30 AM–3:00 PM
OSB Webinar
Click to Register

Introduction to M&A Process and Key Tips for Success
Tuesday June 23, 2020/Noon–1:00 PM
OSB Webinar
Click to Register

One Simple Step, 100% Better Contract
Wednesday, June 24, 2020/10:00–11:00 AM
OSB Webinar
Click to Register

Job Postings

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Oregon State Bar Business Law Section

The mission of the Oregon State Bar Business Law Section is to provide excellent service to the diverse group of business-law practitioners throughout the State of Oregon by providing regular, timely, and useful information about the practice of business law, promoting good business lawyering and professionalism, fostering communication and networking among our members, advocating improvement of business law, and supporting Oregon's business infrastructure and business community.

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