

SMART GROWTH COALITION

June 6, 2023

Chair Mark Meek
Vice-Chair Brian Boquist
Senate Finance & Revenue Committee
Oregon State Legislature
900 Court Street NE
Salem, OR 97301

Sent electronically

RE: Legislature Should Avoid Exploiting Loopholes to Raise Taxes (SB 140-3)

Dear Chair Meek, Vice-Chair Boquist, and Members of the Committee:

Thank you for the opportunity to submit these comments on behalf of the Smart Growth Coalition regarding the proposed changes to the corporate activity tax in the -3 amendment to SB 140. While we understand the desire to provide tax relief to small businesses, the amendment may run afoul of the Oregon Constitution and undermine the rules governing the legislature's management of the tax system. We vehemently oppose this proposal.

About the Smart Growth Coalition

The Smart Growth Coalition is a consortium of traded sector businesses with significant operations in Oregon. Our coalition was formed in 1999 to add technical expertise to state legislative proceedings regarding proposed reforms to state tax law affecting businesses who have made investments in jobs and capital projects in the state. Our members are unified in their commitment to sound tax policies that encourage investment in Oregon and provide technical simplicity and clarity to the state tax code.

-3 Amendment Ignores Legislature's Diligence to the Tax Burden of a Gross Receipts Tax

During the 2019 session, the Joint Committee on Student Success carefully studied the tax incidence of the corporate activity tax on businesses, consumers, and the economy at large. The Subcommittee on Revenue dedicated five hearings to exploring different options for the tax base, rates, and offsets to reduce the economic distortions of a gross receipts tax. The -3 amendment throws all that work out the window and worsens the economic distortions.

Although gross receipts taxes are a stable and powerful revenue tool, they also impose significant burdens on the economy, namely through tax pyramiding. During the 2019 session, the legislature took great care to understand the economic implications of a gross receipts tax. The subcommittee utilized Oregon's dynamic revenue model, the Oregon Tax Incidence Model, to explore the tax's impact on personal income, employment, population, investment, and consumer prices. In 2019, the subcommittee utilized that information to make policy decisions to reduce the economic distortions of a gross receipts tax. In particular, the legislature established the rate and subtraction percentages to soften these distortions. Today, however, the committee is simply looking at its policy decisions through the lens of rates and political tradeoffs, endangering the equilibrium and potentially making the corporate activity tax more burdensome on consumers and businesses.

New "Loophole" to Supermajority Requirement to Face Scrutiny

We are also deeply concerned about the committee exploiting a perceived "loophole" in the supermajority requirement which, at best, seems highly questionable. The Oregon Supreme Court has established a two-part test for determining if a bill is a "bill for raising revenue" subject to the Oregon Constitution's origination clause and supermajority threshold for tax increases. The first part of the inquiry is to determine if the measure brings money into the treasury. If it does not, then that is the end of the inquiry.¹ If it does, the second part of the inquiry is to determine if it includes a new tax with a rate or raises the rate of an existing tax.²

We understand some believe that if a bill's overall effect does not increase *net* revenues, it does not "bring money into the treasury," and, thus, ends the inquiry determining if it is a "bill for raising revenue." While that is a creative theory, it will face considerable scrutiny in the courts. The explanatory statement for Measure 25 (1996), which established the three-fifths supermajority requirement, says, "Measure 25 would apply only if a bill has a primary purpose of raising revenue." **The -3 amendment's primary purpose is clearly to raise revenue to pay for spending on tax expenditures. Thus, the net revenue impact is irrelevant because the bill raises revenue and contains the essential features of a tax.**

Legislature Should Fast-Track Constitutional Challenges for Supermajority Questions

During a 2016 interim hearing of the Senate Finance & Revenue Committee, Legislative Counsel (LC) explained the bounty of case law governing these issues is extremely limited.³ LC suggested the legislature create a fast-track process for legal questions concerning these constitutional provisions directly to the Oregon Supreme Court. In the following session, the

¹ *Bobo v. Kulongoski*, 338 Or 111, 107 P3d 18 (2005)

² *City of Seattle v. Dept. of Revenue*, 357 Or 979 (2015)

³ "Legislative Counsel: Recent State Supreme Court Decisions on Bills for Raising Revenue." Senate Interim Committee On Finance and Revenue, May 23, 2016.

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House Revenue Committee introduced a measure, [HB 2053](#), providing this expedited process for legal review, but the legislation never received a hearing.

If the committee seeks to exploit perceived loopholes in the constitutional rules governing tax increases, we advise the committee to create an expedited process to streamline challenges. We believe that doing so is mutually beneficial for the legislature and taxpayers. The current legal process requires a taxpayer to receive a final tax determination and appeal before beginning a challenge in the courts. This process can take three to ten years, perhaps even longer, for the Oregon Supreme Court to determine the outcome. If the loophole proposed in the -3 amendment to SB 140 fails to survive scrutiny in the courts, the outcome could be devastating for the taxpayers the bill aims to help. The healthcare and small businesses receiving relief from the measure may be required to pay back taxes on amounts otherwise owed without the measure, a cost some of these firms may be unable to pay.

It would be prudent for the legislature to provide an expedited review process to raise these questions to the courts. Rather than taking up to a decade, the courts would resolve these questions much faster, providing certainty for taxpayers and guidance to the legislature as it manages the tax system.

Conclusion

We vehemently oppose the tax increases proposed in the -3 amendment to SB 140. Even more so, we oppose the perceived loophole the legislature is purporting to use to avoid the constitutional requirements for bills for raising revenue. The legislature should not play fast and loose with these rules and throw doubt on a major funding mechanism for the state's public schools. We advise the committee to reject the -3 amendment and the notion that it can pick and choose how the constitutional rules apply to bills for raising revenue.

Sincerely,

Jeff Newgard
Smart Growth Coalition
jeff@peakpolicy.com