

CLEAN ENERGY FUND

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From: Nikki Dobay <ndobay@cost.org>
Sent: Thursday, February 21, 2019 11:25 AM
To: Council Clerk – Testimony
Subject: COST Comments in Opposition to Portland Ordinance No. 160--Portland's Retail Receipts Tax
Attachments: 02212019 COST Comments in Opposition to Portland Ordinance No 160_Retail Receipts Tax FINAL.pdf

To whom it may concern:

Please find attached the above referenced comments regarding Ordinance No 160, which is up for a public hearing this afternoon. I plan to attend that meeting and provide oral comments regarding this ordinance as well.

I appreciate your time on this matter, and thank you in advance for your time.

Nikki

Nikki E. Dobay

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February 21, 2019

VIA EMAIL

**Re: COST Opposition to Ordinance No. 160—Proposed Amendments to
Portland Retail Receipts Tax**

Dear Mayor Wheeler and Portland City Council Commissioners:

On November 6, 2018, Portland voters approved a one percent tax on certain retail receipts by businesses that meet certain national and city sales thresholds (hereinafter referred to as the “retail receipts tax”). The City of Portland Revenue Division (Revenue Division) is charged with administering the retail receipts tax. The Council On State Taxation (COST) appreciates the significant challenges the Revenue Division faces in administering this retail receipts tax, which is the first of its kind in the U.S. Nevertheless, several of the Revenue Division’s proposed amendments to the retail receipts tax in Ordinance No. 160 go significantly beyond the tax that was approved by voters. And, while the Revenue Division describes these changes as “minor” and asserts they are being suggested “[t]o aid in clarity and administration,” the Revenue Division’s proposed amendments are likely to create greater ambiguity, broaden the scope of businesses subject to the tax, and result in litigation. The City Council lacks the inherent authority to tax; therefore, COST urges the Council to reject the Revenue Division’s proposed amendments (discussed in greater detail below) that expand the retail receipts tax beyond the scope of what the voters approved.

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 approximately 550 major corporations engaged in interstate and international business representing every industry doing business in every state. COST members conduct substantial business in the City of Portland, employ a substantial number of Portland citizens, and own extensive property within the City. 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.

The Revenue Division's Proposed Amendments Fail to Clarify and Are Unnecessary for Administration

As passed by the voters, the “ordinance requires large retailers (those with gross revenues nationally exceeding \$1 billion, and \$500,000 in Portland) pay a surcharge of one percent (1%) on gross revenues from retail sales in Portland, excluding basic groceries, medicines and health care services.” The ordinance as passed also defines “Large retailers” as follows:

“[A] business that:

- a. is subject to the Portland Business License Tax;
- b. had annual gross revenue from retail sales from all locations in the United States where the taxpayer conducts business that exceeded \$1 billion (\$1,000,000,000) or more in the prior tax year; and
- c. has annual gross revenue from retail sales within the City of \$500,000 or more in the prior tax year.
- d. the term "Large Retailer" does not include:
 - i. any manufacturer or other business that is not engaged in retail sales within the City;
 - ii. any entity operating a utility within the City;
 - iii. any cooperative recognized under state or federal law; or
 - iv. a federal or state credit union.”

Finally, the ordinance as passed defines “National gross revenue” to mean “gross revenue a business receives nationally in a given year from retail sales.”

The Revenue Division’s proposed amendments strike the references to “national,” “nationally,” and “United States” to the above referenced provisions as it relates to the \$1 billion threshold. Although the Revenue Division’s stated purposes is to clarify the ordinance as passed and assist in administration, the suggested changes create more ambiguity. As passed, the ordinance’s reference to “national” sales is clear, and the determination of the \$1 billion threshold is based on retail sales within the United States. Thus, the retail receipts tax applies only to businesses with **national or U.S.** gross receipts from retail sales that have exceeded the \$1 billion threshold (assuming the taxpayer meets the other two requirements). The use of the terms “national” and “nationally” clearly refer to the United States’ territory, and subsection (b) of the definition specifically refers to the “United States.” With the deletion of the references to “national,” “nationally,” and the “United States,” the Revenue Divisions’ proposed amendment seem to indicate a business might be required to consider its worldwide (as opposed to U.S. or national) sales; however, that is unclear. The Revenue Division adds ambiguity to a provision that was straightforward as passed.

The City Council Lacks the Authority to Broaden the Scope of Ordinance as Passed

In addition, the Revenue Division’s proposed amendments discussed above substantively change the nature of the tax as passed by voters. As passed, the retail receipts tax

is imposed on businesses with national or U.S. retail receipts in excess of \$1 billion and manufacturers were specifically excluded. The Revenue Division's proposed amendments, however, seem to broaden the scope of potential taxpayers by arguably requiring a business to include its worldwide retail receipts to determine whether it meets the \$1 billion threshold, as well as potentially including certain manufacturers. To illustrate, a business with only \$500 million of U.S. retail receipts but worldwide retail receipts in excess \$1 billion may now be subject to the tax.

The Revenue Division has stated in its feedback document that it believes the proposed amendments does not extend beyond a taxpayer's national or U.S. sales because Oregon is a "water's edge" state. Unfortunately, the Revenue Division's response is misleading. The fact that Oregon is a water's edge state does not determine whether the receipts that go into a taxpayer's denominator are U.S. or foreign sales. Rather, that fact only determines which entities are included in the Oregon filing group. For example, an entity incorporated in the U.S. (assuming it is unitary) is considered a "water's edge" company and would be included in the Oregon filing group. A non-U.S. (or foreign) entity, however, is not included in the Oregon return. Further, if an entity is included in the group, all of that company's gross sales—both U.S. and foreign—are included in the denominator of the company's Oregon sales factor. Based on the Revenue Division's response, it appears they believe that only the U.S. sales are included in the denominator of Oregon sales factor because that is what is meant by "water's edge." That is simply not true. Understanding the Revenue Division's rationale behind these proposed changes is misguided and based on its confusion about what is included in the denominator of the sales factor, we strongly urge you to reject the proposed amendments because they do, in fact, significantly expand the reach of the retail receipts tax as passed by voters.

In addition to the proposed changes already discussed, the Revenue Division proposes to delete the word "prior" in the phrase "prior tax year" found in the definition of "Large retailer." The phrase "prior tax year" in that definition is intended to provide the period during which a business is determined to meet the threshold requirements of a "large retailer" and, thus, would be subject to the tax for the next tax year. With the Revenue Division's proposed amendments, a business would be subject to and required to pay the tax in the same tax year. This proposal is a significant change to the ordinance as passed. Not only could it increase the pool of businesses subject to the tax, it would create significant uncertainty as to whether a business is subject to the retail receipts tax for any given year. Under the tax regime as passed by the voters, a business would clearly know at the end of a tax year as to whether it would be subject to the tax in the following year. Without knowing this, a taxpayer may be delinquent in making certain estimated tax payments and would likely face significant challenges in the operation of its business generally.

The City of Portland lacks the general authority to tax. Portland is a home rule city; however, home rule cities have the authority to tax only if their charters confer that authority and the authority has not been preempted by state or federal law. *See Jarvill v. City of Eugene*, 613 P.2d 1, 7-8 (Or. 1980). Unlike other home rule cities in Oregon that have a broad authority tax based on their charter provisions, the City of Portland does not have the "inherent authority to

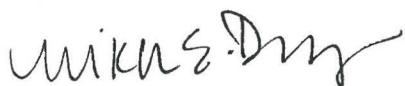
tax.” Rather, it needs express charter authorization by the voters to impose a tax. *See City of Portland v. Homeaway.com Inc. and Homeaway Inc*, Case 3:15-cv-01984-MO (U.S. District Court, for Dist. of Portland). While the voters of Portland have provided the City with the authority to impose the retail receipts tax as passed in the ordinance, the City lacks the authority to broaden that tax by increasing the pool of taxpayers that are subject to the tax, which would likely be the result if the City were to adopt the Revenue Division’s proposed amendments.

It is COST’s understanding that the Revenue Division may be proposing some of these changes (*i.e.*, the deletion of references to national sales and the prior tax period) to align the Revenue Division’s administration of this tax with the information on a taxpayer’s current year apportionment information for purposes of the Portland Business License Tax. Regardless of the Revenue Division’s intent, the result of these proposed amendments broadens the scope of the retail receipts tax as passed by voters. That broadening, however, is simply beyond the scope of the City’s authority, and the adoption of these proposed amendments would likely result in years of costly litigation for taxpayers and the City.

Conclusion

COST understands the Revenue Division is charged with administering this new and one-of-a-kind retail receipts tax as well as the challenges that accompany such a charge. Nevertheless the City Council lacks the general authority to tax, and, therefore cannot broaden the scope of the retail receipts tax as passed by voters. This would clearly be the result of the above discussed proposed amendments; thus, COST strongly urges you to reject the Revenue Division’s proposed amendments discussed above.

Respectfully,



Nikki E. Dobay

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