



STATE OF OREGON  
LEGISLATIVE COUNSEL COMMITTEE

May 15, 2015

Senator Ted Ferrioli  
Senate Republican Leader  
900 Court Street NE S323  
Salem OR 97301

Re: Effect of Senate Bill 567-A on the Kicker

Dear Senator Ferrioli:

You asked for a description of the effect that A-engrossed Senate Bill 567 would have on the calculation of the personal income tax kicker under Article IX, section 14, of the Oregon Constitution. If certain conditions are met, A-engrossed Senate Bill 567 would divert personal income revenues from the General Fund to the Education Stability Fund. You asked whether this reduction in the amount of personal income tax revenues received by the General Fund would change the basis for the calculation of the kicker and have the effect of preventing taxpayers from receiving a kicker tax credit or reducing the amount of any potential credit.

The legal issue is whether the language of Article IX, section 14, allows the Legislative Assembly by statute to change or determine what constitutes "revenues received by the General Fund" and "revenues received from General Fund revenue sources," as those phrases are used in Article IX, section 14.

Short Answer

We believe that A-engrossed Senate Bill 567 would not affect the method for calculating the kicker. For reasons described below, we believe moneys diverted from unreceipted revenues into the Education Stability Fund would still count as General Fund revenues for purposes of calculating the kicker under Article IX, section 14. This is true even though the revenues would never actually be deposited in the General Fund. Therefore, A-engrossed Senate Bill 567 would not have the effect of preventing individual taxpayers from receiving tax credits, or reducing the amount of any credit, under the kicker provisions of the Oregon Constitution.

A statute that changes the amount of revenues received from General Fund revenue sources would be a substantive change in the method for calculating the kicker under Article IX, section 14. We believe the intent of the people in adopting the constitutional provisions in November 2000 was to adopt what was the existing statutory process for calculating the kicker found in ORS 291.349 (1999 Edition). At the time Article IX, section 14, was adopted by the people, personal income tax revenues were deposited in the General Fund and counted as "revenues received by the General Fund" and "revenues received from General Fund revenue sources" for purposes of calculating the kicker. A statute that purports to remove certain personal income tax revenue from the kicker calculation would deviate from the people's intent in adopting

the constitutional kicker provisions and would impermissibly limit the application of the constitutional language.

## DISCUSSION

### A-engrossed Senate Bill 567

A-engrossed Senate Bill 567 provides as follows:

- By May 15 of each odd-numbered year (2017, for example), the Oregon Department of Administrative Services, in consultation with the Department of Revenue, would estimate the annual average amount of revenue received from personal income taxes on taxable capital gains for the two consecutive tax years beginning January 1 of the immediately preceding odd-numbered year (2015 and 2016, for example).
- By May 15 of the following odd-numbered year (2019, for example), the Oregon Department of Administrative Services, in consultation with the Department of Revenue, would estimate the annual average amount of revenue received from personal income taxes on taxable capital gains for the two consecutive tax years beginning January 1 of the immediately preceding odd-numbered year (2017 and 2018, for example).
- By June 30 of that odd-numbered year (2019, for example), the Oregon Department of Administrative Services, in consultation with the Department of Revenue, would calculate the excess, if any, of the amount estimated for the most recent two-year period over the amount estimated for the two-year period immediately preceding the most recent two-year period.
- If there is an excess, the Department of Revenue must transfer twice the amount of the excess to the Education Stability Fund. The department must make the transfer out of unreceipted revenue from personal income taxes in lieu of paying that tax revenue over to the State Treasurer for deposit in the General Fund.

### Article IX, section 14, Oregon Constitution

A court's determination of whether a statute that diverts income tax revenues from the General Fund to the Educational Stability Fund may reduce the amount of General Fund revenues used to calculate the kicker would turn on the court's interpretation of the meaning of the phrases "revenues received by the General Fund" and "revenues received from General Fund revenue sources," as used in Article IX, section 14 (1) to (4).

Article IX, section 14, directs the Governor, "[a]s soon as is practicable after adjournment sine die of an odd-numbered year regular session of the Legislative Assembly, [t]o cause an estimate to be prepared of revenues that will be received by the General Fund for the biennium beginning July 1." As soon as practicable after the end of the biennium, the Governor must cause "actual collections of revenues received by the General Fund for that biennium to be determined." If the revenues received in that biennium by the General Fund from corporate income and excise taxes exceed the estimate by two percent or more, the total amount of the excess is retained in the General Fund to be used for public education. If the "revenues received from General Fund revenue sources," other than corporate income and excise taxes, exceed the estimate by two percent or more, the total amount of the excess is returned to personal income taxpayers.

This constitutional provision resulted from the legislative referral of House Joint Resolution 17 (1999) and its subsequent adoption by a vote of the people on November 7, 2000. Prior to the

adoption of this provision, the kicker refund process was governed by ORS 291.349, which became law in 1979. ORS 291.349 remains in effect, and for the purpose of this discussion, the relevant portions of ORS 291.349 are substantially unchanged since the adoption of Article IX, section 14.

### Methodology for Interpreting Amendments to the Oregon Constitution

In interpreting constitutional provisions adopted by the voters through initiative petition or, as here, through legislative referral, Oregon courts examine the intent that the voters had when adopting the provision.<sup>1</sup> Unless the provision in question is so unambiguous that alternate readings of the provision are not possible, historical evidence of the voters' intent should also be considered. Finally, if the provision remains ambiguous, general maxims of construction should be applied to resolve the ambiguity.<sup>2</sup>

In this instance, alternative readings of Article IX, section 14, are possible. For example, the phrases "revenues received by the General Fund" and "revenues received from General Fund revenue sources" could be understood to mean whatever meaning the Legislative Assembly assigns by law. In other words, the basis for the calculation of the kicker could shift over time as the Legislative Assembly moves revenues in or out of the General Fund. In the alternative, the phrases could be read to refer to those revenues that were directed into the General Fund by law at the time Article IX, section 14, was adopted by the people at the 2000 general election.

#### 1. Textual Analysis

The starting point for assessing the intent of the voters is the text of the provision itself.<sup>3</sup> However, the text of Article IX, section 14, itself does not define the terms "revenues" or "General Fund" or the phrases "revenues received by the General Fund" or "revenues received from General Fund revenue sources." The text does not shed any additional light on the meaning of the relevant terms or whether the voters intended the meaning of those terms to shift depending on implementing statutory definitions.

The plain meaning of "revenue," however, is "the annual or periodical yield of taxes, excises, customs, duties, and other sources of income that a nation, state, or municipality collects and receives into the treasury for public use; public income of whatever kind."<sup>4</sup> Under this definition, "revenues" are moneys that are actually collected and received into the General Fund.

#### 2. Contextual Analysis

Our analysis now turns to the context of Article IX, section 14, to determine if context sheds light on what the voters understood "revenues received by the General Fund" and "revenues received from General Fund revenue sources" to mean. The context of a constitutional provision generally consists of related constitutional provisions or relevant case law. However, because Article IX, section 14, was based on ORS 291.349 as it existed in 1999, it is arguable that the Legislative Assembly's understanding of the statutory scheme at the time House Joint Resolution 17 (1999) was referred to the people may also serve as contextual evidence of the meaning of those provisions.

<sup>1</sup> *Stranahan v. Fred Meyer*, 331 Or. 38 (2000); *Ecumenical Ministries v. Oregon State Lottery Commission*, 318 Or. 551 (1994); *Roseburg School District v. City of Roseburg*, 316 Or. 374, 378 (1993).

<sup>2</sup> *Ecumenical Ministries*, 318 Or. at 559.

<sup>3</sup> *Roseburg School District*, 316 Or. at 378.

<sup>4</sup> Merriam-Webster Unabridged, <http://unabridged.merriam-webster.com/unabridged/revenue> (visited February 5, 2015).

The Oregon Constitution does not define the term "General Fund" but does refer to the General Fund in 11 separate sections in addition to Article IX, section 14.<sup>5</sup> In each case, the term seems to refer to the fund into which general tax revenues are deposited and from which appropriations for general governmental purposes are made.

The only Oregon appellate case to consider Article IX, section 14, is *Bobo v. Kulongoski*.<sup>6</sup> In *Bobo*, the Oregon Supreme Court considered whether a transfer of federal Medicaid moneys from an account in the General Fund to an account outside of the General Fund was a bill for raising revenue. The effect of the transfer was to reduce surplus revenue "kicker" refunds to be distributed to income taxpayers under ORS 291.349.<sup>7</sup> The court concluded that two issues must be answered affirmatively for a measure to be a bill for raising revenue: (1) the bill must actually bring revenues into public coffers; and (2) the bill must possess the essential features of a bill that levies a tax.<sup>8</sup> The court concluded that the mere allocation of moneys that exist in the State Treasury among different programs does not make a bill into a bill for raising revenue within the constitutional meaning of that term.<sup>9</sup>

In reaching its decision, the court determined that "the legislature understood that retroactively transferring the Medicaid funds from the General Fund to a separate account would reduce both the amount of the General Fund revenues received during the 1999-2001 biennium and also the amount of the 2001 kicker refund.<sup>10</sup> Although the *Bobo* case was decided based on the statutory kicker provisions of ORS 291.349 (1999 Edition) and not the constitutional kicker language, it is contextual history of the court recognizing that transferring moneys out of the General Fund to a separate account will have a direct effect on calculating kicker refunds.

ORS 291.349 (1999 Edition) also did not define the term "General Fund" or the term "revenues received from General Fund revenue sources." However, ORS 293.105 and 293.110 (both 1999 Edition) described specific moneys that comprise the General Fund. Further, ORS 293.115 (1999 Edition) described moneys that are separate and distinct from the General Fund. In addition, ORS 291.348 (1999 Edition) directed the Oregon Department of Administrative Services, in each even-numbered year, to "ascertain the total of General Fund revenues obtains from all sources during the preceding fiscal year, so far as is practicable." That law defined "General Fund revenues" as "all payments of money credited to the State Treasury that are placed or to be placed by the State Treasurer to the credit of the General Fund of the State of Oregon for general governmental purposes." Although this law did not apply to General Fund revenues described in ORS 291.349, it provides context for what the Legislative Assembly generally understood General Fund revenues to mean.

For purposes of personal income taxes, ORS 316.502 (1999 Edition) provided that net revenue from personal income taxes "shall be paid over to the State Treasurer and held in the General Fund as miscellaneous receipts available generally to meet any expense or obligation of the State of Oregon lawfully incurred."

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<sup>5</sup> See Article I, section 41; Article X-A, section 2; Article XI, sections 11 and 11b; Article XI-F(1), section 2; Article XI-G, section 1; Article XI-L, section 2; Article XI-M, section 2; Article XI-N, section 2; Article XI-P, section 2; Article XV, section 4.

<sup>6</sup> *Bobo v. Kulongoski*, 338 Or. 111 (2005).

<sup>7</sup> *Bobo*, 338 Or. at 113-114.

<sup>8</sup> *Bobo*, 338 Or. at 122.

<sup>9</sup> *Id.*

<sup>10</sup> *Bobo*, 338 Or. at 119.

Based on the text and context of Article IX, section 14, we believe "revenues received by the General Fund" and "revenues received from General Fund revenue sources" to refer to moneys that are actually received by the state and are directed by law to be deposited in the General Fund. However, this conclusion does not fully answer the question of whether the Legislative Assembly by statute, for purposes of calculating the kicker, may modify what moneys actually constitute "revenues received by the General Fund" and "revenues received from General Fund revenue sources."

### 3. Historical Analysis

If the intent of the voters is not clear from the text and context of a constitutional amendment, courts consider the history of that amendment. A court would proceed to "[examine], as legislative facts, other sources of information that were available to the voters at the time the measure was adopted and that disclose the public's understanding of the measure. Such information includes the ballot title and arguments for and against the measure included in the voters' pamphlet, and contemporaneous news reports and editorial comment on the measure."<sup>11</sup>

Article IX, section 14, appeared on the November 2000 general election ballot as Ballot Measure 86. Materials provided to voters at the time of the adoption of this provision are instructive. The explanatory statement, and the arguments in opposition to and the arguments in favor of the adoption of Ballot Measure 86, make it apparent that the voters believed that they were being asked to consider placing the existing kicker refund scheme into the Constitution. For example, both advocates and opponents discussed the kicker law in the present tense in a manner that suggested they envisioned a continuation of the existing practice. Also, the explanatory statement provided to voters referred to "[c]urrent statutory law" and noted that "Ballot Measure 86 would establish these 'kicker' refunds as constitutional requirements." At that time, the statutory kicker had been in existence for 11 years and had been implemented seven times in the preceding nine years.

Based on this historical evidence, we believe a court would likely find that the voters were accustomed to the existing process for generating the revenue refund and that they believed that they were being asked to ratify continuation of this process by inserting it into the Constitution.

### CONCLUSION

If certain conditions are met, A-engrossed Senate Bill 567 would divert personal income tax revenues from the General Fund to the Education Stability Fund and thereby reduce the amount of revenues received by the General Fund in a biennium. If the diverted revenues are not counted as revenues received from General Fund revenue sources, A-engrossed Senate Bill 567 would affect the calculation of the kicker because it would change the amount used to determine whether revenues received from General Fund revenue sources exceed the estimated revenues by two percent or more. Therefore, the bill could have the effect of preventing taxpayers from receiving a kicker tax credit or reducing the amount of any potential credit.

Based on our analysis of the text, context and history of Article XI, section 14, we believe that a court would hold that allowing a statute to alter the method for calculating the kicker would depart from the intent of the voters who adopted Article IX, section 14. In other words, the people contemplated that personal income taxes were revenues received from General Fund revenue sources for purposes of the kicker. If the Legislative Assembly by statute is able to define what

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<sup>11</sup> *Ecumenical Ministries*, 318 Or. at 559 n.8.

constitutes "revenues received from General Fund revenue sources" for purposes of calculating the kicker, it technically would be possible to remove enough revenues from the General Fund so that the constitutional kicker provisions are rendered functionally meaningless.

If the Legislative Assembly desires to direct moneys from the General Fund to a constitutional or statutory reserve fund and thereby remove those moneys from the kicker calculations required by Article IX, section 14, we believe an amendment to the Oregon Constitution is necessary

Further, we note that Article IX, section 14 (6), contains a process that allows the Legislative Assembly, by a two-thirds majority vote, to increase the revenue estimate for a biennium so as to avoid the requirement that excess revenues be returned to personal income taxpayers. This provision is mentioned in both the explanatory statement and the legislative argument in support of Ballot Measure 86 in the 2000 general election voters' pamphlet, which indicates that the Legislative Assembly: (1) considered the potential need to reduce or eliminate kicker refunds and retain revenues in the General Fund and (2) provided a direct procedure for doing so. Given this provision, it is unlikely that the Legislative Assembly and the people thought that the Legislative Assembly could also by law reduce or eliminate kicker refunds by altering the flow of revenues into the General Fund.

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Very truly yours,

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