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STATE OF OREGON
LEGISLATIVE COUNSEL COMMITTEE

From the desk of:

June 22, 2017

Representative Tina Kotek
Speaker of the House
900 Court Street NE Rm269
Salem OR 97301

Re: Whether House Bill 2060-A is a bill for raising revenue

Dear Speaker Kotek:

You asked whether A-engrossed House Bill 2060 is a bill for raising revenue, as that term is used in Article IV, section 25 (2), of the Oregon Constitution. Put another way, you asked whether House Bill 2060-A requires a three-fifths vote in each chamber of the Legislative Assembly for passage. The answer is no.

Article IV, section 25 (2), provides that "[t]hree-fifths of all members elected to each House shall be necessary to pass bills for raising revenue." In *Bobo v. Kulongoski*, 338 Or. 111 (2005), the Oregon Supreme Court adopted a two-step analytical framework for determining whether a bill was written for raising revenue, as that term is used in the Constitution. First, a court determines "whether the bill collects or brings money into the treasury." *Id.* at 122. If it does not, then it is not a bill for raising revenue. If it does, the court further determines "whether the bill possesses the essential features of a bill levying a tax." *Id.* If it does not, then it is not a bill for raising revenue. The Oregon Supreme Court recently elucidated this framework in *City of Seattle v. Department of Revenue*, 357 Or. 718 (2015). In that case, the Court considered whether a bill that eliminated a property tax exemption for certain out-of-state entities was a bill for raising revenue. The decision turned on the second *Bobo* element: whether the bill possessed the essential features of a tax. Noting that this question should be given a "narrow" interpretation, the Court distinguished between measures that provided for a "direct levy of a tax" and measures that merely secured "a just or expedient basis for the levying of a tax." *Id.*, at 733-734, citing *Dundee Mortgage Trust Investment Co. v. Parrish*, 24 F. 197, 201 (D. Or. 1885). The Court held that the bill in question was not a bill for raising revenue because it merely adjusted the tax base by eliminating a tax exemption. The *Seattle* Court emphasized that a focus exclusively on the revenue effects of the bill in question "misses the mark," because such a focus omits answering the question of whether the bill possesses the essential features of a bill levying a tax. *Seattle*, 357 Or. at 736. Thus, *Seattle* appears to limit bills for raising revenue to those bills that actually impose a new tax or increase the rate of tax that is imposed, while excluding bills that expand the base on which the tax is imposed or make other adjustments to the way a tax is to operate.

An appropriate starting point in determining whether HB 2060-A is a bill for raising revenue is to examine ORS 316.043, the section of existing law proposed to be amended in HB 2060-A. ORS 316.043 was enacted in 2013 and provides that a personal income taxpayer's nonpassive income from a partnership or S corporation is subject to a reduced rate of tax if the taxpayer:

- Owns an interest in a partnership or S corporation that employs at least one nonowner employee and for which nonowner employees of the partnership or S corporation collectively perform at least 1,200 hours of work in Oregon during the tax year;

- Materially participates in the trade or business of the partnership or S corporation; and

- Makes an election to be subject to ORS 316.043.

By making the election, the taxpayer also is required to not claim any other deduction, subtraction, addition or other adjustment against the nonpassive income that is taxed at the preferential tax rate established in ORS 316.043, except for depreciation adjustments directly related to the partnership or S corporation. ORS 316.043 (3), as amended by HB 2060-A.

House Bill 2060-A makes the following modifications to ORS 316.043:

- Requires the partnership or S corporation to employ at least 10 nonowner employees during the tax year instead of one nonowner employee.
- Requires each of the employees to perform at least 1,200 hours of work in Oregon by the close of the tax year.
- Requires the employees to perform the required hours of work in specified industries listed in the bill (*see* p. 2, lines 33 to 39).

Put more simply, HB 2060-A, if enacted, will cause fewer personal income taxpayers to be able to elect to have nonpassive income they receive from a partnership or S corporation be taxed at a lower tax rate than would otherwise be the case and concomitantly forbear use of most applicable deductions, subtractions and other modifications against that income. Accordingly, we view HB 2060-A as adjusting the parameters of a tax benefit rather than enacting a new tax. We therefore conclude that HB 2060-A does not possess the essential features of a tax and therefore requires only a simple majority for passage.

The opinions written by the Legislative Counsel and the staff of the Legislative Counsel's office are prepared solely for the purpose of assisting members of the Legislative Assembly in the development and consideration of legislative matters. In performing their duties, the Legislative Counsel and the members of the staff of the Legislative Counsel's office have no authority to provide legal advice to any other person, group or entity. For this reason, this opinion should not be considered or used as legal advice by any person other than legislators in the conduct of legislative business. Public bodies and their officers and employees should seek and rely upon the advice and opinion of the Attorney General, district attorney, county counsel, city attorney or other retained counsel. Constituents and other private persons and entities should seek and rely upon the advice and opinion of private counsel.

Very truly yours,

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