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STATE OF OREGON
LEGISLATIVE COUNSEL COMMITTEE

August 30, 2024

Senator Brian Boquist
900 Court Street NE S311
Salem OR 97301

Re: The corporate minimum tax and Article IX, section 3a, of the Oregon Constitution.

Dear Senator Boquist:

In light of an amendment to the corporate minimum tax proposed by Ballot Measure 118 (Initiative Petition 17) (2024), you asked for a review of a 2017 opinion in which the Attorney General concluded that corporate minimum tax revenues that are attributable to the sale of motor vehicle fuel are not subject to the highway-related use restrictions of Article IX, section 3a, of the Oregon Constitution. Because the doctrine applicable to the question has changed since 2017, we will address the question directly and comment on the 2017 opinion only where relevant.

Short answer

We believe that the corporate minimum tax, as it applies to gross receipts from the sale of motor vehicle fuel, is a tax levied with respect to the sale of motor vehicle fuel within the meaning of Article IX, section 3a (1)(a). However, in its 2018 opinion in *AAA v. State*, the Oregon Supreme Court considered the legislative history of Article IX, section 3a, and concluded that the section was intended to apply to "taxes paid only by highway users," and, with respect to fuel taxes, only to taxes including, and similar to, the gas and diesel taxes.[1] Under this doctrine, revenues from the corporate minimum tax, which is paid by corporations and not highway users, would not be subject to Article IX, section 3a. The problem with the court's conclusion is that the gas tax is not, and has never been, paid by highway users as such at all, much less *only* by them. Nonetheless, it is prudent to assume that the Supreme Court will follow its own precedents. Therefore, we believe it more likely than not that Oregon courts would hold that corporate minimum tax revenues attributable to the sale of motor vehicle fuel are not subject to Article IX, section 3a.

Article IX, section 3a, of the Oregon Constitution

Article IX, section 3a (1), provides highway-related use restrictions on revenues from taxes described in subsections (1)(a) and (1)(b):

> (1) Except as provided in subsection (2) of this section, revenue from the following shall be used exclusively for the construction, reconstruction, improvement, repair, maintenance, operation and use of public highways, roads, streets and roadside rest areas in this state:

[1] *AAA Oregon/Idaho Auto Source, LLC v. State by and through the Department of Revenue*, 363 Or. 411, 423 (2018).

> (a) Any tax levied on, with respect to, or measured by the storage, withdrawal, use, sale, distribution, importation or receipt of motor vehicle fuel or any other product used for the propulsion of motor vehicles; and
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> (b) Any tax or excise levied on the ownership, operation or use of motor vehicles.

Analytic methodology

The Oregon Supreme Court has announced:

> "We interpret referred constitutional amendments within the same basic framework as we interpret statutes[.]" That requires looking at the text, context, and legislative history of the amendment to determine the voters' intent. "The best evidence of the voters' intent is the text and context of the provision itself[.]" Context for a referred constitutional amendment includes preexisting constitutional provisions, case law, and statutory overlay.
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> "[C]aution must be used before ending the analysis at the first level, *viz.*, without considering the history of the constitutional provision at issue." That history includes "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 as the ballot title, arguments included in the voters' pamphlet, and contemporaneous news reports and editorials."[2]

Analysis

Text

ORS 317.090 imposes a corporate minimum tax on "Oregon sales," which means, in short, all gross receipts from sales without any deduction.[3] The question is whether corporate minimum tax revenues that are attributable to gross receipts from Oregon sales of motor vehicle fuel are revenues from a "tax levied on, with respect to, or measured by the . . . sale . . . of motor vehicle fuel" within the meaning of Article IX, section 3a (1)(a). (Please note that the amendments to ORS

[2] *Linn County v. Brown*, 297 Or. App. 330, 339 (2019) (citations omitted) (*quoting State v. Sagdal,* 356 Or. 639 (2015)), *aff'd* 366 Or. 334 (2020). The *Linn County* court also recognized the significance of legislative deliberation in interpreting a referred constitutional amendment. We cannot engage in that level of statutory construction here because there is no surviving record of the Legislative Assembly's deliberations regarding Senate Joint Resolution 11 (1941), which, when adopted by the people, became *former* Article IX, section 3, of the Oregon Constitution.

[3] The corporate minimum tax is payable in lieu of the corporate excise tax imposed on net income under ORS 317.061 if the amount of the minimum tax due exceeds the amount due under ORS 317.061 for the tax year. The corporate minimum tax is a tax "for the privilege of carrying on or doing business . . . within this state" imposed in an amount determined by the bracket in which the taxpayer's "Oregon sales properly reported on a return" fall. ORS 317.090 (2). As the Attorney General has explained, "'Oregon sales' for purposes of ORS 317.090 is defined as the taxpayer's total Oregon sales as determined for apportionment purposes in the Oregon sales factor, either under ORS 314.665 or as defined by department rule. ORS 317.090(1). 'Sales' means 'all gross receipts of the taxpayer that are apportionable and not allocated to a particular state.' ORS 314.610(7)." Opinion Request OP-2017-1, at 4 (April 14, 2017). Under Article II.6. of the Multistate Tax Compact, "'Gross receipts tax' means a tax, other than a sales tax, which is imposed on or measured by the gross volume of business, in terms of gross receipts or in other terms, and in the determination of which no deduction is allowed which would constitute the tax an income tax." ORS 305.653. "Apportionable income" means, in relevant part, "Income arising from transactions and activity in the regular course of the taxpayer's trade or business." ORS 314.610 (1)(a)(A).

317.090 by Measure 118 are immaterial to the legal analysis; the issue is present in the current version of the statute.) We believe "on" and "measured by" cover any tax that directly involves "the storage, withdrawal, use, sale, distribution, importation or receipt of motor vehicle fuel" under section 3a (1)(a). For instance, the use fuel tax ("diesel tax") is imposed "on the use of fuel in a motor vehicle,"[4] while the gas tax is a license tax imposed on dealers engaging in the business of selling, using, distributing or withdrawing motor vehicle fuel that is measured by the gallon of fuel.[5] On this basis, both taxes are properly treated as taxes described in section 3a (1)(a).

Under Oregon judicial doctrine, "with respect to" as used in section 3a (1)(a) must mean something other than "on" or "measured by" or it would be meaningless surplusage.[6] Taken alone, the prepositional phrase "with respect to" indicates that, as the Supreme Court found, Article IX, section 3a (1)(a), "create[s] a broad category of taxes."[7] We believe that a broad interpretation of the phrase "with respect to" that does not overlap with "on" or "measured by" points to a tax that is not directly tied to fuel sales transactions but one in which the sources of the tax base in those transactions are nonetheless identifiable enough to be quantified, or the amount subject to section 3a (1)(a) could not be determined. Revenues from a tax imposed on the gross receipts of corporate sellers of motor vehicle fuel can be categorized according to the sales that generated them because, if it is conducted rationally, a corporation operating service stations, for instance, must account separately for the receipts of its various lines of business—fuel, food, merchandise, the lottery, cigarettes, automotive services, etc.—for ordinary business reasons unrelated to taxation. And Oregon's corporate activity tax already requires the sources of gross receipts to be identified in order to exclude from taxable commercial activity "[r]eceipts from the sale, transfer, exchange or other disposition of motor vehicle fuel or any other product used for the propulsion of motor vehicles."[8]

A net income tax is different because deductions allowed against gross income to determine net income are not proportional to the sources of the corporation's gross receipts, nor is any single deduction necessarily related at all to each source of gross receipts. So, it is not possible to trace net income back to its sources in meaningful detail for purposes of section 3a (1)(a). Thus, we believe it plausible, at the least, to see the corporate minimum tax as filling a niche between taxes "levied on" or "measured by" sales of motor vehicle fuel on the one hand and a tax imposed on net income on the other.[9]

By contrast, the 2017 Attorney General opinion cited the dictionary to the effect that "with respect to" is a synonym for "with reference to" and then concluded that ORS 317.090 is not subject to section 3a (1)(a) because the text of ORS 317.090 "does not 'refer to' sales of motor vehicle fuels at all."[10] But the constitutional text does not require that the tax statute refer to motor vehicle fuel. We can say here what the Supreme Court said when interpreting the Article IX, section 3a, use restrictions: "ODOT's argument invites us to read into the constitutional text a qualification that does not exist: that the promotion of vehicular travel is the *only* purpose for which

[4] ORS 319.530 (1).
[5] ORS 319.020 (1).
[6] *State v. Clemente-Perez*, 357 Or. 745, 755 (2015) (*citing Arken v. City of Portland*, 351 Or. 113, 156 (2011) for the "well-established principle to avoid interpretations of statutes that render portions of them redundant").
[7] *AAA v. State*, 363 Or. at 421.
[8] ORS 317A.100 (1)(b)(Q).
[9] How much corporate minimum tax a corporation owes is based on where its total Oregon sales fall in a schedule of brackets. The amount owed is thus not proportional to the corporation's gross receipts. But if total gross receipts may be broken down by source, the amount of the tax that is subject to Article IX, section 3a, can be determined using the proportion of total gross receipts that is attributable to the sale of motor vehicle fuel.
[10] Opinion Request OP-2017-1, at 5.

the state may spend highway funds under Article IX, section 3a. We cannot imply that limitation from the constitutional text."[11]

Although there is no Oregon case law addressing your question, and case law from other states may be persuasive but is not binding on Oregon courts, this issue was directly addressed in a parallel situation by the Supreme Court of Ohio.[12] The Ohio Constitution restricts to highway and other related purposes those expenditures of "moneys derived from fees, excises, or license taxes *relating to* . . . fuels used for propelling . . . vehicles [on public highways]."[13] A challenge to the state's commercial activity tax (CAT) as it applied to gross receipts from the sale of motor vehicle fuel was brought because the revenues were not dedicated to the restricted purposes.[14] The Ohio Supreme Court held,

> The text and history of [Article XII, section 5a, of the Ohio Constitution,] make clear that the purpose of the amendment is to ensure that any revenue raised from taxes relating to motor-vehicle fuels is expended only for the purposes specified in Section 5a and is not diverted to other governmental purposes. . . . In view of the foregoing, the phrase "relating to" is plainly intended to be interpreted broadly.[15]

The court continued:

> [T]he term "relating to" broadly connects "fees, excises, or license taxes" to the sources from which the revenue is to be "derived," which are the "registration, operation, or use of vehicles on public highways, or to fuels used for propelling such vehicles." The evident purpose here was to ensure that these objects of fees and taxation would not be narrowed or diminished through any legislative efforts to statutorily redefine the terms as an attempted end-run to the amendment.
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> In this context, the CAT proceeds bear a logical and close connection to motor-vehicle fuels. . . . Although not a transactional tax, the amount of tax one must pay to the state because of the CAT is directly based on motor-vehicle-fuel-sales revenue. Objectively, one is hard pressed to deny the close connection between the tax paid (moneys derived) and the source (excise on fuels used) of that tax revenue. The close relationship is not severed because the excise is on the revenue derived from the sales of motor-vehicle fuel rather than the quantity of such fuel. . . . Consequently, we conclude that the CAT revenues derived from sales of motor-vehicle fuel relate to motor-vehicle fuel used for propelling vehicles on public highways as contemplated within Section 5a.[16]

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[11] *Oregon Telecommunications Ass'n v. Oregon Dep't of Transp.*, 341 Or. 418, 430 (2006).
[12] *Beaver Excavating Co. v. Testa*, 134 Ohio St.3d 565 (2012).
[13] Article XII, section 5a, of the Ohio Constitution (emphasis added).
[14] The CAT was a business privilege tax. Persons with at least $150,000 and not more than $1 million in annual gross receipts paid a flat fee. Persons with annual gross receipts of over $1 million paid the flat fee plus the amount of annual gross receipts over $1 million multiplied by two and six-tenths mills.
[15] *Beaver Excavating*, 134 Ohio St.3d at 573.
[16] *Id.* at 573-574.

Comparing the Ohio and Oregon laws, the breadth of the phrases "relating to" and "with respect to" is similar, as are the structure of the Ohio CAT and the Oregon corporate minimum tax and the constitutional use restrictions. We believe the Ohio Supreme Court's analysis here can reasonably be translated into Oregon law concerning the corporate minimum tax: the close relationship between revenues from the corporate minimum tax on gross receipts and the sale of motor vehicle fuel that generated the receipts is not severed because the tax is levied with respect to, rather than on or measured by, the sales transactions.

One final point: it is uncontroversial that a per-gallon tax levied on retail sales of motor vehicle fuel and collected from purchasers at the pump would be a tax both levied on and measured by the sale of motor vehicle fuel. But, if gross receipts from such sales are not subject to Article IX, section 3a (1)(a), then revenues from the same transaction would either be subject to subsection (1)(a) or not depending on whether the tax is payable by the purchaser or the seller, respectively. This may be how Article IX, section 3a (1)(a), was intended to work, but nothing in the text affirmatively suggests so, and this anomaly seems like an opportunity by which, in the words of the Ohio Supreme Court, the objects of taxation could be narrowed or diminished through statutory redefinition of the terms as an attempted end run around the amendment. The Legislative Assembly's preference for placing the incidence of the tax on one party to the transaction rather than the other should not necessarily dictate the application of the constitutional use restrictions to the revenues from the tax.

Context

As for the context of Article IX, section 3a, the gas tax statutes as they appeared on the books in 1942 are most relevant. We believe these statutes support our conclusion that corporate minimum tax revenues attributable to the sale of motor vehicle fuel are subject to section 3a (1)(a). Analysis of these statutes, however, is so intertwined with the history of *former* Article IX, section 3, of the Oregon Constitution, that the context and history must be analyzed together.

History

A. *AAA Oregon/Idaho Auto Source, LLC v. State by and through the Department of Revenue*, 363 Or. 411 (2018)

The 2017 Attorney General opinion read the history of *former* Article IX, section 3, as dedicating to highway purposes those taxes "imposed *only* on highway users."[17] In its 2018 decision in *AAA v. State*, the Oregon Supreme Court reached the same conclusion. For the sake of convenience, we restate the relevant constitutional text describing the taxes subject to the use restrictions under Article IX, section 3a (1):

> (a) Any tax levied on, with respect to, or measured by the storage, withdrawal, use, sale, distribution, importation or receipt of motor vehicle fuel or any other product used for the propulsion of motor vehicles; and
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> (b) Any tax or excise levied on the ownership, operation or use of motor vehicles.

Section 90, chapter 750, Oregon Laws 2017, imposed a new tax on Oregon vehicle dealers "for the privilege of engaging in the business of selling taxable motor vehicles at retail in

[17] Opinion Request OP-2017-1, at 6 (emphasis added).

this state."[18] The Act also conferred original jurisdiction on the Supreme Court to determine a single question: "[W]hether section 90 . . . imposes a tax or excise levied on the ownership, operation or use of motor vehicles that is subject to the provisions of Article IX, section 3a, of the Oregon Constitution."[19] The court concluded that the new tax was a business privilege tax and not a tax on the ownership, operation or use of motor vehicles.

To reach its conclusion, the court relied on the 1942 Voters' Pamphlet to interpret the history of the constitutional amendment:

> Article IX, section 3a, was intended to apply to "special highway user taxes," as the legislative committee explained in its argument in support of the provision. It was intended to promote fair and equitable taxation by dedicating taxes paid only by highway users—meaning, as respondent argues, taxes attributable to the use of public highways for motor vehicle transportation—to highway purposes. The committee repeatedly emphasized that the provision would apply to taxes on highway users, and the only taxes that it mentioned were taxes paid in connection with the use of public highways. Thus, it appears that Article IX, section 3a, was intended to apply only to taxes including, and similar to, the following: fuel taxes (such as gasoline and diesel taxes); ownership taxes (such as title and registration fees, which must be paid as prerequisite to public highway use); operation taxes (such as driver's license fees); and use taxes (such as ton mile taxes).[20]

We find the following two problems with the court's interpretation.

1. Oregon's gas tax is not a tax "paid only by highway users."

As used by the court, "highway user" is a synonym for "motorist" or "driver"—the 1942 argument in favor uses the term "motor vehicle user" six times interchangeably with the four instances of "highway user." The petitioners in *AAA v. State* argued that section 3a (1)(b) "applies to all taxes that are likely to be passed on to highway users[;]"[21] in other words, it is not just the legal incidence of a tax that triggers the constitutional restriction but the economic incidence as well. The court rejected this argument and concluded that Article IX, section 3a, was intended to dedicate "taxes paid only by highway users" to "highway purposes."[22]

The problem with the court's conclusion is that the voters' supposed intention with Article IX, section 3a, to describe "taxes paid only by highway users" contradicts the example the court

[18] Section 90 (1), chapter 750, Oregon Laws 2017. Section 90 is codified at ORS 320.405.
[19] Section 112 (2), chapter 750, Oregon Laws 2017.
[20] *AAA v. State*, 363 Or. at 423, *quoting* Voters' Pamphlet (November 3, 1942), at 11. The court looked at the legislative history of the 1942 amendment rather than the 1980 amendment that produced current Article IX, section 3a, because "the relevant text of the provision . . . has been in the Oregon Constitution since 1942, when it was adopted as part of *former* Article IX, section 3. . . . The descriptions of the categories have remained the same since 1942." *Id*. at 417. Moreover, if the 1980 amendment had been rejected, the language at issue would still have been in the constitution, and, "What later legislators thought is irrelevant to what an earlier legislature intended with an enactment." *Comcast Corp. v. Dep't of Revenue*, 356 Or. 282, 327 (2014).
[21] *AAA v. State*, 363 Or. at 423.
[22] *Id*.

gives of the gas tax.[23] Under ORS 319.020, a license tax is imposed on "every dealer engaging in the dealer's own name, or in the name of others, in the first sale, use or distribution of motor vehicle fuel . . . or withdrawal of motor vehicle fuel . . . for sale, use or distribution."[24] This dealer license tax is "computed on the basis of 34 cents per gallon on the first sale, use or distribution of such motor vehicle fuel . . . so sold, used, distributed or withdrawn."[25] The tax becomes collectible from dealers when they purchase fuel from a terminal position holder or another dealer, either at the rack or through spot or contract sales.[26] Dealers are required to render a monthly statement to the Department of Transportation and make payment of the tax due, computed on the number of gallons shown on the statement.[27] Thus, as a legal matter, the 2017 Attorney General opinion was mistaken to call the gas tax "a true user tax, with road users paying in direct proportion to how much they used the roads."[28]

Contrary to widespread belief, the gas tax is not a per-gallon tax levied on retail sales of motor vehicle fuel and collected from purchasers at the pump. In fact, because of the complexity of the distribution of motor vehicle fuel, highway users purchasing fuel do not even make payment to the person that did pay the gas tax. The gas tax may indeed be reflected in the retail price at the pump—along with other overhead expenses of the fuel seller's business[29]—but the legal incidence of the tax does not fall on highway users as such at all, much less *only* on them.[30]

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[23] Even if the gas tax is, in an indirect sense, "attributable to the use of public highways for motor vehicle transportation," it is not paid only by highway users. *Id.* Oregon's gas tax is found at ORS 319.010 to 319.430. The term used is not "gasoline" but "motor vehicle fuel," though it is commonly referred to as the "gas tax." The gas tax does not apply to diesel fuel, which is taxed under ORS 319.510 to 319.880 and imposed "on the use of fuel in a motor vehicle" (the "diesel tax"). ORS 319.530 (1). The court's interpretation of the history of Article IX, section 3a, correctly assumes that the diesel tax is imposed on highway users and thus described in section 3a (1)(a).

[24] ORS 319.020 (1). ORS 319.010 (6) defines "dealer" to mean:

> [A]ny person who:
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> (a) Imports or causes to be imported motor vehicle fuels or aircraft fuels for sale, use or distribution in, and after the same reaches the State of Oregon, but "dealer" does not include any person who imports into this state motor vehicle fuel in quantities of 500 gallons or less purchased from a supplier who is licensed as a dealer under ORS 319.010 to 319.430 and who assumes liability for the payment of the applicable license tax to this state;
>
> (b) Produces, refines, manufactures or compounds motor vehicle fuels or aircraft fuels in the State of Oregon for use, distribution or sale in this state;
>
> (c) Acquires in this state for sale, use or distribution in this state motor vehicle fuels or aircraft fuels with respect to which there has been no license tax previously incurred; or
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> (d) Acquires title to or possession of motor vehicle fuels or aircraft fuels in this state and exports the product out of this state.

The gas tax is also reaches aircraft fuel, but that portion of the tax is not at issue here.

[25] ORS 319.020 (1)(b). Under operation of section 45, chapter 750, Oregon Laws 2017, the current rate is actually 40 cents per gallon for both the gas tax and the diesel tax.

[26] Department of Transportation, *Fuels Tax: Distribution Chain for Petroleum,* https://www.oregon.gov/odot/Programs/OReGO%20Acct%20Mgr%20Reqs/Fuels%20Tax%20Distribution%20Chain%205.30.2024.pdf (last visited August 27, 2024).

[27] ORS 319.020 (1).

[28] Opinion Request OP-2017-1, at 5, citing City Club of Portland, *Report on Constitutional Amendment Limits Users of Gasoline and Highway User Taxes* (April 11, 1980), at 195.

[29] "There are a large number of state laws and regulations that impose explicit or implicit costs on private parties and are intended to serve a state policy goal. Such costs are typically then built into the total cost of goods and services exchanged between private sellers and purchasers." *W. States Petroleum Ass'n v. Env't Quality Comm'n*, 296 Or. App. 298, 319 n.12 (2019).

[30] *See, e.g.*, 40 Op. Att'y Gen. 59, at 1 (1979), *citing Commonwealth Edison Company v. Community Unit School District*, 44 Ill. App. 3rd 665 (1976) ("The legal incidence of a tax is determined by the entity imposing the tax in the first instance. That is, the taxing authority designates the group directly obligated to pay the tax. . . . As the legal incidence of the tax is specified by the taxing authority, a subsequent billing to an ultimate consumer separately stating the portion of a purchase price attributable to the tax does not affect its legal incidence, at least where the taxing authority does

Moreover, no part of the amount a highway user pays at the pump is remitted to the state in satisfaction of the gas tax, and delinquent gas taxes, and interest and penalties on the delinquent taxes, are not an obligation of any highway user as such.[31] By the same token, while the fleet of a person engaging in the distribution of motor vehicle fuel may use the highways, the gas tax under ORS 319.020 is imposed on the person as a dealer in motor vehicle fuel, not as a highway user.

Consequently, the court's interpretation of the history of Article IX, section 3a, might exclude the corporate minimum tax from the reach of subsection (1)(a) because it is not a tax paid only by highway users but merely a tax "likely to be passed on to highway users."[32] But the same analysis would also exclude the gas tax, as it is structured now and has been since 1919.[33] Conversely, even if the court's phrase "taxes *paid* only by highway users" does include the ultimate economic incidence of the gas tax—passed down the fuel distribution chain to highway users—it would also capture a tax on gross receipts attributable to retail sales of motor vehicle fuel.

This analysis leads us back to the text of Article IX, section 3a (1)(a) and (1)(b). The Supreme Court's interpretation of the history of Article IX, section 3a, in *AAA v. State* applies squarely to the taxes described in subsection (1)(b). Subsection (1)(b) taxes are imposed "on" noncommercial regulatory interactions between highway users and the state—"ownership taxes (such as title and registration fees . . .); operation taxes (such as driver's license fees); and use taxes (such as ton mile taxes)."[34] There is no chain of transactions between the obligation for the tax and the payment of it by the highway user. The same applies to the motor vehicle use tax, which is "imposed on the storage, use or other consumption in this state of taxable motor vehicles purchased at retail" and for which the purchaser of the vehicle is liable,[35] and to the per-mile road usage charge imposed on the owner or lessee of a motor vehicle for metered use of the highways in Oregon.[36]

By contrast, Article IX, section 3a (1)(a), describes taxes on commercial transactions, only one of which—under current law, the diesel tax—involves highway users as such. Thus, if the Supreme Court's interpretation of the history of Article IX, section 3a, is correct and applies to

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not dictate that the tax shall be paid by such ultimate consumer."); *Sproul v. Gilbert*, 226 Or. 392, 421 (1961), *citing Hammond Lumber Co. v. County of Los Angeles*, 104 Cal. App. 235 (1930) ("Where land is owned by a nonexempt landlord the legislature has seen fit, as a matter of administrative convenience in collecting the tax, to provide for one assessment against the landlord rather than to separately evaluate and assess the interests of the landlord and tenant. Under such a method of assessment the legal incidence of the tax is upon the landlord but the assessment reflects the value of the interests of both landlord and tenant and the burden of the tax eventually falls, in part at least, upon the tenant in the form of higher rent.").

[31] ORS 319.180.

[32] *AAA v. State*, 363 Or. at 423.

[33] The gas tax had the same structure in 1942 when the people approved *former* Article IX, section 3. *See* O.C.L.A. 110-1702 (1940). In 1940 "dealer" meant a person that imported, produced, refined, manufactured or compounded motor vehicle fuel for use, distribution or sale in Oregon. This definition was unchanged from the 1919 definition. *See* section 4815 (c), Olson's Oregon Laws 1920. In targeting the business of dealers of motor vehicle fuel, the legal incidence of the gas tax in 1919 was fundamentally similar as well, being a license tax imposed on "each and every dealer . . . who is now engaged . . . in the sale or distribution, *as dealers and distributors*, of motor vehicle fuel." Section 4816, Olson's Oregon Laws 1920 (emphasis added).

[34] *AAA v. State*, 363 Or. at 423.

[35] ORS 320.410 (1) and (3). Under ORS 803.203, a person may not register or title a taxable motor vehicle purchased from a seller that is not subject to the privilege tax imposed under ORS 320.405 without proof of payment of the use tax or exemption from it. The applicability of Article IX, section 3a, to the motor vehicle use tax is acknowledged by dedication of the revenue to the State Highway Fund. ORS 320.435 (2)(b).

[36] ORS 319.885 (1). Under ORS 319.920, the per-mile road usage charge is payable to the Department of Transportation.

subsection (1)(a), and if highway users as such do not engage in five of the seven commercial transactions listed in subsection (1)(a) because they are business-to-business wholesale transactions, then the words "storage," "withdrawal," "distribution," "importation" and "receipt" are meaningless surplusage. If this is the case, then in 1942 the people adopted a constitutional amendment whose language captures a broad swath of commercial motor-vehicle-fuel transactions entered into by a range of commercial entities but that was in fact intended to capture revenue only from taxes paid only by highway users. Such an interpretation of section 3a (1)(a) violates the court's doctrine as stated elsewhere: "As a general rule, we also assume that the legislature did not intend any portion of its enactments to be meaningless surplusage. *See* ORS 174.010 (instructing courts to construe statutes so as to 'give effect to all' provisions); . . . *Dept. of Transportation v. Stallcup*, 341 Or. 93, 101, 138 P.3d 9 (2006) (rejecting construction that would relegate portion of statute to surplusage, 'in contravention of this court's stated goal of giving effect to every provision of a statute')."[37]

Moreover, the court has held that the text of an Act may not be interpreted to reflect even contemporaneous legislative statements that would narrow the scope of the text. In *Burke v. State ex rel. Department of Land Conservation and Development*, for instance, the court had to determine whether the term "owner" as used in Ballot Measure 49 (2007) allowed more than one person to be considered an owner for purposes of a single Measure 49 claim.[38] The department argued that it did not, by reference to the legislative findings in Measure 49. The Supreme Court held,

> In this case, . . . the legislature included findings as part of what was ultimately passed by the voters as Measure 49. But even assuming that those findings reflect the view that only possessory owners are the targets of the law, the fact remains that those findings are not reflected in the operative provisions of the law.[39]

Likewise, in *Clackamas County v. 102 Marijuana Plants*, the trial court had interpreted a civil forfeiture statute narrowly according to the legislative findings adopted in the same Act rather than according to the broader terms of the substantive forfeiture statute itself. The Supreme Court held,

> The exhortations in section 1, [chapter 791, Oregon Laws 1989,] stated as findings, are reasons to vote for the bill, but they are not stated to be limits on the much broader wording of the operative section defining property subject to forfeiture, section 3. Its operative section enacts forfeiture authority that is much broader and extends beyond those forfeitures that could be justified by those reasons.[40]

We believe that these holdings apply with greater force to the argument in favor in the 1942 Voters' Pamphlet. After all, the legislative findings at issue in *Burke* were referred by enrolled House Bill 3540 (2007) and adopted by the people as part of Measure 49 (2007), while the legislative findings in *Clackamas County* were duly enacted by the legislature in enrolled House Bill 2282 (1989). By contrast, the 1942 argument in favor was not part of the law referred by Senate Joint Resolution 11 (1941) or adopted by the people as Ballot Measures 304 and 305

[37] *Clemente-Perez*, 357 Or. at 755.
[38] *Burke v. State ex rel. Dep't of Land Conservation & Dev.*, 352 Or. 428, 430 (2012).
[39] *Id.* at 442.
[40] *Clackamas County v. 102 Marijuana Plants*, 323 Or. 680, 688 (1996).

(1942). Thus, we believe that the 1942 argument in favor may have provided a reason to vote for the amendment, but it cannot take precedence over the much broader wording of the operative text. As the court has stated, "The best evidence of the voters' intent is the text and context of the provision itself."[41] The operative text of section 3a (1)(a)—"Any tax levied on, with respect to, or measured by the storage, withdrawal, use, sale, distribution, importation or receipt of motor vehicle fuel or any other product used for the propulsion of motor vehicles"—extends beyond taxes paid only by highway users, both on its face, in that it includes wholesale transactions, and in the context of the structure of the gas tax on the books since 1919.

2. The meaning of "on, with respect to, or measured by" was not before the court.

The second problem with the court's interpretation of the history of Article IX, section 3a, in *AAA v. State* for purposes of this opinion is that the question certified to the court was "whether section 90[, chapter 750, Oregon Laws 2017,] imposes a *tax or excise levied on the ownership, operation or use of motor vehicles* that is subject to the provisions of Article IX, section 3a."[42] The italicized language was drawn verbatim from section 3a (1)(b). The issue—a tax on vehicle dealers for the privilege of engaging in the business of selling taxable motor vehicles at retail in this state—limits the analysis to section 3a (1)(b) because it relates to motor vehicles and not to motor vehicle fuel. In other words, the question before the court was limited to an interpretation of section 3a (1)(b) and thus did not allow for an interpretation of section 3a (1)(a).

We are not aware of a legal theory according to which the court's holding in a challenge to section 3a (1)(b) could be applied to language (i.e., "with respect to") that was inserted in section 3a (1)(a) but omitted from section 3a (1)(b). In fact, the court itself relied on the fundamental textual differences between the two paragraphs:

> [T]he text shows that the drafters knew how to create a broad category of taxes, and they did so in paragraph (1)(a), but not in paragraph (1)(b) . . . . [P]aragraph (1)(a) refers to any tax levied "on, with respect to, or measured by" certain bases, whereas paragraph (1)(b) refers only to any tax levied "on" certain bases. That difference indicates that, although paragraph (1)(b) applies to all taxes levied "on" the ownership of motor vehicles, it does not apply to all taxes levied "with respect to, or measured by" the ownership of motor vehicles.[43]

In sum, in *AAA v. State* there was no challenge under section 3a (1)(a) and the meaning of "with respect to" itself was not briefed or analyzed. So, if not for the court's interpretation of the history of Article IX, section 3a, it seems unlikely that such a challenge could be decided by the precedent of *AAA v. State*.

B. *Automobile Club of Oregon v. State of Oregon*, 314 Or. 479 (1992)

Before *AAA v. State*, the Supreme Court had stated, "The purpose of Article IX, section 3a, is to prevent revenue raised from taxes *related to* motor vehicles and motor vehicle fuel from being diverted to impermissible non-highway purposes,"[44] and "The clear purpose of Article IX,

[41] *State v. Harrell*, 353 Or. 247, 255 (2013). *See also Sagdal*, 356 Or. at 642; *Linn County*, 297 Or. App. at 339.
[42] Section 112 (2), chapter 750, Oregon Laws 2017 (emphasis added).
[43] *AAA v. State*, 363 Or. at 421 (emphasis omitted).
[44] *Automobile Club*, 314. Or. at 486-487, *citing Rogers v. Lane County,* 307 Or. 534, 541 (1989) (emphasis added).

section 3a (1)(a), is to prevent diversion from the Highway Fund of money raised from burdens imposed *on* motor vehicle fuel."[45] The tax at issue was an underground storage tank assessment imposed on "persons taking delivery of motor vehicle fuel intended for resale from an underground storage tank."[46] The court held that the underground storage tank assessment was "*measured by* the receipt of motor vehicle fuel into storage tanks" and thus subject to Article IX, section 3a (1)(a).[47] (It was not, of course, an assessment paid by highway users as such.)

Unlike the version of the history of Article IX, section 3a, announced in *AAA v. State*, two of the formulations here—burdens imposed on motor vehicle fuel and a tax measured by the receipt of motor vehicle fuel—would arguably include the gas tax and exclude the corporate minimum tax. The wild card is "taxes related to . . . motor vehicle fuel." As discussed above, the phrase "relating to" convinced the Ohio Supreme Court that the text and history of that state's constitutional equivalent of Article IX, section 3a, captured the state's CAT as it applied to gross receipts from the sale of motor vehicle fuel. And as we said above, we believe that "relating to" and "with respect to" are comparable phrases for linking taxes and motor vehicle fuel sales.

Moreover, it is hard to say whether the *Automobile Club* interpretation of the 1942 history survives the later, narrower interpretation found in *AAA v. State*, *i.e.*, Article IX, section 3a, applies only to taxes paid only by highway users. The *Automobile Club* version might survive, because this first portion of the case decided a challenge under section 3a (1)(a), whereas *AAA v. State* decided a challenge under section 3a (1)(b). But even though the *Automobile Club* court used "on," "related to" and "measured by" sequentially in its analysis, the holding is that the "underground storage tank assessment is *measured by* the receipt of motor vehicle fuel into storage tanks."[48] The court did not discuss how "on," "related to" and "measured by" are different or alike. It is therefore doubtful that *Automobile Club* would provide a direct precedent to a challenge under section 3a (1)(a) claiming that corporate minimum tax revenues attributable to the sale of motor vehicle fuel are revenues from a tax levied with respect to motor vehicle fuel sales.

C. *Northwest Natural Gas Co. v. Frank*, 293 Or. 374 (1982)

In *Northwest Natural Gas*, two assessments for funding the State Department of Energy created by House Bill 2259 (chapter 792, Oregon Laws 1981) were in play: the first, based on an energy resource supplier's annual prorated share of total British thermal units (BTUs) of energy sold by all suppliers, and the second, based on an energy resource supplier's annual prorated share of the total gross operating revenue of all suppliers. House Bill 2259 was enacted in response to two recent constitutional amendments with language similar to that of Article IX, section 3a (1)(a). The more important amendment for this analysis, Article VIII, section 2, of the Oregon Constitution, provides that "the proceeds from any tax or excise levied *on, with respect to or measured by* the extraction, production, storage, use, sale, distribution or receipt of oil or natural gas and the proceeds from any tax or excise levied on the ownership of oil or natural gas" must be deposited in the Common School Fund.[49] The Oregon Supreme Court explained the outcome dictated by HB 2259 if the court held that the BTUs-sold assessment was subject to

[45] *Id*. at 488 (emphasis added).
[46] Section 18, chapter 863, Oregon Laws 1991.
[47] *Automobile Club*, 314 Or. at 488-489 (emphasis added).
[48] *Id*. at 488 (emphasis added).
[49] (Emphasis added.) The assessment scheme was also challenged under Article IX, section 3b, which caps the rate for "[a]ny tax or excise levied on, with respect to, or measured by the extraction, production, storage, use, sale, distribution or receipt of oil or natural gas, or the ownership thereof." Because the court based its decision on Article VIII, section 2 (1)(g), we will not further discuss Article IX, section 3b.

Article VIII, section 2, or Article IX, section 3b: the BTUs-sold assessment would be automatically repealed and "the director must compute his assessment on the gross-revenue basis, *which is not subject to the amendment*."[50]

From this, the 2017 Attorney General opinion concluded that the court *held* that the gross-revenue assessment was not subject to the constitutional provisions[51]—the consequence being that the corporate minimum tax revenues attributable to motor vehicle fuel sales would not be subject to section 3a (1)(a). It is not clear to us what the italicized clause in the preceding paragraph means here, but we believe it cannot be a holding of the court because the court's original jurisdiction did not extend to that issue. As the court stated:

> The *sole question* for our consideration is whether assessments imposed under ORS 469.420(4) [i.e., those based on BTUs sold] are "a tax . . . measured by the . . . sale . . . of oil or natural gas . . . that is subject to the provisions of section 2, Article VIII or section 3(b), Article IX of the Oregon Constitution.' . . . (Ch 792, § 4)."[52]

Accordingly, there is no indication that the question of the gross-revenue assessment was briefed by the parties and the court offered no analysis of the question. Furthermore, nowhere else in the opinion did the court introduce a holding so offhandedly with a relative phrase ("which is") rather than with the common declaratory formulations—"we find that," "[w]e further find that," "we hold that"—that it used to introduce its answers to the "sole question" before it.[53] Finally, whatever the scope of the decision, the court was interpreting a tax "measured by" the sale of fuel. Thus, the court has not rendered an opinion as to what a tax levied "with respect to" the sale of motor vehicle fuel means in the context of a gross receipts or any other kind of tax.

The *Northwest Natural Gas* court also had this to say about the weight of statutory text as against legislative history:

> As a court, our role is to interpret the statutes and constitutional provisions. We do not redraft these provisions; we interpret them as the legislature has drafted them. It is axiomatic that in a case of statutory and constitutional construction, this court must give preeminent attention to the language which the legislature and the people have adopted. The statutes are the law, and while the legislative history may provide invaluable insights into the legislative process, it remains supplemental to the statutes as adopted.
>
> The requirement that we give effect to the words of an enactment is doubly applicable when the law in question is a constitutional amendment adopted by the voters.[54]

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[50] *Northwest Natural Gas*, 293 Or. at 382 (emphasis added).
[51] Opinion Request OP-2017-1, at 8, *citing Northwest Natural Gas*, 293 Or. at 379. The Attorney General actually cited to the court's statement, "This assessment, under section 5[, chapter 792, Oregon Laws 1981], based on gross revenues was not subject to the constitutional amendment." That statement, however, appears in the Legislative Background section of the decision. We discuss the italicized phrase because it, by contrast, appears in the Analysis section of the decision.
[52] *Northwest Natural Gas*, 293 Or. at 376, *quoting* section 4, chapter 792, Oregon Laws 1981 (emphasis added). The court also declared, "This section [4, chapter 792, Oregon Laws 1981,] restricts our role to a determination of whether assessments under ORS 469.420(4) are valid." *Id*. at 382.
[53] *Id*. at 381, 382, 383.
[54] *Id*. at 381.

Were it not for *AAA v. State*, we would thus conclude, based on the words of Article IX, section 3a (1)(a), as drafted and adopted, rather than on any interpretation of the history of the section, that the corporate minimum tax, as it applies to gross receipts from the sale of motor vehicle fuel, is a tax levied with respect to the sale of motor vehicle fuel within the meaning of Article IX, section 3a (1)(a).

Conclusion

The question is whether corporate minimum tax revenues that are attributable to gross receipts from the sale of motor vehicle fuel are revenues from a "tax levied on, with respect to, or measured by the . . . sale . . . of motor vehicle fuel" within the meaning of Article IX, section 3a (1)(a). A gross receipts tax probably cannot be considered to be levied on or measured by motor vehicle fuel sales, but we believe that a broad interpretation of the phrase "with respect to" that does not overlap with "on" or "measured by" encompasses a tax imposed on gross receipts from the sale of motor vehicle fuel. This was the outcome of a case in which the Ohio Supreme Court determined that a gross receipts tax comparable to the corporate minimum tax was subject to that state's constitutional amendment dedicating to highway-related purposes taxes relating to motor vehicle fuels.

In *AAA v. State*, the Oregon Supreme Court interpreted the history of Article IX, section 3a, as reaching only taxes paid only by highway users, giving the gas tax, among others, as an example. There are two problems with applying this interpretation to the present question: (1) Oregon's gas tax is not a tax "paid only by highway users;" and (2) the meaning of section 3a (1)(a) was not before the court. In *Automobile Club*, the court had earlier interpreted the history in a way that might exclude the corporate minimum tax, but that interpretation might also be superseded by the narrower interpretation of the history in *AAA v. State*. Moreover, *Automobile Club* is a case about a tax measured by—not levied with respect to—fuel. The 2017 Attorney General opinion concluded that in *Northwest Natural Gas*, the court held that a tax based on gross receipts was not a tax described in section 3a (1)(a). But again, the case is about a tax measured by the sale of fuel and the gross receipts tax was not before the court.

Altogether, judicial doctrine instructs us to rely on the operative text of a constitutional provision rather than contemporaneous legislative statements that would narrow the scope of the text. This leads us to believe as a textual matter that corporate minimum tax revenues that are attributable to gross receipts from the sale of motor vehicle fuel are revenues from a tax levied with respect to the sale of motor vehicle fuel subject to Article IX, section 3a (1)(a). More likely than not this would be the outcome if not for the interpretation of the history of section 3a (1)(a) presented in *AAA v. State*. Because *AAA v. State* is good law, however, we believe it more likely than not that Oregon courts would hold that corporate minimum tax revenues attributable to the sale of motor vehicle fuel are not subject to Article IX, section 3a.

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