Stephanie T. Do
Senior Tax Counsel
(202) 484-5228
sdo@cost.org

February 14, 2023

Representative Nancy Nathanson, Chair
Representative E. Werner Reschke, Vice-Chair
Representative Jules Walters, Vice-Chair
House Committee On Revenue
Oregon Legislative Assembly

Via E-mail

Re: COST's Support of H.B. 2546 – Repeal of Throwback Rule

Dear Chair Nathanson, Vice-Chair Reschke, Vice-Chair Walters, and Members of the Committee:

I am writing on behalf of the Council On State Taxation ("COST") to support H.B. 2546 that would repeal the throwback rule in Oregon.

COST is a nonprofit trade association based in Washington, DC. COST was formed in 1969 as an advisory committee to the Council of State Chambers of Commerce and today has an independent membership of over 500 major corporations engaged in interstate and international business, including in Oregon. COST's objective is to preserve and promote the equitable and nondiscriminatory state and local taxation of multijurisdictional business entities.

The COST Board of Directors adopted the following policy position on throwback rules:[1]

> *Throwback laws seek to require companies to pay tax in one state on income that another state has chosen not to tax or is legally unable to tax. A company's tax liability in one state should not be measured by its tax in another state. Throwback rules also discourage investment in a state. Such rules must not be adopted and must be repealed where they presently exist.*

Repealing the throwback provision will result in Oregon's corporate excise tax *appropriately* measuring multijurisdictional businesses' activity in the State based on their operations in Oregon, and not those occurring in other states. It also removes the murky issue of determining when a taxpayer is taxable in another state.[2]

[1] The COST policy statement covers both throwback provisions (sourcing a sale to the origin state if a taxpayer is not taxable in another state) and throwout provisions (disregarding a sale for apportionment purposes when a taxpayer is not taxable in another state).

[2] *See Whirlpool Properties, Inc. v. Dir., Div. of Taxation*, 208 N.J. 141 (N.J. 2011); *Lorillard Licensing Co. v. Dir., Div. of Taxation*, No. A-0 (N.J. Sup. Ct., App. Div. 2015) (unpublished). Addressing Commerce Clause concerns, the New Jersey courts held the taxing state was required to use its substantial nexus standard (*e.g.,* economic nexus) and it was not material whether the destination state imposed an income tax in order to satisfy the fair apportionment prong of *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977).

For the reasons discussed above, COST urges this Committee to pass H.B. 2546. Please let me know if you have any questions.

Respectfully,

Stephanie T. Do

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