Dexter A. Johnson
LEGISLATIVE COUNSEL

900 COURT ST NE S101
SALEM, OREGON 97301-4065
(503) 986-1243
FAX: (503) 373-1043
www.oregonlegislature.gov/lc

STATE OF OREGON
LEGISLATIVE COUNSEL COMMITTEE

August 30, 2016

Senator Brian Boquist
900 Court Street NE S305
Salem OR 97301

Re: Initiative Petition 28 and corporate minimum tax revenue derived from sales of motor vehicle fuel

Dear Senator Boquist:

You asked whether, under ORS 317.090, as amended by Initiative Petition 28 (Ballot Measure 97 (2016)), corporate minimum tax revenue attributable to sales of motor vehicle fuel will be subject to Article IX, section 3a, of the Oregon Constitution. Although there is no Oregon case law directly on point, we believe the answer is yes. We have included analysis of certain consequences of this answer, in particular, possible judicial remedies. Finally, your additional questions about the potential revenue are answered in the course of the discussion below.

I. A. IP 28 provides:

> **Section 1.** ORS 317.090 is amended to read:
> (1) As used in this section:
> (a) "Oregon sales" means:
> (A) If the corporation apportions business income under ORS 314.650 to 314.665 for Oregon tax purposes, the total sales of the taxpayer in this state during the tax year, as determined for purposes of ORS 314.665;
> (B) If the corporation does not apportion business income for Oregon tax purposes, the total sales in this state that the taxpayer would have had, as determined for purposes of ORS 314.665, if the taxpayer were required to apportion business income for Oregon tax purposes; or
> (C) If the corporation apportions business income using a method different from the method prescribed by ORS 314.650 to 314.665, Oregon sales as defined by the Department of Revenue by rule.
> (b) If the corporation is an agricultural cooperative that is a cooperative organization described in section 1381 of the Internal Revenue Code, "Oregon sales" does not include sales representing business done with or for members of the agricultural cooperative.
> (2) Each corporation or affiliated group of corporations filing a return under ORS 317.710 shall pay annually to the state,

for the privilege of carrying on or doing business by it within this state, a minimum tax as follows:

(a) If Oregon sales properly reported on a return are:

(A) Less than $500,000, the minimum tax is $150.

(B) $500,000 or more, but less than $1 million, the minimum tax is $500.

(C) $1 million or more, but less than $2 million, the minimum tax is $1,000.

(D) $2 million or more, but less than $3 million, the minimum tax is $1,500.

(E) $3 million or more, but less than $5 million, the minimum tax is $2,000.

(F) $5 million or more, but less than $7 million, the minimum tax is $4,000.

(G) $7 million or more, but less than $10 million, the minimum tax is $7,500.

(H) $10 million or more, but less than $25 million, the minimum tax is $15,000.

(I) $25 million ~~or more, but less than $50 million~~, the minimum tax is $30,000.

(J) ~~$50 million or more, but less than $75 million, the minimum tax is $50,000~~ **More than $25 million, the minimum tax is $30,001 plus 2.5% of the excess over $25 million**.

~~(K) $75 million or more, but less than $100 million, the minimum tax is $75,000.~~

~~(L) $100 million or more, the minimum tax is $100,000.~~

(b) If a corporation is an S corporation, the minimum tax is $150.

(3) The minimum tax is not apportionable (except in the case of a change of accounting periods), and is payable in full for any part of the year during which a corporation is subject to tax.[1]

Section 2. The amendments to the minimum tax made by Section 1 of this 2016 Act do not apply to any legally formed and registered "benefit company," as that term is defined in ORS 60.750. A legally formed and registered "benefit company" shall pay the minimum tax set forth in ORS 317.090(2) in effect prior to the passage of this 2016 Act.

Section 3. All of the revenue generated from the increase in the tax created by this 2016 Act shall be used to provide additional funding for: public early childhood and kindergarten through twelfth grade education; healthcare; and, services for senior citizens. Revenue distributed pursuant to this section shall

[1] Please note that in *Con-Way Inc. & Affiliates v. Dep't of Revenue*, 353 Or. 616 (2013), the Supreme Court held that the version of ORS 317.090 (3) (2011 Edition) that appears in Initiative Petition 28 allowed the use of tax credits to satisfy the minimum tax imposed under ORS 317.090. ORS 317.090 (3) was accordingly amended by section 43 of House Bill 2171 (section 43, chapter 701, Oregon Laws 2015) to disallow the use of tax credits to satisfy the minimum tax. Under section 45 of HB 2171, this amendment is superseded for tax years beginning on or after January 1, 2021, and the prior version of ORS 317.090 (3) is essentially restored. In other words, the version of ORS 317.090 (3) that appears in IP 28 is not current law.

be in addition to other funds distributed for: public early childhood and kindergarten through twelfth grade education; healthcare; and, services for senior citizens.

Section 4. The amendments to ORS 317.090 made by Section 1 of this 2016 Act and Sections 2 and 3 of this 2016 Act apply to tax years beginning on or after January 1, 2017.

Section 5. If any provision of this 2016 Act is held invalid for any reason, all remaining provisions of this Act shall remain in place and shall be given full force and effect.

B. Article IX, section 3a, of the Oregon Constitution, provides in relevant part:

(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:

(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

(b) Any tax or excise levied on the ownership, operation or use of motor vehicles.

(2) Revenues described in subsection (1) of this section:

(a) May also be used for the cost of administration and any refunds or credits authorized by law.

(b) May also be used for the retirement of bonds for which such revenues have been pledged.

(c) If from levies under paragraph (b) of subsection (1) of this section on campers, motor homes, travel trailers, snowmobiles, or like vehicles, may also be used for the acquisition, development, maintenance or care of parks or recreation areas.

(d) If from levies under paragraph (b) of subsection (1) of this section on vehicles used or held out for use for commercial purposes, may also be used for enforcement of commercial vehicle weight, size, load, conformation and equipment regulation.

II. Analysis

A. Analytic methodology

In interpreting a constitutional amendment approved after legislative referral, the Supreme Court applies the same method used to interpret constitutional provisions adopted through the initiative process.[2]

[2] *Stranahan v. Fred Meyer, Inc.*, 331 Or. 38 (2000).

> [The] task is to discern the intent of the voters. The best evidence of the voters' intent is the text of the provision itself. The context of the language of the ballot measure may also be considered; however, if the intent is clear based on the text and context of the constitutional provision, the court does not look further.[3]

"In determining the meaning of the text of a statute, words of common usage that are not defined in the statute typically are to be given their plain, natural, and ordinary meaning."[4]

> The context of a constitutional provision adopted through the initiative process includes related ballot measures submitted to the voters at the same election. . . . If the intent of the voters is not clear from the text and context of the initiated constitutional provision, the court turns to the history of the provision.[5]
>
> In considering the history of a constitutional provision adopted through the initiative process, this court examines, 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.[6]

B. Applicability of Article IX, section 3a, to ORS 317.090

Article IX, section 3a, comprises three basic components: (1) a description of the revenues to which the section applies; (2) limitations on the uses to which the revenues may be put and (3) a proportionality requirement for the share of revenues generated by taxes or excises on the use of light vehicles as against heavy vehicles. Only the first component is relevant to your question, the gist of which is whether, to the extent revenue is derived from Oregon sales of motor vehicle fuel, the tax levied under ORS 317.090, as amended by IP 28, is a "tax levied . . . with respect to . . . the . . . sale . . . of motor vehicle fuel or any other product used for the propulsion of motor vehicles" within the meaning of Article IX, section 3a (1)(a).

We believe that the intent is clear from the text of Article IX, section 3a (1)(a), quoted above and that the text describes taxes levied with respect to Oregon sales of motor vehicle fuel under ORS 317.090 (1)(a). It is true that the minimum tax is a flat tax for Oregon sales that fall within the brackets listed in ORS 317.090 (2)(a)(A) to (I). Similarly, the minimum tax is not imposed on sales transactions per se. That might change our answer if the text of Article IX, section 3a (1)(a), read, "Any tax levied *on or measured by* the . . . sale . . . of motor vehicle fuel or any other product used for the propulsion of motor vehicles" and did not include the phrase "*with respect to.*" This is because "with respect to" is much broader than either "on" or "measured by." As such, we believe the text of Article IX, section 3a (1)(a), clearly applies to minimum tax revenue derived from Oregon sales of motor vehicle fuel.

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[3] *Ecumenical Ministries v. Oregon State Lottery Commission*, 318 Or. 551, 559 (1994), *quoting Roseburg School District v. City of Roseburg*, 316 Or. 374, 378 (1993) (footnote omitted).
[4] *Ecumenical Ministries*, 318 Or. at 560, *citing PGE v. Bureau of Labor and Industries*, 317 Or. 606, 611 (1993).
[5] *Id.* at 559.
[6] *Id.* at 560 n.8.

Altogether, Oregon legal authority supports the conclusion that Article IX, section 3a (1)(a), was intended to have a broad application. In *Automobile Club of Oregon v. State*, 314 Or. 479 (1992), for instance, the Supreme Court heard a challenge to section 18, chapter 863, Oregon Laws 1991, which imposed an assessment on persons taking delivery, into an underground storage tank, of motor vehicle fuel intended for resale. Looking past the fact that the charge was called an "assessment" rather than a "tax," and that section 20 (1), chapter 863, Oregon Laws 1991, stated, "It is the intent of the Legislative Assembly that funds assessed pursuant to section 18 of this Act are not subject to the provisions of . . . section 3a, Article IX of the Oregon Constitution," the court held that the assessment was a tax measured by receipt of motor vehicle fuel within the meaning of Article IX, section 3a (1)(a).[7] The court reasoned: "The clear purpose of Article IX, section 3a (1)(a), is to prevent diversion from the Highway Fund of money raised from burdens imposed on motor vehicle fuel. . . . The people of Oregon have directed that *all* government revenues from motor vehicle fuel taxes be expended for specified highway purposes; we must honor that direction."[8]

In this regard, it important to distinguish between the description of revenues in Article IX, section 3a (1)(a), and the use limitations of Article IX, section 3a (1). When analyzing whether the uses to which the underground storage tank assessment funds were dedicated in *Automobile Club of Oregon* were permissible, the Supreme Court stated, "We construe Article IX, section 3a, narrowly."[9] Likewise, in *Rogers v. Lane County*, 307 Or. 534 (1989), the Supreme Court reviewed the Voters' Pamphlet argument in favor of the ballot measure that became Article IX, section 3a, and held that the language of the argument "demonstrates that the Joint Legislative Committee clearly intended a narrow application of this new constitutional provision *to the specific purposes* stated."[10] We believe these decisions declare only that the use limitations of Article IX, section 3a (1), must be narrowly construed.

By contrast, the language from the holding in *Automobile Club of Oregon* to the effect that the assessment was subject to Article IX, section 3a—"The people of Oregon have directed that *all* government revenues from motor vehicle fuel taxes be expended for specified highway purposes"—suggests that section 3a (1)(a) must be read broadly when determining whether a charge is a tax or excise subject to the section.

The outcome in *State ex rel. Sprague v. Straub*, 240 Or. 272 (March 22, 1965), *clarified by State ex rel. Sprague v. Straub*, 240 Or. 272, 282 (April 14, 1965), bolsters this conclusion. In *Sprague*, the Supreme Court denied a petition for a writ of mandamus to compel the State Treasurer to return to the General Fund interest that had been earned on moneys in the State Highway Fund. The court held that under Article IX, section 3, of the Oregon Constitution (the pre-1980 forerunner of Article IX, section 3a), the interest earned on the moneys "becomes a part of the [fund] by implication" because it was "apparent that the intent of the people when they adopted the amendment was to guarantee that none of the 'proceeds' of the taxes and fees listed in the amendment would be diverted to any other purpose."[11] Despite the fact that there was "no actual expression" directing this outcome, the court found "a strong inference . . . that the clear intent of the people to compel the specified revenues to be used for one purpose

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[7] *Automobile Club of Oregon v. State*, 314 Or. 479, 485-489 (1992).
[8] *Id.* at 488 (emphasis in original).
[9] *Id.* at 490.
[10] *Rogers v. Lane County*, 307 Or. 534, 545 (1989) (emphasis added).
[11] *State ex rel. Sprague v. Straub*, 240 Or. 272, 279 (March 22, 1965), *clarified by State ex rel. Sprague v. Straub*, 240 Or. 272, 282 (April 14, 1965).

implies that it would include all of the interest that would accrue during the State Treasurer's holding of the revenues for their eventual use."[12]

Following the Supreme Court's opinion in *Sprague*, the Attorney General has opined that the following forms of revenue derived from assets of the State Highway Fund are subject to the use limitations of Article IX, section 3a (1):

- License agreement consideration for use of Driver and Motor Vehicle Services Division (DMV) records: Because the DMV uses moneys from the State Highway Fund to generate DMV records, when the DMV enters into a license agreement whereby the Oregon Department of Administrative Services (DAS) will become the exclusive provider of electronic access to the records, the DMV must receive fair market value for the license from DAS in order to reimburse the fund for the use of the property.[13]
- Income from sales of Motor Vehicle Division (MVD) records: Because the MVD created the MVD records by services and with materials purchased with State Highway Fund moneys, income generated from the sale of copies or computer printouts of the records accrued to the fund (net of related administrative costs) and could not lawfully be diverted to cover voter registration expenses of the MVD.[14]
- Logo sign fees: Because logo signs are public property erected by the Highway Division on highway rights-of-way purchased with State Highway Fund moneys, fees paid to the Travel Information Council for mounting commercial logos on the signs are subject to Article IX, section 3a.[15]
- Parking lot receipts: Receipts from parking facilities that were purchased, or are being leased, with moneys from the State Highway Fund are "'fruits of investment of moneys in the Highway Fund'" and are thus constitutionally dedicated to the fund.[16]
- Proceeds of exploration leases of mineral and geothermal resource rights: Because highway rights-of-way were purchased with moneys in the State Highway Fund and thus constituted a real property investment of the fund, revenues derived from exploration leases of geothermal resources and mineral rights pertaining to the rights-of-way are fruits of investment of moneys in the fund and must be credited to the State Highway Fund.[17]

Note that the rationale in *Sprague* and the Attorney General opinions is not that these "fruits of investment" are forms of revenue described in Article IX, section 3a (1). Rather, they are revenue derived from assets created with State Highway Fund moneys and therefore subject to the constitutional use limitations. The *Sprague* court reached its decision by inference and despite the fact that there was "no actual expression" directing this outcome in the constitutional text. In other words, Article IX, section 3a, applies to more revenue than is described in subsection (1)(a) and (b).

These opinions are not directly on point for your question, of course, but they suggest that if "fruits of investment" revenue is subject to the constitutional use limitations *by inference*, a

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[12] *Id.* at 280, 281. With respect to citing opinions interpreting the pre-1980 Article IX, section 3, when analyzing Article IX, section 3a, we are persuaded by the Attorney General's opinion: "We present this history of Article IX, section 3a to make it clear that the nature of the dedication of proceeds from motor vehicle fuel and ownership taxes has not changed and that, therefore, a ruling on that issue by the Oregon Supreme Court concerning former section 3 would remain applicable to section 3a." 1983 Ore. AG LEXIS 3, at 6 (December 30, 1983).
[13] 2010 Ore. AG LEXIS 4 (August 25, 2010).
[14] 1989 Ore. AG LEXIS 47 (June 16, 1989).
[15] 1983 Ore. AG LEXIS 3 (December 30, 1983).
[16] 41 Op. Att'y Gen. 37, 41-42 (1980), *quoting* 37 Op. Att'y Gen. 349, 356 (1975).
[17] 37 Op. Att'y Gen. 349, 355-356 (1975).

much stronger case can be made that revenue from the minimum tax levied with respect to Oregon sales of motor vehicle fuel—which is expressly described in Article IX, section 3a (1)(a), i.e., a "tax levied . . . with respect to . . . the . . . sale . . . of motor vehicle fuel"—is subject to those limitations.

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, your question was directly addressed in a parallel situation by the Supreme Court of Ohio.[18]

Article XII, section 5a, of the Ohio Constitution, provides:

> No moneys derived from fees, excises, or license taxes relating to registration, operation, or use of vehicles on public highways, or to fuels used for propelling such vehicles, shall be expended for other than costs of administering such laws, statutory refunds and adjustments provided therein, payment of highway obligations, costs for construction, reconstruction, maintenance and repair of public highways and bridges and other statutory highway purposes, expense of state enforcement of traffic laws, and expenditures authorized for hospitalization of indigent persons injured in motor vehicle accidents on the public highways.[19]

In *Beaver Excavating Co. v. Testa*, 134 Ohio St.3d 565 (2012), the Supreme Court of Ohio decided a challenge under Article XII, section 5a, to the state's commercial activity tax (CAT) as it applied to gross receipts from sales of motor vehicle fuel. The plaintiff-appellants included two groups claiming the CAT was unconstitutional because the revenue derived from motor vehicle fuel sales was not being expended in accordance with the use limitations of Article XII, section 5a. The first group were contractors that generated gross receipts derived from motor vehicle fuel sales and had paid the CAT as measured by those gross receipts. The second group were county engineers whose budgets for infrastructure projects depended in part on tax moneys relating to motor vehicle fuel sales.

As enacted in 2005, the CAT was levied "on each person with taxable gross receipts for the privilege of doing business" in Ohio.[20] 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. "Gross receipts" included amounts realized from sales of the taxpayer's property. The revenues from the CAT were credited to the general-revenue fund, the school-district tangible-property-tax fund and the local-government tangible-personal-property-tax repayment fund.[21]

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[18] Due to the similarity of state constitutional provisions prohibiting diversion of motor vehicle fuel tax revenues, courts do consider case law from other states persuasive. Thus, the Supreme Court of Missouri, faced with a similar set of facts and no Missouri case law on point, supported its decision by citing the holding in *Sprague*. *See State Highway Commission v. Spainhower*, 504 S.W.2d 121, 125-127 (1973).

[19] Article XII, section 5a, of the Ohio Constitution, was proposed by initiative petition, adopted on November 4, 1947, and became effective on January 1, 1948.

[20] *Beaver Excavating*, 134 Ohio St.3d at 571, *quoting* R.C. 5751.02(A).

[21] *Beaver Excavating*, 134 Ohio St.3d at 571-572.

The question was "whether the CAT is a tax 'relating to' motor-vehicle-fuel sales such that it implicates the prohibition in Section 5a on spending revenue for nonhighway purposes."[22] The court held that it was:

> We have previously held that the phrase "relating to" should be construed according to the plain and ordinary meaning given in the context of "political discussions and arguments," in order to carry out the intention and objectives of the people in making the Constitution, both as it was adopted and as it has been amended. . . . The text and history of Section 5a 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. . . .
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> In view of the foregoing, the phrase "relating to" is plainly intended to be interpreted broadly. First, the drafters of the amendment employed a broad term, "derived from," to connect "moneys" with "fees, excises, or license taxes relating to registration, operation, or use of vehicles on public highways, or to fuels used for propelling such vehicles." The evident purpose for using this particular terminology is to ensure that any revenue from these taxes is clearly within the scope of Section 5a's restriction on its use.
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> Likewise, the 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. The CAT proceeds are (1) money (2) derived (3) from an excise (4) on motor-vehicle-fuel sales. 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. There is still a close connection to the "fuels used for propelling vehicles" on public highways and the revenue generated to fall within the amendment's intended ambit. Consequently, we conclude that the CAT revenues derived from sales of motor-vehicle fuel relate to

[22] *Id.* at 572.

> motor-vehicle fuel used for propelling vehicles on public highways as contemplated within Section 5a.[23]

First, note the similarity of Article XII, section 5a, of the Ohio Constitution, and Article IX, section 3a (1), of the Oregon Constitution.[24] Both provisions describe certain revenues related to motor vehicles and limit the revenues to certain highway-related uses. Moreover, the language that is relevant to your question is similarly broad in both: "moneys derived from fees, excises, or license taxes relating to . . . fuels" in Ohio and "revenue from . . . any tax levied . . . with respect to . . . the . . . sale . . . of motor vehicle fuel" in Oregon. Next, the taxes imposed under both the CAT and ORS 317.090 impose a flat rate of tax for in-state sales up to a certain level and at a percentage of the sales above that level. With respect to in-state sales of motor vehicle fuel, neither the CAT nor the Oregon minimum tax imposes a transactional tax based on the volume of fuel sold.

In *Beaver Excavating*, the Supreme Court of Ohio pointed out that the "CAT proceeds are (1) money (2) derived (3) from an excise (4) on motor-vehicle-fuel sales," reasoned that, "[a]lthough 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," and held that "the 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."[25] Likewise, we believe that an Oregon court would likely find that the minimum tax revenue described in your question is (1) revenue (2) from (3) a tax levied (4) with respect to motor vehicle fuel, would reason that, although not a transactional tax, the amount of tax a seller of motor vehicle fuel has to pay to the state because of the minimum tax is directly based on motor-vehicle-fuel-sales revenue, and would hold that revenue from sales of motor vehicle fuel subject to ORS 317.090 is revenue from a tax levied with respect to the sale of motor vehicle fuel and thus subject to Article IX, section 3a.[26]

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[23] *Id.* at 572-574.

[24] The similarity cannot be considered purely accidental. In the argument in favor of Article XII, section 5a, printed in the official publicity pamphlet for the 1947 Ohio election, Oregon was cited as one of nineteen states that had "acted to protect their road funds by amending their constitutions." (The reference is to Article IX, section 3, of the Oregon Constitution, the pre-1980 forerunner of Article IX, section 3a, which was adopted in November 1942.) 1982 Ohio Op. Att'y Gen. No. 84, at 4 (October 20, 1982).

[25] *Beaver Excavating*, 134 St.3d at 573-574.

[26] As for the question of whether Article IX, section 3a (1)(a), would apply to corporation excise tax revenue derived from sales of motor vehicle fuel, we find the Attorney General's reasoning persuasive:

> You also ask whether an assessment based upon net taxable income as calculated for state corporate income or excise tax is subject to these constitutional use restrictions [i.e., Article IX, sections 3a and 3b, and Article VIII, section 2 (1)(g)]. In 41 Op. Att'y Gen 204, 205, 210 (1980), we were asked whether Article VIII would dedicate state corporation income and excise taxes on oil and natural gas companies to the Common School Fund. We concluded that it did not, because those taxes are imposed on and measured by the corporation's *net income*. Although the net income may be influenced by the sale or other handling of motor vehicle fuel and oil, the tax does not directly fall on the sale of those products. We follow our earlier conclusion, and include Article IX, section 3a within its scope.

1987 Ore. AG LEXIS 86, at 8 (February 6, 1987) (emphasis in original).

C. Revenue estimate

It has perhaps become clear that our analysis of ORS 317.090 would be the same with or without the amendments made by IP 28.[27] The scale of the consequences, however, is considerably changed by IP 28.

According to the Legislative Revenue Office, under current law total corporate tax revenues amount, on average, to roughly $550 million per year. Of that total, minimum tax revenue collected under ORS 317.090 accounts for $50 million per year, $1 million of which is revenue from taxes described in Article IX, section 3a (1)(a). The Legislative Revenue Office estimates that if IP 28 is approved, total corporate tax revenues will amount, on average, to roughly $3.55 billion per year. Of that total, minimum tax revenue will account for $3.4 billion, $250 million of which will be revenue from taxes described in Article IX, section 3a (1)(a).

Thus, under current law, minimum tax revenue derived from taxes described in Article IX, section 3a (1)(a), equals two percent of total minimum tax revenue and about 0.18 percent of total corporate tax revenues. Under IP 28, minimum tax revenue derived from taxes described in Article IX, section 3a (1)(a), would equal about 7.35 percent of total minimum tax revenue and 7.04 percent of total corporate tax revenues.

D. Remedies

Although you did not specifically ask, we feel it is important to discuss what remedies a court might fashion after deciding that Article IX, section 3a, applies to revenue collected under ORS 317.090 that is derived from Oregon sales of motor vehicle fuel. The component questions are: (1) If minimum tax revenue subject to Article IX, section 3a (1)(a), has not been used for permissible purposes, what statutes or portions of statutes are invalidated? (2) What actions would be enjoined or required as a result? As shown below, there is Oregon legal authority to guide our analysis. For reference, however, we begin with the Supreme Court of Ohio's discussion in *Beaver Excavating* of the remedy for the violation of Article XII, section 5a, of the Ohio Constitution, with respect to CAT revenues derived from sales of motor vehicle fuel.

1. *Beaver Excavating*

First, the court held that although the expenditure of the motor-vehicle-fuel-related revenues was unconstitutional, the imposition of the CAT on gross receipts derived from motor-vehicle-fuel sales was not. "Consequently, the state may still collect the revenue derived from the CAT relating to motor-vehicle fuel, but the revenue may not be expended until the General Assembly properly allocates the revenue according to Section 5a."[28]

Next, the court discussed whether the decision should be applied retroactively or prospectively only:

> Appellants and many of their supporting amici curiae urge that should we find a Section 5a violation in the allocation of the revenue derived by the CAT, as we do today, we should apply our decision prospectively only. The taxpayers affirm that they do not

[27] The amount of the minimum tax was first tied to Oregon sales by the amendment of ORS 317.090 by section 1, chapter 745, Oregon Laws 2009 (Enrolled House Bill 3405).
[28] *Beaver Excavating*, 134 Ohio St.3d at 575.

seek, and do not claim as part of the relief sought from this court, any refund of taxes that they have paid pursuant to the CAT relating to motor-vehicle fuel. Nor do they seek an order requiring the state to replenish moneys derived from the CAT relating to motor-vehicle fuel that have already been expended for nonhighway purposes. The tax commissioner specifically contends that should this court hold that the revenue derived from the CAT may not constitutionally be expended except as allowed by Section 5a, the appropriate remedy is to prospectively enjoin the expenditure of the revenue until the General Assembly acts to remedy the statutory defect.

The general rule with respect to the application of court decisions is that a "decision applies retrospectively unless a party has contract rights or vested rights under the prior decision." . . . However, this court has observed that in certain circumstances, it has the authority to apply its decision prospectively only:

> An Ohio court has discretion to apply its decision only prospectively after weighing the following considerations: (1) whether the decision establishes a new principle of law that was not foreshadowed in prior decisions, (2) whether retroactive application of the decision promotes or retards the purpose behind the rule defined in the decision, and (3) whether retroactive application of the decision causes an inequitable result. (*Chevron Oil Co. v. Huson* (1971), 404 U.S. 97 . . . adopted and applied.)
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> . . .

In this case, at the suggestion of the parties, we conclude that this decision is appropriate for prospective-only application.

The first consideration in this regard is whether this decision establishes a new principle of law that was not foreshadowed in prior decisions. The issue presented in this case, whether the allocation of the CAT revenues derived from motor-vehicle-fuel sales in a manner contrary to that provided for in Section 5a, is a matter of first impression before this court. The CAT legislation was enacted in 2005 and wholly replaced the existing corporate-franchise and personal-property taxes. In this respect, the contours of the recently enacted CAT, and the allocation of its revenues from sales of motor-vehicle fuel, are being presently determined. . . .

> The second consideration is whether applying this decision retrospectively promotes or hinders the purposes behind the rule stated in this opinion. We conclude that retroactive application of this decision will neither promote nor hinder the purpose behind our determination that allocation and crediting of the CAT revenue must be made according the provisions of Section 5a. Regardless of whether this decision is given retroactive or prospective effect, the constitutional allocation of the CAT revenues remains the purpose of our decision today.
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> The third inquiry considers whether retroactive application of this decision causes an inequitable result. In this regard, the taxpayers assert that approximately $140 million per year is diverted from public-highway purposes to general-revenue funds by the application of the CAT statute. The fiscal effect of reallocating other state revenue to replace money that has been expended for nonhighway purposes would have a significant, consequential, and negative impact on the state's fiscal footing, which has been under sustained stress for several years during the course of the economic recession. . . .
>
> Clearly, the considerable sum of money implicated in this litigation and its significant effect on state finances satisfy the foregoing standard with respect to causing an inequitable result. Moreover, prospective application promotes equity to the extent that the CAT revenue previously collected and expended by the state is not subject to any refund requests by aggrieved taxpayers, including appellants or any others with claims pending. In this manner, all taxpayers are treated the same, and there is no unequal treatment between similarly situated taxpayers. In fact, appellants specifically state that they have not sought any refund of the CAT amounts paid on sales of motor-vehicle fuel, which provides further indication that appellants have no contract or vested rights that would require this decision to have retrospective application.[29]

The relevant points are that, under the *Chevron Oil* analysis, the CAT statute being new and the effect the decision could have on state finances being significant, the court felt compelled to fashion a prudent, limited remedy. Thus, the statute imposing the tax was not invalidated and the tax could continue to be collected; the statute allocating the revenue was invalidated on a prospective-only basis; and the revenue could not be expended until the legislature cured the constitutional defect in the latter statute.

Similarly, in Oregon the amendments to ORS 317.090 that base the amount of the minimum tax on Oregon sales are recent, the disposition of the motor-vehicle-fuel-related revenue has not previously been challenged under Article IX, section 3a, and the effect of a challenge on state finances could be significant. The *Chevron Oil* factors will not necessarily play a role, however. As the Oregon Tax Court explained in *Dennehy v. Dep't of Revenue*, 11 OTR 191 (1989), while the *Chevron Oil* decision may be "helpful, . . . it is not binding on state

[29] *Beaver Excavating,* 134 Ohio St.3d at 575-577.

courts[, which] are free to develop their own tests" for deciding whether remedies should be applied retroactively.[30] It is likely, however, that the remedy to a challenge under Article IX, section 3a, would effectively be very close to the remedy in *Beaver Excavating*, though under the force of statute, as discussed below.

2. Extent of invalidity

In *Automobile Club of Oregon*, the Supreme Court invalidated an underground storage tank assessment in its entirety because the revenue was dedicated to expenditures that were not permissible under Article IX, section 3a.[31] That is, unlike the Ohio court in *Beaver Excavating*, the court did not hold that the tax was valid but the expenditure of the revenue invalid. Rather, the entire tax program was held to be unconstitutional because of the impermissible expenditure provisions.

In *Carmichael Columbia Oil v. Dep't of Revenue*, 13 OTR 97 (1994), a fee on the bulk withdrawal of petroleum products was challenged under Article IX, section 3a, based on the claim that the statutory scheme allowed expenditures of the fees "for uses other than those set forth in the constitution."[32] Again, because the fee was a tax that was imposed upon fuel for motor vehicles, the Oregon Tax Court held that expenditures for uses not permitted under Article IX, section 3a, made the fee unconstitutional in its entirety and the taxpayers eligible for refunds.

To begin with, in both these cases *all* revenue from the challenged taxes was dedicated to impermissible uses. That is not true of ORS 317.090. As stated above, under current law, minimum tax revenue derived from taxes described in Article IX, section 3a (1)(a), equals two percent of total minimum tax revenue and about 0.18 percent of total corporate tax revenues. Even under IP 28, minimum tax revenue derived from taxes described in Article IX, section 3a (1)(a), would equal about 7.35 percent of total minimum tax revenue and 7.04 percent of total corporate tax revenues. Thus, it seems unlikely that a court would invalidate ORS 317.090 in its entirety when such a small percentage of the revenue is improperly expended, especially considering the significance of minimum tax revenue to the functioning of the state government.

Moreover, the outcome in *Automobile Club of Oregon* was directed by the Act itself. Section 18, chapter 863, Oregon Laws 1991 (Enrolled Senate Bill 1215), imposed the underground storage tank assessment at a rate per gallon of motor vehicle fuel deposited in an underground storage tank and credited the revenue to the Underground Storage Tank Compliance and Corrective Action Fund established under section 16 of the Act for expenditure as required under section 16 (5). Section 20 (2) conferred original jurisdiction on the Supreme Court to determine whether Article IX, section 3a, applied to section 18 of the Act; section 21 repealed section 18 if the court declared that Article IX, section 3a, applied to section 18; and sections 23 to 31 imposed an alternative flat-rate funding mechanism.

Rogers v. Lane County provides what we believe is a more apt precedent. In that case, Lane County and the City of Eugene sought judicial validation of an intergovernmental agreement pursuant to which the county would share highway fund moneys with the city for the purpose of constructing entry and exit roads for travel to and from the city's airport, a public

[30] *Dennehy v. Dep't of Revenue*, 11 OTR 191, 195 (1989). In the end the tax court did apply the *Chevron Oil* factors in *Dennehy*, adding a fourth consideration, and decided that the relevant Supreme Court decision should not be applied retroactively. *Id.* at 196-198.
[31] *Automobile Club of Oregon*, 314 Or. at 490-491.
[32] *Carmichael Columbia Oil v. Dep't of Revenue*, 13 OTR 97, 101 (1994).

parking lot adjacent to the entry and exit roads and a covered walkway from the parking lot to the airport terminal. The Supreme Court held that the expenditure of highway funds for the parking lot and covered walkway was not authorized under Article IX, section 3a.[33] The court did not mention, much less invalidate, specific statutes under which the funds were generated.

Thus, there is precedent for treating the validity of expenditures under Article IX, section 3a, as a matter entirely separate from the validity of the tax statutes generating the revenue being expended.[34] In fact, the Supreme Court has held, "Article IX, section 3 by its express terms governs the use of the proceeds from the taxes to which it refers, not the collection of the taxes."[35] In other words, Article IX, section 3a, does not provide a basis for challenging the validity of a tax that is subject to the section's use limitations. Consequently, we would not expect a court to invalidate ORS 317.090 in part or whole because of any misdirection of revenue subject to Article IX, section 3a.

The same is not true to for ORS 317.850, which provides, in relevant part, that the "net revenue from the tax imposed by this chapter, after deduction of refunds, 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." If a court decided that Article IX, section 3a, applies to minimum tax revenue attributable to sales of motor vehicle fuel, we believe that the disposition of minimum tax revenue derived from sales of motor vehicle fuel to the General Fund under ORS 317.850 would be held to violate Article IX, section 3a.

That is, we would expect that ORS 317.850 would be invalidated only to the extent it requires deposit of minimum tax revenue attributable to sales of motor vehicle fuel in the General Fund. The 1975 Attorney General opinion summarized above addressed a situation in which a statute directed revenue from multiple sources to be deposited in the Common School Fund but violated Article IX, section 3, only with respect to one of the sources. The revenue at issue was proceeds of exploration leases of mineral and geothermal resource rights. The rights pertained to land some of which was owned by the State Board of Higher Education, some of which constituted right-of-way for various highways and some of which was forested and unrelated to any constitutional fund. The Attorney General opined that exploration lease proceeds pertaining to highway rights-of-way that had been purchased with moneys from the State Highway Fund were subject to Article IX, section 3: "That section [of the challenged statute] is unconstitutional and invalid *as applied to* the State Highway Fund. . . . *In this regard* ORS 273.780 (1) is invalid."[36]

Similarly, ORS 317.850 disposes of all tax imposed under ORS chapter 317, both the corporation excise tax and the minimum tax. Of the minimum tax, only revenue attributable to sales of motor vehicle fuel is arguably subject to Article IX, section 3a, and thus misdirected by ORS 317.850 to the General Fund. The 1975 Attorney General opinion provides a reasonable

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[33] *Rogers v. Lane County*, 307 Or. at 545-546.

[34] See also *Oregon Telecommunications Assoc. v. ODOT*, 341 Or. 418 (2006), in which the court held that it was permissible to use state highway funds to pay administrative expenses that ODOT incurred in requiring the relocation of utility facilities within a public highway right-of-way. The court did not discuss the source of the funds.

[35] *Budget Rent-A-Car, Inc. v. Multnomah County*, 287 Or. 93, 99 (1979) (declining to decide claim that an ordinance imposing a tax on the operation or use of motor vehicles, the proceeds of which were directed into the county's general fund, was invalid under Article IX, section 3, because the claim of invalidity could not be brought under Article IX, section 3, and the permissibility of the use of the proceeds was not before the court).

[36] 37 Op. Att'y Gen. 349, 356 (1975) (emphasis added). The violation was addressed by ORS 273.785 (1), added by section 4, chapter 51, Oregon Laws 1974, and (7), added by section 1, chapter 60, Oregon Laws 2005.

model for a court's invalidation of ORS 317.850 solely to the extent the statute does not direct such revenue to be deposited in the State Highway Fund.

3. Consequent actions

As in *Automobile Club of Oregon*, the remedy in *Carmichael Columbia Oil* was required by statute. In contrast to *Automobile Club of Oregon*, however, the statute in *Carmichael Columbia Oil*—ORS 305.765—is directly relevant to your question.

In *Carmichael Columbia Oil*, the court held that because the statutes in ORS chapter 465 applicable to the challenged tax provision did not specifically provide for refunds in the event that any part of the statute was held invalid, the plaintiffs' claims for refunds were governed by ORS 305.765.[37] ORS 305.765 provides:

> In a proceeding involving the validity of any law whereby taxes assessed or imposed have been collected and received by the state, acting through any department or agency thereof, and paid into the State Treasury, if the court of last resort holds the law or any part thereof invalid, and the time limit for any further proceeding to sustain the validity of the law, or the part thereof affected, has expired, and if there is no other statute authorizing refund thereof, all taxes collected and paid under the law or part thereof invalidated, in or after the year in which the action attacking the validity of the same was instituted, shall be refunded and repaid in the manner provided in ORS 305.770 to 305.785.

The Oregon Supreme Court applied ORS 305.765 in *Ragsdale v. Dep't of Revenue*, 312 Or. 529 (1992), in which the plaintiff had paid Oregon income taxes on her federal retirement income from 1970 through 1988. In *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803 (1989), the United States Supreme Court had determined that state taxation of such income was impermissible under federal law if state retirement income was exempt. In *Ragsdale*, the Oregon Supreme Court held that even if *Davis* applied retroactively, ORS 305.765 "authorizes (and, in fact, mandates) refunds only for taxes 'collected and paid' in or after the year in which the action resulting in the invalidation of the tax law was instituted."[38] The plaintiff first filed a claim for refund on April 25, 1989, for tax year 1988, and was thus eligible for refunds for 1988 and any *subsequent* year in which her federal retirement income was similarly subject to impermissible state taxation.[39] The court adhered to its *Ragsdale* decision in the slightly more complicated factual situation presented by *Atkins v. Dep't of Revenue*, 320 Or. 713 (1994), *cert. denied* 516 U.S. 1042 (1996).[40]

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[37] *Carmichael Columbia Oil v. Dep't of Revenue*, 13 OTR at 101.
[38] *Ragsdale v. Dep't of Revenue*, 312 Or. at 534.
[39] *Id.* at 539-540.
[40] The court justified the outcome in *Ragsdale* under the federal Due Process Clause as interpreted in *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990). The post-deprivation limitations of ORS 305.765 were permissible because "the state legitimately may limit its obligation to refund taxes collected under an invalid law by requiring those who claim that a tax law is invalid to pay under protest or by imposing short statutes of limitations on such claims." *Ragsdale* at 540 (*citing McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. at 44-45, 49-50). The Supreme Court reasoned that the "opportunity to plan for the fiscal consequences of invalidation and to minimize the disruption of state finances is at the heart of ORS 305.765 to 305.785" and held that these statutes "create a reasonable procedural barrier to the taxpayer's refund claims." *Id.* at 540-541.

In *Carmichael Columbia Oil*, the Oregon Tax Court followed *Atkins* and *Ragsdale* to hold that the plaintiffs were limited under ORS 305.765 to a refund "for taxes which were due and payable in [or after] the year in which the taxpayers first made a claim for refund or sought to have the law declared invalid."[41]

As noted above, the Oregon Supreme Court has held that "Article IX, section 3 by its express terms governs the use of the proceeds from the taxes to which it refers, not the collection of the taxes."[42] A challenge to the minimum tax under Article IX, section 3a, would thus be against the expenditure of minimum tax revenue attributable to sales of motor vehicle fuel under ORS 317.850 not the collection of the revenue under ORS 317.090. It is thus possible that a court would not consider refunds of such taxes appropriate at all.

If the court did consider refunds appropriate, we believe that in any action—whether for declaratory and injunctive relief or refund of taxes—the refunds would be subject to ORS 305.765. A taxpayer would at most be entitled to refunds for taxes due and payable in the year in which the claim for relief or refund was sought and any subsequent years in which the constitutional defect was not cured. Note, too, that under ORS 305.275, only a taxpayer aggrieved by the collection of an impermissibly expended tax has standing. So a violation of Article IX, section 3a, would not put anyone in a position to seek a refund for minimum tax payments that were unrelated to motor vehicle fuel. Again, the amount of the refunds for pre-IP 28 tax payments would be relatively small, even absent ORS 305.765. Given the limitations imposed under ORS 305.765, however, the refunds would likely be even smaller.

In any event, because we believe that the validity of ORS 317.090 may not be challenged under Article IX, section 3a, but the validity of ORS 317.850 may, we would also expect the court to follow the Ohio Supreme Court in enjoining not the collection of the tax but rather the expenditure of the revenues until the Legislative Assembly directed minimum tax revenue subject to Article IX, section 3a, to be deposited in the State Highway Fund.

It is also conceivable that a court would order the State Highway Fund to be replenished by the amount of minimum tax revenue subject to Article IX, section 3a, that was deposited in the General Fund since 2009. Because the plaintiffs in *Beaver Excavating* did not seek such an order, it is difficult to predict how a court would address such a claim. (Again, relatively speaking, this would not be a large amount of money for pre-IP 28 revenue.)

E. Bonding

Finally, if corporate minimum tax revenue attributable to sales of motor vehicle fuel is held to be subject to the use limitations under Article IX, section 3a (1), the revenue will have to be deposited in the State Highway Fund. Once deposited, nothing will distinguish it from the moneys from other sources in the fund for bonding or any other purpose.

III. Summary

We believe a court would likely hold that corporate minimum tax revenue imposed under ORS 317.090 that is attributable to sales of motor vehicle fuel is subject to Article IX, section 3a. Consequently, the court would hold that the deposit of such revenue in the General Fund under ORS 317.850 and its expenditure for uses unrelated to public highways are invalid. It is unlikely

[41] *Carmichael Columbia Oil*, 13 OTR at 102-103.
[42] *Budget Rent-A-Car, Inc. v. Multnomah County*, 287 Or. at 99.

that the court would invalidate the collection of the tax under ORS 317.090 and virtually certain that any claims for refund of taxes improperly expended would be limited under ORS 305.765 to tax due and payable in the year the claim for refund or declaration of invalidity was brought and subsequent years in which the constitutional defect is not cured. If minimum tax revenue attributable to sales of motor vehicle fuel is deposited in the State Highway Fund, nothing will distinguish the revenue from the moneys from other sources in the fund for bonding or any other purpose.

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Very truly yours,

DEXTER A. JOHNSON
Legislative Counsel

Alan S Dale

By
Alan S. Dale
Senior Deputy Legislative Counsel