

Portland's Gross Receipts Tax Oversteps City's Authority

By **Nikki Dobay and Jeff Newgard** (August 30, 2024, 5:17 PM EDT)

Portland, Oregon's clean energy surcharge, a voter-approved gross receipts tax on the retail sales of certain large retailers, is under scrutiny for overstepping the boundaries set by the city's charter.[1]

Although the Clean Energy Surcharge, or CES, is in its fifth year of operation, it remains a relatively new and evolving tax, with the first legal challenges starting to work through the administrative appeals process.

The CES was approved by voters, but the city's current administration of the tax is at odds with its charter authority.

Additionally, in June, the city's Revenue Division proposed an administrative rule, stating its intent to impose the tax on essentially all business sales to any customer.[2]

In effect, Portland's actions repeatedly and thoroughly eviscerate the commonly understood meaning of "retail."

Overview of the Portland CES

On Nov. 6, 2018, city voters approved Measure 26-201. As approved by voters, the measure summary provided: "Measure amends code to require Portland retailers with total annual revenue over 1 billion dollars and Portland annual revenue over 500,000 dollars to pay 1% surcharge on gross revenue from retail sales (defined) within Portland." [3]

In the supporting ballot materials, the official literature clearly and unambiguously stated that the intent of the measure was to target "large retail corporations." These references, which occur repeatedly throughout the documents and other campaign sources, envisioned a tax targeting the "retail sales" of larger "retailers" — commonly understood terms.

On Feb. 19, 2019, the City Council passed ordinances codifying the measure into the city's code.[4] The ordinances radically altered the size and scope of the tax as it relates to taxable retail activity and the type of business that is considered to be a retailer.

These changes significantly broadened the scope of the tax from those in the retail sector to any business meeting a specified revenue threshold, and expanded the concept of retail sales to include any sale of goods that is not a sale for resale and any sale of services.

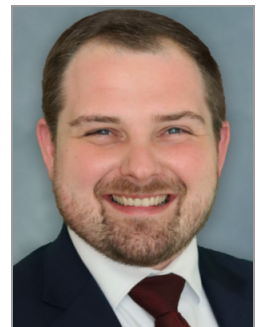
By adopting these definitions, the city effectively implemented a new tax scheme — one that was neither presented to nor approved by Portland voters.

The city's administrative rules for the CES clearly illustrate the departure from the voters' original understanding of the tax they authorized.[5]

For instance, under the rules, a taxpayer providing contract assembly line services for a manufacturer is considered to be engaging in taxable retail sales.



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Similarly, while incidental sales of real property outside a taxpayer's normal course of business are not retail sales, the same does not apply to real estate developers or home builders, whose sales are now considered retail.

It is evident that voters neither anticipated nor intended for the CES to broadly redefine the majority of business activities as retail.

The city recently doubled-down on its all-encompassing definition of retail sales. On June 17, the Revenue Division proposed a new administrative rule affirming that any business sale that is not for resale constitutes taxable retail activity.

Further, the Revenue Division declared a new position that sales to a person, business, government or any other entity are all considered taxable retail activity subject to the tax.

It should come as no surprise that taxpayers and their business associations are wary of these expansions of the tax.[6]

Originally, the measure was estimated to raise \$30 million a year, but actual revenues more than doubled in the first year, generating \$62.7 million, and nearly doubled again in the second year to \$116.7 million.

The city's most recent revenue projection estimates the tax will raise \$198 million by the end of this year and more than \$1.3 billion over the next five years.[7]

These increases are almost surely attributable to the tax's expansion.

Portland's Charter Lacks Inherent Taxing Authority

It is customary for governments to create and expand taxes to meet their spending needs, but for Oregon localities the power to impose a tax must be approved by the voters. In Oregon, the state constitution provides extensive home rule authority to chartered localities, allowing residents to confer legislative powers to a jurisdiction.

Unlike some home rule cities in the state, however, Portland's charter lacks the inherent authority to tax, requiring voter authorization to impose all taxes.

Although voters empowered the city to levy and collect the CES, the measure did not authorize the city to expand the scope of the tax or recharacterize the tax.

These limitations on taxing authority are not novel; they are well supported by more than a century of Oregon case law.

In the 1916 decision, *City of Portland v. Portland Gas & Coke*, the Oregon Supreme Court concluded the city's charter did not provide the power of taxation at large.[8] Likewise, the court's 1980 decision in *Jarvill v. City of Eugene* held that specific state legislative authority is not required, but a city must then have authority in its charter.[9]

This issue also arose more recently in a 2017 case involving Portland's taxing authority. In *City of Portland v. HomeAway.com Inc.*, the U.S. District Court for the District of Oregon dismissed the city's effort to enforce an ordinance including online vacation rental booking agents in its lodging tax.[10]

In *HomeAway*, the city asserted it had "inherent authority to tax and [did] not need express charter or legislative authorization to do so."

Judge Michael Mosman disagreed, however, finding that the state's home rule provisions grant city residents, not city governments, the ability to define the scope of municipal powers.

The City's Legislative Changes Open the Door to Litigation

While the CES has been around for several years, legal challenges to this tax have only recently

ripened due to filing extensions and administrative appeals.

Additionally, the Revenue Division has been aggressively issuing notices, asserting taxpayers far outside the retail category are subject to the tax. These developments present a significant opportunity for taxpayers to challenge the levy and maintain its narrow focus.

This article focuses specifically on the CES, but it is important to recognize that other tax actions by the city share similar legal infirmities.

For instance, in 2016, the City Council enacted the nation's first tax on executive compensation without voter authorization.[11]

Similarly, in 2018, the city increased its business income tax rate by one percent to address a funding shortfall — again, without voter approval or the requisite authority granted by the city's charter.[12]

Conclusion

As taxpayers navigate the complexities of complying with Portland's quirky tax code, they should remain aware of the city's limited charter authority, particularly regarding new or expanded taxes.

For taxpayers with the right facts and circumstances — specifically nonretailers or taxpayers with nonretail sales — challenging a CES assessment could safeguard their financial interest and contribute to efforts to bring this tax, and perhaps others, back within the boundaries originally approved by the voters.

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[1] While this article specifically addresses the City's constrained charter authority to unilaterally enact or expand taxes without voter approval, there are other infirmities taxpayers could raise about the tax. In particular, the imposition of a tax on "large" retailers (and the mechanisms used to capture those taxpayers) may have both U.S. and Oregon constitutional implications.

[2] See "Business Tax Administrative Rule 500.19-4A - Clean Energy Surcharge (CES) Retail Sale," Portland Revenue Division Business Tax Administrative Rules Hearing, June 26, 2024.

[3] Multnomah County Voters' Pamphlet November 6, 2018, General Election, M-49 (Multnomah County Elections Division, 2018).

[4] See Portland City Council Ordinance No. 189389 ("Portland Clean Energy Community Benefits Initiative") and Portland City Code § 7.02.

[5] See Portland Business Tax Administrative Rules LIC-5.06 — Clean Energy Surcharge (CES) — Retail Sale.

[6] See "Business Groups Oppose Portland Revenue Division's Proposal to Supercharge the Clean Energy Surcharge," Testimony Submitted to the City of Portland Revenue Division, June 26, 2024.

[7] See "Portland Clean Energy Fund's Staggering Windfall Spurs Money Grab, Threatens Climate Justice Ambitions," Gosia Wozniacka and Shane Dixon Kavanaugh. The Oregonian, February 29, 2024. Also, see "Clean Energy Surcharge Forecast," City of Portland Budget Office Memorandum, December 13, 2023.

[8] See *City of Portland v. Portland Gas & Coke*, 80 Or. 194, 156 P. 1070, 1071 (1916).

[9] See *Jarvill v. City of Eugene*, 289 Or. 157, 613 P.2d 1, 7–8 (1980).

[10] See *City of Portland v. HomeAway.com, Inc.*, 240 F. Supp. 3d 1099, 1107, (D. Or. 2017).

[11] See Portland City Council Ordinance No. 188129 ("Surtax to Business License Tax if ratio of compensation of a company's chief executive officer to median worker is equal to or greater than 100:1").

[12] See Portland City Council Ordinance No. 189017 ("Business License Law to increase the tax rate").