

Speaker 1 ([00:01](#)):

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Jeff Newgard ([00:16](#)):

Not only does Oregon not have that sales tax revenue stream going into the State's general fund, we also don't have the local versions of that sales tax providing revenues to local jurisdictions.

Nikki Dobay ([00:34](#)):

Hello. And welcome to GeTtin' SALTy, a state and local tax policy podcast hosted by Greenberg Traurig. My name is Nikki Dobay shareholder in the Sacramento, California, and Portland, Oregon offices. I am very pleased to once again be joined by Jeff Newgard, principal at Peak Policy. Jeff and I work together on a lot of Oregon and Portland, Oregon issues, which we are here to talk about today. So Jeff, thanks so much for being here today.

Jeff Newgard ([01:03](#)):

Thanks, Nikki. It's great to be back.

Nikki Dobay ([01:05](#)):

So today you and I are going to have a little old conversation about Portland because Portland is really tax happy, and we've got some things going on in Portland, some things we've both been working on, and so we just wanted to share that with the listeners. But Jeff, let's have a little history lesson about Portland and their taxes. Can you give us an overview of the city's tax base and a little bit of history about how Portland got so tax happy?

Jeff Newgard ([01:37](#)):

Sure, absolutely. And I think one way to start this off is actually to go and look at how Oregon localities generally go and approach their revenue streams. In Oregon, local governments have property taxes, they can also have transient lodging taxes, and they're very slim case of examples. There's local income taxes or business license taxes. But as I think is very commonly known, Oregon is one of the five states that doesn't have a sales tax. And so not only does Oregon not have that sales tax revenue stream going into the state's general fund, we also don't have the local versions of that sales tax providing revenues to local jurisdictions. And so from one vantage point, local governments really are hamstrung on the revenue streams. They really have the property tax as their primary funding source. We also have substantial property tax compression and rate limits measures five and 50, which are much like Prop 13 from California.

([02:43](#)):

And so in the last 10 years or so we've seen there's this evolving landscape in the Portland area of trying to go and solve this riddle of not having a sales tax, but creating these new revenue streams to be able to go and compensate for not having a sales tax. One way that I look at it is back in 2012, Portland voters went and adopted a very creative arts tax. I don't think we need to get into the weeds on that one, but it's a fairly nominal tax that's complicated to administer and for taxpayers to comply.

([03:18](#)):

But ever since then, it opened Pandora's box of what creative ideas are Portland voters willing to go and approve, and we'll get into this in a little bit, but approve ends up becoming a very central term in all of this. And over the last couple of years, 2018, 2020, there have been very substantial new targeted taxes dedicated for specific programs. And from my vantage point, it really all gets back to this notion of, "Well, Oregon and its localities don't have sales taxes. How can the Portland area go and find very creative ways to be able to go and fund the public services that whether it's political operatives, city council, advocacy groups truly believe that..."

Nikki Dobay ([04:05](#)):

That's a great point to make about Oregon's tax structure, the lack of a sales tax, creating some real challenges for localities as they try to figure out how to fund their programs. This point about property tax, I think Portland has a real challenge with property taxes because of Measure 50, which set all of our values back in 1997, and puts very significant caps on them. Unlike Prop 13, Oregon's Measure 50 doesn't, the values don't reset on sale. So we have been really, this problem's been compounding since 1997, and Portland isn't growing its... We don't have a ton of new construction in Portland because of land use issues anyways, so while some of the localities around the state that have been growing, they have a lot of new construction, they aren't dealing with the specific challenges that Portland is with respect to their property taxes.

([05:08](#)):

So to your point, we recognize there's a lot of roadblocks that Portland really faces within Oregon's overall tax structure, but I think they've probably taken things a little too far in where they've currently landed on some of their tax stances. So let's talk about what's unfolded over the last, we had the art tax, and then my recollection is the next big voter approval tax that went in came that was in 2018, right? That was the clean energy surcharge. Am I getting that right?

Jeff Newgard ([05:46](#)):

Yep, that's correct. In November of 2018, we're just shy of, I think, six years from that election. Voters went and approved what I believe, and from everybody I've been able to talk to, is really the nation's first large retailers tax, and it's not a sales tax, although it's certainly talked as if it basically operates like one. But in reality, this is a 1% gross receipts on large retailers throughout the campaign, whether it be the literature or just the commentary that was made from proponents and even opponents too. It's very clear that it was supposed to be a tax on large retailers and their transactions of retail sales, and I think we're just about to get into this, but what constitutes a retail sale or a retailer at least compared to how those terms are commonly understood, has really unfolded in a way that, to me, it seems very clear that the voters had no idea when they voted on it. And I know we can get into that.

Nikki Dobay ([06:47](#)):

Yeah, so let's talk about that. So let's circle back to, okay, so Portland, it's a large metropolitan area. They need to fund services for their residents. Property taxes are insufficient. If we're going way, way back, Portland has long had a business license tax, which now I think initially that really was a fee to get a business license. Now, it operates as a local corporate or, well, business income tax. It is imposed on all types of entities. And then we have Multnomah County that also has a business income tax. And then we had the Metro, that was in 2019, 2020. When did Metro pass?

Jeff Newgard ([07:31](#)):

2020.

Nikki Dobay ([07:32](#)):

2020. So we now have three levels of business income taxes and then the clean energy surcharge, and then there's a few other, I think if you total them all up, there's about eight or nine total local taxes. And I've said this in presentations, if you had a Venn diagram and you're in the marijuana business and you have over a billion dollars of global sales, I think you could be subject to all the taxes. I think maybe you'd need some heavy trucks in there too. But there's a lot of different taxes that the city imposes. And so the question has come up over the years, what is the city's authority to impose tax? And so what do we see in this space? What can Portland do when it comes to taxes?

Jeff Newgard ([08:24](#)):

So in Oregon it's a little different than elsewhere in the country. Oregon's constitution provides very broad home rule authority to local governments, cities and counties, so long as they're operating under a voter approved charter. And so if there's a governmental power that the charter confers to its governing board, the city council, County Board of Commissioners, they're allowed to go and use effectively their legislative authority under their charter to go do that action under Oregon Constitutional Law and certainly case law. There is a bounty of legal precedent saying that you can't go and step outside of what that charter authorities is. There's no inherent authority, you can't just go and assume that the charter provides that governmental power unless it's explicitly provided in the charter. And so we have some local jurisdictions throughout the state, and where in the charter it goes and provides broad general taxing authority to the city council or county commission. And with that, the city council could go and enact a brand new tax and implement it, and it's-

Nikki Dobay ([09:36](#)):

Perfectly valid.

Jeff Newgard ([09:37](#)):

... perfectly valid through the lens of the charter. Obviously other issues could come up. Now in Portland, there's been about a hundred years of case law that looks into this. Portland's charter doesn't provide any type of inherent authority to tax-

Nikki Dobay ([09:52](#)):

General authority.

Jeff Newgard ([09:52](#)):

... so the city council... General authority. So the city council cannot go and draft an ordinance creating a new tax, punch that and begin implementing it. Instead, they have to go and get for the voters to provide the city council and the city the authority to impose the tax.

Nikki Dobay ([10:08](#)):

And I would just jump in and say the clean energy surcharge, and I think the Metro Homelessness Services taxes, whatever they were called in the ballot, those both really came about through citizens initiatives, especially with the clean energy surcharge. This wasn't something that the city council necessarily was pushing. This was a group of citizens that thought this was a good idea, and the Oregon Constitution clearly provides the citizens that authority too. So I think the more I do state and local tax, the more interesting it is to think about what these state constitutions provide to their either locality or

their citizens. But the states are all very different on this point, and Oregon's constitutional authority as to who has what powers is very, very specific. And so it becomes really important to read those provisions anytime these new taxes come up, or tax that's been around for a little bit gets modified. That might've been a leading opportunity for you to say something.

Jeff Newgard ([11:19](#)):

Well, and I would also say that for a government that's in the situation like Portland where it doesn't have that charter authority, it really needs to keep its actions within that box of its charter authority. If the voters go and approve a tax, they certainly have, the city certainly would have the authority to go and implement the voter approved tax because the voters have conferred that power in that instance for that policy. The issue that comes up is that if the government then tries to go and amend or fundamentally change the parameters of that tax, it's doing so without that authority, unless in the measure that the voters approved explicitly went and said that the city council or whatever form of governing board had the authority to go and make any changes that it desired.

([12:11](#)):

And that's exactly what's going on here with the Portland Clean Energy surcharge, the voters went and approved a tax at the time that it was approved by voters, very widely communicated that the tax would raise \$30 million because it was targeted tax on the retail sales of, quote, "large retailers," which I don't think that there's any question out there that the petitioners for the measure, and certainly the voters when they voted on it, presumed that large retailers and their retail sales meant big box retailers, at least the way that we think about it, and specifically retail and retail sales and retailer as the way that they're commonly understood, which going back to what we said earlier, it's like a sales tax.

Nikki Dobay ([12:56](#)):

Right.

Jeff Newgard ([13:00](#)):

But what ended up happening is that when the city council drafted and approved its ordinance as actually putting the voter initiative into City Code, they went and fundamentally changed some of the terms, notably retail sales and retail, the mechanisms used to go and determine what amount of income or sales is subject to the tax. And so we've ended up in this world where on the one hand, voters were told that the tax that they were voting on was a targeted tax on large retailers as those terms are generally understood. But then on the other hand, we have the tax as it exists today of the city has gone broadly applied it where every business, mostly every business is a retailer, and all of the business's sales except for sales of something that is for resale are retail sales. And going and reconciling those becomes very difficult. And then that brings up that question of, does the city have the charter authority to be able to go and broaden the scope?

Nikki Dobay ([14:04](#)):

Right, without going back to voters. And I think that's really the crux here is, I think there's no doubt that the clean energy surcharge was validly approved by the voters of Portland. Nobody calls that into question, and nobody questions the ability of the citizens who brought this initiative forward to put that on the ballot. There's no questions about that, but it really is the city's implementation and administration of this tax, and they've gone and really turned this tax on its head by creating a broad-based sales tax on certain businesses.

([14:44](#)):

And the only real determination is whether you're in or out is whether you're not, you meet these thresholds because the terms as defined are so broad. And I think the disconnect is, what were the voters presented with? What did they approve? And that is really what the focus of what's currently unfolding here, and where we are seeing some taxpayers starting to push back on this tax and say, "Hey, I'm not in the retail business. I have nothing to do with that. How is it that I'm now being told I owe several million dollars or whatever it is to this one jurisdiction?" So I think we're really going to see some movement on this issue in the near term.

Jeff Newgard ([15:35](#)):

I would also add that the proof really is in the revenues. [inaudible 00:15:39] go and look back like we talked about. When this measure was presented to voters and approved by voters, it was very widely said that it would raise \$30 million a year. Right after it was passed, when the city was going and doing those implementation ordinances, the city council staff or the city's Revenue Division staff went and revised those numbers to say it would raise roughly, I believe, it was between 44 and 60 or \$66 million per year. So up to double of what the original projection was.

([16:09](#)):

In the second year of the tax, 66 million came in and the third year of the tax, it was, I believe 113 million came in. Last year it was 198 million that came in, and over the next five years, the city now estimates that \$1.3 billion is going to end up coming in from this tax. And so we've gone from this tax with the scale of \$30 million in revenues to now having something where we're actually adding several zeros after the fact. It's one thing to go and get revenue and estimates wrong, but when you go and look back at what was presented to voters, that \$30 million number or even the \$60 million, sixty-ish million number that came from the city council at the very beginning leads you to think that it is that targeted tax.

([16:54](#)):

But yes, there's inflation. Portland's economy has grown some, but if Portland's economy has grown to the extent where five or six years ago this tax would've been \$30 million, but because of growth and growth alone, we're now at \$200 million a year. I'm looking out my window and I can't see that type of growth. And as a business person, I would love to see that type of growth, but it's just not happening. And so to me, it really signifies that there's something a little funky going on here.

Nikki Dobay ([17:25](#)):

Well, and let's also talk about the other piece of the clean energy surcharge was how the money was going to be spent. So you're talking about what, \$1.2 billion? That's the current estimate?

Jeff Newgard ([17:38](#)):

\$1.3 billion over the next five years.

Nikki Dobay ([17:42](#)):

Okay, so \$1.3 billion. So everybody knows that the voters approved the tax piece, but the other piece of that measure was where the money would go, that was coming in, this \$1.3 billion. And correct me if I'm wrong, I am paraphrasing and reaching back into the depths of my memory, but the money was to be used to fund clean energy projects and underserved communities. That would also be, the work would be performed by underserved workers and communities as well. All very great social policies and aspirations, and good things to support. So I take no issue with the intent of where the money was going

to go. That's a very, very narrow subset of subsets of projects that could come about through these grants and funding. And there's a whole group, a whole council that now oversees this money. I think that's got some political issues going on, but we won't touch that on this podcast.

[\(18:41\)](#):

But Jeff, there's a whole lot of money that's sitting there in this bucket. But the voter said that money, this \$1.3 billion has to be used for those projects and they were having a very hard time spending that money on those projects. We've also learned that the city, in its infinite wisdom, created a second little fund for some revenues that it's saying are subject to the clean energy surcharge, the sale of fuel. The Oregon Constitution also has a little prohibition against imposing taxes on the sale of fuel, unless that money goes for roadway improvements and the highway fund type things. But the city just diverted that money through an ordinance. Do they have the authority? Do you think they have the authority to do that?

Jeff Newgard [\(19:38\)](#):

I think that that can be a very tricky issue. In my opinion, no, they don't have the authority to do that. From my vantage point, when the voters went and approved this tax and approved the avenues to be able to go and spend the money, they explicitly went and said, "Okay, if gas stations are going to be a retail sale," which I think that there's still some question over whether a gas station is a retailer and it's sales of gas are retail sales pursuant to the tax. But setting that aside, I would see the measure, and I think the key word here is voter intent of the revenues that are collected from those sales going into this large pool of money for the clean energy projects. Now, the Oregon Constitution certainly prevails in saying that these funds from the sale of motor fuels need to go to road and highway projects.

[\(20:34\)](#):

But the problem becomes trying to go and square this voter approved ordinance that goes and says one thing that the Oregon Constitution and having the city council be the one to go and just put money into a separate fund. And we learned just a few weeks ago, the city council hasn't actually done anything with any of the money in the funds. And that's not necessarily something for a tax podcast. But going and just looking at the way that funds from this tax have been used, generally we haven't seen the city council going and spending a lot of the money. And part of me starts to wonder, is it because they think or, perhaps, know that the litigation's coming?

Nikki Dobay [\(21:15\)](#):

I'll just say, spoiler alert, yes, I think that is true. The litigation is coming. I think the city could fix this if they wanted to. There could be an alignment of the ordinances with voter approval and riding the ship, so I think those opportunities definitely exist. I think absent those, we're going to see a lot of questions and challenges being raised to this tax. What about in the last couple minutes where we're talking tax, before we get into the fun stuff, does Portland have other issues when we're talking about this potpourri of taxes, I'm working potpourri into every podcast for the rest of the year. But Jeff, are there other issues here? Are there other things bubbling under the surface that taxpayers really need to be thinking about?

Jeff Newgard [\(22:12\)](#):

I think that the biggest issue that every taxpayer, I would argue every resident of certainly Oregon needs to be aware of is Measure 118. And in Oregon, this is a statewide ballot measure. It would go and transform Oregon's corporate minimum tax, the income tax minimum tax from a flat fee graduated tax to a 3% gross receipts tax for sales over \$25 million. And the way that I look at that is I think that your

average person might go and say, "Oh, sales over \$25 million, no big deal. That's only going to hit the largest companies." But you know what? Smaller businesses, and certainly customers spend a good amount of money buying things from companies over that \$25 million mark. And like we know from gross receipts taxes, you have tax pyramid, and that can occur many, many times where the tax rate just goes and compounds. That's the reason why normally when we see a gross receipts tax, and we already have a gross receipts tax at a statewide level in Oregon.

Nikki Dobay ([23:13](#)):

We do.

Jeff Newgard ([23:14](#)):

This is the second one, but that's the reason why we end up seeing gross receipts taxes. I think with very low rates, I think Ohio is 0.26, I think.

Nikki Dobay ([23:23](#)):

Yes.

Jeff Newgard ([23:24](#)):

Oregon is 0.57, and compared to income tax rates, these are very low rates. But when you have that tax compounding, the effective rate that ends up being charged over the course of the supply chain ends up being much higher with a 3% gross receipts tax, which is what's proposed-

Nikki Dobay ([23:41](#)):

Unheard of.

Jeff Newgard ([23:41](#)):

... for the November ballot. Going and compounding that is an astronomical gross receipts tax rate. And keep in mind, this isn't like Washington and, I believe, Nevada where they have different rates for certain industries that can get up to 3%. This is a 3% across the board. This is by far the most threatening ballot measure for the business community, at least through a tax landscape or a tax perspective that I've ever seen in my 15 years of working in Oregon politics. I know that a few weeks ago you had the tax foundation on to go and get deeper into the weeds on Measure 118 in Oregon. And as an avid listener of this podcast myself, I highly recommend listeners to go back and listen to that podcast. Nikki, I don't know if you know the episode number off the top of your head.

Nikki Dobay ([24:33](#)):

I do not. But it was back in July, and we can definitely reference it. Yes, we've been talking to a lot of folks about Measure 118 and the campaign that's kicked off, and in opposition to that is, I think, up and running and full steam ahead. So yes, Measure 118 is the big existential threat in Oregon right now. And hopefully folks have been working with the opposition campaign, and we are putting a lot in the hands of Oregon voters come November. But Jeff, I want to circle back to Portland on this, and I think we can do this in a yes and no answer, and then we'll move on to the surprise non-tax question. But do you think that there, and I'm teeing you up for a later podcast. Are there other Portland taxes that you think are at risk based on how they came about or have been amended that are also potentially at risk when we think about what the city's authority is to impose taxes under its charter?

Jeff Newgard ([25:42](#)):

I know that you said a one word answer, but as well obvious, I'm prone to trying to use as much time and as many words as possible. So instead of one word, I will do three words, without a doubt.

Nikki Dobay ([25:54](#)):

Okay. All right. Awesome. Well, Jeff, thank you as always for this conversation about Portland, and I'm sure we'll be chatting more as there are developments locally. And then also both of us I know have our fingers crossed with respect to the election and that 118 will go down, but we will have to see what the Oregon voters do. So before I let you go, I've got to ask a surprise non-tax question. And I do generally do Portland centric things. So I'm going to do an Oregon dog thing. We just had a funny thing happen today. We had some rain, which we haven't had in a while, and our dogs came back. They go on these pup hikes, and I'm trying to think of a question as I'm telling the story, so bear with me. So the dogs came back and they're totally dirty, and the woman that takes them on these hikes just opens the door and says, "They're dirty," and they were very dirty.

([26:52](#)):

What is your favorite thing about fall in Oregon with your dogs? So I'm going to say, I'm going to go about this from a person that left that rain. And I'll say my least favorite thing was always cleaning dogs off that are that dirty. But it's super fun now that it's a little cooler because we can take them out on more bike rides. We would do that in the summer and they were just dying because of the heat, but that'll be a lot more fun this fall. So what are you looking forward to, as we move out of the hot weather, to be doing with your dogs?

Jeff Newgard ([27:28](#)):

Well, for listeners that don't know me, I have two 7-year-old Australian shepherds and that combined with my three-year-old daughter, there is a lot of energy in [inaudible 00:27:38].

Nikki Dobay ([27:37](#)):

You've got your hands full, you and Natalie do.

Jeff Newgard ([27:41](#)):

And my favorite thing with the dogs, and this going to take a second to get there, but the Australian shepherds have very long fur coats. Their hair can get two, three inches long, even with getting an annual haircut. And with the timeframes that we were getting the dogs groomed, the fall would be when they would just have the longest hair. And during the summertime it's great, there's not a lot of rain. When we get into October, it really starts raining.

([28:10](#)):

And for listeners that might not know Oregon, and especially west of the Cascades, so the Portland area south and western Oregon, we can easily have months with 30, 40, 50, 60 inches of rain for the months. And with the way that our backyard is, we're on a hill and sometimes that water can just cool. And our dogs, if the dog's hair was long, the dogs would just go outside and they wouldn't even do anything to get dirty other than go outside. But their hair all the way down to their skin would just have dirt and mud, and then they would come inside and they would shake before we could even go and-

Nikki Dobay ([28:47](#)):

Oh, no.

Jeff Newgard ([28:50](#)):

... clean them. And so you're probably sitting there wondering, "Why are you saying that this is your favorite thing to do with dogs?"

Nikki Dobay ([28:55](#)):

Yes. I'm wondering that.

Jeff Newgard ([28:56](#)):

My favorite thing to do with the dogs now is we go and take them for grooming four times a year and they get buzz cuts, so that way it doesn't happen. And also, and it might sound weird for an Australian shepherd because they're a breed that's known for their long hair, they're adorable with buzz cuts.

Nikki Dobay ([29:11](#)):

All right. We're going to need some pictures of those guys.

Jeff Newgard ([29:14](#)):

I can absolutely do that.

Nikki Dobay ([29:16](#)):

All right. Well, so did they get their haircuts yet or is that coming?

Jeff Newgard ([29:21](#)):

They had their last one in August. They'll get another one in November and then again in January. So we try to go and map them out so that way the hairs, at least the maximum length of the hair is a steady that we don't end up having to deal with our nine-month rain season that we get in Oregon with the longer hair because it's not fun to have to get cloths and wash down walls just for when the dogs come back in from outside.

Nikki Dobay ([29:49](#)):

Yeah, I will say I don't miss the rain of Portland and dealing with dogs. And we have very short-haired dogs, but they came in so muddy this morning and I was just like, "Ah." But they look like they had a lot of fun. All right, Jeff, well, thank you so much again for the conversation and thank you to the listeners for hanging out with us and talking about Portland or listening about Portland. There'll be information for Jeff and I in the show notes. If you have any questions or comments, do feel free to leave those as well. And I will be back with you in a couple of weeks on the next GeTtin' SALTy.