Disclaimer (00:00):

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Nikki Dobay (00:14):

Jeff, you're here because Portland's up to some shenanigans.

(00:23):

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 Portland, Oregon and Sacramento, California offices. I am very pleased to have one of our regulars back on the show, Jeff Newgard. Jeff is the founder and CEO and president of Peak Policy here in Oregon. So thank you so much for being here.

Jeff Newgard (00:50):

It's great to be back, Nikki. And yes, in Portland, there always seems to be something going on. I think that at least once a year we're doing a podcast episode just on new developments out of Portland.

Nikki Dobay (01:03):

Yeah. I wish we were just here talking about the food or some of their shopping scene. That was really cool, but they're up to, I will say, probably not good stuff on the tax side. So can you explain what the city council's been doing?

Jeff Newgard (01:21):

Sure. So I think it's actually best to go and take a step back to 2016.

Nikki Dobay (01:25):

Sure, you can.

Jeff Newgard (01:27):

In 2016, the city of Portland became the first jurisdiction in the country to go and impose a tax or a surtax on the CEO pay ratio that is reported to the Securities and Exchange Commission. At the time, it was a small surtax and it was kind of, I think of it as a nuisance tax because the surtax itself was small because the number of companies that it affected was relatively small, that certainly there wasn't the economic incentive for companies to truly react at least legally about the surtax.

Nikki Dobay (02:05):

If I'm recalling, it only would bring in a couple million bucks a year.

Jeff Newgard (02:09):

I believe it was between 6.5 and $7 million a year, which relative to the city of Portland's general fund, it's not even a rounding error. For many companies to go and litigate or challenge the surtax, there was the political drawback of being in the press of fighting the city of Portland. So there was certainly a political calculus there. Now jumping forward a decade-

Nikki Dobay (02:36):

It kind of just did its thing for about 10 years.

Jeff Newgard (02:40):

Did its thing, kind of sat there. To a large degree, I attribute the Portland's CEO pay ratio surtax as the starting point for Portland's quirky and targeted tax system, something that you and I have written about quite a bit in tax notes over the years. That was in 2016, and then in 2018 you had the clean energy surcharge, you had a whole assortment of different taxes that were placed into law in 2020. But now this fall, there is a fairly sizable and powerful DSA contingent on Portland City Council. Two of those councilors are proposing supercharging the CEO pay ratio tax to the point where it's 10 or 25% surtax today, but it could go up to a 500% surtax if this ordinance goes into effect. So what it does is it goes and it takes the infirmities of the previous tax, but if you're going to go on supercharge tax, you're also going to go and fundamentally change that calculus over whether to litigate and what the political reaction is to the tax.

Nikki Dobay (03:46):

And so maybe let's just take a step back and explain how this thing worked. So in 2016, it was passed, as you mentioned, it's a surtax, so you pay an additional percentage of the tax amount and that percentage is based on your CEO to average wage ratio. And Portland, and for those listeners who haven't quite picked up on my sarcasm tone yet, they wanted to make it easy, so they just grabbed the wage ratio from that SEC form that you mentioned earlier. There's many things wrong with this on a constitutional level. One, it applies just to publicly traded companies. They did not impose this on non-publicly traded companies. So we actually have equal protection claim issues there. And then just the calculus basing it on your worldwide, well, one CEO to your worldwide employees, many times there definitely wasn't CEOs in the Portland area, and then many of the workers for many of these companies are outside of the Portland area.

(04:59):

So we've got some commerce clause issues in there too.

Jeff Newgard (05:02):

One thing on that, the example that comes to mind frequently for me is if you have a small but publicly traded manufacturing company that is entirely based in the United States, but goes and purchases a contract manufacturer say in Vietnam or somewhere else where you have 15,000 new employees that are coming on the roles that are being paid local living wage, that can drastically go and change the CEO pay ratio that's reported to the SEC. And under this tax in Portland, the existing one, but also certainly the one that's being proposed, you would have factors that are entirely unrelated to Portland that are attributing that calculation for the Portland tax and the sizable increase in the Portland tax.

Nikki Dobay (05:50):

And also thinking about this through the lens of the change in Portland from cost of performance to market-based sourcing, Portland's always taken a very aggressive position on nexus. I don't think Portland though it was tethered to any sort of physical presence nexus, I would say probably long before Wayfair. But with market-based sourcing, you could have a business with no employees within the jurisdiction that are subject to the tax that could be subject to the surtax based on employees and a CEO also wholly outside of the city. So there, again, I think would definitely raise some constitutional issues.

(06:34):

To your point, nobody was ready to move forward and litigate previously because I remember talking to folks when this thing went into effect and it was like, "Well, it's not going to cost us that much. We don't like it. It's not a good precedent, but it's not worth challenging." And also including the political issue you raised as well.

Jeff Newgard (06:55):

One thing that's also weird about this tax, again, the existing one and also the one that's being proposed is that in Oregon we use the federal consolidated group as the starting point for the corporate return. The parent and affiliates here within the United States within the jurisdictional boundaries of the United States. But with this SEC CEO pay ratio, you have factors that are well outside of the jurisdiction that the tax system is working in, which to me it's just nonsensical.

Nikki Dobay (07:24):

And I remember I was at cost when this went into effect and I went and actually testified on this. I believe it was to the revenue division, although it may have been the city council, but I brought that point up, this mismatch in the filing groups. And I know the revenue division people also looked at me like I had at least four heads because there was definitely not a lot of understanding about how the Oregon group works as opposed to what is included for SEC purposes. So there's always been a host of issues as we've been mentioning, but unfortunately it was one nobody ever kind of stepped up and pulled the trigger. But it seems like what they're contemplating could change that calculus, as you say.

Jeff Newgard (08:13):

I think that it very much changes the calculus. There's also an entirely different predicament that the city council is going to find itself in here. Back in December of 2016, the city council believed and the courts hadn't fully opined on an issue surrounding its charter authority for the city council to go and impose access without first seeking voter approval. There's been a longstanding provision in the city charter that requires that. In 2017 in the HomeAway case in the US District Court for the District of Oregon, the federal district judge very adamantly pointed out that the city of Portland doesn't have this unilateral inherent authority to tax.

(08:54):

So perhaps there's an argument, at least on the political side, that in December of 2016, the city council didn't know it didn't have the authority to go and create this tax, this tax within a tax, to be precise here. But there has been a lot of noise made over the last several months, certainly the last several years, this issue surrounding the city of Portland's charter authority around taxes. And it's just another example of litigation fodder that the city seems to be anxious to go and give taxpayers. And from my vantage point on the budget politics and also the politics just more globally, the city council is creating a problem for itself where whether it's taxes like the clean energy surcharge or this CEO pay ratio and a whole assortment of other taxes where the city's charter authority comes into question, if the courts go and follow what the previous rulings have been, the city could find itself having a really bad day.

Nikki Dobay (09:54):

Yeah, I think, and you and I have talked about this in the past, this one as a surtax, there's even another layer of questions on this issue related to charter authority. I think both of us at various points over the past 10 years have gone back and looked to see if the business license tax was ever enacted by voters. I

don't think I've found a definitive vote of the people on that. So again, that also is kind of swirling around out there. And then we have current litigation on the clean energy surcharge as well as the increase to the arts tax, which the city council passed just earlier this year or last year. So these are bubbling up. I'm not one to step in the political suit, but I wonder if the city really does have a bad day, what they do because voters, at least since the mid 2020s, have been pretty fatigued with taxes in Portland.

(10:57):

And remind me, wasn't there a capital gains tax that actually failed? That's shocking that a Portland tax on the ballot failed. Sent a pretty big message.

Jeff Newgard (11:09):

Over the last few years, I'd say probably the last eight years, really since Measure 97, Multnomah County, which is the county that the city of Portland resides in, has historically been the county that carries taxes on the ballot. But since Measure 97, and there's a couple of outliers here, but we've seen a trend where Multnomah County has become far less willing to go and just rubber stamp new taxes on the ballot. I think that the Preschool for All Initiative in Multnomah County that was approved in 2020 is an exception. And likewise, the metro regional government has a 1% personal and business income tax. Multnomah County carried that. But even in those races or those campaigns, the margins weren't as high as we normally expect. And so we are seeing a very drastic change in the way that even Multnomah County voters are looking at, I would say, non-traditional taxes.

(12:07):

I think that when you go and look at property tax levies and bonds and operational charges, there's still an appetite to go and support higher or new taxes when there's a clear delineation for the public services that are received in exchange. Also, I think people are more just comfortable with property taxes, but with income taxes, whether it's business or personal income in the Portland area, I think there's a sour taste from voters.

Nikki Dobay (12:38):

I think it really, those two taxes, the metro and the Multnomah County personal income taxes, I feel like those were kind of the death nail because what voters were so used to seeing is all these services they were going to get and there wasn't going to be an impact. And those two taxes, they felt them, the people, many people, not everybody. And then they're not feeling like they're getting the services that they thought they were getting. So Portland and Multnomah County, I think we're in complete agreement. They've let down their voters and their voters are reacting.

(13:17):

I have the scene from Dirty Dancing in my head when Baby's talking to her dad and he's very disappointed in her and she says that he disappointed her too. So I don't know why that just popped into my head, but I feel like that's how the voters of Portland and Multnomah County are feeling.

(13:36):

So kind of going back to our initial conversation about this CEO to average wage ratio, surtax, I assume they're still calling it a surtax. If they have this bad day, yeah, there'll be different conversations. That would be a real bad day.

Jeff Newgard (13:51):

There's also multiple forms of having that bad day. It might not even come down to the charter authority question. There has already been reports that the Trump administration and the SEC are looking at, to a large degree, nurfing some of those pay ratio reporting requirements. Well, if you have this local tax that's predicated on it's one thing that if you have $7 million that disappear overnight because the federal administration goes and changes its approach to something, but if you go and supercharge the tax, and I believe the estimates are upwards of $80 million is what the higher tax would raise, you're looking at a far more painful budget situation if that just disappears overnight.

Nikki Dobay (14:34):

Well, and the last thing on the legal challenge front, the recent decision by the Maryland Tax Court in the digital advertising case, that case ruled on the fourth prong of the complete auto test. And we don't see this every day, but this CEO to average wage ratio tax is one that strikes at the heart of the fourth prong. In addition, I think to just being completely untethered to having the tax base be untethered to any activity or business activities in Portland. So there would be a lot to chew on if this thing passes.

(15:15):

So crystal balling it, Jeff, is this something that we need to be worried about beyond just having an interesting podcast topic?

Jeff Newgard (15:24):

I've heard from some people that are deep within city council that they're looking at potentially voting this out of committee sometime next week.

Nikki Dobay (15:33):

Oh dear.

Jeff Newgard (15:34):

And then it will go to the full council. The city of Portland has been, for lack of a better way of putting it, a little disorganized. It's two years after doing a full charter overhaul. There's a completely different form of government, much more of a legislature than it is more administrative style of a city council. Just because it's moving doesn't mean that it's moving fast, the wheels of government taking something from point A and putting it in point B. But I think we need to treat it very seriously. And if there's companies out there that are concerned about this, and I know of plenty that are, this isn't something that we should be willing to kind of sweep under the rug and just assume that it's another crazy idea out of Portland. Portland loves its crazy ideas.

Nikki Dobay (16:22):

Yeah. And I mean this would impact any publicly traded company that's subject to those SEC reporting rules about the CEO to average wage ratio. The other thing I would note about that is because the SEC rules really have no teeth, I don't know that companies have thought too much about that ratio. And again, even if they were filing in Portland, it was going to be so immaterial in the impact, but what you're talking about is a very different situation.

(16:55):

I guess one last question before we move away from Portland, are they considering any other proposals to raise revenue or is this kind of the shiny toy? And maybe I'll turn that into a two part question. Do they need this revenue first? And then if so, are they looking at other ideas?

Jeff Newgard (17:14):

To answer this in a second question, if you go and ask members of city council, they always need new revenue.

Nikki Dobay (17:20):

Sure. But do they really need new revenue according to Jeff Newgard?

Jeff Newgard (17:25):

According to Jeff Newgard, no. Local governments in Oregon are struggling. With measures five and 50 are property tax limits. Local governments do have-

Nikki Dobay (17:34):

Challenges.

Jeff Newgard (17:35):

... more challenging time balancing their budgets. While I say that as a very generalized statement for me, it doesn't apply as much for Portland because Portland has adopted this entirely separate non-property tax regime where there's multiple income taxes, there's a high rate gross receipts tax. Do they need the money? No, not particularly. Are there other topics kind of percolating? Again, always, but this is the shiny object right now with the way that local government law works in Oregon in May and June is when local governments must approve their budgets. And so I'm watching this one to see, are they trying to go and pass this now to go and make room for other tax topics as they get into the heart of their budget season, or is this going to be something that carries over into that?

Nikki Dobay (18:28):

This is also where I'll just make the statement that Oregon and Portland's life could be so much easier if they would just adopt that general sales tax and then allow the locals to also impose a local option sales tax on that. But we don't have that structure, so I won't belabor that point.

(18:48):

We're going to talk a little bit about Oregon, but there's one other locality that is doing something silly. Eugene, I know I've talked to some folks. Eugene wants to follow Portland down the clean energy surcharge path, and that is on the ballot. It's a little different than Portland's. It's got a deduction, but the same, I would say, overarching structure with a tax on retailers and retail sales. Are you hearing how this thing is shaken out in the polls? Is it expected to pass? Last I heard nobody was doing too much on it, the proponents at least.

(19:30):

So I was hopeful.

Jeff Newgard (19:33):

I'm hearing the same thing. I do think it's going to be quite a bit of a nail biter heading into next Tuesday. Eugene, for those that might not know Oregon particularly well, Eugene has a long history in climate activism and in liberal activism generally. It's where the University of Oregon is located. I think that this one could have a good amount of quiet support, not necessarily people that are gung-ho about it, but people who hear about issues related to climate and climate change and the need for investments in that area and just take it at face value. That's a big part of the problem with populist tax initiatives going to voters. Not that voters don't deserve the right to be able to go and opine on these issues, but when you have advocates that are going and crafting a tax, there is nobody with technical expertise that is going and actually figuring out what are the levers of this tax going to be, but you end up having a populous tax, a tax that is written for the way that it will appear to voters rather than actually trying to go and solve the problem.

Nikki Dobay (20:42):

Yeah. And this one, I mean, if it does pass, I'm going to assume there's going to be litigation on this as well. It looks strikingly similar to the Oregon Cat, and we've got a state level preemption for the Cat. So I think we'll have some litigation action there and then we'll see if somebody challenges Eugene's charter authority, although kind of different questions as it relates to the voters, this would be voted on by the people. If it were to pass, then they'd have to wait and see how it gets implemented. But I don't think it's the smoothest path for Eugene if it does pass.

Jeff Newgard (21:20):

Well, I also believe they run into some of the same issues that the city of Portland's clean energy surcharge gross receipts tax as it relates to thresholds for the tax, which then brings into play US constitutional claims. Again, with the digital ad tax ruling, I think that comes into play here.

Nikki Dobay (21:39):

Okay. Well, we spent a lot of time on the who Oregon locals, not even that many, but what in a nutshell, what's percolating at the state level?

Jeff Newgard (21:52):

At the state level, one of the things that's most interesting to me right now is that I believe two weeks ago on October 8th, a group of progressive advocacy, a coalition of progressive advocacy groups filed an initiative petition that would go and create the financial assets tax or FAT.

Nikki Dobay (22:10):

Love that acronym.

Jeff Newgard (22:11):

It is their version of what I think is becoming colloquially known as a wealth tax.

Nikki Dobay (22:18):

Yes.

Jeff Newgard (22:18):

One thing that's interesting to me, and just on the technical side, it's different than Proposition 40 in California where it's a one-time tax. This tax that's being proposed in Oregon, and just let me just emphasize that this is the earliest of early stages. This is for the November 2028 ballot. There's a lot of action items that have to happen for this to actually appear on the ballot, but that tax in Oregon is an annual tax. So unlike California where it's a one-time tax, in Oregon, we would be looking at a tax that applies every single year. The thing that stands out to me the most about that initiative and that campaign is that when they announced the initiative filing, they explicitly admitted to reporters that their point was to go and apply pressure was the word that they used on lawmakers heading into the 2027 session.

(23:06):

We've seen the initiative process be used as a very powerful threat in the past to go and get either lawmakers or the business community to come to the bargaining table and give in to something that the other side wants. I've never seen a time where advocates go and file an initiative petition and then almost in the same breath go and say, "This is a bluff. I'm doing this to apply leverage." And the more that I think about this issue, I either don't think that it's real or I don't think that proponents actually think that it's a viable option. Because if you think about what else would be on the ballot in Oregon in November 2028, the Portland's metro's regional government metro has until 2030 for its port of housing services income taxes. That's the metro area personal and business income taxes with 1% rates. Unless the voters go and renew those taxes, those taxes sunset at the end of 2030. So the way that I look at it, November 2028 really is metro's only shot to go to voters and get that renewal.

(24:13):

The groups that are pursuing this FAT, the wealth tax, are also some of the same groups that support those regional taxes. And the appetite for voters, especially in the Portland area, like we were talking about just a little bit ago, is diminishing on taxes. And so if you end up going and going stir crazy on the ballot with a wealth tax, renewing a tax that was previously messaged as a tax on high income on wealth, do you end up risking-

Nikki Dobay (24:45):

Those low calls.

Jeff Newgard (24:47):

... all of the tax issues on the ballot and have a local tax revolt. I'm not saying that that necessarily happens, but I don't think that the advocates are thinking all of this through or at the very least they wouldn't have admitted that it was a bluff right from the get-go.

Nikki Dobay (25:03):

Okay, so that's one to watch. I think what happens in California and its wealth tax will also play into this conversation. So if that's defeated pretty strongly, hopefully that would send some sort of message to Oregon, but it is Oregon, so we don't like to take our plays from California's playbook all the time.

Jeff Newgard (25:27):

No, I think California is certainly a state that I'm watching on tax measures just like I think everybody else. I'm also very closely watching Colorado right now because while it's a very different proposal, kind of gives you the inner and outer bounds of this entire category of taxes, while no two states are

identical, the way that, at least in this populous world that we live in right now, the way that taxes are being treated on the ballot can give us a pretty solid read in other states.

Nikki Dobay (25:59):

I always get nervous about asking if there's anything else.

Jeff Newgard (26:02):

Always.

Nikki Dobay (26:03):

Yes, I know.

Jeff Newgard (26:04):

We haven't even talked about anything that could come up in Oregon's legislative session.

Nikki Dobay (26:08):

Well, that's an entirely separate podcast, I'm sure.

Jeff Newgard (26:12):

Now, the only other thing that I think is worth flagging is that there is a group that's called the Universal Healthcare Governance Board here in Oregon. It's a process that started up in 2019, but really got going in 2023. It's a group of healthcare professionals and funding advocates that have been meeting to go and piece together a plan for the state to go and run a state managed health insurance policy. And they have already pieced together what the price tag is for that. It's upwards of 69, $70 billion every two years, and that is nearly twice as much as the state's entire general fund. But for that proposal, they are looking at virtually doubling the personal income tax, going and significantly raising the corporate income tax, adding more to the cat, having a employer side payroll tax. There's lodging taxes involved in this proposal in Oregon to get to $70 billion.

(27:09):

You really have to get creative in what taxes you're going to be looking at. Now, do I think that the legislature is going to jump at this one next year? No, but there is a contingent, especially on the far left that wants to see healthcare move in this direction and thinks that Oregon is well suited to be an experiment state to go and do this. And so it's something that I'm watching really closely as we start getting ready for the next legislative session. And I think that that could be another thing that ends up on the ballot for November 2028. So again, if you go and put too much in front of voters and their reaction is repulsive, the outcomes are going to be repulsive.

Nikki Dobay (27:51):

All right. Well, lots going on, but we'll put a pin in it for now. I'm sure we will be back ahead of the legislative session to talk about more. But before we go, I have to ask you a surprise non-tax question.

Jeff Newgard (28:04):

Let's hear it.

Nikki Dobay (28:05):

All right. It's almost Halloween. So the question is, are you and Natalie dressing up? Are you dressing your daughter up? Are you dressing your dogs up? So I'll start. The dogs are dressing up this year. So Frankie is going as Popeye, and she looks pretty good. So we'll definitely have to post some pictures after Halloween. And Rosie is going as a miniature botted albino lion. So because she is white, it's botted, and I was able to find her a white mane, so she will be supporting that. But how about you guys? What are you guys up to for Halloween?

Jeff Newgard (28:45):

So our two dogs, Huck and Jacks, are not the type to go and put costumes on. We have Australian Shepherds, so we always have a lot of energy. They will be resting with grandma, possibly with a sedative, just because of all the kids in the neighborhood.

Nikki Dobay (29:00):

Yes.

Jeff Newgard (29:01):

And my daughter just found a Hulk costume that I had from about 10 years ago and is insisting that that's what I get to wear this year. And so I will wear whatever I'm told. My daughter is five years old and she is very into princesses. She thinks of herself as a little princess, and she has, I think, probably a dozen different princess costumes, and she's going to pick day of who gets to be the trick or treating costume for the night.

Nikki Dobay (29:26):

All right. Well, we'll have to post pictures for the listeners when this comes out. But Jeff, thank you so much for connecting and talking about Portland. Just so the listeners know, Jared Walczak is going to join us in a few weeks to do an economic breakdown for some of these crazy Portland proposals. And Jeff and I's information will be in the show notes, and I will be back with you in a few weeks on the next GeTtin' SALTy.