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1 **ARGUMENT**

2 **I. THE TEXT, HISTORY, AND STATUTORY FRAMEWORK AROUND ORS**
3 **§ 316.082 COMPELS A REFUND TO MR. AND MRS. SPEER IN THIS INSTANCE.**

4 This case is about the word “imposed,” and whether “imposed” means “imposed” for purposes of
5 ORS § 316.082(1) or whether the Department’s gloss that “imposed” really means “imposed and then paid”
6 is a proper reading of the statute. *Compare* ORS § 316.082(1) (using only “imposed”) *with* OAR 150-316-
7 0084(3) (inserting actual payment requirement). When “interpreting a statute,” it is the task of courts to
8 “discern the intent of the legislature.” *Carlson v. Myers*, 327 Ore. 213, 223 (1998).

9 Fortunately for the Speers, all levels of statutory interpretation favor their reading of ORS
10 § 316.082(1) that “imposed” is different than “paid.” The plain meaning of the words—and the mere fact
11 that they are *different* words—show that the Speers’ reading is correct and that ORS § 316.082(1)’s credit
12 is on the tax imposed by Wisconsin. To the extent there is any ambiguity on how to calculate the tax
13 “imposed,” the Oregon Supreme Court’s decision in *Con-Way Inc. & Affiliates v. Dep’ of Revenue*, 353
14 Ore. 616, 302 P.3d 804 (2013), guides that tax credits do not change the tax liability, they are merely a
15 means of paying them. The relevant legislative history for ORS § 316.082 also supports this conclusion.
16 Taking each in turn, this Court can rule for the Speers without needing to weigh in on any Constitutional
17 questions.

18 **A. Plain, Natural, and Ordinary Meaning Analysis Shows that “Imposed” does not**
19 **mean “Paid.”**

20 This Court should start with the plain text. The Oregon Supreme Court has long mandated that “[t]he
21 starting point for interpreting the statute is its text and context.” *Carlson*, 327 Ore. at 223 (citing *Portland*
22 *Gen. Elec. Co. v. Bureau of Labor and Indus.*, 317 Ore. 606, 610–11 (1993) (“PGE”)). This is “the first
23 level of analysis” before going to legislative history or canons of statutory construction. *Smurfit Newsprint*
Corp. v. Dep’ of Revenue, 329 Ore. 591, 597 (2000). That is because, “there is no more persuasive evidence
of the intent of the legislature than the words by which the legislature undertook to give expression to its
wishes.” *State v. Gaines*, 346 Ore. 160, 171 (2009) (internal quotations omitted). This Court should

1 therefore start with the text, recognizing that “[w]ords of common usage should be given their ‘plain, natural
2 and ordinary meaning.’” *Carlson*, 327 Ore. 223 (quoting *PGE*, 317 Ore. at 611); *Smurfit Newsprint*, 329
3 Ore. at 597 (quoting same).

4 But in its Response, the Department spends three pages jumping from definitions of “impose,”
5 “credit,” “levy,” and “payment” in an unintelligible morass to try to turn “impose” into “paid.” Dept.
6 Response 11–14. Jumping through such hoops is the antithesis of finding a “plain, natural, and ordinary
7 meaning” that the case law requires. That is because, no matter how many definitions they supply, all agree
8 that, in the tax context, to impose is to levy. The disagreement lies in the Department’s insistence that “paid”
9 is part of a statute that does not contain the word. This Court should reject the convoluted route proposed
10 by the Department to transmogrify “impose” to “paid only by bankable funds.”

11 In contrast, the Speers assert that it is axiomatic that “imposed” and “paid” can and do mean different
12 things. In Black’s Law Dictionary, “impose” is subject to one, singular definition: “[t]o levy or exact (a tax
13 or duty).” *Impose*, BLACK’S LAW DICTIONARY (12th ed. 2024). *Pay*, unsurprisingly, has multiple
14 definitions, but the most salient are all focused on satisfaction of a debt or the transfer of money. *See, e.g.*
15 *Pay*, BLACK’S LAW DICTIONARY (12th ed. 2024) (“To give money for a good or service that one buys; to
16 make satisfaction <pay by credit card>.”) (definition 1); *id.* (“To transfer money that one owes to a person,
17 company, etc. <pay the utility bill>.”) (definition 2); *see also id.* (“To give (someone) money for the job
18 that he or she does; to compensate a person for his or her occupation; compensate (1) <she gets paid twice
19 a month>.”). The Internal Revenue Code starts by imposing a tax on income, and then deductions and
20 credits apply. *See, e.g.*, 26 U.S.C. § 1; *see also* ORS § 314.011(2)(a) (“Any term has the same meaning as
21 when used in a comparable context in the laws of the United States relating to federal income taxes, unless
22 a different meaning is clearly required or the term is specifically defined in this chapter.”).

23 These definitions align with the definitions provided by Merriam-Webster’s online dictionary and
Webster’s Third New International Dictionary from 1961. *Impose*, MERRIAM-WEBSTER ONLINE

1 DICTONARY, <https://www.merriam-webster.com/dictionary/impose> (“a: to establish or apply by authority
2 [ex: to] impose a tax[,]”); Impose, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY, 1136 (unabridged
3 ed. 1961) (“to cause to be burdened : Subject – used with to b (1): to make, frame, or apply (as a charge,
4 tax, obligations, rule, penalty) as compulsory, obligatory, or enforceable.”); Motion for Summ. J. at 14
5 (quoting same). “Impose,” therefore, in our context is about what the government demands of the taxpayer
6 while “paid” is about how the taxpayer satisfies the levy. As any working adult understands, the taxpayer
7 pays the levy.

8 Much of the confusion in the state’s position lies in its insistence that the *imposition* of taxes does
9 not matter for ORS § 316.082, but instead only what is actually withdrawn from the taxpayer’s bank
10 account. *See, e.g.*, Dept. Response at 4 (“The department has interpreted ORS § 316.082(1) . . . to limit the
11 allowable credit to the amount of the net tax a resident is obliged to pay and actually paid to the other
12 state.”). The Department then chides the Speers for “conflat[ing] ‘credit’ and ‘payment,’” *id.* at 6, and
13 attempts to discuss tax credits as reducing “tax liability” rather than paying for the tax. But tax credits, such
14 as Wisconsin’s support of local industry like breweries, are another way to *pay* taxes that are already due.

15 As the United States Supreme Court observed, “[a] tax credit, of course, is one variety of ‘let the
16 government pay.’” *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 767 (2014). Understanding this
17 aspect of a tax credit clarifies that the Speers are already paying Wisconsin in a way that Oregon is failing
18 to recognize—resulting in the imposition of tax twice on the same income. In both practical and legal effect,
19 “[a] dollar is a dollar—both for the person who receives it and the government that pays it, whether the
20 dollar comes with a tax credit label or a direct expenditure label.” Stanley S. Surrey, *Tax Incentives As A*
21 *Device for Implementing Government Policy: A Comparison with Direct Government Expenditures*, 83
22 *Harv. L. Rev.* 705, 717 (1970). In effect, the Wisconsin tax credit *is* payment for the Wisconsin tax due.

23 The Oregon Supreme Court recognizes this as well. In *Con-Way Inc. & Affiliates v. Dep’t of*
Revenue, 353 Ore. 616, 630-31 (2013), the Court recognized the definitions from Websters Dictionary and

1 Black’s Law Dictionary pointed to this result. *Con-Way* recognized that a “tax” is ““a *usu[ally]* pecuniary
2 charge imposed by legislative or other public authority upon persons or property for public purposes.”” *Id.*
3 (quoting Tax, Webster’s Third New Int’l Dictionary (unabridged ed. 2002)) (brackets supplied).
4 Additionally, citing Black’s Law Dictionary, the *Con-Way* Court held: ““Although a tax is often thought of
5 as being pecuniary in nature, *it is not necessarily payable in money.*”” *Id.* at 631 (quoting Tax, Black’s Law
6 Dictionary (8th ed. 2004)). Combined, the dictionary “meanings of ‘tax’ show that, although monetary in
7 nature, a tax need not be paid in cash.” *Id.*

8 Instead of recognizing this axiom about tax credits, the Department focuses on whether a tax credit
9 reduces the “tax liability”—and such discussion of reducing liability sounds much more like a “tax
10 deduction.”¹ Taking a step back in the analysis is helpful here to describe what tax credits do versus tax
11 deductions. Tax credits are not the same as tax deductions, and this distinction shows that using a tax credit
12 is just another payment method. Black’s Law Dictionary defines “tax credit” as “[a]n amount subtracted
13 directly from one’s total tax liability, *dollar for dollar*, as opposed to a deduction from gross income.” Tax
14 Credit, BLACK’S LAW DICTIONARY (12th ed. 2024) (emphasis supplied). The tax credit definition then gives
15 a “*cf.*” citation for comparison to the second definition of that dictionary’s definition of “deduction.” *Id.*
16 That is because a tax credit does not change the levy owed or the basic calculation of gross income. Instead,
17 such a reduction in levy or gross income is what a *tax deduction* does. *See, e.g.*, Deduction, BLACK’S LAW
18 DICTIONARY (12th ed. 2024) (“*Tax*. An amount subtracted from gross income when calculating adjusted
19 gross income, or from adjusted gross income when calculating taxable income. — Also termed *tax*
20 *deduction.*”) (emphasis in original); *id.* (also using a “*cf.*” reference back to “tax credit”).

21 A tax credit is like using a restaurant’s gift card to either partially or fully pay for a meal: the money
22 came from the establishment, but it was always the customer’s bill to pay. A tax deduction is like a

23 ¹ Of course, out-of-state tax deductions are not available for the credit in question on this case. *See* ORS
§ 316.082(4) (“No credit allowed under this section or ORS [§] 316.292 shall be applied in calculating tax
due under this chapter if the tax upon which the credit is based has been claimed as a deduction, unless the
tax upon which the credit is based is restored to income on the Oregon return.”).

1 restaurant’s coupon, reducing the cost of the meal. The Department wishes to infer that a credit is lowering
2 the costs of the Wisconsin taxes, but that is not true. What a tax credit does is grant what the state itself
3 pays for some or all of the taxes imposed on a business, such as the brewery.

4 The Legislature chose to use the word “impose” to calculate the offset of ORS § 316.082(1).
5 Accordingly, the “plain, natural and ordinary meaning” of that word is the actual tax bill due from
6 Wisconsin for the brewery’s income—not the later amount due after tax credits, offsets, or other
7 modifications. This is the plain and ordinary as well as simplest and clearest meaning of the statute, and the
8 very meaning on-point case law compels as discussed below. In this instance, Wisconsin helped pay the
9 Speers’ tax liability by issuing tax credits. But in the Department’s view of this case, Oregon should be able
10 to extract that money for this state’s own uses.

11 **B. The Oregon Supreme Court’s *Con-Way* Decision in 2013 Controls this Case, Not
12 Pre-World-War-II Federal Cases.**

13 As argued in the Speers’ opening brief, the Oregon Supreme Court’s decision in *Con-Way*, 353 Ore.
14 616, 302 P.3d 804, is dispositive on the question of payment and credits. Pl. Mot. for Summ. J. at 11–12.
15 The case establishes that: (1) a tax credit functions as a form of payment to satisfy a tax liability, not as a
16 retroactive reduction of the tax imposed; and (2) the legislature must be explicit when it intends to deny the
17 use of a credit. *See* Pl. Mot. for Summ. J. at 11–12 (discussing same). An in-depth, wholistic analysis of
18 *Con-Way* illustrates not only is the case directly applicable to the present case but also favors the Speers’
19 interpretation of ORS § 316.082.

20 In *Con-Way*, the company was subject to a tax liability of \$75,000 under Oregon minimum tax
21 provision. *See Con-Way*, 353 at 617–18, 302 P.3d at 805. Con-Way had paid \$50,000 in estimated taxes
22 and attempted to apply a portion of its ORS § 315.354(1) Business Energy Tax Credit (“BETC”) (under
23 ORS § 315.354(1)) to the balance. *See Con-Way*, 353 at 617–18, 302 P.3d at 805. The Department
disallowed Con-Way’s application of the BETC, arguing that the taxpayer was required to “pay” the Oregon
minimum tax because “a tax credit only reduces a [general] tax liability.” *Id.* at 618, 302 P.3d at 805. Con-

1 Way, in response, asserted that the Legislature will specifically disallow a credit when it intends to do so,
2 which it had not done so for purposes of the Oregon minimum tax. *See id.* at 625, 302 P.3d at 809. Con-
3 Way, like the Speers, argued that neighboring statutes use of different phrasing was significant. *See id.* at
4 625, 302 P.3d at 809. In other words, if the legislature knows how to say it in one place, it could have said
5 it in another. *See id.* at 353 Ore. at 626, 302 P.3d at 809–10.

6 Ultimately, the Supreme Court agreed with Con-Way, recognizing “the broad phrase ‘allowed
7 against the taxes otherwise due’ under ORS chapter 317, and the absence of an express prohibition in ORS
8 [§] 317.090 of the use of credits against the minimum corporate tax,” would therefore “weigh against the
9 [D]epartment’s assertion that the legislature intended to prohibit the use of a BETC against that minimum
10 tax.” *Id.* at 625, 302 P.3d at 809. Furthermore, the omission of an express prohibition on using credits under
11 ORS § 315.354 by later enactment was “presume[d]” to be “purposeful.” *Id.*

12 This Court has also recognized that, when the Legislature allows, tax credits can be traded for value,
13 making them “property.” *See, e.g., Dep’t of Rev. v. Sedgewick*, 24 OTR 178, 190 (2020); *see also Virginia*
14 *Historic Tax Credit Fund 2001 LP v. Comm’r*, 639 F.3d 129, 141 (4th Cir. 2011) (holding similar regarding
15 historic buildings tax credit). That’s because a “[t]axpayers’ tax liability was a personal debt, due the state
16 of Oregon” that “could be paid using a credit allowed under state law.” *Sedgewick*, 24 OTR at 198-99 (citing
17 *Con-Way*, 353 Ore. at 631, 302 P.3d at 812).²

18 The Department, in their Cross-Motion and Response, wishes to cabin *Con-Way* to its facts. *See,*
19 *e.g.,* Dept. Response at 6 (“*Con-Way* focused on the practical function of the BETC as applied to the
20 minimum corporate excise tax in ORS 317.090.”). *Con-Way* has not been so cabined by any Oregon court.
21 *See, e.g., Kupillas v. Sage & Soc. LLC*, 337 Ore. App. 67, 77, 563 P.3d 394, 400 (2024) (applying *Con-*
22 *Way*’s statutory construction reasoning in case involving a Christmas tree/small flower farm challenge to

23 ² This Court “regard[ed] as synonymous the terms ‘claiming’ a credit and ‘using’ a credit to offset tax liability.” *Id.* at 180 n.6 (again citing *Con-way*). Claiming a credit is thus another way to pay one’s taxes—using government money.

1 the special use permits); *ABC Inc. v. Dep't of Revenue*, No. TC-RD 5431, 2025 WL 2598221, at *5 (Ore.
2 T.C. Sept. 8, 2025) (applying *Con-Way* to statutory interpretation of property tax refunds); *Tomseth v. Dep't*
3 *of Revenue*, No. TC-MD 150434C, 2016 WL 4446323, at *6 (Ore. T.C. Aug. 23, 2016) (applying *Con-Way*
4 to income tax dispute).

5 In place of *Con-Way*, the Department wishes to set a standard based on pre-World War II trial-court-
6 level pronouncements on the federal tax code dealing with two issues: a complex foreign-sourced tax credit
7 in the Revenue Act of 1924 and the first steps at a federal inheritance tax in the Revenue Act of 1926. Both
8 lines of cases are inapposite.

9 Three cases really amount to an examination of the same issue of a tax credit featured in the Revenue
10 Act of 1924. In *Appeal of Moir*, 3 BTA 21, 22 (1925), the newly-created Board of Tax Appeals within the
11 executive branch (and thus not an independent court)³ examined the Revenue Act of 1924 on a credit that
12 created a hassle for many taxpayers for tax year 1923. Dept. Response at 7 (citing same). Indeed, the other
13 primary authority for the Department is also on the same 1923 tax credit in *Stover v. McCaughn*, 28 F.2d
14 1005 (ED Penn 1928). See also Dept. Response at 7 (“*Stover*... addressed the same issue”). The same is
15 true for *Whitney v. United States*, 79 Ct. Cl. 480, 483, 6 F. Supp. 849 (1934). All are cabined to that one
16 feature of that single tax credit, such that *Moir* simply became a placeholder for any future challenge by
17 taxpayers. See, e.g., *Harkness v. Comm’r*, 21 B.T.A. 1068, 1072 (1931) (“On the question of the credit
18 provided by section 1200 of the Revenue Act of 1924, our judgment is for the respondent. *John Moir et al.*,
19 3 B.T.A. 21; *David A. Cunningham*, 9 B.T.A. 1050; *Stover v. McCaughn*, 28 Fed.(2d) 1005.”). But none of
20 these lower-level tax cases about the Revenue Act of 1924’s Section 1200 are powerful enough to set aside
21 on-point case law from this state’s supreme court in 2013. *Con-Way* must control.

21 ³ The BTA would become the Tax Court of the United States (also an executive agency), and it was not until
22 the Tax Reform Act of 1969 that Congress created the Article I-based United States Tax Court we know
23 today. See, e.g., United States Tax Court, “History” <https://www.ustaxcourt.gov/history/>. Prior to 1969, the
BTA was independent of the Internal Revenue Service, but still beholden to the executive department under
Article II and its rulings should be taken as one of administrative, rather than judicial, review.

1 Both *Morsman v. Commissioner*, 13 B.T.A. 415 (1928) and *Pearson v. United States*, 14 F. Supp.
2 1016, 83 Ct. Cl. 624, 632 (1936) dealt with the federal inheritance tax from the Revenue Act of 1926,⁴ which
3 expressly called for calculation based on what was “actually paid to any State or Territory.” See, e.g.,
4 *Morsman*, 13 B.T.A. at 416 (quoting § 301(b) of the Revenue Act of 1924). It is unremarkable that, in
5 *Morsman* and *Pearson*, tax credits only applied to what was “actually paid” because the statute Congress
6 wrote ordered the calculation to be based on what was “actually paid.” That is far different than ORS §
7 316.082(1), which carries no such explicit “actually paid,” proviso. In other words, Section 301(b) of the
8 Revenue Act of 1924 is what the Department *wished* ORS § 316.082(1) said. But since ORS § 316.082(1)
9 focuses on the tax “imposed,” *Morsman* and *Pearson* are inapposite.

10 In the end, *Con-Way*, is dispositive on the question of payment and credits. Pl. Mot. for Summ. J.
11 at 11–12 (arguing same). Just as in *Con-Way* the Department’s legal theory was that credits cannot count
12 as “payments” since they came from the government rather than the Speers’ bank account. Just as in *Con-*
13 *Way*, that is not how credits work for ORS § 316.082(1), which carries no such explicit “actually paid,”
14 language, only that tax be imposed by the other state. *Con-Way*, the case on-point and from this state’s
15 supreme court, supports the Speers.

16 C. The Relevant Legislative History Shows that “Imposed” does not mean “Paid.”

17 The Department proffers hundreds of pages of purported legislative history pertaining to ORS
18 § 316.082, including various national documents and meetings. These documents, however, are not

19 ⁴ To assuage complaints that the federal government was encroaching on an area of core state-level taxation,
20 Congress provided a partial tax credit in relation to what was paid to the decedent’s state upon death. See,
21 e.g., *Additional State Inheritance Taxation to Take Advantage of Credit Allowance on Federal Tax*, 43 YALE
22 L.J. 134, 134–35 (1933). The partial credit was initially 25 percent credit for federal estate taxes of whatever
23 was paid to the state, later raised to 80 percent with conditions on timing for claiming the credit. *Id.* at 134.
This system created gamesmanship “[s]ince under this provision a state, merely by imposing a sufficiently
high tax, may receive a tax which the estate would otherwise be required to pay to the federal government.”
Id. Therefore “state legislatures . . . sought ways and means of taking advantage of the credit allowance.”
With this backdrop, is of little wonder that Congress would want the federal tax credit to be calculated based
on what was paid, rather than let states game a system of credits. But that is not the situation for ORS §
316.082, which exists to protect against double taxation for activity that is out-of-state.

1 pertinent as they fail to specifically address the Oregon Legislature’s intent for ORS § 316.082. *See e.g.*,
2 *State v. Gaines*, 346 Ore. 160, 171–72, 206 P.3d 1042, 1050–51 (2009) (explaining “pertinent” and “useful”
3 legislative history may be used to assist the Court’s analysis).

4 Rather, a complete review of the relevant legislative history supports the Speers’ conclusion ORS
5 § 316.082(1)’s term “imposed” means “imposed.” The Chief Counsel of the State Tax Commission in 1968
6 recognized that “[t]he rates of tax are imposed upon the taxable net income and against the result of this
7 calculation there may be offset statutory ‘tax credits.’” Mem. from Carlisle B. Roberts, Chief Counsel, Law
8 Section to Comm’r Charles H. Mack (August 19, 1968) (attached as Exhibit 1). The Minutes of the Oregon
9 Legislative Tax Study Committee from October 1 to 3, 1968, shows Committee members using “imposed”
10 as Plaintiffs’ suggest here: “Mr. Ira Jones, State Tax Commission, pointed out that the purpose of HB 1764
11 is to permit counties or cities to *impose* a tax at a rate not to exceed one percent on net income of residents[]
12” Dec. of Bella Na, Ex. F, p. 18. Moreover, although Defendants claim the Advisory Commission on
13 Intergovernmental Relations (“ACIR”) meant “imposed and paid,” the model statute they proposed and that
14 Oregon adopted used “imposed.” *See, e.g.*, Dec. of Bella Na, Ex. B, p. 15 (“A resident individual shall be
15 allowed a credit against the tax otherwise due under this act for the amount of any income tax *imposed* on
16 him for the taxable year by another state of the United States or a political subdivision thereof or the District
17 of Columbia on income derived from sources therein and which is also subject to tax under this act.”)
(emphasis supplied). There is no inclusion of “paid” in the ACIR proposed text.

18 The Department points to the Legislature including the term “paid” in ORS § 316.082(5), ORS
19 § 316.292, and ORS § 316.131. Dept. Response at 16–20. But these provisions were not added until 1991,
20 twenty-two years after ORS § 316.082(1) was created. *See* 1991 Oregon HB 2715; Dept. Response at 16–
21 19 (acknowledging same). “Statutory context includes earlier-enacted statutes, but does not include later-
22 enacted statutes[]” *State v. Neff*, 246 Ore. App. 186, 192, 265 P.3d 62, 65 (2011). As such, examining
23

1 ORS § 316.082(5), ORS § 316.292, and ORS § 316.131 is not beneficial to analyzing ORS § 316.082's
2 context, and even if they were, such an analysis still supports Plaintiffs' position.

3 The Department acknowledges Plaintiffs' observation that the 1991 Legislature specifically inserted
4 the term "paid" into other subsections and statutes, yet it did not include such term in ORS § 316.082(1).
5 See Dept. Response at 20. Prior to the 1991 amendments, ORS § 316.292 stated, "[a] resident estate or trust
6 shall be allowed the credit provided in ORS § 316.082 (relating to income tax imposed by another state)
7 except that the limitation shall be computed by reference to the taxable income of the estate or trust." 1991
8 Oregon HB 2715. After the 1991 amendment, ORS § 316.292 provided, "[n]otwithstanding the limitations
9 contained in ORS §§ 316.082 and 316.131, if an estate or trust is a resident of this state and also a resident
10 of another state, the estate or trust shall be allowed a credit against the taxes imposed under this chapter for
11 income taxes *imposed by and paid to* the other state[]" ORS § 316.292(2). ORS § 316.131, which was
12 adopted by the 1991 legislature, states, "[a] nonresident shall be allowed a credit against the taxes otherwise
13 due under this chapter for income taxes *imposed by and paid to* the state" ORS § 316.131(1) (emphasis
14 added). Finally, the 1991 Legislature's insertion of ORS § 316.082(5) provides such a payment
15 requirement: "It is the purpose of this subsection to avoid duplicative taxation through use of a nonresident,
16 rather than a resident, credit for *taxes paid or payable* to another state." ORS § 316.082(5) (emphasis
17 added). As the 1991 Legislature worked through the statute, adding or changing "imposed" and "paid" in
18 various places, at no point did it insert the terms "and paid" to § 316.082(1)—the applicable provision here.

18 The better reading in light of the relevant case law is that the use of the term "imposed and paid" in
19 ORS § 316.082(5), but not subsection one, indicates "such an omission was deliberate." See *Emerald PUD*
20 *v. PP&L Co.*, 302 Ore. 256, 269 (1986); *PGE*, 317 Ore. at 611; *Con-Way*, 353 Ore. at 625. Similarly, the
21 1991 Legislature's amendment to ORS § 316.292(2) and enactment of ORS § 316.131 is "'strong evidence'
22 that, 'when the legislature intends to condition [the operation of a statute on a certain event or requirement],
23 it knows how to express that intention.'" *Con-Way*, 353 Ore. at 626.

1 Here, the Department acknowledges that ORS § 316.082’s neighboring statutes and subsection five
2 include “paid,” but rather than accepting that the non-use of the term in 316.082(1) (and non-amendment
3 of the provision in 1991 when surrounding provisions were amended) is a purposeful omission, they
4 strangely conclude that the lack of action by the Legislature must mean that they believed the term to be
5 implied within the term “imposed.” Dept. Response at 20. This conclusion flies in the face of *Con-Way*’s
6 instruction that the Legislature’s use of qualifying language in one statute but not in a neighboring statute
7 is “presume[d] . . . purposeful.” *Id.*; see also *PGE*, 317 Ore. at 611 (“[T]hat use of a term in one section and
8 not in another section of the same statute indicates a purposeful omission . . . and that use of the same term
9 throughout a statute indicates that the term has the same meaning throughout the statute”) (internal citations
10 omitted). Under *Con-Way*, if the Legislature wanted ORS § 316.082(1) to include the term “imposed and
11 paid,” it would have done so.

12 The Legislature has amended ORS § 316.082 seven times after its enactment in 1969. ORS
13 § 316.082 (1981); ORS § 316.082 (1987); ORS § 316.082 (1991); ORS § 316.082 (1993); ORS § 316.082
14 (1995); ORS § 316.082 (1999); ORS § 316.082 (2001). Specifically, in the 1999 and 2001 amendments,
15 the Legislature amended the language of subsection one. See 1999 Ore. SB 257, 2001 Oregon HB 2274. At
16 no point during these amendments did the legislature decide to change the term “imposed” in subsection
17 one.

18 The Department also remarkably asserts ORS § 315.095(1) (1953) and ORS § 316.080 (1953)
19 (renumbered 316.475(1) in 1957), as predecessors to ORS § 316.082, support its proposition ORS
20 § 316.082’s “imposed” means “paid” as these predecessor statutes included the terms “imposed by and paid
21 to.” See Dept. Response at 19. But the Legislature’s specific omission of a term (here, “paid” in ORS
22 § 316.082), despite its inclusion in a predecessor statute, also indicates that the change was purposeful. See
23 *e.g.*, *Con-Way*, 353 Ore. at 625, 302 P.3d at 809; *Hynix Semiconductor Mfg. Am., Inc. v. Lane Cnty.*
Assessor, No. TC-MD 091320B, 2011 WL 1706062, at *7 (Ore. T.C. May 5, 2011) (“Based on a change in

1 a word or words, the court may infer a legislative intent to change the meaning or scope of a statute.”); *see*
2 also *Carrigan v. State Farm Mutual Auto. Ins. Co.*, 326 Ore. 97, 103–104, (1997) (determining that the
3 legislature intended to broaden the scope of a statute based on its removal of limiting language). In short,
4 the Legislature has had ample time to add “paid” to ORS § 316.082(1), but has refrained from doing so.
5 Accordingly, an analysis of ORS § 316.082’s statutory history and neighboring statutes supports the Speers’
6 position ORS § 316.082(1) provides a credit for taxes “imposed.”

7 It is important to look at the context for the existence of ORS § 316.082, which the Oregon Supreme
8 Court has long held to be “to avoid double taxation on income received by Oregon taxpayers.” *Keller v.*
9 *Dep’t of Revenue*, 319 Ore. 73, 77 (1994). Oregon’s statute is not unique, because it is part of “[t]he history
10 of the indirect credit [that] clearly demonstrates that the credit was intended to protect a domestic parent
11 from double taxation of its income.” *United States v. Goodyear Tire & Rubber Co.*, 493 U.S. 132, 139–40
12 (1989) (describing similar federal provision); *American Chicle Co. v. United States*, 316 U.S. 450, 452
13 (1942) (recognizing same). The structure of “ORS § 316.082(1) allows an Oregon resident a credit against
14 Oregon income taxes for ‘the amount of any income tax imposed * * * by another state’ on income derived
15 from sources in that state.” *Schuette v. Dep’t of Revenue*, 326 Ore. 213, 217 (1997) (edits in *Schuette*).
16 Courts “act as a defense against state taxes which, whether by design or inadvertence, either give rise to
17 serious concerns of double taxation, or attempt to capture tax revenues that, under the theory of the tax,
18 belong of right to other jurisdictions.” *Trinova Corp. v. Michigan Dep’t of Treasury*, 498 U.S. 358, 386
(1991).

19 The Department characterizes the tax credit provided in ORS § 316.082 as one of “privilege” or
20 largesse. Dept. Response at 24 (relying on *Keyes v. Chambers*, 209 Ore. 640, 646 (1957)). For all of the
21 reasons discussed above (and in Plaintiff’s opening brief), the credit applies to taxes *imposed* by another
22 state not imposed *and paid* as the Department wishes the statute to read. Plaintiff’s reading is clearly
23 supported by the plain language, the significant legislative history, and the context of this provision. Further,

1 ORS § 316.082 is a very real and important bulwark against the imposition of tax twice on the same income,
2 triggering constitutional deficiencies under the Commerce or Due Process Clauses.

3 **II. THE DEPARTMENT OF REVENUE’S STATUTORY READING UNNECESSARILY
4 CREATES CONSTITUTIONAL HARMS.**

5 The Oregon Supreme Court commands this Court to “construe statutes, if possible, to avoid
6 constitutional difficulties.” *Vokoun v. City of Lake Oswego*, 189 Ore. App. 499, 511, 76 P.3d 677, 684
7 (2003). Therefore, this court should choose a “construction[]” of ORS § 316.082(1) that avoids
8 constitutional issues “before reaching claims that the state has violated its own or the federal constitution.”
9 *Tharalson v. State Dep’t of Revenue*, 281 Ore. 9, 13 (1978). Plaintiffs’ reading accomplishes this task. But
10 if, *arguendo*, the Department is correct, and Oregon law allows the State to impose tax twice on the Speers’
11 income from an out-of-state brewery that operates solely out-of-state and has no connection to Oregon, then
12 both the Dormant Commerce Clause and the Due Process Clause may be implicated.

13 **A. The Department’s Reading Fails *Complete Auto*’s Test.**

14 The Department disputes that its interpretation of ORS § 316.082(1) violates the Dormant
15 Commerce Clause. Dept. Response at 29–35. The Department is incorrect. The Department’s failure to
16 provide a full credit for taxes imposed violates the Dormant Commerce Clause as applied in Plaintiffs’ case.
17 It is important to note that, in almost all cases, there is no practical difference between the out-of-state credit
18 pursuant to ORS § 316.082(1) being for taxes “imposed” versus taxes “paid.” But as-applied to the Speers’
19 specific facts and circumstances, there is a difference.

20 In *South Dakota v. Wayfair*, 585 U.S. 162, 179–80 (2018), the United States Supreme Court held
21 that its “Commerce Clause jurisprudence has ‘eschewed formalism for a sensitive, case-by-case analysis of
22 purposes and effects.’” (quoting *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 201 (1994)). That is
23 because the “Court’s Commerce Clause jurisprudence [is] grounded in functional, marketplace dynamics;
and States can and should consider those realities in enacting and enforcing their tax laws.” *Id.* at 180.
Therefore, this Court must look at the realities of the Department’s enforcement.

1 Under *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977), state taxes on interstate
2 commerce may survive a “challenge when the tax is applied to an activity with a substantial nexus with the
3 taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related
4 to the services provided by the State.” *Id.* This passage results in a four-part test: (1) there must be
5 substantial nexus with the taxing state; (2) the tax must be fairly apportioned; (3) the tax must not
6 discriminate against interstate commerce; and (4) the tax must be fairly related to the services the state
7 provides.

8 Considering the four-prongs of *Complete Auto*, the Department asserts that Plaintiffs “wrongly
9 focus on NGB instead of themselves as Oregon residents,” because “Plaintiffs, not NGB, were subject to
10 Oregon taxation.” Dept. Mot. for Summ. J. at 37. But this is a red herring. Taking each factor in turn and
11 applying the Speers’ facts, this case implicates and fails all four prongs of *Complete Auto*, though the
12 discrimination revealed by the internal consistency test is most damaging to the Department’s mandate that
13 the income at issue here be subject to the imposition of tax by both Oregon and Wisconsin.

14 **First**, Substantial nexus requires a connection between the business activity, such as the activity at
15 issue here, with the taxing state. The income Oregon now seeks to tax stems from business activity
16 conducted purely within the confines of Wisconsin and the activities that created that income have no nexus
17 with this state.

18 **Second**, as applied to the facts of this case, the Oregon tax is not “fairly apportioned.” Although
19 states have latitude to select an apportionment formula, or use an out-of-state credit, to address fair
20 apportionment, an assessment arising therefrom may be “disturbed when the taxpayer has proved by clear
21 and cogent evidence that the income attributed to the state is in fact out of all appropriate proportions of the
22 business transacted in that State . . . or has led to a grossly distorted result.” *Moorman Mfg. Co. v. Bair*, 437
23 U.S. 267, 274 (1978) (cleaned up) (quotation omitted). For purposes of the personal income tax, the credit
for taxes imposed by another state, does generally satisfy the fair apportionment requirements. But the

1 failure to apply the plain language of ORS § 316.082(1) here results in 100 percent of the Speers' Wisconsin
2 income being subject to tax twice—a complete breakdown of the fair apportionment requirement. None of
3 the brewery's activities occur within Oregon. *See* Stip. Fact 5(b) (“NGB does not manufacture or sell
4 products, have employees, or otherwise engage in any commercial activity of any kind in Oregon.”). This
5 is “clear and cogent evidence,” required by *Moorman*, 437 U.S. at 274, that zero percent of the brewery's
6 business occurs in Oregon. Yet, Oregon would be imposing tax on a grossly distorted portion of that income.

7 The Supreme Court has used the external consistency test “to discover whether a State's tax reaches
8 beyond that portion of value that is fairly attributable to economic activity within the taxing State.”
9 *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 185 (1995). Here, the state initially allocates
10 to itself 100 percent of the Speers' interstate commerce-derived pass-through income, reducing it only by
11 amounts related to the Speers' 11-month in-state residency and the \$1,123 credit for the amount of tax
12 imposed that was “actually paid” to Wisconsin. The end result leaves over 90 percent of the pass-through
13 income apportioned to Oregon, even though none of the income being taxed was generated from business
14 activity that took place in Oregon (*See* Stip. Fact 5(a) & 5(d)). As such, the Department's interpretation of
15 ORS § 316.082(1) results in nearly full taxation of the Speers' share of the brewery's income, distributed
16 or not. This result causes Oregon to “reach profits which are in no just sense attributable to transactions
17 within its jurisdictions.” *Hans Rees' Sons, Inc. v. N.C.*, 283 U.S. 123, 134 (1931). Because the denominator
18 is zero, the distortion here is mathematically infinite.

19 **Third**, the Department's gloss on ORS § 316.082 discriminates against interstate commerce by
20 effectively placing a 100 percent tariff on the value of any non-Oregon state tax credits offered to Oregon
21 residents. Looking at the internal consistency test, “[t]his test . . . looks to the structure of the tax at issue to
22 see whether its identical application by every State in the Union would place interstate commerce at a
23 disadvantage as compared with commerce intrastate.” *Comptroller of the Treasury v. Wynne*, 575 U.S. 542,
562 (2015) (internal quotations omitted); *see also id.*, at 563 (“Any cross-border tax disadvantage that

1 remains after application of the test cannot be due to tax disparities, but is instead attributable to the taxing
2 State’s discriminatory policies alone.” (internal brackets omitted).

3 Tax credits generally fix internal consistency problems, but a case-by-case analysis is still
4 warranted. In *Wynne*, 575 U.S. at 567, the United States Supreme Court held that Maryland’s inclusion of
5 only a partial tax credit for taxes paid to another state made “the total tax burden on interstate commerce is
6 higher.” The *Wynne* Court further rejected Maryland’s argument that the provision of a tax credit of some
7 kind was dispositive, explaining “[t]he critical point is that the total tax burden on interstate commerce is
8 higher, not that Maryland may receive more or less tax revenue from a particular taxpayer.” *Id.*

9 The Department proffered an example that ignored the treatment of tax credits that we now correct.
10 Assume, for example, a taxpayer is a resident of State B and has \$1,000 in income from a pass-through
11 business that operates only in State A. State A imposes a 1% tax on all income earned in State A, resulting
12 in a tax of \$10. State A also awards a tax credit of \$2 to the business operating in the state, and the taxpayer
13 pays the unpaid balance of \$8 in cash. State B imposes a 1% tax on all income earned by residents but
14 allows a credit for income tax paid (*i.e.*, in cash) to other states. State B also imposes \$10 of tax on the
15 taxpayer and recognizes the \$8 as a credit for taxes paid to State A. This results in a net tax balance of \$2
16 due to State B. When both states adopt the Department’s “net tax” rules, a total tax burden of \$12 results.

17 Continuing with the example, measure the total tax burden where the business and taxpayer are both
18 operating in the same state using the same tax rules. The State A resident taxpayer has \$1,000 in pass-
19 through income from a business that operates solely in State A. State A imposes a 1% tax of \$10 and awards
20 the business a \$2 tax credit that passes through to the taxpayer leaving a balance due of \$8 which the
21 taxpayer pays in cash. The total tax burden of \$10 is satisfied with \$8 in cash. Whether the total tax burden
22 is viewed as taxes “imposed” or “paid” makes no difference, the tax burden is \$2 higher in the interstate
23 example than the intrastate example. Considering this, the Department’s insistence on taxes “paid” fails the
internal consistency test. Most states, including Oregon, use incentive tax credits as a prominent feature of

1 state tax policy and that is the feature incorporated into the corrected example. The purpose or label of the
2 tax credit is irrelevant to the internal consistency test result.

3 The Department’s answer to this discriminatory effect is to assign the blame on Wisconsin for its
4 credits. Dept. Response at 33–34. But Oregon cannot avoid an internal consistency test showing of
5 discrimination by insisting that another state takes action: “Our decision today does not prevent the States
6 from structuring their tax systems to encourage the growth and development of intrastate commerce and
7 industry. Nor do we hold that a State may not compete with other States for a share of interstate commerce;
8 such competition lies at the heart of a free trade policy. We hold only that, in the process of competition no
9 State may discriminatorily tax the products manufactured or the business operations performed in any other
10 State.” *Armco, Inc. v. Hardesty*, 467 U.S. 638, 645-46 (1984). In effect, Wisconsin grants a credit to the
Speers that Oregon then confiscates.

11 **Fourth**, because the Department’s only nexus to the brewery is Speers’ in-state residency, its
12 taxation has no rational relation with government services provided. *See* Stip. Fact. 5(b) (“NGB does not
13 manufacture or sell products, have employees, or otherwise engage in any commercial activity of any kind
14 in Oregon.”). And the Speers “did not materially participate in NGB’s business operations,” Stip. Fact. 5(d),
15 making services they enjoyed irrelevant to the income NGB generated. The *Wynne* Court rejected the
16 position that the “States should have a free hand to tax their residents’ out-of-state income because States
17 provide their residents with many services.” *Wynne*, 574 U.S. at 553-54. Instead, whether a tax is fairly
18 related to services provided requires looking at the entity generating the income and whether they benefit
19 from in-state services. *See, e.g., Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 629 (1981) (“[W]hen
20 the measure of a tax bears no relationship to the taxpayers’ presence or activities in a State, a court may
21 properly conclude under the fourth prong of the *Complete Auto Transit* test that the State is imposing an
22 undue burden on interstate commerce. We are satisfied that the Montana tax, assessed under a formula that
23 relates the tax liability to the value of appellant coal producers’ *activities within the State*, comports with

1 the requirements of the *Complete Auto Transit* test.”) (emphasis added). Here, the income is generated by
2 the brewery to which the State of Oregon provides no services, so the state’s tax is not fairly related.

3 Finally, in response, the Department offers hypotheticals that it believes could create a tax advantage
4 for the Speers. Dept. Response at 25. The *reality* is that in this case, Oregon has gained a windfall.

5 **B. The Department’s Reading Creates Grave Due Process Violations.**

6 The Department recites several cases establishing the power of states to tax residents on their out-
7 of-state income, Dept. Response at 27, but this power is not absolute. It is limited in some situations by the
8 Due Process and Commerce Clauses. *See, e.g., Wynne*, 575 U.S. at 554–55 (“But if a State’s tax
9 unconstitutionally discriminates against interstate commerce, it is invalid regardless of whether the plaintiff
10 is a resident voter or nonresident of the State.”). The Supreme Court has long held that in “the context of
11 state taxation, the Due Process Clause limits States to imposing only taxes that ‘bea[r] fiscal relation to
12 protection, opportunities and benefits given by the state.’” *N. C. Dep’t of Revenue v. The Kimberley Rice*
13 *Kaestner 1992 Fam. Tr.*, 588 U.S. 262, 268–69 (2019) (quoting *Wisconsin v. J. C. Penney Co.*, 311 U.S.
14 435, 444 (1940)) (modifications in *Kaestner*). The state’s general powers of taxation of its own residents
15 are not absolute, because it still “requires drawing a line between taxation and mere unjustified
16 ‘confiscation.’” *Id.* at 269 (quoting *Miller Brothers Co. v. Maryland*, 347 U.S. 340, 342 (1954)). Under the
17 Due Process Clause, the “simple but controlling question whether the state has given anything for
18 which it can ask return.” *Id.* (quoting *J. C. Penny*, 311 U.S. at 444). Under this test and the facts surrounding
19 the Speers’ situation, Oregon violates the Due Process Clause if “imposed” means “imposed and paid.”

20 In *Kaestner*, the trust in question was formed in New York, governed by the laws of New York, and
21 the resident trustee was a New York resident. *See id.* at 226. Yet North Carolina claimed that the only
22 connection to the trust was that the beneficiary lived in North Carolina. *Id.* The *Kaestner* Court held “that
23 the presence of in-state beneficiaries alone does not empower a State to tax trust income that has not been

1 distributed to the beneficiaries where the beneficiaries have no right to demand that income and are
2 uncertain ever to receive it.” *Id.* at 270.⁵

3 Applying *Kaestner* to this case, the characteristics of the S corporation involved here are similar to
4 those of the trusts. As with trusts, the S corporation distribution of funds is an elective choice outside of the
5 residents’ control in this case. Under an S corporation model like a brewery, the company generally has the
6 power to decide whether to distribute its earnings to its shareholders. *See In re Marriage Perlenfein and*
7 *Perlenfein*, 316 Ore. 16, 25 (1993) (discussing whether undistributed S corporation income may be
8 attributed to the shareholder for calculating child support payments and allowing presumption of availability
9 to be rebutted by evidence). Furthermore, the brewery, like the *Kaestner* and *Evans* trusts passes the tax
10 obligation onto the individuals. *See* 2C-2C:5 Lexis Tax Advisor – Federal Topical § 2C:5.01 (2023) (“Under
11 IRC Section 1363(a), an S corporation is generally treated as a passthrough entity and not as a taxable entity
12 for federal income tax purposes, and, as such, its shareholders are generally subject to only one level of tax
on its earnings.”).

13 The Department asserts that *Kaestner* blesses its claim on the Wisconsin income because S
14 corporation distribution, it argues, need not be *actually* passed through to be taxed. Dept. Response at 28.
15 In support of this claim, the Department relies on a trio of cases, but each authority they rely upon involves
16 businesses where the government *could* tax the income regardless of its pass-through nature. *Heiner v.*
17 *Mellon*, 304 U.S. 271, 273 (1938) involved the federal whiskey tax and thus had none of the characteristics
18 involved in Due Process considerations for interstate taxation since the tax would be due anywhere in the
19 country. *Id.* at 279 (“The state law creates legal interests, but the federal statute determines when and how

20 ⁵ *Kaestner* and *Evans* also highlight how fact-dependent the Due Process analysis must be. The *Kaestner*
21 Court held there was not sufficient possession, control, or enjoyment of that trust such that North Carolina
22 could tax. *Kaestner*, 588 U.S. at 270. Oregon applied *Kaestner* to state law through *Estate of Evans v. Dep’t*
23 *of Revenue*, 368 Ore. 430 (2021). Under *Evans*, a state tax on distributions passes muster under the Due
Process Clause only if the resident has “some degree of possession or enjoyment of, or right to receive, the
trust property.” *Evans*, 368 Ore. at 446. But the *Evans* Court did find such control in that instance. *Evans*,
368 Ore. at 448.

1 they shall be taxed.”). Beyond taxing authority, the partnership at issue there did realize income, but the
2 question was simply whether the intervening death of a partner immediately wrapped up the partnership
3 (thus effecting tax liability). *Id.* The tax was due no matter what to the federal government which does not
4 have the same interstate commerce due process strictures.

5 The Department’s reliance on *Kulick v. Dep’t of Revenue*, 290 Ore. 507 (1981) fares no better. *Kulick*
6 involved an Oregon S Corporation, and taxpayers there “concede that even as nonresidents, they could
7 constitutionally be reached by an Oregon tax on income derived from their own business or occupational
8 activities in the state.” *Id.* at 290 Ore. at 511. The same is true for *O’Neil v. Dep’t of Revenue*, 6 OTR 467,
9 467–68 (1976) (“The question presented is whether the State of Oregon has jurisdiction to tax a nonresident
10 for distributed and undistributed dividend income received by him or credited to him which was derived
11 from business activity carried on in Oregon . . .”). Both cases are precisely what Wisconsin does in this
12 instance: tax the business activity that occurs in its own borders, and the Speers assert that Oregon could do
13 likewise. The difference is when the activity is *not* in Oregon and the only connection is the residence of a
14 minority shareholder.

15 Like the trust in *Kaestner*, Oregon’s only connection to the brewery is Plaintiffs’ part-time residency
16 status in 2018. The brewery is located in Wisconsin, and the company does not sell or distribute any goods
17 or services out-of-state. The brewery “also maintain[s] no physical presence in . . . [Oregon,] made no direct
18 investments in the State, and held no real property there.” *Id.* at 267. Also, as minority shareholders, the
19 Speers have no “degree of possession or enjoyment of, or right to receive, the [brewery] property.” *Evans*,
20 368 Ore. at 446, 492 P.3d at 56; *see also* Stip. Fact. 5(c) (“As a minority shareholder, Plaintiff Steven Speer
21 has no access to or control over the distribution of dividends above those deemed necessary by the NGB
22 controlling shareholder and sole director to cover taxes.”). It is under these unique circumstances that the
23 fact of distributions becomes an issue because without them, there is no other due process connection

1 Oregon has with the income it seeks to tax. Oregon cannot gain through Speer a connection Speer himself
2 does not have.

3 **III. THE PENALTIES IMPOSED ON THE SPEERS WERE IMPROPER.**

4 Given the forgoing, the Department improperly imposed penalties on Plaintiffs pursuant to ORS
5 § 314.400(1) and ORS §§ 314.402(1), (2). Because the Department improperly interpreted ORS § 316.082,
6 any accompanying penalties resulting from this dispute must be refunded.

7 **CONCLUSION**

8 For the foregoing reasons, Plaintiffs respectfully request the Court to grant Plaintiffs' Motion for
9 Summary Judgment and deny the Department's Cross-Motion for Summary Judgment.

10 Respectfully submitted,

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18 Dated: April 2, 2026

19 *Counsel for Plaintiffs*

20

21

22

23

Exhibit 1

Exhibit 4

STATE TAX COMMISSION

MEMORANDUM

August 19, 1968

TO: Commissioner Charles H. Mack, Chairman, State Tax Commission, Room 412

FROM: Carlisle B. Roberts, Chief Counsel, Law Section, Room 403

RE: The Pro and Con of Adoption of a Federal Taxable Income Base for Oregon
Personal Income Taxation (LS 5604)

The Governor's office has asked for a discussion, pro and con (without recommendation) on the subject of the adoption of the federal personal income tax law for Oregon personal income tax purposes. It is expected that this matter will be placed before the 1969 Legislative Assembly by one or more proponents, stimulated by the testimony of the Oregon Association of Certified Public Accountants and by the tax committee of the Oregon State Bar. It is anticipated that something along the format of House Bill 1209 (1967 Regular Session) and House Bill 1801 (1967 Special Session) will be used. The over-all aim would be to provide for the filing by an Oregon personal income taxpayer of a copy of his federal income tax return, supplemented by an Oregon "cover sheet" or form which would require the least possible number of adjustments from the federal return.

Edward Branchfield, Esquire, Administrative Assistant to the Governor, has suggested that this memorandum point out, at the inception, that the various states have used several different points of departure upon the adoption of the federal form, but these are loosely grouped, or undifferentiated in the lay mind as "using a percentage of the federal", "using the federal tax base", or words of similar import which fail to recognize the vital distinctions which must be taken into account by the legislator and the administrator. Consequently, it is appropriate to say that both the federal personal income tax and the Oregon personal income tax laws will follow the same basic "formula": During the taxable year, the monetary receipts and values in lieu of money received by the taxpayer are subject to certain statutory exclusions, the balance of which must be reported as "gross income". From this sum are deducted statutory allowances for the ordinary and necessary expenses of doing business and other statutory items which lead to the result denominated as "adjusted gross income". From adjusted gross income statutory deductions are allowed for specific personal costs (e.g., certain medical expenses) and the misnamed "personal exemption" and deductions for dependents, or a standard deduction, leading to taxable net income. The rates of tax are imposed upon the taxable net income and against the result of this calculation there may be offset statutory "tax credits". The federal law could be followed to any particular step in the formula, the state law taking over completely thereafter.

cc: Darren Weirnick + Na Belle, Defendant Counsel

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At the present time, it is believed that 20 states can be classified as being "federally based" but their laws fall into three different categories, as follows:

I. Alaska began with a percentage of the federal income tax, abandoned it in 1963, and apparently has returned to it. It presently taxes at the rate of 16 percent of the federal tax. It is unique in using this method and has had some disagreeable history, inasmuch as it almost requires a special session of the legislature to make adjustments each time the federal government changes its rates. (It is common for the lay person to talk about "a percentage of the federal tax" as the easy solution, seeking simplicity, but experience shows that this is the poorest method of those available).

II. Sixteen states take off at the point of the determination of federal adjusted gross income, with necessary adjustments (e.g., the addition of state and local bond interest) and then provide for their own personal deductions and exemptions and rates. This method is followed with individual variances by Colorado, Hawaii, Indiana, Iowa, Kansas, Kentucky, Maryland, Michigan, Minnesota, Montana, Nebraska, New Jersey (upon election by the taxpayer), New York, Vermont, West Virginia and Wisconsin.

III. The method which is now beginning to come into prominence is the use of federal taxable income, with necessary adjustments. This means that the determination of personal exemptions and deductions will follow the federal law, leaving only the rates and the allowable credits to be determined by the state (and with those adjustments as to federal and state bond interest and allocation for nonresidents which must be observed for constitutional reasons or through comity). This is the method followed by Idaho, New Mexico and North Dakota and was the basis for the bills introduced into the Oregon legislature in 1967. This appears to be the most logical method if the simplicity sought for is to be obtained in the fullest measure.

The arguments generally given for adoption of a federal base are:

1. Tax returns would be simplified and the keeping of separate records supporting the state return would be eliminated, thus reducing taxpayer compliance cost.
2. Full advantage could be taken of federal administrative and court interpretations, rulings and decisions by the taxpayer and by the state administration.
3. Administrative costs would be reduced as a result of federal auditing and enforcement.

While these allegations do not include all the considerations to be taken into account in a proper study of a massive change of law, they are significant and will be given our first attention.

I. Simplification of the Making of Returns and Keeping Records
By the Individual Taxpayer

Pro

1. Start with the basic premise that practically all taxpayers must file federal personal income tax returns and they are also required to file Oregon personal income tax returns, and there is practically no possibility of Oregon being in a position to change the federal Internal Revenue Code. While it is true that Oregon's basic personal income tax law is substantially derived from the language of the federal statutes (especially since the complete adoption of the federal capital gains provisions in 1967, retroactive to July 1, 1965) there are still a great many variances between the state's and the federal law. See Exhibit A, attached to this memorandum. While the State Tax Commission does not send out billings for less than \$5, any one of these variances may give rise to additional tax in excess of that amount and, undoubtedly, there are thousands of billings which are a direct result of such variations. The massive similarity between the state and the federal law undoubtedly leads many taxpayers to assume that the two Codes are alike in all respects as they affect the individual making the return. To align the two completely would substantially remove disputes as to what is income, the amount of deductions, the types of exemptions available, the tax treatment of particular transactions, etc. All of this would make for simplicity.

2. The federal Internal Revenue Code and the official regulations are far more complete and comprehensive than the less sophisticated Oregon Personal Income Tax Act. Consequently, some taxpayers become involved in transactions as to which questions are raised by the state but for which the federal law provides clear guidelines. From time to time, after a period of vexation, the state will be prompted to adopt such federal provision. For example, see ORS 314.155 - 314.170, adopted in 1965, based upon IRC § 1038. Other relief measures, forced upon the federal government by a multiplicity of cases, have not come into the Oregon law because of the few number of cases in which the issues have been raised, but simplicity (ease of handling the case) would have been achieved if the federal law had been incorporated into the state law. For example, see IRC § 1312, secs. 1311 - 1315, secs. 381 - 382.

Letters received from tax administrators in the states of Colorado, Idaho and New York, addressed to a representative of the Oregon Society of Certified Public Accountants, indicate that they are generally pleased with the law, based upon the federal statutes, constantly updated.

Con

One can only be impressed when a great state like New York adopts the federal personal income tax law with as little variation as possible and finds the system satisfactory. However, before the legislature abdicates the exercise of its discretion over the state's most important revenue measure, the following points should be considered:

1. The federal Internal Revenue Code is a horrendous patchwork of very great complexity, filled with inequities. Every new administration hears well grounded proposals for reform but entrenched interests make reform impossible. See Hellerstein: Taxes, Loopholes & Morals (New York: McGraw - Hill, 1963); Eisenstein, The Ideologies of Taxation (New York: Ronald Press 1961); Stern, The Great Treasury Raid (). Such a law should be adopted only for reasons of great expediency.

2. If principal aim is to obtain simplicity for the personal income taxpayer, it is important to stress that relatively few taxpayers would be affected. There is no doubt that the effort and cost of complying with the tax law (a most legitimate goal) would probably be gained by a narrow band of taxpayers. Based on the last Biennial Report of the State Tax Commission, it would appear that only 15 percent of the taxpayers filing returns had income in excess of \$10,000. The wage earner's return in Oregon is, today, virtually identical with the federal return as to the elements to be considered and is deemed to be of the utmost simplicity. Most of the errors are mathematical (which would not be affected by adopting the federal laws). Nearly 70 percent of the returns under \$10,000 use the short form return requiring no more complicated procedure for tax determination than would be involved in applying a given percentage figure to the federal tax amount. One must almost inevitably conclude that the greatest benefit of the proposed law would be received by the tax advisor to the substantial taxpayer. (This is a legitimate object; the weight which it deserves can be debated.)

3. No matter how much we may aim for simplicity, it is doubtful that the nonresident will be relieved of any degree of present burden. Nonresidents can be taxed only on their income derived from sources within this state. They are generally allowed deductions related to income derived from the state and perhaps a portion of personal deductions not related to Oregon. This means that some rather detailed provisions in the state law relating to nonresidents are unavoidable. The data must be obtained which are necessary for allocation of income to this state and an apportionment of the federal income tax deduction (if this deduction should be the subject of such special interest by the legislature that it will be continued). [On the other hand, a nonresident may be aided by the change in law, inasmuch as the provisions of the federal income tax law are better known than those peculiar to Oregon.] In the provisions for adoption of a federal tax base in the 1967 legislative sessions, the proposed Acts required a special income tax return form for the nonresident.

4. The problem of "decreasing uniformity" must be given careful study. The whole aim in adopting what many have considered a grossly inequitable law is to achieve simplicity through uniformity. Total uniformity cannot be attained because of the difference between state and federal jurisdiction, rules of comity and constitutional prohibition. Among the minimum adjustments to be studied are:

(a) Exclusion of income which the United States can tax but the state cannot; viz., interest on federal securities.

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(b) Inclusion of income which the state can tax but the United States either cannot tax or has not chosen to tax; viz., interest on securities of other states and their subdivisions.

(c) Disallowance of expenses of earning income in the first category above and allowance of expenses of earning income in the second category.

(d) Disallowance of deduction for state income tax (although this can be recouped by adjusting the rates. The same is true of the federal income tax deduction, if it seems preferable to allow such a deduction rather than trying to educate the taxpayers as to the significance thereof in relation to the whole income tax formula.)

(e) Determination of the tax on nonresidents.

(f) Allowance of deductions or credits for taxes paid to other states or countries.

But these special considerations are the smaller part of the problem. The real problem grows out of the fact that the Congress is in session almost continuously, whereas the state legislature at present meets only once in two years. Alteration of the federal income tax by Congressional action and through regulations and rulings is a continuous process. Whatever the situation in other states, a number of careful studies over the last several years in Oregon have all concluded (on the basis of our Oregon Constitution and recent Supreme Court decisions) that the Oregon legislature, by its own act, can adopt the present Internal Revenue Code by reference but cannot adopt future amendments in a present act without grave danger of constitutional attack. There can be no argument that the taxpaying public, assured that the Oregon law is now the same as the federal, will distinguish between the Oregon law at the time of its adoption and those changes which have been made in the interim. Income tax returns will be filled with gross errors, innocently made.

The best solution to this problem for Oregon purposes would be to follow the example of New York and Kansas, adopting a constitutional provision which would enable the legislature to retain freedom that empowers it to adopt the federal law in futuro. Section 22, Article III, New York Constitution, reads:

"Notwithstanding the foregoing or any other provision of this Constitution, the legislature, in any law imposing a tax or taxes on, in respect to or measured by income, may define the income on, in respect to or by which such tax or taxes are imposed or measured, by reference to any provision of the law of the United States as the same may be or become effective at any time, or from time to time, and may prescribe exceptions or modifications to any such provision."

5. We cannot overlook the fact that, although it is technically possible,

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through Constitutional amendments and legislative enactments, to obtain a workable conformity to the federal personal income tax law, there remains a question as to whether the members of the Legislative Assembly forever and continuously would adhere to as rigid conformity as is possible. To some degree, "simplicity" is lost with every variation. It predicted that the tendency will be to inject new variations at every session.

This conclusion is based on experience. There have been quite a number of examples where some legislative mentor proposed to adopt in toto some section or sections of the federal law but, before the amendment was finally approved, variations crept in to meet the demands of some potential opponents. See, for example, ORS 316.345 (extraordinary medical expenses) and ORS 317.298 (disallowance of ORS 317.255 and 317.260 deductions in certain cases). Both of these sections are taken bodily from the federal law but subtly changed in a significant way on the basis of state considerations of what constitutes "equity".

There are a number of areas where legislators will be subject to great pressure to maintain variations, any or all of which will tend to dilute the effort to achieve "simplicity" through uniformity. For example: Must withholding be imposed upon the Armed Forces? Must the Armed Forces' active duty pay exclusion of \$3,000 be eliminated? Must the pensions of retired governmental employes under the retirement system be subjected to state tax? Must the value of livestock be accrued upon the death of the taxpayer - owner? Must Oregon bond interest be subjected to tax? Must a ceiling be placed upon the medical expense deduction of persons under 65 years of age? Should the special, locally important provisions in the withholding tax sections relating to fire fighters and agricultural workers be changed? Should several hundred Oregon taxpayers be given a windfall in the way of 27-1/2 percent oil depletion after recovering their basis?

6. If simplicity is the objective, the Oregon personal income tax law could be made much more simple by reform which would start with the principle that the law was strictly a revenue measure, not to be used to stimulate economic enterprise or to achieve social reform. A measure could be framed that could be realistic in protecting the person producing on a marginal income and it could eliminate a great many "gimmicks" by eliminating or greatly constricting the progressive rates.

II. Full Utilization of Federal Decisions and Rulings.

Pro

This argument would seem to speak for itself. If we adopt the federal income tax law for personal income tax returns in toto, the outpouring of federal administrative and court interpretations, rulings and decisions relating to such law would be available to the taxpayer and to the state tax administration. The tax studies generated by the

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problems of 200 million people would be available rather than the output generated by the needs of 2 million. This would certainly seem to be very useful.

Con

1. Since so much of the Oregon personal income tax law is based upon federal law, Oregon administrators and tax practitioners are already taking full advantage of federal administrative and court interpretations, rulings and decisions. With the advent of the Oregon Tax Court, the amount of Oregon interpretation at the judicial level is steadily increasing, but both the Oregon Tax Court and the Oregon Supreme Court regularly apply federal decisions in proper circumstances. See Ruth Realty Co. v. State Tax Commission, 222 Or. 290, where, at page 294, the court said:

"Before proceeding further, we observe that both parties depend solely on federal decisions interpreting sections of the U. S. Internal Revenue Code in support of their respective positions here. The propriety, and to a great measure the necessity, for so doing is made evident by the historical evolution of Oregon's Corporation Excise Tax Code and particularly by the close identity in pattern between Oregon Laws 1939, supra, and the sections of the federal code to which we later make reference. It appears over the years to have been the legislative intent in this state to simplify demands on taxpayers by bringing our income and excise tax laws in substantial conformity with corresponding provisions of the federal law when such could be accomplished without sacrifice to legislative independence and yet retain certain distinct and different features from the federal code. This tendency to harmonize appears particularly true in the area where the laws involve methods of accounting relating to similar transactions subject to tax by both state and federal authority. And we entertain no doubt that decisions of federal courts touching upon matters in tax areas common to the laws of each government are accorded a serious and persuasive consideration by the state legislature in order to attain such a harmony of construction for the benefit of the taxpayer when it can be done without sacrifice to the overall tax objectives of the state."

2. However, the utilization of federal administrative and court interpretations, rulings and decisions is not an unmixed blessing. The federal Internal Revenue Code, as everyone will agree, is very complex. This is the set of laws which evoked, from Judge Learned Hand, the famous and oft-quoted confession:

". . . In my own case, the words of such an act as the Income Tax . . . will dance before my eyes in a meaningless procession; cross reference to cross reference, exception upon exception --couched in abstract terms that offer no handle to seize hold of -- leave in my mind only a confused sense of some vital importance, but successfully con-

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cealed purport, which it is my duty to extract, but which is within my power, if at all, only after the most inordinate expenditure of time." (57 Yale L. J. 167, 169 [1947])

The federal income tax law is subject to the interpretation of its administrators (expressed in regulations and rulings), and to judicial interpretation by sixteen federal tax court judges, the Court of Claims, hundreds of federal district court judges, scores of circuit court judges, and the United States Supreme Court. In many instances, the circuits of the country are in conflict and the Commissioner of Internal Revenue refuses to acquiesce with one or another, forcing the issue to the Supreme Court. (The Court of Appeals for the Ninth Circuit, which includes Oregon, is a "maverick" on tax decisions, being often at variance with the rest of the United States.)

In fact, when following the federal law is an issue, the question often turns on "which federal law?" Indeed, in the Ruth Realty Co., case, quoted above, the State Tax Commission argued that the section (taken from the federal law) does not allow the capitalization of property taxes and other carrying charges, relying heavily upon a decision of the federal court of appeals, interpreting the similar federal code, and the taxpayer relied with equal confidence upon other decisions of the federal tax court. We will never be able to avoid this paradox.

III. Administrative Costs Would Be Reduced as a Result of Federal Auditing and Enforcement

This particular argument, which again seems to speak for itself, has no validity whatever, as anyone who will take the time to examine into the matter will shortly discover.

It must be remembered that the federal government, with all its vast resources and machinery, is faced with a problem of administration which is comparable to that of Oregon, but on a greatly enlarged scale. It is administering the most complex tax law in existence, in a democracy, subject to the problems of staffing and time limitations upon audits provided by the statute. In consequence, the federal administrators expect only to audit from three to five percent of the individual income tax returns. From this small but selective audit, the government reaps a harvest of additional revenue which more than pays for the task (but would be necessary in any event, for police purposes).

Oregon audits only about two to three percent (or, including reciprocal federal audits, about five percent) of the returns. It has a close working relationship with the Oregon district of the Federal Internal Revenue, to avoid a duplication of auditing and for an exchange of work.

Studies have proved that if the audit coverage could be increased by either or both agencies, the results would be very profitable. To cut either agency, in reliance upon the work of the other, would be an absurdity, since both agencies are doing too little for the best administration.

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When Alaska adopted the federal income tax law, using a percentage of the federal tax, it expected to be able to rely heavily upon federal auditing and administration, and Mr. R. D. Stevenson, a long-time commissioner of the Alaska Department of Taxation, has told me that the federal authorities were eager to be of assistance to Alaska. However, in practice, it was found that the federal agency did not have the staff or time to be of the assistance that was expected. Federal personnel were working right up against the statute of limitations and their results were available too late for Alaska's purposes. Effective territorial administration of the Alaskan Act had to be developed despite the close working relationship with Washington - Alaska District of Internal Revenue.

Incidentally, Mr. Stevenson pointed out:

" . . . It should be noted that when the Internal Revenue Code is used as a basis for the tax, a considerable number of audit cases will develop where an Internal Revenue Code ruling is involved, and the taxpayer may point out that the Internal Revenue Bureau did not audit his return or make any changes and that therefore the point in issue must have been correct as reported on the taxpayer's federal return and that the Territory has no right to make changes."

This argument is often made to the Oregon authorities, too, since Oregon relies heavily upon the exchange of information and utilizes Revenue Agent's Reports fully. The argument is not tenable, but does add to taxpayer vexation.

Alaska has followed Oregon in its experience and developed a complementary audit program, utilizing the federal work as fully as possible (received on a basis of reciprocity) but pushing ahead with its own audit program.

However, it is undeniable that with greater accord between the state law and the Internal Revenue Code, interpretation of Revenue Agent's Reports will be reduced accordingly.

Some Final Questions

In making the radical change of adopting the federal income tax law to the largest extent possible, study should be made of the shift of the tax burden which is inevitable because of inherent differences between the two acts, and determination made whether or not such shift can or should be obviated.

Another question to be considered is, if adoption of the personal income tax law on a federal basis is highly useful, why should not the principle be extended to the corporation excise tax law as well? As in the case of the personal income tax law, the corporation excise tax law in Oregon is largely based upon federal developments, but there are many differences which we would expect to be subject to the same criticisms

as are used in connection with the personal income tax law.

Conclusion

There is no doubt that a state personal income tax law based in the highest degree upon adoption of the federal Internal Revenue Code can be successfully administered. This is proved by the experience of other states. A great deal of study, involving personal contact with administrators at all levels in the states utilizing the system, would be justified before determining that this is the answer in obtaining the simplest, most equitable personal income tax.

CBR:br

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on April 2, 2026, I served the foregoing on the following named person(s) by the
3 method indicated below, addressed to the following:

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