



Citizen Commission for Performance Measurement of Tax Preferences

William A. Longbrake, Chair
Governor's Council of Economic Advisors

Lily Kahng, Vice Chair
Seattle University Law School

James Bobst
Pacific Fibre Products

Stephen Miller
Washington Education Association

Paul Guppy
Washington Policy Center

Representative Troy Kelley
Chair, Joint Legislative Audit
and Review Committee

Brian Sonntag
State Auditor

Citizen Commission for Performance Measurement of Tax Preferences

Meeting Minutes

October 15, 2010

John A. Cherberg Bldg.,
Senate Hearing Rm. 3
Olympia, WA

Members Present:

William A. Longbrake
James Bobst
Stephen Miller

Lily Kahng
Paul Guppy

Members Absent:

Rep. Troy Kelley

Brian Sonntag

Staff:

Ruta Fanning
Mary Welsh
Dana Lynn
Cindy Evans
Lisa Hennessy

Keenan Konopaski
Curt Rogers
Peter Heineccius
Suzanne Kelly

WELCOME / INTRODUCTIONS

Commission Chair Bill Longbrake welcomed those in attendance and called the meeting to order at 2:03 p.m.

APPROVAL OF MEETING MINUTES

MOTION: A motion was made to approve the September 24, 2010, meeting minutes.

The motion was seconded and carried.

STAFF REPORTS

Keenan Konopaski summarized the 2011 Proposed Scope and Objectives documents for the 2011 Tax Preference Reviews.

Keenan Konopaski distributed a memo from the Commission Chair to the Task Force on Tax Preference Reform regarding Task Force proposals involving the Commission. Chair Longbrake asked for comments on the memo. The Commission unanimously endorsed the memo, which will be forwarded to the Task Force Chair, State Treasurer James McIntire.

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Chair Longbrake presented a resolution thanking and commending Ruta Fanning for her service to the Citizen Commission, as Ms. Fanning will be retiring this December.

MOTION: A motion was made to adopt the resolution thanking and commending Ruta Fanning.
The motion was seconded and carried.

2011 COMMISSION MEETING SCHEDULE

A draft 2011 Commission meeting schedule was presented.

MOTION: A motion was made to approve the 2011 meeting schedule.
The motion was seconded and carried.

DISCUSSION / APPROVAL OF COMMISSION COMMENTS ON 2010 TAX PREFERENCE REVIEWS

Chair Longbrake reviewed the process to approve Commission comments on the 2010 Tax Preference Reviews. He asked whether the Commission wished to include statements of rationale in Commission comments. The Commission found sufficient consensus to include statements of rationale. The Commission discussed the 2010 Tax Preference Reviews.

MOTION: A motion was made to acknowledge receipt of the 2010 JLARC Tax Preference Reviews of: **vehicles sold to nonresidents; fertilizer, spray materials, and chemical sprays and washes; sales of breeding livestock, cattle, and milk cows; title, insurance premiums; poultry used to produce poultry and poultry products; farm machinery sold to nonresidents; vehicles acquired out-of-state while in the armed services; labor and services for mining/sorting/crushing sand/gravel/rock for public roads; conservation and open space lands; and nonresidents' personal property.** The Commission has provided a forum for discussion and public comment on these recommendations. The Commission endorses the JLARC recommendations for these preferences. The Commission does not have additional comments to append to the 2010 JLARC reports related to these preferences.

The motion was seconded and carried unanimously.

MOTION: The Commission acknowledges receipt of the 2010 JLARC Tax Preference Review of **interstate transportation equipment.** The Commission has provided a forum for discussion and public comment on these reviews. The Commission endorses the JLARC recommendation for this review, subject to the following additional comments:

The Commission endorses the recommendation but further recommends that the Legislature consider whether to increase the qualifying threshold

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for motor vehicles by reviewing whether "in substantial part" should be replaced by the language "primarily used."

Rationale: The Legislature considered such a change in 2010. Adoption of "primarily used" language would provide the same 50 percent interstate use threshold for both motor vehicles and other transportation equipment.

The motion was seconded and carried unanimously.

MOTION: The Commission acknowledges receipt of the 2010 JLARC Tax Preference Review of **labor and services used in construction and repair of public roads**. The Commission has provided a forum for discussion and public comment on these reviews. The Commission endorses the JLARC recommendation for this review, subject to the following additional comment:

The Commission endorses the recommendations and notes that the circumstances have changed regarding the exclusion of state-owned roads from this tax preference and that the exclusion may no longer serve its original purpose. The Commission recommends that the Legislature consider revising the relevant statute to extend the tax preference to apply to labor and services for construction and repair of state-owned roads.

The motion was seconded and carried unanimously.

MOTION: The Commission acknowledges receipt of the 2010 JLARC Tax Preference Review of: **fruit and vegetable manufacturers; seafood products manufacturers; dairy products manufacturers; and fresh food processors**. The Commission has provided a forum for discussion and public comment on these reviews. The Commission endorses the JLARC recommendation for this review, but acknowledges that the Department of Agriculture disagrees with the JLARC recommendation and recommends that the tax exemption be continued.

The motion was seconded and carried unanimously.

MOTION: The Commission acknowledges receipt of the 2010 JLARC Tax Preference Review of the **instate portion of interstate transportation**. The Commission has provided a forum for discussion and public comment on these reviews.

The Commission does not endorse the recommendation because it believes it is premature to authorize the Department of Revenue to develop an apportionment methodology. Although the existing preference is no longer constitutionally necessary, affected taxpayers have structured competitive activities in reliance on continuation of the preference. Because termination of the preference may have unintended deleterious consequences for taxpayers and more generally for the state, the Commission recommends that the Legislature direct either the Office of Financial Management, the Department of Revenue, or the Economic and Revenue Forecast

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Council to conduct an economic impact study of the effects of termination on the competitiveness of affected taxpayers and the primary and secondary tax revenue impacts of termination. The Commission also recommends that the Legislature consider whether the economic impact study should identify policy options such as defining the tax base, and the revenue impacts of such options, for restructuring the public utility tax for affected taxpayers. The study should also include recommendations for how to structure an apportionment methodology that complies with the guidelines established by the U.S. Supreme Court.

The Legislature should specify that the study should be completed by December 31, 2011, to inform a decision during the 2012 legislative session. After the 2012 session, if the Legislature has taken no action, the Commission intends to determine whether it should schedule this preference for another review.

The motion was seconded and carried unanimously.

MOTION: The Commission acknowledges receipt of the 2010 JLARC Tax Preference Review of **through freight in interstate transportation**. The Commission has provided a forum for discussion and public comment on these reviews.

The Commission does not endorse the recommendation. Although the existing preference is no longer constitutionally necessary, affected taxpayers have structured competitive activities in reliance on continuation of the preference. Because termination of the preference may have unintended deleterious consequences for taxpayers and more generally for the State, the Commission recommends that the Legislature direct either the Office of Financial Management, the Department of Revenue, or the Economic and Revenue Forecast Council to conduct an economic impact study of the effects of termination on the competitiveness of affected taxpayers and the primary and secondary tax revenue impacts of termination. The Commission also recommends that the Legislature consider whether the economic impact study should identify policy options such as defining the tax base, and the revenue impacts of such options, for restructuring the public utility tax for affected taxpayers.

The Legislature should specify that the study should be completed by December 31, 2011, to inform a decision during the 2012 legislative session. After the 2012 session, if the Legislature has taken no action, the Commission intends to determine whether it should schedule this preference for another review.

The motion was seconded and carried unanimously.

MOTION: The Commission acknowledges receipt of the 2010 JLARC Tax Preference Review of **shipments to ports for interstate or foreign transportation**. The Commission has provided a forum for discussion and public comment on these reviews.

The Commission endorses the recommendation but suggests the Legislature conduct its reexamination of the intent of this preference in conjunction with the economic impact study that the Commission recommends for the 'Through Freight in Interstate

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Transportation Public Utility Tax Deduction' and 'Instate Portion of Interstate Transportation' tax preferences.

The Legislature should specify that the study should be completed by December 31, 2011, to inform a decision during the 2012 legislative session. After the 2012 session, if the Legislature has taken no action, the Commission intends to determine whether it should schedule this preference for another review.

The motion was seconded and carried unanimously.

MOTION: The Commission acknowledges receipt of the 2010 JLARC Tax Preference Review of **bailed tangible personal property consumed in research & development, experimental, and testing**. The Commission has provided a forum for discussion and public comment on these reviews. The Commission endorses the JLARC recommendation for this review, subject to the following additional comments:

The Commission endorses the recommendation that the Legislature should review and clarify the purpose of the preference and further recommends that the Legislature consider whether the interpretation of the existing statute by the Department of Revenue results in fairness or competitive impacts.

Rationale: The Commission noted that the Department of Revenue issued an advisory in 2005 explaining that labels provided ("bailed") to salmon labeling companies qualify for this preference. The rationale of this advisory ruling appears to be a technical interpretation of the statute and may not be what the Legislature intended when it established a preference for a use tax exemption for tangible property that is bailed to a person and used in research, development, experimental, and testing activities when the bailed property is entirely consumed during the research, development, experimental, and testing activities, and the party that bails the property was not subject to sales tax or use tax when the party initially purchased or acquired the property.

The motion was seconded and carried unanimously.

Additional General Commission Comment to Include in the 2010 Tax Preference Reports

The Task Force on Tax Preference Reform recently encouraged the Commission to make general observations about the clarity and assumptions included in the state's tax preference statutes. The Task Force also recently discussed best practices for establishing legislative intent when legislation is drafted. The Commission therefore unanimously adopted the following general comment about legislative intent for the Legislature's consideration.

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"To improve the ability to evaluate the effectiveness of tax preferences, the Commission encourages the Legislature to employ the following practices when establishing legislative intent in tax preference bills.

Best Practices for Drafting Intent Sections

- Preambles to legislation (intent sections) are not part of the operative law, but they may be used by courts and others to interpret the law. Good intent sections may be useful during both the judicial and legislative processes.
- A good intent section is a reliable form of legislative history: it is contemporaneous, collective, official, and bicameral (and presented). For this reason, a well-drafted intent section may be useful in interpreting and evaluating a statute.
- Notwithstanding their uses, intent sections may also have unintended consequences, such as inadvertent creation of a cause of action.
- As with all other drafting decisions, the sponsor decides whether to include an intent section and what that section should say. And, as will all legislation, the intent section may be revised during the amendment process.
- Most ordinary legislation does not require an intent section. An intent section is not a substitute for precision (or breadth) in the operative text of the bill.
- Good intent sections explain the purpose of the legislation rather than state legal conclusions about the legislation's effect. They are expository rather than persuasive or polemical.
- Good intent sections reflect general good drafting practices. They are consistent with the rest of the bill and updated by amendment as needed. They are drafted in light of relevant statutes, common law, and constitutional law.
- An intent section may be more appropriate where there is prior judicial construction of a statute (e.g., the legislature is rejecting a judicial construction) or where a statute is likely to be subject to judicial construction or review in the future (e.g., a retroactive statute).
- Good factual findings are brief, declarative, and supported by the record. Good factual findings do not purport to be legal conclusions."

With no further public comment or Commission discussion, the meeting was adjourned at 4:06 p.m.