June 11, 1998

Honorable Neil Bryant
State Senator
PO Box 1151
Bend, Oregon 97709-1151

Honorable Dennis Luke
State Representative
PO Box 9069
Bend, Oregon 97708

Honorable Ben Westlund
State Representative
20590 Arrowhead Drive
Bend, Oregon 97701

Re: Opinion Request OP-1998-4

Dear Senator Bryant and Representatives Luke and Westlund:

You have asked that we review a letter opinion of the Legislative Counsel dated January 12, 1998. That opinion reviewed the treatment under Ballot Measure 50 of certain expiring serial levies that voters may be said to have "reauthorized" as local option taxes during the first year of implementation of Measure 50. (1) Measure 50 was created through House Joint Resolution 85 (1997) and approved by the people May 20, 1997, as Article XI, section 11, of the Oregon Constitution, replacing another provision with the same number.(2) In response to your request, the Legislative Counsel addressed several questions concerning the possibility of reversing the presumably unanticipated effects of those local option taxes. Below, we set out those questions and our comments. At your request, we have confined our comments to points of supplementation, qualification or disagreement with the Legislative Counsel opinion and have not repeated the analysis.

1. Rebate of Legally Collected Taxes

Your first question was whether taxing districts may rebate legally collected taxes to taxpayers. We agree with Legislative Counsel that the tax refund statutes do not authorize a refund of taxes if the taxes were approved and imposed under the mistaken belief that they were needed. However, Legislative Counsel did not address whether, apart from the tax refund statutes, taxing districts have authority to "grant" to the taxpayers of their respective districts an amount equivalent to the unnecessary tax revenues. In part, this is a question of the legal authority of each taxing district involved. That authority is found both in state statutory law and in local laws consisting of charters, bylaws and ordinances.

The relevant authority of taxing districts other than counties or cities is varied. For example, ORS 268.320(1) provides that the voters of metropolitan service districts may authorize the district to "assume additional functions." Conceivably, this could encompass the return of tax revenues collected by the district. ORS 266.410(13) authorizes a parks and recreation district "[g]enerally to do and perform any and all acts necessary and proper to the complete exercise and effect of any of its powers or the purposes for which it was formed." ORS 266.410(12) provides that the district has power "[t]o establish and collect reasonable charges." It may be argued that the duty to collect only "reasonable charges" implies

the authority to refund excess tax revenues. In contrast, although domestic water supply districts have the power to levy taxes, see ORS 264.300, and to "do all other acts and things which may be requisite, necessary or convenient in carrying out the objects of the district," *see* ORS 264.210, the districts' powers are not limited to collecting only "reasonable charges." Thus, it may be more difficult to argue that a domestic water supply district has authority to rebate excess tax revenues to taxpayers. Similarly, the authority of school district and education service district boards to "transact all business coming within the jurisdiction," see ORS 332.072 and 334.125(2), respectively, is not clear authority, if any authority at all, to return excess revenues. The authority of a community college district board to "[e]xercise any other power, duty or responsibility necessary to carry out the functions under this section or required by law," see ORS 341.290(16), even more clearly appears to confer only the implied power to effect other powers expressly granted.

Without gathering and considering the local laws governing each of these taxing districts, we are unable to adequately address whether the taxing districts other than counties or cities may return excess tax revenues to taxpayers. Thus, we reach no definite conclusion about such districts.

Counties have broad "home rule" powers under Article VI, section 10, of the Oregon Constitution and broad statutory powers under ORS 203.035.(3) Many cities have similar "home rule" powers under Article XI, section 2, of the Oregon Constitution. These powers probably encompass the power to enact local laws permitting the return of excess tax revenues of these taxing districts to the taxpayers.(4) However, a county's "home rule" powers do not authorize the county, for example, to return excess revenues of another taxing district within that county, at least without authorization by the other taxing district of such action. Because of the limited information and time available, we are unable to determine whether counties or cities have exercised their powers to authorize the return of their own excess tax revenues to taxpayers.

Against such variations in the authority of local governments, we must also consider the common law principle that government may use public funds only for a "public purpose." See Carruthers v. Port of Astoria, 249 Or 329, 333, 438 P2d 725 (1968). Sometimes, this test has been expressed in terms of the public purposes that the particular government serves. Thus, we previously noted that a county may use county funds "for county purposes only." 38 Op Atty 1093, 1095 (1977). We concluded that a "county cannot make a 'gift' of public funds" to, among others, a joint school district because that would have the "effect of giving county money to benefit citizens of the adjoining county." Id. at 1097-98. In that opinion, we noted the California case of Conlin v. Board of Supervisors, 33 P 753, 755, 99 Cal Rpt 17 (1893), where the court wrote:

> The legislature has no more right to direct a municipality to give away the public moneys in its treasury than had the municipality.

In Carruthers, however, the Oregon Supreme Court ignored "the obscure tests found in the cases" and instead followed the "sensible tests" suggested by law reviews, holding that a public purpose is any general benefit to the economy of the community. 249 Or at 341. Given the plenary authority of the Legislative Assembly and the comparable authorities of counties and "home rule" cities, we believe it is reasonably likely that the courts would hold that at least the "home rule" taxing districts have the power to return excess tax revenues to their taxpayers. The authority of other forms of taxing districts to do likewise is less clear and varies from district to district. We cannot opine on this part of the question without a review of the specific statutes and local laws governing each of these other taxing districts.

Because of the State School Fund, the effect of a rebate of unintended taxes on school districts, educational service districts or community colleges is different. For example, ORS 327.008 provides for an apportionment of money from the State School Fund to each school district in the form of grants that are reduced by "local revenue." Under ORS 327.013(9), "local revenue" is calculated in terms of the moneys actually received by the district, including but not limited to local property taxes, except revenues used for the payment of bonds for integration into the Public Employees' Retirement System pursuant to ORS 238.685(2)(a). see ORS 327.013(10). Therefore, if the school district collected more property taxes than intended, it received less State School Fund moneys. Correspondingly, if a school district rebates excess taxes, the rebate will not change the State School Fund distribution, because the rebate does not change the revenues that the district actually received. Thus, assuming that a school district has authority to rebate excess revenues to its taxpayers, the rebate effectively would be funded from the State School Fund.(5)

We do agree with Legislative Counsel that any taxing district may certify an operating tax rate in subsequent tax years below the district's rate limit. By so doing, those districts that mistakenly approved local option taxes, i.e., Linn and Deschutes Counties, may effect the economic equivalent of a tax refund to the current owners of the properties that were subject to these "unintended" taxes. This reduction may occur in the districts' 1998-99 and 1999-2000 tax certifications to the assessor. Because of the State School Fund formula, discussed above, if a school district reduces its operating tax rate below that allowed under the permanent rate limit, the school district will receive an additional amount of state School Fund moneys equal to that reduction.

Of course, the ownership of the properties may have changed following the imposition of taxes in tax year 1997-98. In those instances, the original property taxpayers will not necessarily receive the benefit of the tax reduction and the new property taxpayers may receive a tax reduction although they may not have paid the unintended taxes. In other words, a general rebate to current taxpayers will not be the exact equivalent of a tax refund to the owners of the properties that paid the "unintended" taxes.

A true tax "refund" presumes that the taxes were unlawful; these taxes were not; they were lawful, but unintended. Moreover, a "refund" requires a calculation of the exact amount of taxes that were erroneously collected. Because the calculations of the tax reduction for the 1997-98 tax year under ORS 310.200, 310.202 and 310.206 to 310.242, particularly the 17 percent statewide tax reduction, is complex and requires knowledge of the taxes imposed by other taxing districts, it is practically impossible for individual taxing units, such as the counties, to compute the amount of the unintended taxes for the 1997-98 tax year. Therefore, there appears to be no practical way that those taxes may be "refunded" by a reduction in operating taxes in subsequent tax years without computational assistance at the state level.

We also agree with Legislative Counsel that the foregoing "solution" does not adjust the district tax rate limits of the counties that obtained voter approval of local option taxes. Correction of this problem will require legislation.

2. Local Option Levies

You next asked whether the local option levies were properly made and whether the way the levies were handled was constitutional under Measure 50. Based solely on the facts recited in the letter opinion of Legislative Counsel, we conclude that the local option levies were properly made and were constitutional under Measure 50. There may be facts not discussed in the letter opinion which may have provided a basis for a claim that the ballot titles were unlawful or that the subsequently approved local option taxes

were unlawful. Any such claims appear to be time-barred by applicable statutes, as discussed by Legislative Counsel.

3. District's Tax Certification Notice

Your next question was whether a taxing district may change its tax certification notice to avoid the unanticipated effects caused by the local option levies. As noted in the letter opinion of Legislative Counsel, a district's notice of ad valorem property taxes for the 1997-98 tax year may be modified under prescribed conditions, but not due to a mistake as to the effect of the law, and not after October 1, 1997. Or Laws 1997, ch 541, § 339.

4. Authority of Department of Revenue

Finally, you asked whether the Department of Revenue, by rule or otherwise, may change the calculation of the district's tax rate limit for 1997-98 or 1998-99 to avoid the unanticipated effects of the local option levies. We agree with the conclusion of Legislative Counsel that the Department of Revenue lacks authority to change, or direct others to change, the taxing district's calculation of the district's rate limit for 1997-98 or 1998-99 to avoid the unanticipated effects of the local option levies.

ORS 310.246 authorizes the department to adjust a taxing district's tax rate limit for "mistakes," stating:

> (1) The Department of Revenue may adjust the permanent rate limits for operating taxes established under ORS 310.200 to 310.242 to correct for mistakes. All adjustments must be made by June 30, 1998.
>
> (2) No change to the assessment and tax roll shall be made as the result of an adjustment under this section.

ORS 310.246 (emphasis added). Although the term "mistakes" is not defined, we believe that the mistakes to which this provision refers are mistakes in interpretation of provisions of law governing the tax rate limit and in calculations in accordance with those provisions of law. ORS 310.200 to 310.242 require the department only to correctly interpret the law and to make the prescribed calculations. Because these statutes do not address in any way adjustments based on the subjective assumptions of government officials or voters concerning the effects of Measure 50, we do not believe the word "mistakes" refers to such assumptions. Rather, "mistakes" means erroneous calculations of the permanent rate limits for operating taxes.

The department lacks authority to change or order others to make changes in the tax rate limit on ad valorem property taxes that are in accordance with law, notwithstanding the fact that the effects of local option taxes were not fully understood at the time those taxes were submitted to the voters for approval.

Sincerely,

Donald C. Arnold
Chief Counsel
General Counsel Division

---

1. There is no necessary relationship between the expiring serial levies and the voters' approval of local option taxes. As Legislative

Counsel pointed out in its letter to you, a replacement levy is subject to the 1997-98 reduction calculation and is incorporated into the district's tax rate limit if the replacement levy replaces an existing serial or one-year levy that had been approved by the voters after December 5, 1996, and to be first imposed for the tax year beginning July 1, 1997, and if the rate or amount of the replacement levy is "not greater than" the rate or amount of the levy replaced. Or Const Art XI, § 11(7)(b). The only connection between the prior serial levies and the local option taxes that the voters "reauthorized," rests upon what apparently was the voters' mistaken belief that the expiring serial levy would reduce the district's tax rate limit.

Return to previous location

---

2. The former Article XI, section 11, restricted ad valorem property taxes by establishing an amount of taxes for each taxing district as the "base" and limited the growth of this base to six percent per year unless the voters approved special levies outside of those limitations. The new Article XI, section 11, generally "rolls back" the value on properties to that of tax year 1995-96, less 10 percent, and limits the growth of value, with a few exceptions, to three percent per year. The new provision also establishes a permanent tax rate for each district based on the district's tax base and special levy authority under the old provision but reduced to reflect a 17 percent reduction in property taxes statewide.

Return to previous location

---

3. ORS 203.035 provides, in part:

(1) Subject to subsection (3) of this section, the governing body or the electors of a county may by ordinance exercise authority within the county over matters of county concern, to the fullest extent allowed by Constitutions and laws of the United States and of this state, as fully as if each particular power comprised in that general authority were specifically listed in ORS 203.030 to 203.075.

Return to previous location

---

4. This opinion does not address whether the tax revenues from the local option taxes approved by Deschutes and Linn County voters may be used for any purposes other than those purposes, such as law enforcement, that were specifically identified on the ballot statements. see ORS 280.075, 250.035. Conceivably, these moneys may be

legally dedicated to the specifically identified purposes and unavailable for other purposes, such as rebates of unneeded tax revenues.

Return to previous location

---

5. This opinion does not discuss the effect of the State School Fund distributions on similar actions by educational service districts and community college districts.

Return to previous location

Go to:
Top of page.
AG Opinions home page.

Created 6/14/98
Webmaster see: Print Services.