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GROSS RECEIPTS TAXES

Some Observations on Gross Receipts Taxes

There has been a recent upsurge in interest in gross receipts taxes, which present a variety of policy and legal issues.

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The majority of states impose a form of a corporate income tax.[1] However, currently five states—Delaware, Ohio, Nevada, Texas, and Washington—impose a broad-based, statewide corporate gross receipts tax. The most recent addition to that list is Nevada, which in its 2015 Legislative Session enacted a new Commerce Tax that is imposed on gross revenue. More recently, there have been and are, at the time of writing, ongoing efforts in Oregon to enact a corporate gross receipts tax, either as a separate tax or as an alternative tax to the existing Oregon corporate income/excise tax. Even more recently, both West Virginia[2] and Louisiana[3] have considered a gross receipts tax.

Such existing and proposed gross receipts taxes present a variety of policy and legal issues. This article will discuss a number of those issues and what appears to be a recent upsurge in interest in gross receipts taxes, with a discussion of the most recently enacted gross receipts tax (Nevada) and the most serious current effort to enact a gross receipts tax (Oregon).

Background

Gross receipts taxes first gained popularity during the late 1920s and early 1930s when state revenues decreased during the Great Depression, and popular opinion held them to be a stable source of revenue because the tax base was not directly linked to either the income or the profitability of a business.[4] For example, "facing unprecedented budget conditions," the state of Washington "scrambled . . . to find new sources of tax revenue," and in 1933, enacted the nation's second oldest[5] broad-based gross receipts tax (then called an "occupation tax"), which was made permanent and renamed by the Washington Legislature in 1935 as the Business and Occupation (B&O) Tax.[6] As mentioned above, five states currently impose gross receipts taxes, with the basic structure as presented in Exhibit 1.

Exhibit 1. Currently Imposed Gross Receipts Taxes

State	Tax	Year Enacted	Rates
Delaware	Gross Receipts Tax	1913	0.2% to 0.8%[1]
Nevada	Commerce Tax	2015	0.051% to 0.331%[2]
Ohio	Commercial Activity Tax	2005	0.26%[3]
Texas	Margin Tax	2008	0.33% to 0.75%[4]
Washington	Business & Occupation Tax	1933	0.00138% to 0.033%[5]

[1] See Del. Code Ann. tit. 30, § 2301; State of Delaware, *Gross Receipts Taxes*, http://revenue.delaware.gov/services/Business_Tax/Step4.shtml (last visited Mar. 22, 2017).

[2] See Nev. Rev. Stat. § 363C.200; State of Nev. Dep't of Taxation, *Commerce Tax Questions and Answers* (Sept.8, 2015), https://tax.nv.gov/uploadedFiles/taxnvgov/Content/FAQs/Commerce_Tax_FAQs.pdf.

[3] See Ohio Rev. Code Ann. §§ 5751.02, 5751.03.

[4] See Tex. Tax Code Ann. §§ 171.001, 171.002.

[5] See Wash. Rev. Code § 82.04.220; Dep't of Revenue Wash., *Business and Occupation Tax Classifications*, http://dor.wa.gov/Content/FindTaxesAndRates/BAndOTax/BandOrates.aspx (last visited Mar. 22, 2017).

In contrast, four states have relatively recently repealed their gross receipts taxes. Indiana adopted in 1933 a gross receipts tax, and repealed it in 2002.[7] New Jersey adopted in 2002 a gross receipts tax as an alternative minimum assessment, and repealed it in 2006.[8] Kentucky adopted in 2005 a gross receipts tax as an alternative minimum assessment, and repealed it in 2006.[9] Michigan adopted in 2008 a business tax imposed on gross receipts (less purchases from other businesses), and repealed it in 2011.[10]

Policy Issues

There are a number of policy arguments generally presented against gross receipts taxes. First, gross receipts taxes are typically viewed as complex in their application, with multiple rates for multiple types of businesses. For example, the Washington B&O Tax is a gross receipts tax measured on the value of products, gross proceeds of sale, or gross income of the business. There are 47 different tax classifications, with six tax rates.[11] If a taxpayer conducts multiple business activities, it may be necessary to report under more than one tax classification.[12] Specific activities, such as cigarette sales, also may be subject to additional taxes.[13] Another example is the recently enacted Nevada Commerce Tax, which has 26 business categories.[14] Furthermore, in cases where the gross receipts tax is intended as an alternative minimum tax, as is the case of Oregon's 2016 unsuccessful attempt to enact a statewide progress receipts tax through a ballot measure, the complexity of a gross receipts tax is added upon an existing complex tax structure.

Second, gross receipts taxes typically create "pyramiding" where the taxes are paid at each stage of a process or each time an item changes hands, the result of which is that the value created in earlier stages is taxed again at later stages. In other words, as products pass from one stage to another, the full value is taxed at each stage. Compare this to a typical state sales tax where tax is only imposed once upon the final sale.

The consequence of this pyramiding effect is that such taxes result in "forward shifting" of costs to final consumers.[15] Tax pyramiding also encourages and rewards businesses that minimize the number of taxable steps in a process in order to decrease their overall tax burden. By cutting the number of taxable steps in a process to minimize that tax burden, e.g., by moving to more vertical integration, it encourages an approach of creating larger firms with fewer (taxable) business-to-business transactions.[16]

Third, gross receipts taxes typically have a disproportionate impact on businesses with high volumes of sales, but low profit margins. Two businesses with identical gross receipts, but different net incomes (i.e., profit margins) will have different tax obligations with a heavier effective tax rate on low profit margin businesses. The effects of tax pyramiding can also then magnify the tax impact on a low profit industry. A Washington study analyzing the B&O Tax found taxes pyramid on the average of 2.5 times under that tax, but in the food manufacturing industry, there is a pyramiding rate of 6.7 times.[17]

Consequently, a common approach in imposing a gross receipts tax on businesses with different profit margins is the creation of different rates for different types of activities, that is, the tax burden is purportedly adjusted to give lower marginal rates to lower profit margin businesses. However, the byproduct of such multiple rates is additional complexity. On the other hand, a more simplistic system, with a single rate for all types of businesses, exaggerates the risk of hitting certain business segments harder than others when dealing with a broad range of businesses with differing profit margins.

Fourth, common sense, as well as the literature, tells us that gross receipts taxes are passed along to end consumers, resulting in higher prices. However, unlike a sales tax, which is typically passed along directly to the consumer, there is little to no transparency on how this occurs with gross receipts taxes. However, clearly, higher prices result in less household buying power. For example, in analyzing the 2016 Oregon ballot proposal for a new gross receipts tax, the Oregon Legislative Revenue Office stated that the new tax was expected to result in higher consumer prices for Oregon residents (as well as higher wages), which would increase the Oregon per capita state and local tax burden by roughly $600 per year.[18]

Current Legal Issues

Two clear legal consequences flow from a gross receipts tax. First, Public Law 86-272,[19] by its terms, only applies to a "net income" tax. Accordingly, a taxpayer whose only business activities in a state consist of solicitation of orders for sales of tangible personal property is not protected by the statute from a gross receipts tax in that state.[20] Second, states which allow a deduction for taxes paid frequently exclude taxes on or measured by income, thus making true gross receipts taxes deductible.[21]

Jurisdictional nexus standards for a gross receipts tax are not quite as clear. Certainly, under the Commerce Clause and *Complete Auto Transit,*[22] a company must have substantial nexus with a state in order for that state to impose a gross receipts tax. However, the meaning of "substantial nexus" and the application of that standard to gross receipts taxes is a fluid issue.

What of a physical presence requirement? In *Tyler Pipe*,[23] the U.S. Supreme Court declared in 1987 that Washington had jurisdiction to impose its B&O Tax where "the activities performed in this state on behalf of the taxpayer are significantly associated with the taxpayer's ability to establish and maintain a market in this state for the sales."[24] The taxpayer in *Tyler Pipe* had no physical presence in Washington, but had engaged an independent contractor who employed salespeople in Washington and who "acted daily" on behalf of *Tyler Pipe* in calling on its customers and soliciting orders.

Accordingly, can *Tyler Pipe* in 1987 be read simply as a physical-presence nexus standard in a gross receipts tax case, based upon well-established principles of agency and attributional nexus, such as those set forth in *Scripto*[25] and *National Geographic*,[26] both of which were cited by the Court in *Tyler Pipe?* Or did *Scripto* intend to set forth a different "substantial nexus" standard for gross receipts taxes?

Five years later, the Court's 1992 decision in *Quill* clearly stated that physical presence is required under the substantial nexus prong of the Commerce Clause under the facts of that case. However, *Quill* involved a challenge to a state law requirement that a state could impose a use tax collection obligation on out-of-state sellers on use tax incurred by in-state buyers who ordered items for delivery into the state. The court in *Quill* reaffirmed its 1967 holding in *National Bellas Hess*[27] that only a physical presence in the state satisfied the Commerce Clause requirement of substantial nexus. While the U.S. Supreme Court has not yet addressed the issue, a large number of state courts have read *Quill* as being limited to sales and use taxes and not applicable to corporate income taxes,[28] but at least one state appellate court has found *Quill's* physical presence requirement was not limited to the sales/use tax context.[29]

Is a gross receipts tax akin to a sales tax? Likely not. As one court remarked, "In terms of its structure and reporting requirements, the [Washington] B & O tax differs sharply from a sales or use tax: sales and use taxes are stated separately, imposed on a transaction by transaction basis, and usually involve numerous limitations and exemptions intended to ensure that their burdens fall upon the final purchaser or consumer. By contrast, gross receipts taxes, such as Washington's B & O tax, are calculated quarterly or annually, are aimed at the seller, and seldom involve limitations or exemptions."[30]

In late 2016, the Supreme Court of Ohio in *Crutchfield Corp. v. Testa*[31] addressed this jurisdictional issue involving Ohio's Commercial Activity Tax which is imposed on gross receipts sitused to that state. Crutchfield had no physical presence in Ohio but sold electronics to Ohio customers that were shipped from out of state. Ohio law provides a bright line of taxability for those persons having, during the calendar year, taxable gross receipts of at least $500,000, irrespective of physical presence in Ohio.[32] For the period in issue, Crutchfield had sales of over $500,000 to Ohio customers.

In a 5-2 majority opinion, the *Crutchfield* court held that although *Quill* recognized physical presence as a necessary condition for imposing a use tax collection obligation, that requirement does not extend to business-privilege taxes as a general matter.[33] The court stated, "[A]lthough a physical presence in a state may furnish a sufficient basis for finding a substantial nexus, *Quill's* holding that physical presence is a *necessary condition for imposing the tax obligation* does not apply to a business-privilege tax such as the CAT, as long as the privilege tax is imposed with an adequate quantitative standard that ensures that the taxpayer's nexus with the state is substantial."[34] The court also held that under the standard set forth in *Tyler Pipe*, physical presence is a *sufficient*, but not a *necessary*, condition to imposing Ohio's business privilege tax on gross receipts.[35]

Assuming the standard is not physical presence—not an insignificant assumption considering the U.S. Supreme Court has never expressly addressed the issue outside of the context of a use tax—what then is the federal constitutional jurisdictional standard under the Commerce Clause for imposition of a gross receipts tax? According to the court in *Crutchfield*, a sales receipts threshold of $500,000 of sales is sufficient to satisfy a non-physical presence, substantial nexus requirement of the Commerce Clause involving a gross receipts tax. On this question, the decision contains a significant discussion and analysis of *Norton*,[36] a 1951 U.S. Supreme Court decision that the *Crutchfield* court noted the taxpayer had particularly relied upon.

Norton was a Massachusetts manufacturer with an office and warehouse in Illinois from which it made sales in Illinois. However, the taxpayer also separately engaged in a purely mail-order business selling to Illinois customers. Illinois attempted to impose a gross receipts tax upon *all* of the Illinois sales of the taxpayer and the Illinois Supreme Court affirmed.[37] However, the U.S. Supreme Court in *Norton* reversed and remanded the case to the state courts for further proceedings in which sales involving the purely interstate mail-order transactions were *immune* from tax. The *Norton* Court stated, "*Unless some local incident* occurs sufficient to bring *the transaction* within its taxing power, the vendor is not taxable. Of course, a state imposing a sales or use tax can more easily meet this burden, because the impact of those taxes is on the local buyer or user. Cases involving them are not controlling here, for this tax falls on the vendor."[38]

The *Crutchfield* court disagreed with the taxpayer's reading of the above language in *Norton* as requiring an association between the tax and local, in-state activities, and the court stated the language "does not at all comment on 'substantial nexus,'" but instead reflects the interstate commerce immunity theory that at the time of *Norton* in 1951 would have distinguished between Norton's sales made by or through local agents in the state, taxable as local commerce, and the strictly mail-order transactions immune as purely interstate commerce.[39] *Crutchfield* states that *Complete Auto Transit* in 1977 abolished the prohibition against levying a tax on the privilege of engaging in interstate commerce.[40]

Likewise, Hellerstein notes that *Complete Auto Transit* made *Norton* "obsolete" when the Court finally overruled *Spector Motors*[41] and rejected the earlier line of cases holding that the *direct* taxation of interstate commerce was impermissible and also rejected previous formal distinctions between direct and indirect taxes.[42] More recently, the Court in 2015 in *Wynne,* a personal income tax case, relied heavily upon three cases that involve a gross receipts tax rather than a tax on income, and repeated that the Court's previous decisions have rejected any formal distinction between gross receipts and net income taxes.[43] According to *Wynne,* "[t]he discarded distinction between taxes on gross receipts and net income was based on the notion, endorsed in some early cases, that a tax on gross receipts is an impermissible 'direct and immediate burden' on interstate commerce, whereas a tax on net income is merely an 'indirect and incidental' burden," and *Complete Auto Transit* "squarely rejected the argument that the Commerce Clause distinguishes between taxes on net and gross income."[44]

What then, if anything, remains of the so-called "disassociation" doctrine in *Norton* that played a part in the *Crutchfield* decision? Recall, *Norton* quite clearly stated that a taxpayer could avoid taxation of some in-state sales by showing "that particular transactions are disassociated from the local business and interstate in nature."[45] *Crutchfield* read that language as being written in the context of interstate commerce immunity theory, not in the context of Commerce Clause substantial nexus. If *Crutchfield* is correct, that doctrine was inextricably tied to a now-rejected distinction between direct and indirect taxes and, hence, is outdated and no longer valid. However, the Supreme Court of Washington when recently faced in 2016 with this issue in *Avnet,*[46] hesitated to go so far.

Avnet, a major distributor of electronic components and computer technology, sold its products through many regional sales offices, including one in Washington. Avnet also had "national sales" delivered to a Washington facility owned by Avnet's customer, even though the customer placed the order from an office outside of Washington. Avnet also had "drop shipped sales" delivered to a third party in Washington at the request of Avnet's customer, usually Avnet's buyer's customer. Avnet did not report either its national sales or its drop-shipped sales as subject to Washington's B&O Tax. On audit, the Department included all such sales in Avnet's tax base and assessed accordingly.[47] The Washington Supreme Court in *Avnet* upheld that assessment.

A significant portion of the *Avnet* decision is devoted to addressing the taxpayer's argument that it was entitled under the Commerce Clause to "disassociate" both the national sales and the drop-shipped sales from its tax base because its Washington office was not involved in any way in those sales, an argument which the *Avnet* court noted "rests entirely" on *Norton.*[48] The court observed both parties argue over whether *Norton* has been overruled, but the court then concluded, "we need not resolve this question today."[49] "What has changed," said the court, "in the 60 years since *Norton* is the Supreme Court's interpretation of how a company must *demonstrate* disassociation."[50]

Looking to *Tyler Pipe,* as well as its own 1983 decision in *Chicago Bridge*[51] the Washington Supreme Court held, mimicking the language in *Tyler Pipe*, that Avnet had failed to offer any evidence that its local activities in Washington were not "significantly associated with its ability to establish and maintain a Washington market when its local office or employees are not directly involved with the inbound sales" and that Avnet's activities in Washington "were at least minimally associated with its ability to establish and maintain a market in Washington for the sale of its products."[52] However, the decision was far from unanimous, and three justices in *Avnet* dissented, arguing that "*Norton* remains binding precedent" and that upon these facts, "*Norton* therefore controls and bars application of Washington's B&O tax to the disputed transactions."[53]

Thus, to date, one can find three judicial views on the current vitality of *Norton* and its disassociation doctrine: (1) the view in *Crutchfield* that *Norton* has been overruled on this point; (2) the view in the dissent in *Avnet* that *Norton* has not been overruled on this point and remains good law; and (3) the view in the majority opinion in *Avnet* that it need not decide the issue, but that the dissociation doctrine in *Norton* now must be read in the context of the substantial nexus standard set forth in *Tyler Pipe. Crutchfield,* decided on

November 17, 2016, and *Avnet,* decided on November 23, 2016, are essentially concurrent decisions in which neither court had the benefit of the other court's reasoning or had the opportunity to react to that reasoning.[54]

Certainly, there should be agreement on the point that to the extent *Norton* relied upon a Commerce Clause analysis which distinguishes between direct and indirect taxes, that distinction has been abolished by subsequent case law, including *Complete Auto Transit.* However, to the argument that *Complete Auto Transit* also overruled the disassociation language in *Norton,* it should be remembered the court in *Complete Auto Transit* clearly made the effort to point out that *no claim* was made under the facts of that case that the "activity" was not sufficiently connected to the state to justify a tax.[55] Further, addressing the Due Process (not Commerce) Clause, the Court in 1992 in *Allied-Signal* pointed out "the Due Process Clause also underlies our decisions in this area. Although our modern due process jurisprudence rejects a rigid, formalistic definition of minimum connection, we have not abandoned the requirement that, *in the case of a tax on an activity, there must be a connection to the activity itself*, rather than a connection only to the actor the State seeks to tax."[56]

The Nevada Commerce Tax

The most recently enacted broad-based statewide gross receipts tax is the Nevada Commerce Tax, which took effect July 1, 2015.[57] A Nevada gross receipts tax has been in the works for quite some time. The Commerce Tax is a more refined spin-off from Governor Sandoval's Business License Fee plan also introduced in 2015, which attempted to establish a business license fee based on a business's gross receipts.[58] Prior to the failed Business License Fee plan, a 2% margin tax was rejected by Nevada voters in 2014 as well as a prior gross receipts tax, which the Nevada Legislature debated in 2003 but did not adopt.[59]

The gross receipts tax was the most controversial part of Governor Sandoval's Nevada Revenue Plan. Modeled after Ohio's Commercial Activity Tax, Texas's Margin Tax, and Washington's B&O Tax, Nevada requires every corporation to file a tax return, but only businesses with gross revenue in excess of $4 million per year are subject to the tax.[60] For purposes of Nevada's gross receipts tax, there are 26 categories, each with a varying tax rate.[61] The varying tax rates were compiled based on a study of the Texas Margin Tax, "which attempted to calculate the effective tax rates experienced by firms across a range of industry classifications."[62] An estimated 10,000 businesses are affected by the tax and in drafting the plan, the

Governor's office hoped the tax would capture business revenue of corporations based outside of Nevada but operating in the state.[63]

The Commerce Tax managed to survive its first year intact, despite being faced with its fair share of the usual criticisms, discussed above. In fact, a few months after the Commerce Tax was signed into law, RIP Commerce Tax, Inc. filed a petition with the Secretary of State to refer the tax to voters for approval or disapproval.[64] In an attempt to thwart their efforts, the Coalition for Nevada's Future then filed an action challenging the referendum petition. The Nevada Supreme Court held that RIP Commerce Tax's referendum was valid as written; however, the description of the effect[65] of the referendum failed to reveal the significant practical ramifications of the measure's disapproval.[66]

Recently, Nevada State Treasurer Dan Schwartz announced plans to bring forward in 2017 legislation to revamp the tax structure, including the Commerce Tax.[67] Schwartz's plan to revamp Nevada's current tax structure would include the repeal of the Commerce Tax.[68] While the Commerce Tax has managed to withstand the efforts of critics thus far, the battle may not be over.

The Oregon Gross Receipts Tax Experience

Finally, consider Oregon's recent and ongoing attempts to enact a gross receipt tax. The story began last year when on June 6, 2016, "Our Oregon," a coalition of public sector unions and progressive groups, submitted a sufficient number of signatures for the Oregon Secretary of State to certify Initiative Petition 28 (IP 28) for the general ballot in November 2016. IP 28 would have increased the minimum tax on C corporations with Oregon sales of more than $25 million by imposing a minimum tax of $30,001 plus 2.5% of the amount of sales above $25 million.

In September 2016, the Oregon Legislative Revenue Office released a Research Report,[69] which concluded that IP 28 was expected to generate $548 million in new revenue in the 2015-17 biennium, $6.1 billion in the 2017-19 biennium, and $6.0 billion in the 2019-21 biennium.[70] The Report also concluded that because IP 28 would be based on Oregon sales and heavily concentrated on domestic consumer sectors, it was expected to largely act as a consumption tax on the state economy.[71] Such taxes initially born by the retail trade, wholesale trade and utility sectors were expected to result in higher prices for Oregon residents, and the higher gross receipts taxes triggered by IP 28 were expected to lead to higher consumer prices and higher wages. IP 28 appeared on the November 8, 2016, general election ballot as "Measure 97," and was soundly defeated by a wide 59%-41% vote.

The usual criticisms, discussed above, of gross receipts taxes were leveled against Measure 97: it would add complexity to the Oregon tax structure; it would greatly increase taxes in Oregon; it would create new economic distortions; it would harm firms with small profit margins; and it would make Oregon noncompetitive, etc.[72] However, several observations are particularly noteworthy. First, it would have established a broad corporate minimum gross receipts tax on companies doing business in Oregon, i.e., unlike Washington or Nevada, it did not create distinctions between types of business activities.

Second, it had an extremely simple rate structure of a minimum tax of $30,001, plus 2.5% of the amount of sales above $25 million, as compared to a structure with multiple rates for different types of business activities. Such a structure favors simplicity over complexity in its application and administration, but conversely does not even attempt to address different profit levels among different types of business by creating different rates for different businesses. The largest tax increases would have occurred in the wholesale trade and retail trade sectors, with the share of taxes paid by these sectors expected to rise from 37.5% to 45.2%.[73]

Third, it would have drastically shifted the revenue base from the personal and the corporate income tax to a tax measured instead by gross receipts. The percentage of state tax revenue from personal income taxes would have dropped from 69% to 55%, and would have dropped from 4.3% to 1.4% for corporate income taxes.[74] From Oregon's perspective, the positive consequence of this shift would have been to "reduce the instability of state revenue over the course of the business cycle."[75] Put differently, the intended shift here from revenue based on income to revenue based on gross receipts was intended to ensure a tax base even when companies are losing money.

The gross receipts tax saga is far from over in Oregon. On December 14, 2016, the group behind Measure 97 (which was defeated at the November 2016 general election), released a booklet setting forth its 2017 legislative proposals. The document includes the basic structure for a new "$100 Million Business Tax" and is "calling on the Legislature to create this tax." Highlights of this new gross receipts tax proposal are (1) A 2% tax on Oregon gross receipts (Measure 97 was 2.5%.); (2) all types of businesses would be subject to the tax (Measure 97 only applied to C corporations.); (3) utility companies would be exempt; and (4) the threshold for applying the tax would be $100 million of Oregon gross receipts (Measure 97 had a $25 million threshold).

The booklet states this gross receipts tax would raise $4 billion per biennium (as opposed to the $6 billion that Measure 97 was projected to raise). It is not entirely clear whether this proposal would operate like Measure 97, which modified Oregon's corporate minimum tax, or if it would replace Oregon's corporate income tax. However, the $4 billion revenue estimate suggests it would operate as would Measure 97, i.e., as a corporate minimum tax. At the time of this writing, there is no Oregon legislative sponsor or author identified with this proposal (or any draft bill language).[76]

More recently, on February 10, 2017, Oregon Legislative Concept (LC) 3548 was released, which proposed a legislative referendum to amend Oregon's constitution to provide for a "Business Privilege Tax" on all business entities, based on gross receipts. On February 14, 2017, LC 3548 was transformed into Senate Joint Resolution 41, under sponsorship of the Senate Committee on Finance and Revenue and introduced in the Oregon Senate. It provides that the rate to be imposed would not exceed 0.7 percent, that businesses with less than $5 million in gross receipts would pay a flat tax of $250, and that businesses with less than $150,000 in gross receipts would not be required to file or pay anything. The draft proposal would not repeal the corporate income and excise tax. Thus, it appears that under LC 3548, corporations would be subject to both a gross receipts tax and the existing corporate income tax. At the time of writing, the fate of this proposal was uncertain.

Conclusion

An attempted comeback of gross receipts taxes appears to be taking place. By current count, four states have abandoned a form of gross receipts taxes, while five states currently have a form of a gross receipts tax. But, absent Nevada's recent 2015 enactment of such a tax, the number of states in modern times having a gross receipts tax and having abandoned a gross receipts tax would have stood at a 4-4 tie. Prior to Nevada's 2015 legislation, the most recent adoption of a state gross receipts tax is the Texas Margin Tax enacted seven years ago in 2008. In addition to Nevada's 2015 legislation, serious efforts in Oregon began in 2016 and are continuing to enact a gross receipts tax. Even more recently, proposals for gross receipts taxes were considered in West Virginia and Louisiana. Contrary to critics' opinions, with the increasing number of states enacting or attempting to enact a gross receipts tax, states may still believe the tax might be fit for the modern economy.

[1] As of 2016, six states, Nevada, Ohio, South Dakota, Texas, Washington, and Wyoming, do not levy a corporate income tax; however, Delaware, Nevada, Ohio, Texas, and Washington do impose a gross receipts tax. Nicole Kaeding, *State Corporate Income Tax Rates and Brackets for 2016*, Tax Foundation (Jan. 2016), https://files.taxfoundation.org/legacy/docs/TaxFoundation-FF497.pdf.

[2] The West Virginia Governor has proposed a 0.2% commercial activity tax on business gross receipts as part of his FY2018 Budget Report. Jim Justice, Governor, *State of West Virginia Executive Budget: Vol. 1 Budget Report Fiscal Year 2018*, W. Va. State Budget Office (Feb. 8, 2017), http://www.budget.wv.gov/executivebudget/Documents/VI2018.pdf.

[3] H.B. 628 would impose a commercial activity tax at a single rate of 0.35 percent for any entity with more than $1.5 million in gross receipts. H.R. 628, 43rd Reg. Sess. (La. 2017).

[4] Nicole Kaeding & Erica Wilt, *Gross Receipts Taxes: Lessons from Previous State Experiences*, Tax Foundation 2 (Aug. 9, 2016), https://files.taxfoundation.org/20170209073111/TaxFoundation_FF523_0.pdf.

[5] The country's first statewide gross receipts tax was a "business and occupations privilege tax" enacted in 1921 in West Virginia. Andrew Chamberlain & Patrick Fleenor, *Special Report No. 147: Tax Pyramiding: The Economic Consequences of Gross Receipts Taxes*, Tax Foundation 2 (Dec. 2006), https://files.taxfoundation.org/legacy/docs/sr147.pdf.

[6] Washington Research Council, *The Way We're taxed: a Brief History*, Policy Brief 12-13 at 2 (May 29, 2012), https://researchcouncil.org/files/docs/2013/08/brieftaxhistoryfinal.pdf.

[7] N. Kaeding and E. Wilt, *Gross Receipts Taxes: Lessons From Previous State Experiences,* Tax Foundation, Fiscal Fact No. 523, Aug. 9, 2016, p. 3.

[8] *Id*. at 6.

[9] *Id*. at 8.

[10] *Id*. at 9.

[11] Dep't of Revenue Wash., *Business and Occupation tax Classifications*, http://dor.wa.gov/Content/FileAndPayTaxes/BeforeIFile/doingBus_CommonBusActivities.aspx (last visited Mar. 22, 2017).

[12] *Id*.

[13] *Id*.

[14] *See* Nev. Rev. Stat. § 363C.310-560; State of Nev. Dep't of Taxation, *Commerce Tax Questions and Answers* (Sept. 8, 2015), https://tax.nv.gov/uploadedFiles/taxnvgov/Content/FAQs/Commerce_Tax_FAQs.pdf.

[15] *See* Justin Ross, *Gross Receipts Taxes: Theory and Recent Evidence*, Tax Foundation (Oct. 2016), https://files.taxfoundation.org/legacy/docs/TaxFoundation-FF529.pdf.

[16] Andrew Chamberlain & Patrick Fleenor, *Special Report No. 147: Tax Pyramiding: The Economic Consequences of Gross Receipts Taxes*, Tax Foundation 8 (Dec. 2006), https://files.taxfoundation.org/legacy/docs/sr147.pdf.

[17] Washington State Tax Structure Study Committee, *Tax Alternatives for Washington State: A Report to the Legislature*, Wash. Dep't of Revenue 14 (Nov. 2002), http://dor.wa.gov/content/aboutus/statisticsandreports/wataxstudy/volume_2.pdf.

[18] Oregon Legislative Revenue Office, *Initiative Petition 28 Description and Analysis Research Report #3-16*, 2 (May 2016), https://olis.leg.state.or.us/liz/2015I1/Downloads/CommitteeMeetingDocument/90401.

[19] 15 U.S.C. § 381.

[20] Ohio Rev. Code Ann. § 5751.02 ("The [Commercial Activity] tax imposed under this section is not a transactional tax and is not subject to Public Law No. 86-272"); Walter Hellerstein & John A. Swain, State Taxation ¶ 6.18 at 2 (3d ed. 2015).

[21] *See, e.g.,* Cal. Rev. & Tax. Code § 24345; *Appeal of Dayton Hudson*, Cal. St. Bd. of Equalization, 94-SBE-003 (Feb. 3, 1994).

[22] *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977).

[23] *Tyler Pipe Industries, Inc. v. Washington State Dep't of Revenue*, 483 U.S. 232 (1987).

[24] *Id*. at 250.

[25] *Scripto v. Carson,* 362 U.S. 207 (1960).

[26] *National Geographic Society v. California State Board of Equalization*, 430 U.S. 551 (1977).

[27] *National Bellas Hess, Inc. v. Dep't of Revenue of the State of Illinois,* 386 U.S. 753 (1967).

[28] *See, e.g., KFC Corp v. Iowa Dep't of Revenue*, 792 N.W.2d 308 (Iowa 2010); *Lanco, Inc. v. Dir., Div. of Taxation*, 379 N.J. Super. 562 (N.J. Super. Ct. App. Div. 2006), *cert. denied,* 551 U.S. 1131 (2007), *Tax Com'r of State v. MBNA Am. Bank, N.A.*, 220 W. Va. 163, 640 S.E.2d 226 (2006), *cert. denied,* 551 U.S. 1141 (2007).

[29] *J.C. Penney Nat'l Bank v. Johnson,* 19 S.W.3d 831 (Tenn. Ct. App. 1999).

[30] *Lamtec Corp. v. Dep't of Revenue,* 170 Wash. 2d 838, 246 P.3d 788, 794 n.6 (2011), *cert. denied,* 565 U.S. 816 (2011).

[31] *Crutchfield Corp. v. Testa,* 2016-Ohio-7760 (Nov. 17, 2016).

[32] Ohio Rev. Code Ann. § 5751.01(1)(3).

[33] *Crutchfield* at ¶ 42.

[34] *Id*.

[35] *Id*. at ¶ 50.

[36] *Norton Co. v. Dep't of Revenue of State of Illinois,* 340 U.S. 534 (1951).

[37] *Id*. at 535-537.

[38] *Id*. at 537 (citations omitted, emphasis added).

[39] *Crutchfield* at ¶ 33.

[40] *Crutchfield* at ¶ 34.

[41] *Spector Motor Service v. O'Connor*, 340 U.S. 602 (1951).

[42] Walter Hellerstein & John A. Swain, State Taxation ¶ 19.02[3][b][i] (3d ed. 2015).

[43] *Comptroller of the Treasury of Maryland v. Wynne*, 135 S. Ct. 1787 (2015).

[44] *Id*.

[45] *Norton Co.,* 340 U.S. at 537.

[46] *Avnet, Inc. v. Washington Dep't of Revenue,* 187 Wash. 2d 44 (2016).

[47] *Id*. at 46.

[48] *Id*. at 54.

[49] *Id*. at 60.

[50] *Id*. at 60 (emphasis added).

[51] *Chicago Bridge & Iron Co. v. Dep't of Revenue*, 98 Wash. 2d 814 (1983).

[52] *Avnet*, 187 Wash. 2d at 61. The court then proceeded to reject the taxpayer's contention that under these facts, the Department of Revenue's (former) "Rule 93" prevented it from assessing the taxes.

[53] *Avnet*, 187 Wash. 2d at 69, 83.

[54] *Avnet,* the later of the two decisions by six days, does not mention *Crutchfield.*

[55] *Complete Auto Transit Inc.*, 430 U.S. at 288: "*We note again that no claim is made that the activity is not sufficiently connected to the State to justify a tax,* or that the tax is not fairly related to benefits provided the taxpayer, or that the tax discriminates against interstate commerce, or that the tax is not fairly apportioned." (Emphasis added)

[56] *Allied Signal, Inc. v. Director, Division of Taxation,* 504 U.S. 768, 778 (1992) (emphasis added).

[57] Jared Walczak, *Nevada Approves New tax on Business Gross Receipts*, Tax Foundation 2 (June. 2016), https://files.taxfoundation.org/legacy/docs/TaxFoundation_FF468_0.pdf.

[58] *Id*. at 4. The fee-based gross receipts structure would have required each firm to determine its tax liability using its Nevada gross receipts and a matrix of over 1,800 possible fees, based on industry classifications.

[59] Nevada Governor's Office, *Business License Fee Facts*, http://gov.nv.gov/uploadedFiles/govnvgov/Content/News_and_Media/Press/2015_Images_and_Files/BusinessLicenseFeeFacts.pdf (last visited Mar. 31, 2017).

[60] Nev. Rev. Stat. § 363C.200.

[61] *See* Nev. Rev. Stat. § 363C.310-560; State of Nev. Dep't of Taxation, *Commerce Tax Questions and Answers* (Sept. 8, 2015), https://tax.nv.gov/uploadedFiles/taxnvgov/Content/FAQs/Commerce_Tax_FAQs.pdf.

[62] Jared Walczak, *Nevada Approves New tax on Business Gross Receipts*, Tax Foundation 2 (June. 2016), https://files.taxfoundation.org/legacy/docs/TaxFoundation_FF468_0.pdf.

[63] Paul Jones, *Nevada Lawmakers Express Concern Over Governor's Business Tax Compromise*, Tax Notes 1 (May 26, 2015), http://www.taxnotes.com/state-tax-today/gross-receipts-tax/nevada-lawmakers-express-concern-over-governors-business-tax-compromise/2015/05/26/233r.

[64] *Coalition for Nevada's Future v. RIP Commerce Tax, Inc.*, No. 69501 at 1 (Nev. May 11, 2016).

[65] "A description of effect is intended to facilitate the people's right to meaningfully engage in the initiative process by prevent[ing] voter confusion and promot[ing] informed decisions." The description is very

important since it is "what the voters see when deciding whether to even sign a petition." *Id*. at 2 (internal quotations omitted).

[66] *Id*. at 3. On remand, a Nevada District Court approved a revised version of the referendum; however, RIP Commerce Tax, Inc. did not think it feasible to obtain the necessary signatures needed before the deadline.

[67] William Carlile, *Tax Overhaul: Nevada Treasurer Seeks Overhaul of Tax Structure*, Bloomberg BNA Daily Tax Report (Sept. 2, 2016).

[68] *Id*.

[69] Oregon Legislative Revenue Office, Measure 97 Description and Analysis, Research Report #3-16 at 2-3 (Sept. 2016).

[70] *Id*. at 2.

[71] *Id*.

[72] *See* Nicole Keading, *Oregon Measure 97: The Threat to Oregon's Tax Climate*, Tax Foundation (April 2016), https://files.taxfoundation.org/legacy/docs/TaxFoundation-FF508-2.pdf.

[73] Oregon Legislative Revenue Office, Measure 97 Description and Analysis, Research Report #3-16 at 2-3 (Sept. 2016).

[74] *Id*. at 9-10.

[75] *Id*. at 3.

[76] *See* A Better Oregon, *A Better Oregon Budget Report* (Dec. 14, 2016), http://www.abetteroregon.org/wp-content/uploads/2016/12/A-Better-Oregon-Report.pdf.