

Portland voters approve 1% gross receipts tax on large retailers

Overview

On November 6, 2018, voters in Portland, Oregon approved Measure 26-201 (the Measure), which imposes a 1% gross receipts tax on “large retailers” doing business in Portland, with exceptions for certain industries and certain types of sales. As a ballot measure, Measure 26-201 was approved directly by Portland voters and did not go through the legislative process involving hearings and amendments. This tax alert summarizes the Measure, identifies uncertainties in the terms and provisions and offers some taxpayer considerations.

Significant provisions of the Measure

Effective for tax years beginning on or after January 1, 2019, “Large Retailers” must pay a one percent “surcharge on gross revenue from retail sales within the City, unless specifically exempted.”¹ The Measure adopts the following key definitions:

- A “Large Retailer” is a “business” that:
 - Is subject to the Portland Business License Tax;
 - Had annual gross revenue from retail sales from all locations in the United States where the taxpayer conducts business that exceeded \$1 billion in the prior tax year;
 - Had annual gross revenue from retail sales within Portland of \$500,000 or more in the prior tax year.²
- The term “Large Retailer” does not include:
 - Any manufacturer or other business that is not engaged in retail sales within Portland;
 - Any entity operating a utility within Portland;
 - Any cooperative recognized under federal or state law; or
 - A federal or state credit union.³
- National Gross Revenue is “the gross revenue a business receives nationally in a given year from retail sales.”⁴
- A “Retail Sale” is a sale to a consumer for use or consumption, but not for resale. The term also “includes but is not limited to the sale of services, including but not limited to retail banking services.”⁵

The use of the term “business” in the definitions of “Large Retailer” and “National Gross Revenue” creates potential uncertainty as it appears the term “business” may be referring to “taxpayer” or “taxfiler.” In that context, the City Business License Tax Code refers to “taxfilers” rather than “taxpayers” or “businesses.”⁶ It is also unclear from the text of the Measure whether a taxfiler’s qualification as a Large Retailer (either through the calculation of annual gross revenue or the application of an exemption, such as whether the taxfiler is a “manufacturer”) should be applied on an entity-by-entity basis or on a consolidated basis.⁷

¹ Measure, Section 4(1), (3).

² Measure, Section 3(8)(a)-(c).

³ Measure, Section 3(8)(d).

⁴ Measure, Section 3(13).

⁵ Measure, Section 3(16).

⁶ For example, the City’s Business License Law’s apportionment provision reads as follows:

In computing the business license tax, taxfilers that have income from business activity both within and without the City must determine the income apportioned to the City by multiplying the total net income from the taxfiler’s business by a fraction, the numerator of which is the total gross income of the taxfiler from business activity in the City during the tax year, and the denominator of which is the total gross income of the taxfiler from business activity everywhere during the tax year. Portland City Code Section 7.02.610(C).

⁷ The City’s Business License Tax conforms to Oregon’s corporate excise tax law unless otherwise specified. Portland City Code Section 7.02.020. The Measure’s provisions have been added to Chapter 7 of the Portland City Code so should be governed by this conformity

Calculation of tax

Large Retailers must pay a one percent surcharge on their retail sales in the City, unless exempted.⁸ As noted above, retail sales include sales of services. While the Measure does not provide guidance on how taxpayers should apportion their sales for purposes of the surcharge, it may be reasonable to presume that the apportionment provisions similar to those applicable to City's Business License tax will apply.

The Measure provides the following deductions from gross receipts:

- The amount of Portland Business License Tax paid to the city;
- Retail sales of qualified groceries (i.e., food products that qualify for purchase under the United States Supplemental Nutritional Assistance Program);
- Retail sales of qualified medicines or drugs (i.e., any medicine, drugs, or medical devices that are regulated as a medicine or drug by the United States Food and Drug Administration); and
- Retail sales of qualified health care services (i.e., broadly defined as any service that involves the provision of health care to the public).⁹

Administrative provisions

While the surcharge will apply to tax years beginning on or after January 1, 2019, the Measure provides that no penalties or interest will be charged for failure to make quarterly estimated payments of the surcharge during the 2019 tax year.¹⁰ Estimated payments for the surcharge will be due using the City's estimated tax calendar for the City's Business License Tax.¹¹

The Measure also provides that the City of Portland Revenue Division will, within six months of passage of the Measure, "prepare a list of businesses it is aware of that meet the definition of a Large Retailer and notify such business of their obligations" regarding the surcharge.¹² It is unclear how the Revenue Division will make this determination and the Measure provides no additional criteria. However, the Measure does not require the City to notify a business of its obligations under the surcharge as a precondition for the imposition of the surcharge.

Uncertainties exist

In addition to uncertainty surrounding the interpretation of "business" and apportionment, other questions are raised by the terms of the Measure for which additional clarification may be necessary. For example, the term "manufacturer" is not defined, which is a significant element of analyzing possible exemptions from the surcharge. In addition, while the Measure explicitly refers to the surcharge being imposed on "gross revenue," the Measure also explicitly provides several deductions from gross revenue. This raises the question of whether the safe harbors provided under Public Law 86-272 (which would normally not be available to taxpayers subject to a "gross receipts" tax) apply. Finally, neither Oregon nor the City of Portland currently impose a sales tax, so the City does not have a broad body of sales tax law to look to for potential guidance regarding the taxation of retail sales.

Considerations

Businesses potentially impacted by the Portland surcharge should contact their Oregon tax advisors for further assistance.

Contacts:

provision. While the state's corporate excise tax provisions provide guidance regarding nexus and apportionment for taxpayers doing business in the state, the state's corporate excise tax provisions do not use the term "business" as does the Measure.

⁸ Measure, Section 4(1)

⁹ Measure, Section 4(2).

¹⁰ Measure, Section 4(3).

¹¹ *Id.*

¹² Measure, Section 5(2).

External Multistate Tax Alert

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