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Alaska 2020 Ballot Initiative 190GTX – Fair Share Act: Analysis of Section 7 Public Records Disclosure Requirements

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I. Executive Summary

Tax Changes

190GTX, which was filed in August of 2019 and certified on October 14, 2019, seeks to increase the Alaska oil and gas production tax for certain oil fields in the North Slope. Specifically, if passed, 190GTX would generally require impacted producers to pay monthly the greater of the following:

- The alternative gross minimum tax at a rate of 10 to 15 percent with all credits and offsets excluded; or
- The tax on production tax value at a rate of 15 percent.

Disclosure Requirement

In addition to the proposed changes to the Alaska oil and production tax, 190GTX also includes the following disclosure provision:

Section 7, Public Records. All filings and supporting information provided by each producer to the Department relating to the calculation and payment of the taxes set forth in Section 3 and 4 shall be a matter of public record.

Considering the legal and policy issues discussed below, the implementation of the public records requirements in 190GTX would likely subject Alaska to significant risks of litigation and would make the state an outlier as it would be the only state to implement broad disclosure of all taxpayer information required to make a business tax filing as well as supporting information.

II. Introduction

190GTX, which was filed in August of 2019 and certified on October 14, 2019, seeks to increase the Alaska oil and gas production tax for certain oil fields in the North Slope. Specifically, if passed, 190GTX would generally require impacted producers to pay monthly the greater of the following:

- The alternative gross minimum tax at a rate of 10 to 15 percent with all credits and offsets excluded; or
- The tax on production tax value at a rate of 15 percent.

In addition to the proposed changes to the Alaska oil and gas production tax, 190GTX also includes the following disclosure provision:

Section 7, Public Records. All filings and supporting information provided by each producer to the Department relating to the calculation and payment of the taxes set forth in Section 3 and 4 shall be a matter of public record.

The wording of this provision is significantly ambiguous and could result in the public disclosure of all the information on a taxpayer's production tax return as well as the underlying information and documentation require to calculate the proposed tax increases in 19GTX if the initiative passes.

III. Disclosure of Taxpayer Information

a. Current Law

Currently Alaska law specifically prohibits the disclosure of taxpayer information. Specifically, AS § 43.05.230 provides:

- (a) It is unlawful for a current or former officer, employee, or agent of the state to divulge the amount of income or the particulars set out or disclosed in a report or return made under this title, except
- (1) in connection with official investigations or proceedings of the department, whether judicial or administrative, involving taxes due under this title;
 - (2) in connection with official investigations or proceedings of the child support enforcement agency, whether judicial or administrative, involving child support obligations imposed or imposable under AS [25](#) or AS [47](#);
 - (3) as provided in AS [38.05.036](#) pertaining to audit functions of the Department of Natural Resources;
 - (4) as provided in AS [43.05.405](#) - 43.05.499; and
 - (5) as otherwise provided in this section or AS [43.55.890](#). . .”

Subpart (f) of that provision also provides that “[a] willful violation of the provisions of this section. . . is punishable by a fine of not more than \$5,000, or by imprisonment for not more than two years, or by both.”

Additionally, the Public Records and Recordors provisions set forth in Title 40 of the Alaska Statutes also provide a clear exception to the public records disclosure requirements for tax information. Specifically, AS § 40.25.100(a) provides:

“Information in the possession of the Department of Revenue that discloses the particulars of the business or affairs of a taxpayer or other person is not a matter of public record, except as provided in AS [43.05.230](#)(i) or for purposes of investigation and law enforcement. The information shall be kept confidential except when its production is required in an official investigation, administrative adjudication under AS [43.05.405](#) - [43.05.499](#), or court proceeding. These restrictions do not prohibit the publication of statistics presented in a manner that prevents the identification of particular reports and items, prohibit the publication of tax lists showing the names of taxpayers who are delinquent and relevant information that may assist in the collection of delinquent taxes, or prohibit the publication of records, proceedings, and decisions under AS [43.05.405](#) - [43.05.499](#).”

Considering these provisions collectively, Alaska law currently provides a clear prohibition—enforceable by criminal fines and penalties—against the disclosure of taxpayer information. Although the relevant provisions provide some exceptions, there is no exception for specific public disclosure of individual taxpayer information unless it is provided on an aggregate basis for statistical purposes that prevents the specific taxpayer identification.

b. Proposed Initiatives

As noted above, the proposed initiative 190GTX includes the following disclosure provision:

Section 7, Public Records. All filings and supporting information provided by each producer to the Department relating to the calculation and payment of the taxes set forth in Section 3 and 4 shall be a matter of public record.

IV. The Potential Impact of 190GTX on Taxpayer Disclosure

a. Legal Impact of Section 7 Disclosure Requirement

Federal Taxpayer Disclosure Prohibition

Internal Revenue Code (IRC) § 6103 provides that a taxpayer’s federal “[r]eturns and return information shall be confidential” and that “no officer or employee of any State, . . . shall disclose any return or return information obtained. . . .”

Any information subject to the disclosure requirements in 190GTX § 7 that is derived from a taxpayer’s federal return or federal return information would be confidential pursuant to federal law and the disclosure of such information by the Alaska Department of Revenue would be prohibited pursuant to IRC § 6103. Although the specific taxes at issue in 190GTX are oil and gas production taxes, it is unclear what information on the Alaska filings and supporting information would be subject to disclosure prohibitions included in IRC § 6103. Nevertheless, the language of 190GTX § 7 is extremely broad. Thus, there could be some information that could ultimately appear on or become part of a taxpayer’s federal return. Thus, it is unclear how much of the information required to be disclosed would fall within the purview of IRC § 6103 and would thus be illegal to disclose publicly. Consequently, 190GTX § 7 is likely to result in significant litigation as to what information falls within the purview and protection of IRC § 6103.

State Taxpayer Disclosure Prohibition

As discussed above, Alaska law currently provides a clear prohibition—enforceable by criminal fines and penalties—against the disclosure of specific taxpayer information. If 190GTX is enacted, section 7 seems to require that specific taxpayer information relating to the calculations in sections 3 and 4 shall be a matter of public record. Section 7 does not explicitly require public disclosure, but rather requires those documents would be subject to the Public Records Act.

This issue was addressed in the Attorney General’s opinion Dated October 14, 2019. There the Attorney General specifically opined:

“[T]he reality is that most of the tax documents would still likely be protected from disclosure. This is because making the tax documents ‘a matter of public record’ simply means the Public Records Act applies, instead of being exempt from it. Under the Public Records Act, the Department of Revenue would have to review all the requested records and redact those portions that should be protected for privacy, proprietary information or balance of interest, for example. These protections likely apply to most, if not all, of the tax documents.”¹

In addition, it is unclear how section 7 would intersect with AS § 43.05.230, which imposes criminal liability for disclosure of confidential tax documents. As pointed out by the Attorney General, although section 7 is likely intended to supersede the existing statute, “[t]his could be difficult to implement for the Department of Revenue.”² The Attorney General appears to have equivocate on the issue of whether the imposition of 190GTX would in fact supersede AS § 43.05.230.

Upon review of relevant Alaska case law, it is unclear how a Court would reconcile a state statute imposing a criminal penalty for disclosure of confidential taxpayer information with a later enacted ballot initiative requiring such documentation be made a part of the public record. Echoing the Attorney General’s opinion, this will likely be a very difficult issue for the Department of Revenue, and ultimately the manner in which it is implemented may depend on the current Director of the Tax Division and/or the aggressiveness of the current Administration. In other words, this could result in erratic and selective enforcement by Directors and Administrations.

b. Policy Considerations

Imposition of 190GTX section 7 Would Make Alaska an Outlier

Based on the prohibition against the public disclosure of taxpayer information pursuant to IRC § 6103, no state requires the broad disclosure of taxpayer information. The following states do require very limited disclosure:

- Arkansas: Requires limited disclosure from taxpayers receiving certain credits; however, an exception is provided for information that would threaten a taxpayer’s competitiveness.³

¹ See p 6.

² *Id.*

³ Ark. Code Ann. §§ 26-18-303(b)(11)(A)-(P) and (Q).

- Massachusetts: Although the reporting of certain specific taxpayer information is required to be reported to the Secretary of State, that information is only made public on an aggregate basis and taxpayer's names are kept confidential (even internally).⁴
- Washington: Requires disclosure for taxpayers' receiving tax incentives of employment and wage information and the amount of tax preference claimed by a taxpayer.⁵
- West Virginia: Requires limited disclosure for taxpayers receiving certain credits.⁶

Considering the very limited disclosure of taxpayer information currently required by only a small number of states, Alaska's new requirement for broad disclosure of taxpayer information for taxpayers subject to 190GTX would make Alaska the first state to do so and an extreme outlier among all states.

*Additional Policy Considerations*⁷

Public Disclosure Will Not Assist in the Determination of a Taxpayer's "Fair Share": The proposition that confidential tax information should be made available for public inspection so that the public can determine whether a business is paying its "fair share" is fundamentally flawed. The determination of a specific taxpayer's "fair share" of tax is inherently subjective, and necessarily based on the taxpayer's liability under a broader range of state and local tax and fee statutes. Public disclosure does not enhance tax policy objectives, but rather undermines taxpayer confidence in the tax system.

Tax Laws Are Complex and Public Disclosure Will Serve Neither the Public nor Law Makers: Tax laws are inherently complex, which is why states have a dedicated taxing agency made up of tax specialists to administer the tax laws. Further, the taxing agencies audit business taxpayers on a regular basis to ensure that all relevant tax laws are appropriately enforced.

Public Disclosure Fails to Serve a Public Purpose: The disclosure of tax information to the general public without specialized tax training will likely not result in any significant additional understanding by the general public and does not assist in any specific public purpose other than the public shaming of those taxpayers subject to 190GTX.

Law Makers Have Access to Aggregated Information to Make Policy Decisions: If the legislature is concerned that certain classes of taxpayers are not being taxed appropriately, then the legislature can obtain taxpayer-related information on an aggregate basis from the taxing agency. Further, if the legislature is concerned with the administration of certain taxes by its taxing agencies, then those issues should be addressed directly with the taxing agencies, and not through the public disclosure of specific taxpayer information.

⁴ Mass. Gen. L. ch 62C § 82.

⁵ RCW § 82.32.534.

⁶ W. Va. Code § 11-10-5s(a).

⁷ See attached Exhibit A: COST Policy Position—Confidential Taxpayer Information.



Confidentiality of Taxpayer Information

Policy Position

Position: *Taxpayers have a justifiable expectation of privacy. State departments of revenue audit business taxpayers on a regular basis to ensure that all relevant tax laws are appropriately enforced; releasing specific business tax returns or information from those returns to the public would serve no policy purpose.*

Explanation: The proposition that confidential tax returns should be made available for public inspection so that the public can determine whether a business is paying its “fair share” is fundamentally wrong. The determination of one’s “fair share” of taxes is inherently subjective. A taxpayer’s tax liability is determined by law, not by subjective criteria. The public’s right to set appropriate levels of taxation for different groups is through the lawmaking power of its elected representatives. Those laws, once made, must be fairly interpreted and enforced.

Because tax laws are inherently complex, every state has a dedicated agency of specialists to ensure that tax laws are fairly interpreted and enforced. If lawmakers are concerned that those laws are not being correctly administered, the appropriate response is proper oversight of the tax agency and not disclosure of confidential taxpayer information. If, however, the legislative branch is concerned that certain classes of taxpayers are inappropriately taxed, it can and should ask the executive branch for aggregate information on that class of taxpayers.

From an empirical perspective, having legislators or the public examine specific tax returns is not useful in formulating policy. When such disclosures have been made in past, they have generally been counter-productive due to the lack of public understanding of the complexities of corporate income taxes, especially as they apply to multistate business entities. For example, in New Jersey, tax return information was used to allege that “Public Company A” employed thousands of workers and earned significant income but was paying the State’s minimum tax. In fact, those employees worked for and those profits were earned by a subsidiary of the public company; that subsidiary paid a substantial amount of tax to the state. Furthermore, such disclosures of confidential information make public trade secrets and other sensitive information that can be used by competitors—including competitors not located in the state and subject to the state’s tax system. Thus, taxpayers will be disadvantaged to the extent that they must disclose information that is then available to their competitors.

In 2000, the United States Congress Joint Committee on Taxation completed an exhaustive review of taxpayer confidentiality. The Committee concluded:

Taxpayers have a justifiable expectation of privacy in the extensive information they furnish under penalty of fine or imprisonment....Our tax system is based on voluntary compliance. Many observers believe that the degree of voluntary compliance is directly affected by the degree of confidentiality given the information that is provided to the IRS.

If returns and return information were publicly available, it would invite a variety of intrusions into a taxpayer’s privacy. Business competitors could use the information to gain economic advantage....A lack of confidentiality could also facilitate the use of return information for political gain.

Federal Treatment of Tax Returns: The general rule of §6103 of the Internal Revenue Code (IRC) is that tax returns and tax return information are confidential and not subject to public disclosure.

State Treatment of Tax Returns: The IRC contains a provision prohibiting the sharing of federal tax return information with a state or local government unless the state or local government is likewise required to protect the information.