TABOR Considerations for the LOCCTP

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Topics to be Discussed

- Taxes
- Prior Voter Approval Requirement
- Fiscal Year Spending Limit
- Special Issues for Income Tax

Taxes

A tax is a charge that is intended to raise revenues to defray the general expenses of government. *Barber v. Ritter*, 196 P.3d 238, 248 (Colo. 2008).

STATE TAXES: Income, sales and use, gasoline and special fuel tax, cigarette tax, tobacco products tax, nicotine products tax, retail marijuana sales and excise tax, severance tax, insurance premium tax, alcohol tax, gaming taxes, and pari-mutuel racing tax.

Taxes

Tax Expenditures

39-21-302. Definitions. (2) "Tax expenditure" means a tax provision that provides a gross or taxable income definition, deduction, exemption, credit, or rate for certain persons, types of income, transactions, or property that results in reduced tax revenue.

TABOR

- Article X, section 20 of the Colorado Constitution
- A/k/a Amendment 1, The Taxpayer's Bill of Rights, TABOR
- Considerations for Committee are primarily in subsections (4), (7), and (8)

Prior Voter Approval

Section 20. The Taxpayer's Bill of Rights.

(4) Required elections. Starting November 4, 1992, districts must have voter approval in advance for:

(a) Unless (1) or (6) applies, any new tax, tax rate increase, mill levy above that for the prior year, valuation for assessment ratio increase for a property class, or extension of an expiring tax, or a tax policy change directly causing a net tax revenue gain to any district.

Prior Voter Approval
New Tax

Examples:

- Retail marijuana sales and excise taxes (Proposition AA).
- Sports betting tax (Proposition DD).
- Nicotine products tax (Proposition EE).

HCA Healthone v. City of Lone Tree, 197 P.3d 236 (Colo. App. 2008).

- Expansion of a use tax on construction materials to all tangible personal property was a new tax.

Prior Voter Approval
Tax Rate Increase

- A mathematical figure for calculating a tax, usually expressed as a percentage
- Amendment 35 and Proposition EE increased the tax rates for cigarettes and OTP

Prior Voter Approval
Assessment Rate Increase

- Valuation for Assessment Ratio Increase for a Property Class
- Still applies post-Gallagher Amendment
- Applies to the class, not individuals

Prior Voter Approval
Tax Policy Change

- Requires prior voter approval for a tax policy change directly causing a net tax revenue gain to any district.

- Only applies to changes made by the General Assembly and not to ministerial changes by Department of Revenue. *see Huber v. Colo. Mining Ass'n.*, 240 P.3d 453 (Colo. 2011).

Taxes

Tax Policy Change

39-21-402. Definitions. (3) “Tax policy” refers to decisions by the state or local governments regarding taxes that have or may be levied, and includes an analysis of the benefits and burdens of the state’s overall tax structure with respect to the promotion of certainty, fairness, adequacy, transparency, and administrative ease.

Prior Voter Approval
Tax Policy Change

- What is a tax policy?
  - A catch-all phrase to encompass what would be equivalent of a new tax or tax rate increase
  - A high level overall plan
  - A significant change

Prior Voter Approval
Tax Policy Change

1. Does the change relate to the imposition of a tax being created, repealed, or amended in a manner that results in a modification of the standards or rules governing the imposition of the tax?

Examples: Repealing a tax credit, adding an add-back to the definition of taxable income, suspending a tax exemption, etc.

Prior Voter Approval
Tax Policy Change

2. Does it directly increase tax revenue?
   - Based on the fiscal note
   - May include the net of several changes
   - Must “directly cause” the increase

Prior Voter Approval
Tax Policy Change

3. Is there precedent that supports not referring the measure?

- *Mesa County Bd. of Comm'rs v. State*, 203 P.3d 519, 530 (Colo. 2009).

- *TABOR Found. v. Reg'l Transp. Dist.*, 416 P.3d 101 (Colo. 2018).

Prior voter approval
Tax policy change

TABOR Found. v. Reg'l Transp. Dist

- A legislative change that is only an incidental and de minimis revenue increase is not a new tax or tax policy change.
- Sales tax changes that simplified tax collection and ease administration burdens and increase revenues by de minimis amount are not a new tax or tax policy change.
  - De minimis = less than 1% of the district's overall tax revenue and budget, then the net tax revenue increase is de minimis.

Prior voter approval
Tax policy change

Mesa County Bd. of Comm'rs v. State

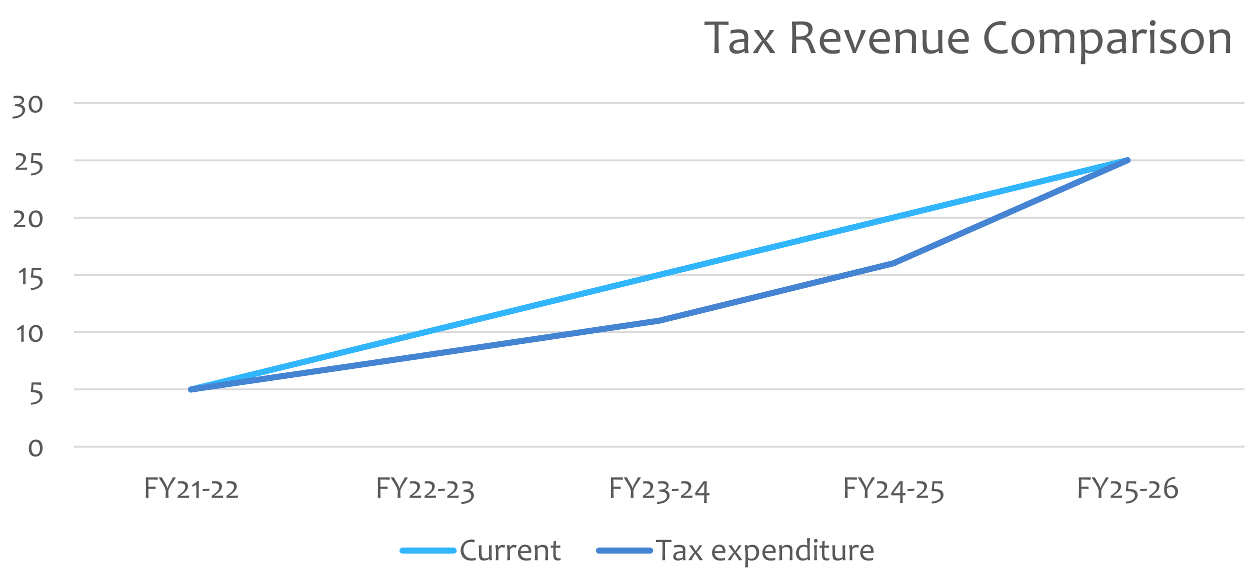
- *De minimis* exception
- We find that a "tax policy change directly causing a net tax revenue gain" only requires voter approval when the revenue gain exceeds the limits dictated by subsection (7).

The state is expected to exceed the TABOR state fiscal year spending limit for the immediate future

Prior voter approval

What doesn't require prior voter approval?

- Tax rate decreases
- New or expanded tax credits or exemptions, including one that has a sunset.



Prior Voter Approval
Election Provisions

- Must begin "Shall state taxes be increased (first, or if phased in, final, full fiscal year dollar increase) annually…"
- Blue Book estimates includes estimates that may be binding for the first year
- May be referred in odd-numbered year election

Fiscal Year Spending Limit

Section 20. The Taxpayer's Bill of Rights. (7) **Spending limits.** (a) The maximum annual percentage change in state fiscal year spending equals inflation plus the percentage change in state population in the prior calendar year, adjusted for revenue changes approved by voters after 1991.

...

(d) If revenue from sources not excluded from fiscal year spending exceeds these limits in dollars for that fiscal year, the excess shall be refunded in the next fiscal year unless voters approve a revenue change as an offset.

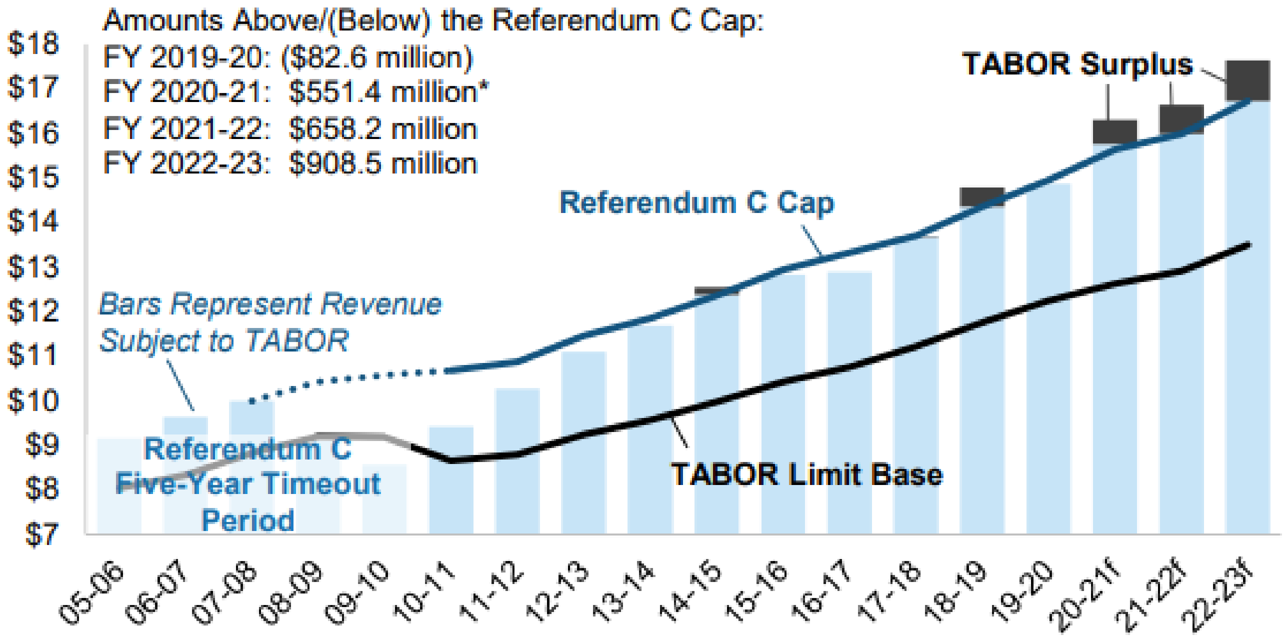
Fiscal Year Spending Limit

- TABOR Limit = Prior fiscal year's spending adjusted by inflation & population growth + voter-approved revenue changes.
    - Revenue in excess of the limit is refunded.

- Voter-approved revenue changes
    - Referendum C
    - Propositions AA, DD, EE

Fiscal Year Spending Limit
LCS June Forecast

Figure 2
TABOR Revenue, TABOR Limit Base, and the Referendum C Cap
Dollars in Billions



Source: Office of the State Controller and Legislative Council Staff. f = Forecast.
**Refunds for the FY 2021-22 surplus will be adjusted for overrefunds in prior years.*

Fiscal Year Spending Limit
Effect of Tax Expenditure Change

Based on current revenue projections:

-- **Tax Increases**

- The state can retain and spend the revenue from a voter-approved revenue change.
- Any tax change that increases revenue but does not require prior voter approval increases the state's refund obligation, which is made from the General Fund.

-- **Tax Decreases**

- May only reduce refunds

Other TABOR Issues
(8)(a) Revenue Limits

- Neither an income tax rate increase nor a new state definition of taxable income shall apply before the next tax year

-- Applies regardless of revenue effect

-- HB20-1420 created add-backs for the 2020 income tax year to avoid a federal tax law change.

Other TABOR Issues
(8)(a) Revenue Limits

- All taxable net income to be taxed at one rate, excluding refund tax credits or voter-approved tax credits, with no added tax or surcharge.

The End

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