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In this article, Morris contextualizes the November Massachusetts ballot question regarding a 4 percent surtax on individuals whose taxable income exceeds \$1 million — a group estimated to constitute only 0.6 percent of the commonwealth’s voters.

On June 22 the Supreme Judicial Court of Massachusetts (SJC) in *Anderson v. Attorney General*¹ (*Anderson II*) removed the last remaining legal hurdle to a November 2022 ballot question related to the so-called millionaires’ tax. The ballot question will ask voters whether to approve an amendment to the Massachusetts Constitution that would impose a 4 percent surtax on individual taxable incomes over \$1 million.

The surtax is most often referred to as a graduated income tax because, when combined with the standard Massachusetts income tax rate (5 percent), the income tax regime would shift from a flat rate for most categories of property and most categories of taxpayers to a more progressive tax system whereby the highest-income taxpayers are taxed at a higher rate. But the 4 percent tax for taxpayers whose taxable income exceeds \$1 million is more accurately referred to as a surtax than a graduated income tax because (1) the purpose of a surtax is to fund a specific

government program (in this case, “to provide the resources for quality public education and affordable public colleges and universities, and for the repair and maintenance of roads, bridges, and public transportation”²) and (2) a surtax is “not an increase in a particular tax, but a new tax levied on top of another.”³ Regardless of whether we refer to the additional 4 percent tax as a surtax or a graduated income tax, the Massachusetts Constitution would need to be amended before the Department of Revenue can assess it.

A constitutional amendment to authorize the surtax is required because article 44 of the Amendments to the Massachusetts Constitution provides that the income tax “may be at different rates upon income derived from different classes of property, but shall be levied at a uniform rate throughout the commonwealth upon incomes derived from the same class of property.”⁴ Unlike special tax rates such as the 12 percent rate on short-term capital gains, the surtax is imposed on different categories of taxpayers (that is, those whose taxable income exceeds \$1 million) rather than different categories of property. Accordingly, the constitution would need to be amended to authorize the surtax.

The constitution provides for two amendment processes: (1) the initiative petition process and (2) the legislative amendment process. Since article 44 was ratified in 1915, there have been six unsuccessful attempts to amend the Massachusetts Constitution to allow for the imposition of a graduated income tax — the first five were ballot questions that voters rejected, and

² *Id.* at *2.

³ See Tax Foundation, What Is a Surtax?

⁴ Mass. Const. Amend. Art. 44.

¹ See SJC-13257 (June 22, 2022) (Lowy, J.).

the most recent attempt was an initiative petition that never appeared on a Massachusetts ballot.⁵ In this most recent attempt, the attorney general in 2015 certified an initiative petition that proposed the following amendment to article 44:

To provide the resources for quality public education and affordable public colleges and universities, and for the repair and maintenance of roads, bridges and public transportation, all revenues received in accordance with this paragraph shall be expended, subject to appropriation, only for these purposes. In addition to the taxes on income otherwise authorized under this Article, there shall be an additional tax of 4 percent on that portion of annual taxable income in excess of \$1,000,000 (one million dollars) reported on any return related to those taxes. To ensure that this additional tax continues to apply only to the commonwealth's highest income residents, this \$1,000,000 (one million dollar) income level shall be adjusted annually to reflect any increases in the cost of living by the same method used for federal income tax brackets. This paragraph shall apply to all tax years beginning on or after January 1, 2019.⁶

In 2018 the SJC in *Anderson v. Attorney General* (*Anderson I*) held that the initiative petition violated the mutual dependence (also referred to as the relatedness) requirement of article 48, part 2, section 3 of the constitutional amendments.⁷ Despite the fact that the attorney general certified that (a) the imposition of a graduated income tax on high-income taxpayers, (b) the earmarking of funds generated from this new income tax for "quality public education and affordable public colleges and universities," and (c) the earmarking of funds generated from this new income tax for "the repair and maintenance of roads, bridges, and public transportation" were sufficiently related subjects, the court determined that these subjects were not "mutually dependent" because

each can exist independently.⁸ The court further determined that the attorney general failed to articulate a "common purpose between these spending priorities, beyond the abstract determination that both purposes are 'broad areas of public concern.'"⁹

On January 18, 2019, Rep. James O'Day (D) proposed a legislative amendment to the constitution that is substantially identical to the initiative petition the SJC invalidated six months earlier. The text of the proposed constitutional amendment, which would be added to the end of article 44, is as follows:

To provide the resources for quality public education and affordable public colleges and universities, and for the repair and maintenance of roads, bridges, and public transportation, all revenues received in accordance with this paragraph shall be expended, subject to appropriation, only for these purposes. In addition to the taxes on income otherwise authorized under this Article, there shall be an additional tax of 4 percent on that portion of annual taxable income in excess of \$1,000,000 (one million dollars) reported on any return related to those taxes. To ensure that this additional tax continues to apply only to the commonwealth's highest income taxpayers, this \$1,000,000 (one million dollars) income level shall be adjusted annually to reflect any increases in the cost of living by the same method used for federal income tax brackets. This paragraph shall apply to all tax years beginning on or after January 1, 2023.¹⁰

The attorney general proposes the following summary of the amendment, which will likely be presented to voters on the November ballot:

This proposed constitutional amendment would establish an additional 4 percent state income tax on that portion of annual taxable income in excess of \$1 million. This

⁵ See *Anderson II*, SJC-13257 at *1.

⁶ Massachusetts Initiative Petition 15-17.

⁷ 479 Mass. 780, 798 (2018).

⁸ *Id.* at 794.

⁹ *Id.* at 795.

¹⁰ Mass. House Dkt. No. 3300, Proposal for Constitutional Amendment, House No. 86 (Jan. 18, 2019).

income level would be adjusted annually, by the same method used for federal income-tax brackets, to reflect increases in the cost of living. Revenues from this tax would be used, subject to appropriation by the state Legislature, for public education, public colleges and universities; and for the repair and maintenance of roads, bridges, and public transportation. The proposed amendment would apply to tax years beginning on or after January 1, 2023.

The attorney general proposes the following yes/no statements that would be inserted in the ballot following the summary of the proposed amendment:

A YES VOTE would amend the state Constitution to impose an additional 4 percent tax on that portion of incomes over one million dollars to be used, subject to appropriation by the state Legislature, on education and transportation.

A NO VOTE would make no change in the state Constitution relative to income tax.

Unlike constitutional amendments proposed through the initiative petition process, the related subjects requirement does not apply to amendments proposed through the legislative process. Accordingly, the attorney general did not have to certify that the earmarking of funds for public transportation and public education as described in this most recently proposed amendment were sufficiently related to the surtax. Unable to pursue a challenge to the *relatedness* of the surtax and the desired spending measures, the plaintiffs in *Anderson II* argued that that the attorney general's summary of the proposed constitutional amendment was *misleading* to voters because state spending on education and transportation would significantly exceed the additional revenue generated by the surtax, which would enable the legislature to "use the additional revenues raised by the new tax to increase spending on whatever it wants."¹¹

¹¹ *Anderson II*, SJC-13257.

The SJC disagreed with the *Anderson II* plaintiffs on the basis of the decisions in *Associated Industries of Massachusetts (AIM)*¹² and *Gilligan*.¹³ These cases addressed initiative petitions that proposed statutes to "raise revenue through an excise and channel that revenue into a specific fund, to be spent on certain enumerated purposes subject to appropriation by the Legislature."¹⁴ In both cases, the SJC rejected the plaintiffs' arguments that the attorney general's summaries were misleading to voters because they did not adequately disclose that the "Legislature might not be obligated to spend the money as designated."¹⁵ The SJC determined that the attorney general's summaries in *AIM*, *Gilligan*, and *Anderson II* were not misleading to voters because they "track the basic language of the measure" by accurately describing the revenues subject to appropriation and informing voters that the expenditure for the measure's stated purposes is subject to approval by the legislature.¹⁶

Now that the last remaining legal obstacle has been cleared, the fate of the surtax will be in the voters' hands this November. If history has shown us anything, it is that Massachusetts voters will reflexively oppose the imposition of new taxes and new tax structures. Massachusetts voters on five occasions — in 1962, 1968, 1972, 1976, and 1994 — have rejected proposed constitutional amendments that would have allowed for a graduated income tax regime:

- 1962: Voters rejected a ballot measure that would have granted the legislature "full power and authority . . . to impose and levy a tax on incomes at rates which are proportioned or graduated according to the amount of income received, irrespective of the source from which it may be derived, and to grant reasonable exemptions,

¹² *Associated Industries of Massachusetts v. Secretary of the Commonwealth*, 413 Mass. 1 (1992).

¹³ *Gilligan v. Attorney General*, 413 Mass. 14 (1992).

¹⁴ *Anderson II*, SJC-13257 at *4.

¹⁵ *Id.*

¹⁶ *Id.* at *5.

deductions and abate­ments.”¹⁷ The measure failed by a vote of 16.6 percent to 83.4 percent.¹⁸

- 1968: Voters rejected a ballot measure, proposed through the legislative process, that would have authorized the legislature to impose a graduated income tax. Only 29.6 percent of voters who responded to this question voted in favor of the measure.¹⁹
- 1972: Voters rejected a proposed amendment that would have authorized the legislature to “(1) apply a uniform rate or percentage to an individual’s federal income tax liability, or (2) apply graduated rates to an individual’s federal taxable income, or (3) apply graduated rates to income determined to be taxable under Massachusetts law.” Only 32.8 percent of voters who responded to this question voted in favor of the amendment.²⁰
- 1976: Voters rejected a proposed amendment that would have “authorize[d] the Legislature to substitute for the present system of flat or uniform personal income tax rates a system of rates graduated according to the total amount of income received.” The amendment would have authorized the legislature to “provide for reasonable exemptions, deductions, credits, and abate­ments” and to “base Massachusetts income tax provisions on provisions of Federal income tax law.” The final tally of votes cast on this question was 73.5 percent “no” and 26.5 percent “yes.”²¹
- 1994: Voters rejected a proposed amendment that would have “require[d] Massachusetts income tax rates to be graduated, in order to distribute the burden of the tax fairly and equitably.” The final tally of votes cast on this question was 69.6 percent “no” and 30.4 percent “yes.”²² On the same ballot, voters rejected an initiative

petition that a statute be enacted requiring graduated income tax rates. The final tally of votes on this question was 70.9 percent “no” and 29.1 percent “yes.”²³

Unlike the rejected ballot measures set forth above, the proposed constitutional amendment allowing for the surtax is more narrowly focused on a tax increase for a specific category of high-income Massachusetts taxpayers. As discussed above, the surtax would increase the otherwise flat standard income tax rate by 4 percent for those whose taxable income exceeds \$1 million. According to Tufts University, the surtax is likely to affect less than 0.6 percent of Massachusetts households each year,²⁴ which is significantly less than the percentage of taxpayers who were likely to be affected by the previously rejected amendments. Moreover, the language of this proposed amendment contrasts sharply with the broad-based proposals that voters previously rejected, each of which would have granted the legislature sweeping authority to transform the Massachusetts tax regime to a true graduated structure akin to the federal tax regime.

But even if the new proposed constitutional amendment is more narrowly focused than the amendments that voters rejected on five previous ballots, there is still plenty of opposition to the surtax. Opposition to the proposed constitutional amendment can generally be summarized by the following themes:

- The proposed amendment is overly rigid because it does not allow for legislative adjustments. Unlike the language of the previously rejected constitutional amendments that would have authorized the legislature to impose a graduated income tax regime, this amendment would lock the surtax into the Massachusetts Constitution without the need for legislative action. Critics argue that the rigidity of the proposed amendment makes it impossible for the legislature to change course — for example, in the event that the surtax is adversely affecting the Massachusetts

¹⁷ *Lustwerk v. Lytron Inc.*, 344 Mass. 647, 648 n.1 (1962).

¹⁸ Commonwealth of Massachusetts, *Statewide Ballot Questions — Statistics by Year: 1919-2018, 1962*.

¹⁹ *Id.* at 1968.

²⁰ Official Mass. Election Statistics, 1972, Statewide, Question 6.

²¹ Official Mass. Election Statistics, 1976, Statewide, Question 2.

²² Official Mass. Election Statistics, 1994, Statewide, Question 6.

²³ Official Mass. Election Statistics, 1994, Statewide, Question 7.

²⁴ “Evaluating the Massachusetts Millionaires Tax,” Tufts University, The Center for State Policy Analysis (Jan. 2022).

economy — without proposing another constitutional amendment.²⁵

- Increasing the tax burden on high-net-worth taxpayers will result in an exodus of job creators from the commonwealth. Critics argue that the surtax is a step backward toward the “Taxachusetts” era and that wealthy job creators will respond by simply leaving the state, which is exactly what happened to Connecticut.²⁶ Over the course of 20 years (from 1995 to 2015), Connecticut gradually moved from a flat individual tax rate of 4.5 percent to a graduated tax regime with seven brackets ranging from 3 to 6.99 percent²⁷ — this shift to a graduated income tax regime was at least one of the factors informing General Electric Co.’s decision to move from Connecticut to Massachusetts.²⁸
- The millionaires’ tax is likely to affect more than just millionaires — many homeowners, retirees, and owners of passthrough businesses will also be affected. Critics argue that the term “millionaires’ tax” is misleading because the tax is purely based on taxable income — some taxpayers might find themselves subject to the surtax in only one year on the sale of their “nest egg,” but these taxpayers will be taxed the same as billionaires with millions more in taxable income.²⁹

- Increasing tax burdens without a corresponding need for additional revenue is fiscally irresponsible. Critics argue that the surtax is a solution to a nonexistent problem. Because it is working with a significant budget surplus (much of which is attributable to unspent COVID-19 relief funding), Massachusetts does not need the additional projected revenue. Critics also argue that the additional revenue is unnecessary because Massachusetts already spends more per student than almost every other state and has not proven that it can spend existing infrastructure funds efficiently.³⁰

Support for the surtax can generally be summarized by the following themes:

- The additional revenue will advance racial and economic equity. Proponents argue that the surtax will help to bridge racial and economic gaps by redirecting wealth from the highest-income taxpayers — who are predominantly white — to more diverse communities. In a state like Massachusetts with a fairly regressive tax structure and a fairly progressive spending structure, “anything that raises taxes on high earners is going to shift dollars and services toward lower-income folks, including in communities of color.”³¹
- The additional revenue generated by the surtax will fund much-needed improvements to school systems in lower-income areas³² and crumbling transportation infrastructure.³³ The

²⁵ See, e.g., Michael Lucci, “Millionaires’ Tax Take Two; Massachusetts Legislature Moves Forward Millionaires’ Tax,” Tax Foundation (June 24, 2019) (“Perhaps equally concerning from a governance perspective is that policymakers could not easily adjust course on tax policy if they find that the new tax surcharge hurts the dynamism of the Massachusetts economy.”).

²⁶ See, e.g., Coalition to Stop the Tax Hike Amendment, Damages Our Economy When MA Already Has a Giant Budget Surplus.

²⁷ See Rute Pinho, “Connecticut Income Tax Rates and Brackets Since 1991,” Connecticut Office of Legislative Research, at 1 (June 14, 2018) (providing a detailed summary of brackets and rates in different tax years).

²⁸ See Patrick Gleason, “General Electric Shipping Up to Boston, and Connecticut Only Has Itself to Blame,” *Forbes*, Jan. 17, 2016.

²⁹ See, e.g., Tufts, *supra* note 24 at 4 (“By contrast, half of all million-dollar earners between 1999 and 2007 were one-timers. This matches what we know about life-cycle earnings. It’s much more common for families to experience a one-time million-dollar windfall than to make \$1 million year after year: think of dentists who sell their practices, business-owners bought out by their partners, or individuals selling a valuable investment they’ve held for decades. If Massachusetts passes a millionaires tax, such households would pay the surtax in their one high-earning year, and likely never again.”); Coalition to Stop the Tax Hike Amendment, “Taxes the Nest Eggs of Homeowners, Retirees and Small Businesses.”

³⁰ See, e.g., Coalition to Stop the Tax Hike Amendment, *id.*

³¹ Tufts, *supra* note 24 at 6.

³² Colin Jones, “A Millionaire Tax Is Necessary to Advance Critical Education Investments in Massachusetts,” Massachusetts Budget and Policy Center (Apr. 4, 2022) (“Massachusetts enacted a seven-year funding plan in 2019 to improve education equity and quality, called the Student Opportunity Act (SOA). This state law did not identify a specific ongoing source of revenue to pay for the plan. This means that revenue from FSA will be an important part of keeping the SOA on track.”).

³³ See, e.g., Kurt Wise, “‘Millionaire Tax’ Would Make Massachusetts Tax System Fairer,” Massachusetts Budget & Policy Center (Apr. 7, 2022) (“We can repair and upgrade our crumbling roads, bridges, and public transit systems.”).

additional revenue will be used to maintain underfunded programs such as early care and education (ECE)³⁴ and to repair roads (25 percent of which are in poor condition) and bridges (9 percent of which are structurally deficient).³⁵ Despite the fact that the legislature would not be obligated to increase spending on infrastructure and education, it would be politically risky to reduce existing funding for infrastructure and education to make up for the additional revenue generated by the surtax.³⁶

- Fears regarding the exodus of high-net-worth taxpayers are greatly exaggerated. Proponents of the surtax argue that the number of wealthy families that decide to leave Massachusetts is likely to be small. Research from other states that made similar tax changes indicates that “big earners tend to be deeply connected to where they live and work.” Moreover, high-income taxpayers have always had the option of relocating to states with no income tax such as Florida and conducting work remotely from those states.³⁷

As both sides of the surtax ramp up their public relations campaigns, voters should familiarize themselves with the issue by gathering information from a variety of sources before crystallizing their positions and heading to the polls. Although it is not always easy to differentiate bona fide public policy analysis from targeted public relations materials, Massachusetts voters owe it to themselves to dig beneath the surface of sound bites and catchphrases from special interest groups. The more time that voters spend researching the surtax today, the more confident they will be when confronted with the ballot question this November.

³⁴ Jones, *supra* note 32 (“In March 2022, a special legislative commission on ECE financing released a report on the way forward for ECE funding.”).

³⁵ American Society of Civil Engineers, “2021 Report Card for America’s Infrastructure: Infrastructure in Massachusetts.”

³⁶ Adam Reilly, “Push for Millionaires’ Tax in Massachusetts Ramps Up,” GBH News (May 11, 2022) (“When Farnitano was asked if the Legislature might diminish spending drawn from other sources if the amendment passes, leading to smaller-than-advertised new investments in education and transportation, he suggested that such maneuvering would be politically risky.”).

³⁷ Tufts, *supra* note 24 at 4.

Nonpartisan, academic think tanks are generally more reliable sources of information than organizations that are specifically dedicated to supporting or opposing this ballot question. “Evaluating the Massachusetts Millionaires Tax,” prepared by the Center for State Policy Analysis at Tufts University, is one of the most reliable sources of information on the likely impact of the surtax.³⁸ Although this report concludes that the additional revenue — projected to be \$1.3 billion in 2023 — is likely to be a positive step toward achieving racial and economic equality in the commonwealth, the report also warns that the surtax could have “serious side effects”³⁹ in the form of tax avoidance and “uncertainty about how the money from the millionaires tax will actually be used.”⁴⁰

When advising clients on how to plan for the surtax, we should first emphasize that the five prior failed ballot measures should not be relied on to predict the outcome of the millionaires’ tax question. Each of the failed measures would have granted the legislature broad authority to enact a broad-based graduated income tax regime akin to the federal system. In contrast, the surtax is a much more targeted tax increase that only affects 0.6 percent of taxpayers and is likely to have more support from working- and middle-class taxpayers.

For clients who consistently report more than \$1 million in taxable income annually, the easiest advice is the same as the guidance we routinely provide to high-net-worth clients who have a significant presence in the commonwealth: If possible, take immediate steps to abandon Massachusetts domicile and adopt domicile in a state with no individual income tax such as Florida or New Hampshire. If these clients own real estate in Massachusetts, we can advise them to either sell it in 2022 (as the effective date of the surtax amendment is January 1, 2023) or make sure that they do not spend more than 183 days in the commonwealth in 2023 or any subsequent calendar year. This is far from a new strategy, and there are many high-net-worth taxpayers who for

³⁸ *Id.*

³⁹ *Id.* at 1.

⁴⁰ *Id.* at 6.

business or personal reasons will be unwilling to abandon their domicile and reduce their number of days of physical presence in the commonwealth despite the additional tax cost.

For clients who might be subject to the surtax because of a one-time sale of a personal residence or flow-through business in 2023 or later, the easiest advice is to move up the closing date to the 2022 tax year if possible. Other strategies for these taxpayers might include (a) reinvesting the capital gains on the sale of the business or real estate located in Massachusetts in a qualified Opportunity Zone fund under IRC section 1400-Z, (b) restructuring the sale of a Massachusetts business as a tax-free reorganization, (c) exploring whether filing as “married, filing separately” offers any overall tax savings compared to filing as “married, filing jointly,”⁴¹ and (d) gifting the appreciated real estate or business assets to an irrevocable trust such as a spousal lifetime access trust, which will alleviate concerns regarding the surtax, effectuate an “estate freeze,” and enable both spouses to take full advantage of their federal lifetime gift and estate tax exemptions.

Regardless of whether they are likely to be immediately affected by the surtax, clients should watch this issue closely and, if possible, postpone any final decisions regarding their Massachusetts domicile or the timing of their asset sales until after the election on November 8. This is likely to be the most fiercely contested question on November’s ballot, and there is plenty of time for proponents on both sides of the issue to present and defend their positions. If polling suggests that support for the ballot question is likely to fall along party lines — with most Democrats supporting a “yes” vote for the question and most Republicans supporting a “no” vote — then the surtax amendment will likely be decided by Massachusetts’s “unenrolled” voters, who comprised 57.42 percent of all registered voters

and outnumbered registered Democrats by approximately 1.2 million in 2021.⁴² Even though the election is less than four months away, it is still too early to make irrevocable decisions on the basis of a surtax whose fate is uncertain. ■

⁴¹ See Tax Foundation, *supra* note 25 (“The amendment also creates a marriage penalty — the \$1 million income threshold does not vary based on filing status.”).

⁴² Secretary of the Commonwealth of Massachusetts, Massachusetts Registered Voter Enrollment: 1948-2021 (4,731,940 registered voters in 2021, of which 1,494,980 are Democrats; 459,663 are Republicans; 60,004 identify with other political parties; and 2,717,293 are “unenrolled”).