



October 20, 2022

Chair My-Linh Thai
Joint Administrative Rules Review Committee
c/o Office of Program Research
P.O. Box 40600
Olympia, WA 98504

VIA EMAIL at jarrc_petition@leg.wa.gov

RE: Department of Revenue Proposed Rule at WAC 458-20-300

Dear Chair Thai,

On behalf of the Citizen Action Defense Fund ("CADF") - a nonprofit, public interest law firm based in Washington state- please accept this letter as petition for the Joint Administrative Rules Review Committee ("JARRC") to review the proposed rule published by the Department of Revenue ("the Department") implementing the capital gains income tax provided in SB 5096 (2021) ("SB 5096") that was recently declared unconstitutional in our state by the Douglas County Superior Court in *Quinn v. State of Washington*. A copy of proposed rule at WAC 458-20-300 as provided in WSR 22-18-097 is attached to this petition.

RCW 34.05.655 provides that "[a]ny person may petition the rules review committee for a review of a proposed or existing rule or a proposed or existing policy or interpretive statement, guideline, or document that is of general applicability, or its equivalent." The committee is then required to acknowledge receipt of the petition and describe any initial action taken. RCW 34.05.620 also provides that "[i]f the rule review committee finds by a majority vote of its members that a proposed rule is not within the intent of the legislature as expressed in the statute which the rule implements or that an agency may not be adopting a proposed rule in accordance with all applicable provisions of law, the committee shall give the affected agency written notice of its decision." The committee is then required to send notice with a statement of the review committee's findings and reasons seven days in advance of any hearing scheduled for consideration or adoption of the proposed rule. The agency is required to consider the Committee's decision.

The simple question for the committee is whether void provisions of law (including intent language) are applicable to a proposed rule. The agency relies upon RCW 82.87.110 and RCW 82.87.130 as authority to adopt rules implementing the capital gains income tax in SB 5096. Both sections of law originated in the bill as sections 12 and 14, respectively. The problem for the

Governor and his Department of Revenue is that these sections of law no longer exist as a matter of law. As noted above, a court struck down SB 5096 and therefore these provisions are deemed void “from the beginning” or *ab initio* – they have no legal effect whatsoever and the law treats them as if they never existed. It now falls to JARRC to determine if these void provisions are still to be considered part of the intent of the legislature and “applicable” to the adoption of the rule. If not, the agency is without authority and the committee should inform it as required under RCW 34.05.620.

I raised concerns regarding the legality of the proposed rule in a letter to Acting Director Ryser. He responded by denying my request to cease rulemaking and pointing to the Department’s website that states: “[a]ny guidance provided herein will apply only if the tax is ruled constitutional and valid, in its entirety, by a court of final jurisdiction.” While I appreciate that the Acting Director’s was prompt in responding and denying my request that that the agency abstain from rulemaking, it does not adequately address the concerns.

Unfortunately, the Department’s actions on this matter speak louder than its website’s words. The actual language in the proposed rule indicates that it is anything but “guidance” but instead imposes the tax January 1, 2022 and provides a due date for submission of returns “on or before the date your federal income tax return is required to be filed for the same taxable year” which multiple examples within the rule itself identify as April 17, 2023. The website also identifies the last quarter of 2022 for when the final rule will be adopted. Another telling sign of the Department’s intent is its recent budget request to the legislature seeking IT funding to implement the tax in the next biennium. Both letters and the budget request are attached. Finally, I would note that the Department maintains on its website a list of interim guidance statements. <https://dor.wa.gov/forms-publications/publications-subject/tax-topics/interim-guidance-statements>. The Department could certainly issue interim guidance in this matter as well without having to go through the formal rulemaking process if that was its goal.

The bottom line is that the proposed rule is inconsistent with current legal authority- a matter clearly within the jurisdiction of JARRC. I respectfully request an opportunity at a hearing to address these concerns and allow the agency to explain its position regarding this petition now pending before the Committee.

Sincerely,

A handwritten signature in blue ink that reads "Jackson Maynard, Jr." The signature is fluid and cursive, with the first and last names being more prominent than the middle name.

Jackson Maynard
Executive Director
Citizen Action Defense Fund
300 Deschutes Way SW
Tumwater, WA 98501
(360) 878-9206
jackson@citizenactiondefense.org



PREPROPOSAL STATEMENT OF INQUIRY

CR-101 (October 2017)
(Implements RCW 34.05.310)

Do **NOT** use for expedited rule making

CODE REVISER USE ONLY

OFFICE OF THE CODE REVISER
STATE OF WASHINGTON
FILED

DATE: September 07, 2022

TIME: 9:22 AM

WSR 22-18-097

Agency: Department of Revenue

Subject of possible rule making: Chapter 82.87 RCW - Excise Tax on Capital Gains

Statutes authorizing the agency to adopt rules on this subject: RCW 82.87.110; RCW 82.87.130

Reasons why rules on this subject may be needed and what they might accomplish: Effective January 1, 2022, Chapter 82.87 RCW imposes an excise tax on sales or exchanges of long-term capital assets. This proposed rule seeks to clarify administrative aspects of the excise tax on capital gains such as proper filing procedures and penalties related to this excise tax.

In March of 2022, the Douglas County Superior Court ruled in *Quinn v. State of Washington* that the excise tax on capital gains does not meet state constitutional requirements and, therefore, is unconstitutional and invalid. The State has appealed the ruling to the Washington Supreme Court. While the appeal is pending, the Department will continue to provide guidance, such as this rule, to the public regarding the tax as a courtesy. This rule will apply only if the tax is ruled constitutional and valid by a court of final jurisdiction.

Identify other federal and state agencies that regulate this subject and the process coordinating the rule with these agencies:

Process for developing new rule (check all that apply):

- ☐ Negotiated rule making
- ☐ Pilot rule making
- ☐ Agency study

☒ Other (describe) Parties interested in this rule making may contact the individual listed below. The public may

also participate by providing written comments throughout this rule making or giving oral testimony at the public meeting or public hearing.

Interested parties can participate in the decision to adopt the new rule and formulation of the proposed rule before publication by contacting:

(If necessary)

Name: Michael Hwang
Address: 6400 Linderson Way SW,
PO Box 47453, Tumwater, WA 98504
Phone: 360-534-1575
Fax:
TTY:
Email: MichaelHw@dor.wa.gov.
Web site: dor.wa.gov
Other:

Name:
Address:
Phone:
Fax: -
TTY:
Email:
Web site:
Other:

Additional comments: Written comments may be submitted by mail or email and should be directed to Michael Hwang using one of the contact methods above by October 12, 2022. Written and oral comments will be accepted at the Public Meeting.

Date: Wednesday, September 28, 2022

Time: 10:00 A.M.

Public Meeting Location: virtual meeting

Contact Sierra Crumbaker at SierraC@dor.wa.gov for dial-in/login information

Date: September 7, 2022

Name: Atif Aziz

Title: Rules Coordinator

Signature:

A handwritten signature in black ink, appearing to read 'Atif Aziz', is written over the signature line.

NEW SECTION

WAC 458-20-300 Capital gains excise tax—Overview and administration. (1) **Introduction and overview.** Beginning January 1, 2022, Washington law imposes an excise tax on individuals with sales or exchanges of long-term capital assets (capital gains excise tax). See RCW 82.87.040. This rule provides information regarding the administration of the capital gains excise tax and is divided into six subsections as follows: Introduction and overview; returns; extensions; payment of tax; penalties and interest; and general administration.

(a) **Imposition.** The capital gains excise tax is imposed on the sale or exchange of long-term capital assets. The capital gains excise tax is not imposed on any sale or exchange occurring prior to January 1, 2022. A "long-term capital asset" is a capital asset that is held for more than one year. A "capital asset" has the same meaning as provided by section 1221 of the federal Internal Revenue Code and includes any other property in the sale or exchange of the property results in a gain that is treated as a long-term capital gain under section 1231 or any other provision of the federal Internal Revenue Code.

(b) **Who is taxable?** Only individual natural persons (referred to in this rule as "taxpayer," "you," or "your") are subject to the capital gains excise tax.

(c) **What is the tax rate?** The tax rate is seven percent. The tax is calculated by multiplying a taxpayer's Washington capital gains by the seven percent tax rate.

(d) **Washington capital gains.** Washington capital gains is your federal net long-term capital gain with certain adjustments made under RCW 82.87.020 (1)(a) through (c) and further modified by the deductions in RCW 82.87.060. The adjustments are primarily aimed at removing capital gains and losses allocated to places outside of Washington from your Washington capital gains figure.

(i) "Federal net long-term capital gain" means the net long-term capital gain reportable for federal income tax purposes determined as if Title 26 U.S.C. Secs. 55 through 59 and 1400Z-1 and 1400Z-2 of the federal Internal Revenue Code did not exist. Title 26 U.S.C. Secs. 55 through 59 relate to the alternative minimum tax and Title 26 U.S.C. Secs. 1400Z-1 and 1400Z-2 relate to opportunity zones.

(ii) The deductions in RCW 82.87.060 are as follows:

(A) A standard deduction. If you are married or a state-registered domestic partner, the total combined standard deduction for both you and your spouse or domestic partner is \$250,000, regardless of whether you and your spouse or domestic partner file a joint or separate return. In all other cases, the standard deduction is \$250,000 per individual natural person. The \$250,000 deduction amount may be adjusted for inflation every December, beginning in December 2023. See RCW 82.87.150 for additional information.

(B) Amounts that the state is prohibited from taxing under the Constitution of this state or the Constitution or laws of the United States.

(C) Adjusted capital gain derived from the sale or transfer of your interest in a qualified family-owned small business pursuant to RCW 82.87.070.

(D) Charitable donations deductible under RCW 82.87.080. The charitable donation deduction cannot exceed \$100,000. The \$100,000 de-

duction cap may be adjusted for inflation every December, beginning in December 2023. See RCW 82.87.150 for additional information.

(e) **Exemptions.** Certain sales or exchanges, such as sales of real estate, are exempt from the capital gains excise tax. See RCW 82.87.050 for additional information.

(f) **Examples.** This rule contains examples. These examples identify a number of facts and then state a conclusion. They are provided only as a general guide. The tax results of other situations must be determined after a review of all the facts and circumstances.

(2) **Returns.**

(a) **Filing obligation and due date.** Only taxpayers owing Washington's capital gains excise tax in a taxable year are required to file a capital gains excise tax return with the department.

(i) If you are required to file a capital gains excise tax return, you must file the return with the department on or before the date your federal income tax return is required to be filed for the same taxable year.

(ii) If you owe capital gains excise tax, you are required to file a capital gains excise tax return whether or not you filed a federal income tax return.

(iii) If you did not file a federal income tax return, the due date for your capital gains excise tax return is the date your federal income tax return would have been due.

Example 1 – Return due date

Facts: The due date for Michael's federal income tax return is April 17, 2023. Michael has a Washington capital gains excise tax liability.

Result: The capital gains excise tax return due date is April 17, 2023, which is the date Michael's federal income tax return is due. Michael must file his capital gains excise tax return on or before April 17, 2023, or the return will be late and penalties will apply.

(b) **Separate and joint filers, single filers.** If you are required to file a capital gains excise tax return, your federal income tax filing status may affect how you must file your capital gains excise tax return as follows:

(i) Spouses filing jointly. Spouses who file a joint federal income tax return for the taxable year must file a joint capital gains excise tax return for the same taxable year. Accordingly, if you are married, and file a joint federal income tax return with your spouse, you must file a joint capital gains excise tax return with your spouse.

(ii) Spouses filing separately. If a spouse files a separate federal income tax return for the taxable year, each spouse that owes capital gains excise tax must file a separate capital gains excise tax return for the same taxable year. Accordingly, if you are married and file a separate federal income tax return from your spouse, you must file a separate capital gains excise tax return.

(iii) State-registered domestic partners. State-registered domestic partners may file a joint capital gains excise tax return even if they filed separate federal income tax returns for the taxable year. Accordingly, if you are a state-registered domestic partner and file a separate federal income tax return from your partner, you may elect either to file a joint or separate capital gains excise tax return.

(iv) Single filers. Any individual that is not married and is not a state-registered domestic partner must file their capital gains excise tax returns as a single individual.

(c) **Required documentation with the capital gains excise tax return.** All taxpayers required to file a capital gains excise tax return for a taxable year must submit, along with the capital gains excise tax return form, all of the following:

(i) A copy of the complete, filed federal individual income tax return, including all supporting schedules and documentation filed with the Internal Revenue Service (IRS), for the taxable year.

(ii) For any claim for exemption under RCW 82.87.050(2), which may exempt the sale or exchange of an interest in a privately held entity directly owning real estate, documentation that substantiates the following:

(A) The fair market value and basis of the real estate held directly by the privately held entity;

(B) The percentage of the ownership interest sold or exchanged in the privately held entity that owns the real estate; and

(C) The methodology established by the privately held entity for allocating gains or losses from the sale of real estate among the owners, partners, or shareholders of the entity.

(d) **Incomplete returns.** A capital gains excise tax return is considered complete only if the return is filed in accordance with the filing requirements described in RCW 82.87.110 and subsection (2) of this rule. If a complete capital gains excise tax return is not filed on or before the due date for the capital gains excise tax return, the return will be late and the late filing penalty may apply. See subsection (5) of this rule for more information.

Example 2 - Incomplete return

Facts: Jane filed her federal income tax return on April 17, 2023. Jane owes capital gains excise tax and is required to file a capital gains excise tax return. She filed the return on April 17, 2023, but did not provide the department with a copy of her federal income tax return until April 30, 2023.

Result: Jane was required to file a complete return by April 17, 2023. Jane did not file a complete return on April 17, 2023, because she failed to include a copy of her federal individual income tax return along with the capital gains excise tax return. Jane's return is late. See subsection (5) of this rule for additional information on the late filing penalty.

(e) **Electronic filing.** All taxpayers must electronically file their capital gains excise tax returns and all required documentation identified in subsection (2)(c) of this rule. Electronic filings must be submitted to the department via the "My DOR" portal at www.secure.dor.wa.gov. The department may waive the electronic filing requirement for good cause as provided in RCW 82.32.080. See RCW 82.32.080 and WAC 458-20-22802 for additional information regarding electronic filing and the good cause waiver.

(f) **Amended returns.**

(i) **Amended return required.** If you or the IRS make any changes to your federal income tax return for any reason, and the changes affect the reported capital gains or the capital gains excise tax liability, you must file an amended capital gains excise tax return reflecting all changes made to the federal income tax return. You must also file an amended capital gains excise tax return if the original capital gains excise tax return needs to be corrected for errors identified after the due date for the original capital gains excise tax return.

(ii) **Filing and payment requirements for amended returns.** The documentation requirements described in subsection (2) of this rule

apply to amended returns. This means, for instance, a copy of the complete, filed amended federal individual income tax return and all supporting amended schedules and documentation must be filed along with the amended return. You must also file your amended capital gains excise tax return electronically and electronically pay any additional tax due unless granted a waiver from the electronic filing/payment requirements by the department.

(3) **Extensions.**

(a) **Extension period; timely payment still required.** If a taxpayer obtains an extension of time for filing the federal income tax return for the taxable year and provides the department proof of the extension, the capital gains excise tax return is considered due on or before the extended due date for the federal income tax return. However, an extension for filing the capital gains excise tax return does not extend the due date for paying the capital gains excise tax.

Extension request certification required. Taxpayers must submit an extension request certification with the department on or before the original due date. Taxpayers must also attach a copy of the federal form 4868, *Application for Automatic Extension of Time to File U.S. Individual Income Tax Return* or Form 2350, *Application for Extension of Time to File U.S. Income Tax Return*, when filing the capital gains excise tax return.

(4) **Payment of tax.**

(a) **Due date.** If you owe the capital gains excise tax, you must remit the tax to the department on or before the date your federal income tax return is required to be filed without regard to any extension granted to you for the filing of your federal income tax return. The extension of time for filing the federal income tax return or capital gains excise tax return does not extend the due date for paying your capital gains excise tax. If you pay your capital gains excise tax late, the late payment penalty and interest may apply. See subsection (5) of this rule for more information.

Example 3 - Late payment - No federal extension

Facts: Jeannette filed her federal income tax return on April 17, 2023. Jeannette files a capital gains excise tax return on April 17, 2023. She later remits her capital gains excise tax to the department on April 20, 2023.

Result: Jeannette was required to pay the capital gains excise tax on April 17, 2023, when her federal income tax return was due. Jeannette paid the capital gains excise tax late and is subject to penalties and interest.

Example 4 - Late payment - Federal income tax return extension

Facts: Gil requested a federal income tax return extension on April 12, 2023, and received an automatic extension of time to file his federal tax return to October 13, 2023. Gil properly submits an extension request certification to the department before April 17, 2023, the original due date for the federal tax return and capital gains excise tax return. Gil files a capital gains excise tax return and pays his capital gains excise tax on October 13, 2023.

Result: Gil paid his capital gains excise tax late and is subject to penalties and interest with respect to the late payment. While Gil extended the date for filing the capital gains excise tax return, the due date for the payment of the capital gains excise tax remained April 17, 2023.

(b) **Electronic payment.** Capital gains excise tax must be paid by electronic funds transfer or other form of department authorized electronic payment, such as by credit card. The department may waive the

electronic payment requirement for good cause. See RCW 82.32.080 and WAC 458-20-22802 for additional information regarding electronic payment requirements and the good cause waiver.

(c) **Joint and several liability.** The capital gains excise tax liability of each spouse or state-registered domestic partner filing a capital gains excise tax return is joint and several unless one of the spouses is relieved of liability for federal tax purposes as provided under section 6015 of the federal Internal Revenue Code or the department determines that the domestic partner would qualify for relief under the same parameters provided in section 6015.

(5) **Penalties and interest**

(a) **Late filing penalty.** If you do not file a complete capital gains excise tax return by the due date, the department will assess a late filing penalty in the amount of five percent of the tax due for the taxable year covered by the return for each month or portion of a month that the return remains unfiled. See RCW 82.87.110. The total late filing penalty may not exceed 25 percent of the tax due for the taxable year covered by the late return.

(b) **Late payment penalty.** If you do not remit your capital gains excise tax on or before the due date for payment of the capital gains excise tax, you are subject to the late payment penalty. If payment is not received by the department on the due date, the department will assess a penalty of nine percent of the amount of the tax due; if the tax is not received on or before the last day of the month following the due date, the department will assess a total penalty of 19 percent of the amount of the tax due; and if the tax is not received on or before the last day of the second month following the due date, the department will assess a total penalty of 29 percent of the amount of the tax due. See RCW 82.32.090(1) and WAC 458-20-228 for more information regarding late payment penalties.

(c) **Other penalties.**

(i) Other penalties imposed under chapter 82.32 RCW may apply. These penalties include the penalties for substantial underpayment of tax, disregard of specific written instructions, and intent to evade tax. See RCW 82.32.090 and WAC 458-20-228 for additional information.

(ii) Any taxpayer who knowingly attempts to evade payment of the capital gains excise tax is guilty of a class C felony as provided in chapter 9A.20 RCW. Any taxpayer who knowingly fails to pay tax, make returns, keep records, or supply information required under the capital gains excise tax, is guilty of a gross misdemeanor as provided in chapter 9A.20 RCW. RCW 82.87.140.

(d) **Amended returns.** The penalties described in this subsection may apply to amended capital gains excise tax returns, except the department will not assess late return or late payment penalties on increased amounts of tax due as a result of the amendment if the original capital gains excise tax return and tax due were timely filed and paid, and the increased amounts are paid on the same calendar day as the amended return was filed.

(e) **Penalty waivers.**

(i) The department will waive the late filing penalty only if the department determines that:

(A) The taxpayer's failure to timely file the return was due to circumstances beyond their control; or

(B) The taxpayer has not been delinquent in filing any capital gains excise tax returns due during the preceding five calendar years.

(ii) The department will waive the late payment (RCW 82.32.090(1)) and substantial underpayment penalties (RCW

82.32.090(2)), if the department determines that the taxpayer's failure to timely pay was due to circumstances beyond their control. See RCW 82.32.105 and WAC 458-20-228 for additional information regarding waivers due to circumstances beyond the taxpayer's control.

(f) **Interest.**

(i) If you do not pay your capital gains excise tax by the due date described in subsection (4) of this rule, you will be assessed interest on the unpaid amounts. See RCW 82.32.050 and WAC 458-20-228 for additional information on interest assessed on underpayments and interest waivers.

(ii) If you have paid more tax than is properly due, you will receive interest for your overpayment. See RCW 82.32.060 and WAC 458-20-229 for information on interest on tax overpayments.

(6) **General administration**

(a) **Application of chapter 82.32 RCW.** The department administers the capital gains excise tax in accordance with chapter 82.32 RCW except as otherwise provided by law and to the extent not inconsistent with chapter 82.87 RCW.

(b) **Preserving accurate and complete records.** You have the burden of proving any claimed deductions, exemptions, and credits. Washington law requires you to keep accurate and complete records and timely respond to communications from the department. You must preserve records that substantiate the amounts of all deductions, exemptions, or credits claimed, as well as any documentation that substantiates your allocation of capital gains and losses. Claims for exemptions, deductions, and credits from the capital gains excise tax may require additional documents to be submitted to the department at the department's request. See RCW 82.32.070 and WAC 458-20-254 for additional information on recordkeeping requirements.

(c) **Refunds.** If you discover that you have overpaid taxes, penalties, or interest, you may file an amended capital gains excise tax return or apply for a refund or credit. The provisions under WAC 458-20-229 apply to refunds of overpaid capital gains excise tax.

(d) **Informal administrative reviews.** If you disagree with the department's assessment of tax, penalties, or interest; a department letter ruling; or the department's denial of a refund, you may seek an informal review of that action by submitting a petition for review with the department's administrative review and hearings division. The petition must be filed within 30 days of the department action. See WAC 458-20-100 for additional information.

(e) **Nonclaim period.** The nonclaim period provided under RCW 82.32.050 and 82.32.060 for deficient tax or penalty payments and excess payment of tax, penalty, or interest, respectively, apply to the capital gains excise tax. However, there is no limitation for the period in which an assessment or correction of an assessment can be made upon a showing of evasion or of misrepresentation of a material fact. See RCW 82.32.050 and WAC 458-20-230.



October 5, 2022

Mr. John Ryser
Acting Director
Department of Revenue
6500 Linderson Way SW,
Tumwater, WA 98501

VIA EMAIL C/O MICHAEL HWANG AT MICHAELHW@DOR.WA.GOV

Dear Mr. Ryser,

On behalf of the Citizen Action Defense Fund ("CADF") - a nonprofit, public interest law firm based in Washington state- I am writing with concern in response to the proposed rule published by the Department of Revenue ("the Department") implementing the capital gains income tax provided in SB 5096 (2021) ("SB 5096") that was recently declared unconstitutional in our state by the Douglas County Superior Court in *Quinn v. State of Washington*. See proposed rule at WAC 458-20-300 as provided in WSR 22-18-097.

It is black letter law that statutes declared unconstitutional are deemed void "from the beginning" or *ab initio* – they have no legal effect whatsoever and the law treats them as if they never existed. Despite this, the Department is proceeding with rulemaking and, according to its website, the new rule could be adopted as soon as "the 4th quarter of 2022." I understand that the State has appealed this matter and the state supreme court has accepted jurisdiction. However, the State did not seek a stay of the lower court order on appeal so it is therefore still in full force and effect.

The Department's haste to proceed with rulemaking and potential collection of a tax based on a statute that is now a legal nullity is itself illegal for the following reasons:

First, it's unconstitutional. The Department's actions to ignore a valid ruling from another branch of government serves to undermine the rule of law and respect for the judiciary.

Second, it's outside the statutory authority of the agency or the authority conferred by a provision of law. Because a state trial court with jurisdiction over this matter has ruled that SB 5096 "unconstitutional and invalid," there is no current law authorizing the Department to create rules governing or to collect the tax.

Third, it's arbitrary or capricious. Contrary to the Department's public assertions that rulemaking would be "guidance" and "a courtesy," new rules enforcing a statute that has been struck down and is undergoing judicial review could only serve to confuse, not help, the public. Such illegal agency action would be clearly "taken without regard to surrounding facts and circumstances."

The bottom line is that I am concerned that political pressure may have been brought to bear on the Department. I therefore request:

- a legal justification for the Department's actions in this matter;
- that the Department cease and desist any rulemaking regarding the implementation of SB 5096 or collection of any tax authorized under that legislation until:
 - such time as an appellate court has rendered a final decision reversing the lower court ruling in *Quinn* and the time for appeal or reconsideration has elapsed, or
 - a stay of the lower court decision in *Quinn* is entered by a court of competent jurisdiction; and
- that the Department accept this letter as a public records request for the following documents and records pursuant to the Washington Public Records Act (RCW 42.56):
 - the complete rulemaking file as of the date of this letter;
 - all communications - including emails, notes, records of phone calls, physical letters, and other correspondence—sent, prepared, or received by any employee of the Department of Revenue from March 1, 2022 through the date of this letter regarding rulemaking to implement (or provide guidance regarding) SB 5096; and
 - any communications- including emails, notes, records of phone calls, physical letters, and other correspondence—sent, prepared, or received by any employee of the Department of Revenue from March 1, 2022 through the date of this letter from the Governor or staff of his office, a member of the legislature or legislative staff, the attorney general or his staff or any other person, group, or organization providing comments, analysis, critiques, suggestions or changes to the timing of promulgation or text of proposed rule WAC 458-20-300 as provided in in WSR 22-18-097.

The above requests for records are intended to include copies of all drafts of documents. If not specified, the term “records” is also intended to include all communications, including emails, text messages, and other electronic communications (e.g., Facebook Messenger, Twitter public and direct messages, etc.) regardless of whether they are contained on the personal or work devices or accounts of employees of the Department of Revenue.

Please produce any responsive records in electronic format via email to jackson@citizenactiondefense.org or through a file sharing service. If you do not have a cloud-based sharing method and the responsive records are too large to send via email, please let me know and my office will coordinate with you to utilize a file-sharing service. If records responsive to these requests may be produced in installments, please do so as soon as they are available. If there are any fees associated with searching for and copying the requested records, please inform me if those costs exceed \$100 prior to producing those documents to my office.

If all or any part of this public records request is denied, please provide a statement citing the specific exemptions that you believe justify the refusal to release the documents or communications and an explanation of how that exemption applies to this request. RCW 42.56.210(3). Additionally, if only portions of a document are exempt, only the exempt portions may be redacted, and the remainder of the record provided. RCW 42.56.210(1).

These requests concern a matter of great public importance and a speedy response would be appreciated. I therefore look forward to receiving your response within five days of the date of

this letter. Please be advised that if the Department persists in implementation of SB 5096 that CADF will take whatever actions it deems necessary in accordance with the law to protect the public interest in our state.

Sincerely,

A handwritten signature in black ink, reading "Jackson Maynard, Jr." in a cursive style.

Jackson Maynard
Executive Director
Citizen Action Defense Fund
300 Deschutes Way SW
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(360) 878-9206
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STATE OF WASHINGTON
DEPARTMENT OF REVENUE
OFFICE OF THE DIRECTOR

P.O. Box 47454 • Olympia, Washington 98504-7454 • (360) 534-1600 • FAX (360) 534-1606

October 19, 2022

Jackson Maynard, Executive Director
Citizen Action Defense Fund
300 Deschutes Way SW
Tumwater, WA 98501

Dear Mr. Maynard,

Thank you for your letter of October 5, 2022. The Department has previously acknowledged receipt of the public records request included in a separate letter. This response addresses the concerns you raise relating to the Department's current rule-making process pertaining to the capital gains tax. You argue that the Department should pause its rule-making process until a final appellate court decision is issued upholding the tax, or a stay of the lower court decision is entered. The Department disagrees with both points.

First, the Department disagrees that its rule-making activities are unconstitutional, outside its statutory authority, or arbitrary and capricious. The Department has not taken any actions to enforce the capital gains tax. Rather, it simply is taking reasonable steps to be prepared to administer the capital gains tax *if* the Washington Supreme Court reverses the superior court and upholds the tax's constitutionality. And, contrary to your concern, the Department's actions should not confuse anyone, as its website on the capital gains tax prominently states:

In March of 2022, the Douglas County Superior Court ruled in *Quinn v. State of Washington* that the capital gains excise tax (ESSB 5096) does not meet state constitutional requirements and, therefore, is unconstitutional and invalid. The State has appealed the ruling to the Washington Supreme Court. While the appeal is pending, the Department will continue to provide guidance to the public regarding the tax as a courtesy. ***Any guidance provided herein will apply only if the tax is ruled constitutional and valid, in its entirety, by a court of final jurisdiction.***

(Emphases added).

Second, while the superior court declared ESSB 5096 unconstitutional, its ruling did not include injunctive relief prohibiting the Department from taking actions to prepare to implement the capital gains tax if it is ultimately upheld. As detailed in the Department's website—quoted

Jackson Maynard, Executive Director
October 19, 2022
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above—the Department believes that it has a duty to provide guidance to the public regarding the tax and to take reasonable steps to be prepared to administer the tax *if* the Washington Supreme Court upholds its constitutionality.

We hope this information is useful.

Sincerely,

A handwritten signature in black ink that reads "John Ryser". The signature is written in a cursive, flowing style with a long horizontal stroke at the end.

John Ryser
Acting Director



Department of Revenue
2023-25 Regular Budget Session
Maintenance Level - CG - Capital Gains Carryforward Funding

Agency Recommendation Summary

In the 2021 Legislative Session, ESSB 5096 - Capital Gains Tax, was passed by the Legislature. Funds for IT implementation were appropriated to the Department of Revenue (DOR) with oversight by the OCIO, along with funds to administer the capital gains tax. In carry forward, funding is provided only for the contracted maintenance and operations related to the portion of the IT system that is developed through FY23. Funding was not provided for the remaining IT implementation costs or for costs associated with administering the tax. This request is for funding not included in carryforward level to be reestablished as identified in the fiscal note. The department is not asking for additional funding outside of what was already identified in the fiscal note.

Fiscal Summary

Fiscal Summary <i>Dollars in Thousands</i>	Fiscal Years		Biennial	Fiscal Years		Biennial
	2024	2025	2023-25	2026	2027	2025-27
Staffing						
FTEs	20.0	18.4	19.2	15.7	15.7	15.7
Operating Expenditures						
Fund 001 - 1	\$3,952	\$2,621	\$6,573	\$1,981	\$1,856	\$3,837
Total Expenditures	\$3,952	\$2,621	\$6,573	\$1,981	\$1,856	\$3,837
Revenue						
001 - 0105	\$420,000	\$420,000	\$840,000	\$432,500	\$432,500	\$865,000
001 - 0150	\$67,000	\$67,000	\$134,000	\$94,000	\$94,000	\$188,000
Total Revenue	\$487,000	\$487,000	\$974,000	\$526,500	\$526,500	\$1,053,000

Decision Package Description

A Capital Gains Tax (ESSB 5096) was passed by the legislature in the 2021 session. This tax took effect on January 1, 2022. The first payments are due to the Department of Revenue on or about April 17, 2023. To implement this program, the department was provided funding in FY22 and FY23 for:

- Information service costs to program, setup and test a computer system to accept taxpayer returns and other required information; process reporting information for collection, audit, and refund purposes; and purchase additional server equipment.
- Implementation costs for technical advice, interpretation, and analysis for internal use; adopt new administrative rules.
- Administrative costs for staff to prepare tax returns; process and work with returns; answer phone calls, email, and in person inquiries; create special notices, update the website and published information; respond to tax ruling requests.

Funding for FY22 \$2,489,000 and FY23 \$4,189,000 was appropriated directly to the department, with the requirement that the project be under the oversight of the OCIO. This funding includes the costs necessary to support information services and implementation efforts as well as the administrative costs necessary to administer the capital gains tax.

During the development of the 2023-25 carry forward level of the budget, the department was informed that projects under OCIO oversight requiring funding, not under a contractual obligation, to be reevaluated and requested again each biennium. Therefore, the only funding carried forward for this project is the \$125,000 for FY24, and \$250,000 for FY25 for the contracted operational cost to support the portion of the IT systems built up through FY23 and placed into operation. This request is for reinstatement of funds for this project as are identified in the final fiscal note for Capital Gains tax. Without funding, the department will not be able to complete the IT implementation required in FY24 & FY25 and will not be able to administer the program beyond June 30, 2023.

Assumptions and Calculations

Expansion, Reduction, Elimination or Alteration of a current program or service:

As the Capital Gains Tax proposal was modified throughout the legislative session, the department also modified the fiscal estimates. When the legislation passed, funding was provided to the department based off version seven (7) of the department's fiscal notes. There were however several changes made to the legislation, and the department responded with additional versions of the fiscal note. The final version the department submitted was version 12. The expenditure estimate from version seven (7) to version 12 is less than \$100,000 each year. This request is to continue funding for the Capital Gains project as identified in version 12 of the fiscal notes.

Detailed Assumptions and Calculations:

The fiscal detail in this request aligns with the department's fiscal note # 5096-12 submitted on 5/27/2021 less the amount provided in carry forward.

Funded fiscal note vs. final fiscal note:

	FTE	FY24	FTE	FY25
Fiscal Note - ESSB 5096-7	19.2	\$3,991,600	17.6	\$2,791,200
Fiscal Note - ESSB 5096-12	20.0	\$4,077,000	18.4	\$2,871,100
Difference	0.8	\$85,400	0.8	\$79,900

The department is requesting funding for version 12 of the Capital Gains Tax fiscal estimate, minus the amount provided in carry forward level.

	FTE	FY24	FTE	FY25
Fiscal Note - ESSB 5096-12	20.0	\$4,077,000	18.4	\$2,871,000
Carry Forward level Funding	0.0	\$125,000	0.0	\$250,000
Funding needed	20.0	\$3,952,000	18.4	\$2,621,000

Workforce Assumptions:

See Fiscal Note ESSB 5096-12

	FY 2024	FY 2025	FY 2026	FY 2027
Adm Asst 3	0.1	0.1	0.0	0.0
Customer Serv Sp2	0.1	0.1	0.1	0.1
Excise Tax Ex 1	1.0	1.0	1.0	1.0
Excise Tax Ex 2	5.0	5.0	5.0	5.0
Excise Tax Ex 3	1.0	1.0	1.0	1.0
Fiscal Analyst 3	0.5	0.5	0.5	0.5
IT App Dev Journey	0.5	0.5	0.5	0.5
IT BA Journey	0.3	0.3	0.3	0.3
IT Proj Mgt Journey	0.5	0.5	0.5	0.5
IT QA Journey	0.8	0.8	0.8	0.8
Mgmt Analyst 4	3.0	1.8	1.8	1.8
Mgmt Analyst 5	0.5	0.3	0.1	0.1
Revenue Agent 4	0.3	0.3	0.3	0.3
Tax Info Spec 1	2.2	2.0	1.0	1.0
Tax Info Spec 4	1.0	1.0	0.5	0.5
Tax Policy Sp 3	1.8	1.8	1.1	1.1
Tax Policy Sp 4	0.4	0.4	0.2	0.2
WMS Band 2	1.0	1.0	1.0	1.0
	20.0	18.4	15.7	15.7

Strategic and Performance Outcomes

Strategic Framework:

How this package relates to, or affects, the Governor's Results Washington goal areas and statewide priorities was evaluated by the legislature prior to passing this bill in the 2021 session.

Performance Outcomes:

If the department receives funding, as we estimated in the fiscal note, there are no anticipated changes to performance outcomes. If not funded, the department will be unable to fully implement this legislation without impacting revenue collections in other areas.

Equity Impacts

Community outreach and engagement:

This package was evaluated by the legislature prior to passing this bill in the 2021 session.

Disproportional Impact Considerations:

This package was evaluated by the legislature prior to passing this bill in the 2021 session.

Target Populations or Communities:

How this package relates to, or affects, the target populations or communities was evaluated by the legislature prior to passing this bill in the 2021 session.

Other Collateral Connections

Puget Sound Recovery:

N/A

State Workforce Impacts:

No change anticipated.

Intergovernmental:

No additional intergovernmental impacts are anticipated.

Stakeholder Response:

No additional stakeholder impacts are anticipated.

State Facilities Impacts:

No change anticipated.

Changes from Current Law:

No change anticipated.

Legal or Administrative Mandates:

This request is in response to legislation passed in 2021.

Reference Documents

2021 5096-12 E SSB FiscalNote Cap Gains.pdf
2021 5096-7 E SSB FiscalNote.pdf
23-25 CG Gap Gains Carry Forward DP.pdf
Cap Gains Bill 5096-S.SL.pdf
CapGains CFL IT Addendum 2023-2025.docx

IT Addendum

Does this Decision Package include funding for any IT-related costs, including hardware, software, (including cloud-based services), contracts or IT staff?

Yes

Objects of Expenditure

Objects of Expenditure <i>Dollars in Thousands</i>	Fiscal Years		Biennial	Fiscal Years		Biennial
	2024	2025	2023-25	2026	2027	2025-27
Obj. A	\$1,296	\$1,186	\$2,482	\$1,015	\$1,015	\$2,030
Obj. B	\$466	\$427	\$893	\$365	\$365	\$730
Obj. C	\$1,875	\$750	\$2,625	\$375	\$250	\$625
Obj. E	\$285	\$230	\$515	\$201	\$201	\$402
Obj. G	\$0	\$0	\$0	\$0	\$0	\$0
Obj. J	\$30	\$28	\$58	\$25	\$25	\$50

Agency Contact Information

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