

RECEIVED

ATTORNEY GENERALS OFFICE
REVENUE AND FINANCE DIVISION

10/20/2021

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

Expedite
 No hearing set
 Hearing is set
 Date:
 Time:
 Judge/Calendar:

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF DOUGLAS

CHRIS QUINN, an individual; CRAIG
LEUTHOLD, an individual; SUZIE BURKE, an
individual; LEWIS and MARTHA RANDALL,
as individuals and the marital community
comprised thereof; RICK GLENN, an individual;
LARRY and MARGARET KING, as individuals
and the marital community comprised thereof;
and KERRY COX, an individual,

Plaintiffs,

v.

THE STATE OF WASHINGTON,
DEPARTMENT OF REVENUE, an agency of
the State of Washington; and VIKKI SMITH, in
her official capacity as Director of the
Department of Revenue,

Defendants.

Case No. 21-2-00075-09
Case No. 21-2-00087-09

AMICUS CURIAE BRIEF OF
THE BUILDING INDUSTRY
ASSOCIATION OF
WASHINGTON AND
WASHINGTON CATTLEMEN'S
ASSOCIATION IN SUPPORT OF
PLANTIFFS' MOTION FOR
SUMMARY JUDGMENT



1 APRIL CLAYTON, an individual; KEVING)
BOUCHEY, an individual; RENEE BOUCHEY,)
2 an individual; JOANNA CABLE, an individual;)
ROSELLA MOSBY, an individual; BURR)
3 MOSBY, an individual; CHRISTOPHER)
SENKE, an individual; CATHERINE SENSKE,)
4 an individual; MATTHEW SONDEREN, an)
individual; and the WASHINGTON FARM)
BUREAU,)

5)
6)
7)
8)
9)
10)
11)
12)
13)
14)
15)
16)
17)
18)
19)
20)
21)
22)
23)
24)
25)
26)
27)
Plaintiffs,

v.

THE STATE OF WASHINGTON,
DEPARTMENT OF REVENUE, an agency of
the State of Washington; and VIKKI SMITH, in
her official capacity as Director of the
Department of Revenue,

Defendants.

I. INTRODUCTION

Plaintiffs move for summary judgment on their constitutional challenges to the enactment of Engrossed Substitute Senate Bill (ESSB) 5096, which levies an unconstitutional capital gains tax on the sale or exchange of non-exempt capital assets by Washington residents. Plaintiffs' motion ably explains the constitutional defects of ESSB 5096. This amicus brief will focus on the very real economic harms this income tax will cause — and already is causing — for small business owners in our state.

The Court should grant Plaintiffs' motion for summary judgment because the law is an unconstitutional assessment of tax on the income of the thousands of businesses represented by the Building Industry Association of Washington (BIAW) and the Washington Cattlemen's Association (WCA). The hardworking business owners who make up both associations' respective membership deserve to have their income taxed fairly, consistently, and constitutionally. The illegal income tax that ESSB 5096 disguises as an excise tax does none of those things, instead introducing uncertainty, inconsistency,

1 and arbitrariness into the tax code. It is both bad law and bad policy. For these reasons as
2 well as those stated by Plaintiffs, this Court should decline the legislature’s invitation to
3 circumvent the longstanding constitutional limitations on income taxes in Washington and
4 grant Plaintiffs’ motion for summary judgment.

5 **II. FACTUAL AND PROCEDURAL BACKGROUND**

6 In the interest of judicial economy, this brief defers to the thorough recitation of the
7 facts and procedural background of this case given by Plaintiffs in their motion for
8 summary judgment.

9 **III. IDENTITY AND INTEREST OF AMICUS CURIAE**

10 BIAW represents nearly 8,000 members of the home building industry. It is made
11 up of 14 affiliated local associations: the Building Industry Association of Clark County,
12 the Central Washington Home Builders Association, the Jefferson County Home Builders
13 Association, the Master Builders Association of King and Snohomish Counties, the Home
14 Builders Association of Kitsap County, the Lower Columbia Contractors Association, the
15 North Peninsula Building Association, the Olympia Master Builders, the Master Builders
16 Association of Pierce County, the San Juan Builders Association, the Skagit-Island
17 Counties Builders Association, the Spokane Home Builders Association, the Home
18 Builders Association of Tri-Cities, and the Building Industry Association of Whatcom
19 County. The organization’s members are engaged in every aspect of the residential
20 construction industry, providing well-paying jobs for thousands of working families and
21 sizable tax revenue for both state and local governments.

22 WCA is a statewide association of beef producers that provides a unified voice for
23 producers, promotes innovative rangeland and livestock management practices, and
24 protects the cattle industry in Washington.

25 Collectively, BIAW and WCA are referred to as the “Business Associations.”
26
27

1 nationwide, treats them as income. The forty-one states that tax capital gains also treat
2 them as income. The only states that do not tax capital gains as income are those that levy
3 no income taxes at all — Alaska, Florida, Nevada, South Dakota, Texas, and Wyoming —
4 and the two states, New Hampshire and Tennessee, that tax only dividends and interest
5 income earned by individual taxpayers. Thus, every jurisdiction in our nation that taxes
6 capital gains treats them as income, and duly recognizes its capital gains tax as an income
7 tax. The solitary exception is Washington, thanks to ESSB 5096.

8 With the vote forty-nine to one, logic compels the conclusion that the emperor has
9 no clothes and the capital gains tax imposed by ESSB 5096 is actually an income tax, not
10 an excise tax, self-serving legislative nomenclature notwithstanding. But how does the
11 incongruity between Washington’s taxation of capital gains and everywhere else’s taxation
12 of them affect businesses and ranches?

13 The simplest answer is that it harms Washington businesses and ranches by
14 creating an inconsistency between the fiscal reality of buying, owning, selling and
15 exchanging capital assets in Washington and the rest of the nation. Washington is not an
16 economic island; its taxpayers own non-exempt capital assets and manage businesses that
17 own such assets in many other states, including the forty-one states that tax gains from the
18 sale or exchange of such assets as income. The fiscal inconsistency poses a problem for
19 taxpaying business owners, both within and beyond our borders, one recognized by the
20 United States Supreme Court as undesirable. “Taxpayers should be treated equally without
21 regard to the fortuity of residence,” that court observed in *Comm’r v. Stern*, 357 U.S. 39,
22 49, 78 S. Ct. 1047, 2 L. Ed. 2d 1126 (1958), “and the additional complication and
23 inconvenience in the administration of an already complex federal tax system which is
24 certain to follow an attempt to apply the differing laws of [individual states] ought to be
25 avoided, if at all possible.” Although *Stern* involved transferee tax liability, its rationale
26
27

1 applies to liability for the capital gains tax at issue here, which is also based on federal law.
2 See ESSB 5096, § 4 (defining capital gain as that reportable on federal income tax returns).

3 No other state charges an excise tax on the sale or exchange of non-exempt capital
4 assets, and no state that charges an excise tax on certain sales or exchanges assesses it on
5 transactions occurring outside of its taxing jurisdiction. For a business owner or rancher
6 who lives in Washington and sells products in another state, this disparity of capital gains
7 treatment complicates bookkeeping, adds to the administrative complexity of
8 interjurisdictional business, and discourages commerce. The lack of certainty over what
9 capital gains *are* for Washington residents puts a structural burden in the way of their
10 businesses. Are capital gains a type of income, as absolutely every other taxing
11 jurisdiction in our country believes? If so, businesses can plan accordingly. Or are they
12 part of the privilege of doing business while residing in Washington? ESSB 5096 obscures
13 this question.

14 This complexity differs from that inherent in other capital gains taxing regimes in
15 the United States. It is true that states tax capital gains differently: for example, some
16 jurisdictions allow individuals to deduct capital gains from taxable income, while others
17 tax all or part of such gains as income. States also vary in their approaches to the treatment
18 of capital gains and losses of married individuals, the treatment of gain and loss from the
19 sale or exchange of certain types of property, such as a principal residence, and the sale of
20 specific types of stock; they also vary in their treatment of the capital gains and losses of
21 nonresident individual taxpayers.

22 But these variations lie on a known tax spectrum, and businesses can plan for them
23 when buying, selling, and investing in non-exempt capital assets within their states as well
24 as across state lines. By contrast, no other state imposes an excise tax on gains realized on
25 the sales or exchanges of this class of property. Washington's application of an excise tax
26 to capital gains is a baffling singularity within the continuum of American capital gains
27

1 taxation, one that adds complexity, confusion, and inconvenience to Washington taxpayers
2 who own assets and businesses in multiple jurisdictions. This “complication and
3 inconvenience” is exactly what our government should seek to avoid in creating and
4 administering our state tax code. *See Stern*, 357 U.S. at 49.

5 **B. The levy imposed by ESSB 5096 will harm businesses and ranches by**
6 **illegally taxing their out-of-state business activities in violation of the**
7 **Commerce Clause.**

8 As explained in Plaintiffs’ motion for summary judgment, ESSB 5096 clearly
9 violates the Commerce Clause of the United States Constitution, which grants to Congress
10 the exclusive power “to regulate commerce . . . among the several states.” The illegal
11 income tax that ESSB 5096 imposes not just on income generated by sales and exchanges
12 of property located in Washington, but also generated by such activities by Washington
13 residents in *all* states and indeed the world over, violates the well-established line of
14 Commerce Clause cases that limit the ability of one state to tax activities occurring outside
15 its borders. This is a terrible blow for Washington taxpayers engaged in interstate
16 commerce.

17 In 1946, the United States Supreme Court held that in determining whether a tax
18 imposes a prohibited burden on interstate commerce, the tax’s practical effect rather than
19 its label or appearance will be controlling. *See Nippert v. Richmond*, 327 U.S. 416, 66
20 S.Ct. 586, 593, 90 L.Ed. 760, 766 (1946); *Railway Express Agency v. Virginia*, 347 U.S.
21 359, 74 S.Ct. 558, 561, 98 L.Ed. 757, 762 (1954); *cf. Martin Ship Service Co. v. Los*
22 *Angeles* 34 C.2d 793, 803, 215 P.2d 24 (1950). Under the Commerce Clause, this is our
23 guide in interpreting the tax imposed under ESSB 5096: not what the state calls it, but how
24 it practically affects Washington taxpayers, including the business owners and ranchers
25 authoring this brief.

26 Despite the legislature’s most deeply cherished hopes, it is not enough to
27 characterize an event or transaction as local or to label a tax as an excise tax in order to

1 make it so. To pass scrutiny under the dormant Commerce Clause, ESSB 5096 must, in its
2 practical effect, (1) apply to an activity with a substantial nexus with the taxing state, (2) be
3 fairly apportioned, (3) not discriminate against interstate commerce, and (4) be fairly
4 related to the services the state provides. *See Complete Auto Transit, Inc. v. Brady*, 430
5 U.S. 274, 279, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977); *S. Dakota v. Wayfair, Inc.*, 138 S. Ct.
6 2080, 2091, 201 L. Ed. 2d 403 (2018). The tax imposed by ESSB 5096 fails this test from
7 the starting gate when one considers the practical effects the tax is having on the
8 Washington business owners and ranchers represented by the Business Associations. *See*
9 *Nippert*, 327 U.S. at 416.

10 Consider a Washington taxpayer with an interstate business that owns and sells or
11 exchanges non-exempt capital assets in states throughout the country. She may sell capital
12 assets in Tennessee that are subject to the capital gains tax imposed by ESSB 5096; there is
13 no deduction or exemption available, since Tennessee does not assess a capital gains tax.
14 *See* ESSB 5096, § 11 (relieving taxpayers from allocation of extraterritorial gain if another
15 taxing jurisdiction assesses tax on the transaction). Suppose the assets were made in
16 Tennessee, bought in Tennessee, used in Tennessee, and sold in Tennessee. Does the
17 taxation of gain from their sale by Washington pass constitutional muster? No: under the
18 *Complete Auto* test the tax imposed by ESSB 5096 applies to the capital gains of
19 Washington residents like the business owner in our example, regardless of where the
20 capital assets that generated her gains were located, Tennessee or otherwise. Thus, the tax
21 can and will continue to apply to assets and activities with absolutely no nexus or
22 connection to Washington, is not apportioned, and is not fairly related to the services
23 Washington provides, rendering it federally unconstitutional and harming Washington
24 businesses.

25 Likewise, consider a lumber company based in the Tri-Cities, which does
26 significant business in Oregon. The faux excise tax imposed by ESSB 5096 eventually
27

1 consumes a share of the lumber company's accumulated profits from Oregon activities by
2 taking a 7% bite from the eventual gain on the sale of non-exempt inventory and
3 equipment located in that state. The Oregon activities have no nexus or ties to Washington
4 other than through the residency of the company's owner. The assessment of an excise tax
5 on these out-of-state activities is a clear violation of the Commerce Clause, not to mention
6 a significant hit to the company's bottom line.

7 The consequences of this illegal extraterritorial taxation are dire. It is one thing for
8 a state to assess a unique tax within its territory, but in the case of ESSB 5096, as shown
9 above, the tax's extension beyond our state's borders presents unique problems for resident
10 taxpayers who own capital assets in other states — assets over which Washington lacks
11 jurisdiction. Washington's unique, unprecedented and unconstitutional tax on capital gains
12 will discourage our state's entrepreneurs and investors from investing in new and
13 expanded businesses in our state, or businesses with extraterritorial aspirations, in order to
14 avoid the confusion and disparate tax treatment it introduces. It will also cause significant
15 numbers of individual business owners to leave Washington to avoid the new tax on gains
16 from sales and exchanges of not only their assets located within our state, but those located
17 in jurisdictions across the United States, and literally anywhere in the world. Rather than
18 raise net revenue for Washington's coffers, the income tax that ESSB 5096 imposes on
19 capital gains could have the effect of reducing it by encouraging taxpayer migration and
20 capital flight.

21 It bears restatement: ESSB 5096 will harm Washington businesses and ranches by
22 discouraging investment in capital assets owned by Washington residents and their
23 companies. Business owners and ranchers who live within our borders may elect not to
24 invest in capital assets because they do not know how they will be taxed if sold or
25 exchanged: as income, like everywhere else, or part of the privilege of living in
26 Washington, like nowhere else. Not knowing whether the sale or exchange of such assets
27

1 might fall under one of the myriad exemptions provided seemingly at random by ESSB
2 5096 (the exemption for goodwill received from the sale of certain auto dealerships comes
3 to mind), they may opt to invest their profits elsewhere and either move their money or, as
4 submitted above, their very households out of Washington to avoid the fiscal inconsistency
5 and uncertainty created by this new illegal income tax. The resulting contraction of
6 commerce in Washington will harm consumers nationwide who rely on our products.

7 This not only renders the tax unconstitutional on Commerce Clause grounds, it also
8 harms business owners and ranchers by discouraging them from expanding their
9 businesses beyond state lines. If their business activities in other states are subjected to
10 Washington taxation solely based on their state residency, and not (as in all other states)
11 based on the activities' connection to Washington, the natural choice for Washington
12 taxpayers is to limit their acquisition of and investment in out-of-state assets and business
13 operations, thereby limiting the growth of their businesses and contracting commerce in
14 Washington. This artificial suppression of interstate commerce is exactly why the Framers
15 included the Commerce Clause in the United States Constitution and exactly why ESSB
16 5096 is unconstitutional from a federal perspective. They knew that if states were
17 permitted to regulate interstate commerce, the commercial health of the nation would
18 suffer, as businessmen and businesswomen are suffering under ESSB 5096 now.

19 **C. The blatant illegality of ESSB 5096 harms Washington businesses and**
20 **ranchers because it shows a disregard for the rule of law by Washington**
21 **lawmakers, which puts a chill on business in our state.**

22 More difficult to quantify than the harms caused by the fiscal confusion and illegal
23 extraterritorial taxation of ESSB 5096 is the harm caused by the obvious illegality of our
24 state lawmakers' actions in enacting the tax. As noted above, Washington is the only state
25 in the country that pretends the sale or exchange of non-exempt capital assets is an excise
26 tax event, not an income tax event. The motive for this semantic fiction is plain: our state
27

1 constitution is crystal clear that taxes on property — an asset class which our judiciary has
2 long held includes all forms of income — must be uniform and less than one percent.
3 Notwithstanding these limitations, our legislature wanted to pass a graduated income tax
4 with rates well in excess of one percent. Previous attempts to do so through the ballot box
5 repeatedly had failed, soundly rejected by Washington voters. What to do?

6 Our lawmakers landed on the solution of calling the tax imposed by ESSB 5096 an
7 “excise” tax rather than an income tax, to sidestep the constitutional constraints on the
8 latter. This political maneuvering is obvious to Washington taxpayers, and it is equally
9 obvious that ESSB 5096 actually imposes an income tax that is *not* uniform and *not* less
10 than one percent, in clear contravention of our constitution. Passing a nonuniform, seven
11 percent tax on income earned by Washingtonians is a legislative policy choice that our
12 constitution clearly forbids.
13

14 The problem is that ESSB 5096 suggests a dangerous disregard for the law on the
15 part of our state legislature, a willingness to use semantics to circumvent well-established
16 constitutional limitations on its taxing authority. Washington business owners and
17 ranchers are wary of lawmakers like this, as were our Founders, particularly in the area of
18 taxation:
19

20 The apportionment of taxes on the various descriptions of
21 property is an act which seems to require the most exact
22 impartiality; yet there is, perhaps, no legislative act in which
23 greater opportunity and temptation are given to a
predominant party to trample on the rules of justice.

24 THE FEDERALIST NO. 10 (James Madison, 1787). If Washington lawmakers are willing to
25 trample on the rules of justice and ignore the constitution now in order to achieve their
26 legislative agenda, will they do so again? What constitutional restraints will they flout
27 next in the service of their political ends? Are our checks and balances meaningless?

1 No business owner wants to live or do business in a jurisdiction with a weak
2 commitment to the rule of law. Orderly commerce relies on consistent application of the
3 law, and lawmakers who honor it. The legislature’s imposition of an illegal income tax
4 through ESSB 5096 signals to current and prospective Washington businessmen and
5 businesswomen that Washington is a place where lawmakers bend (or break) the law when
6 it suits their politics — not the kind of place to do business. The insecurity created by this
7 legislative misbehavior will cause longtime Washington businesses to relocate to other
8 jurisdictions with leaders who respect the rule of law, and it will discourage entrepreneurs
9 and out-of-state companies from forming new businesses and ranches in our state. No
10 rational business owner wants to operate in an environment of legal uncertainty, under a
11 tyrannical legislature that ignores constitutional limits on its power.
12


13 **D. Even if ESSB 5096 were a legitimate income tax, it is bad policy.**


14 Leaving aside the observations above and assuming, arguendo, that the tax imposed
15 by ESSB 5096 is lawful, the authors submit for the Court’s consideration that it is bad
16 policy for Washington business owners and ranches. This income tax, as written, is both
17 complex and replete with deductions and exemptions for seemingly incongruous interest
18 groups, such as certain auto dealerships and timber owners, that appear more the result of
19 effective lobbying than sensible or cohesive policy. Navigating these narrow channels will
20 prove difficult for all but the most sophisticated business owners in our state, and the
21 resulting impact on small and mid-sized business owners runs contrary to the ideals that the
22 BIAW and WCA seek to further. The tax will discourage budding entrepreneurs, legacy
23 family businesses and ranches, and industrious taxpayers throughout our state from
24 starting, continuing, and expanding their enterprises. Thus, ESSB 5096 is not only bad
25 law, it is bad policy. The authors urge the Court to overturn it.
26
27

1 **VI. CONCLUSION**

2 For the reasons stated above, the Business Associations respectfully ask the Court
3 to grant Plaintiffs' motion for summary judgment.

4 DATED: Monday, December 20, 2021.

5
6 
7 JACKSON WILDER MAYNARD, JR.
8 GENERAL COUNSEL
9 WSBA No. 43481


10 
11 BROOKE FRICKLETON
12 ASSOCIATE GENERAL COUNSEL
13 WSBA No. 55580

14 BUILDING INDUSTRY ASSOCIATION OF
15 WASHINGTON
16 300 DESCHUTES WAY SW STE 300
17 TUMWATER, WA 98501
18 (360) 352-7800

1 **CERTIFICATE OF SERVICE**

2 I certify that I caused a true and correct copy of the Amicus Brief to be served on
3 all parties, listed below, in the manner outlined in the parties' E-Service Agreement:
4

5 Dated this 20th day of December, 2021.
6

7
8 
9 JACKSON WILDER MAYNARD, JR.
10 GENERAL COUNSEL
11 WSBA No. 43481

12 BUILDING INDUSTRY ASSOCIATION OF
13 WASHINGTON
14 300 DESCHUTES WAY SW STE 300
15 TUMWATER, WA 98501
16 (360) 352-7800
17
18
19
20
21
22
23
24
25
26
27