

## Jacob Allen

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**From:** Tommy J Gantz <tommyjg@awb.org>  
**Sent:** Monday, March 28, 2022 10:13 AM  
**Subject:** [External] AG seeks direct review of capital gains income tax ruling  
**Attachments:** NoticeOfAppeal.pdf

Good afternoon Tax & Fiscal Policy Committee,

As expected, on the 25<sup>th</sup>, the Attorney General is seeking direct review by the Washington Supreme Court of the Douglas County Superior Court's March 22, 2022 Order Granting Plaintiffs' Motion for Summary Judgment and Denying Defendants' Motion for Summary Judgment (Order)." Please see the below press release from WPC.

### What this means

- State has filed an appeal for Direct Review with the Washington State Supreme Court
- Plaintiffs have 30 days to file their opposition

### What's Unclear Today

- Which court (state Supreme our Appellate) takes the case on the appeal
- How the state might try to collect the tax (due in 2023 for 2022 Tax Year) - despite initial victory

### Next Steps

- State has filed an appeal for Direct Review with the Washington State Supreme Court
- Plaintiffs have 30 days to file their opposition
- It will be sometime June or July before we know if the case will go to the court of appeals or the WA state supreme court
- It is expected that the AG will request direct review by the WA state supreme court
- It is possible but unlikely that oral arguments will occur prior to the elections
- Any ruling won't happen before 2023

Please let me know if you have any questions.

Warm Regards,

*Tommy Gantz / Government Affairs Director, Tax & Fiscal Policy, Manufacturing*  
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**From:** Jason Mercier <jmercier@washingtonpolicy.org>  
**Sent:** Friday, March 25, 2022 10:00 AM  
**Subject:** AG seeks direct review of capital gains income tax ruling

Inslee appointed judge officially signed capital gains income tax order this week saying: "ESSB 5096 is declared unconstitutional and invalid and, therefore, is void and inoperable as a matter of law."

As expected, @AGOWA today "seek direct review by the Washington Supreme Court of the Douglas County Superior Court's March 22, 2022 Order Granting Plaintiffs' Motion for Summary Judgment and Denying Defendants' Motion for Summary Judgment (Order)."

Sincerely,

Jason Mercier  
Director, Center for Government Reform  
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Track bills: [washingtonvotes.org](http://washingtonvotes.org)

*Improving the transparency, accountability and performance of government*

**From:** Jason Mercier  
**Sent:** Wednesday, March 23, 2022 11:59 AM  
**Subject:** WPC played important role in capital gains income tax being ruled unconstitutional

<https://www.washingtonpolicy.org/publications/detail/wpc-played-important-role-in-capital-gains-income-tax-being-ruled-unconstitutional>

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By Jason Mercier  
Mar 23, 2022

On March 1, Douglas County Superior Court ruled the capital gains income tax adopted last year (SB 5096) is an [unconstitutional graduated income tax](#). Because of a [surprise motion by the state Attorney General in the case](#), the first half of the ruling talked about Washington Policy Center (WPC) research. More on that in a moment, but first, the judge's ruling is a total team victory for WPC and our supporters.

WPC has been actively involved for the past decade trying to educate policymakers that a capital gains tax is an unconstitutional income tax in Washington state. After some lawmakers ignored our clear research and by one vote passed the capital gains income tax last year, WPC worked closely with the [Opportunity For All Coalition's \(OFAC\)](#) effort to overturn the new tax with a lawsuit. In fact, thanks to the recruiting work by WPC's Chris Cargill and Pam Lewison, all the plaintiffs in the OFAC lawsuit are WPC members (and several are board members).

Talking about the role WPC's research played in the lawsuit, lead OFAC attorney and former Attorney General Rob McKenna wrote:

"The best quotes in the complaint are from records you unearthed or collected, Jason. Thank you!"

OFAC leaders also sent WPC this note about our involvement with the capital gains income tax lawsuit:

“On behalf of Matt McIlwain and the Opportunity for All Coalition (OFAC), I just wanted to thank you and Jason Mercier for your tireless support in our efforts to battle Washington’s illegal capital gains tax. Washington Policy Center’s exhaustive research, identification of plaintiffs, and general aid has buttressed our organization and the overall effort. And we are extremely grateful and so excited to be working alongside you and your team.”

Prior to filing their briefs, the OFAC attorneys wrote me and asked:

“I now see all the substantial work you have undertaken to reach these conclusions. How would you like to be our star witness and submit a declaration Monday reporting your inquiries and the responses that you received, essentially reporting the data and quotes...”

It was this legal declaration that resulted in the surprise motion from the Attorney General and the judge’s ruling discussing WPC research by name.

During the course of the legal briefing, the Attorney General asked the judge to strike from the court record [my capital gains income tax declaration](#), including all of the correspondence I had with the IRS and state revenue departments across the country describing a capital gains tax as an income tax.

Here is what the [Attorney General's said](#):

“Plaintiffs generally rely on the Mercier declaration for their statements of out-of-state ‘authority.’ But the Mercier declaration consists of collected correspondence with various non-judicial state and federal employees across the country, all of which are inadmissible hearsay . . . Defendants move to strike the Mercier declaration and its exhibits in their entirety.”

This is the information the Attorney General didn’t want the court to consider or allow in the case record. [From my declaration](#):

“In April 2017, I surveyed the revenue departments of every U.S. state to determine whether the state taxed capital gains as a tax on income or as an excise tax. If I did not receive a written response from a state’s revenue department, I followed up telephonically to obtain an answer from an appropriate official responsible for and knowledgeable about state tax policy and administration and included those responses in my survey results. A true and correct copy of all written responses I received is attached as Exhibit B. The [responses for every state](#) are summarized in the table below . . .

While some jurisdictions responded that they did not tax capital gains at all, no state that was surveyed taxed capital gains through an excise tax or in any way other than through a tax on income.

Attached as Exhibit C is a true and correct copy of an email and attached Washington Department of Revenue bill report for ESSB 5096, received in response to a public records request.

Attached as Exhibit D is a true and correct copy of a September 25, 2018 letter from the U.S. Internal Revenue Service to U.S. Congressman Dan Newhouse that I received in response to a public records request."

When issuing his ruling declaring the capital gains income tax unconstitutional, however, the judge explained why he was rejecting (for the most part) the Attorney General's motion to reject my declaration and decades of research. The judge said he was going to allow my testimony as an expert on the topic to be used in his decision:

"In Paragraph 5 Mr. Mercier testifies that while some states responded that they did not tax capital gains at all, no state that was surveyed taxed capital gains through an excise tax or in any way other than through an income tax. This Court deems Paragraph 5 to be admissible expert testimony under ER 702 . . ."

Here is what else the [judge said when ruling](#) the capital gains income tax is unconstitutional:

"ESSB 5096 is properly characterized as an income tax pursuant to Culliton, Jensen, Power and other applicable Washington caselaw, rather than as an excise tax as argued by the State. As a tax on the receipt of income, ESSB 5096 is also properly characterized as a tax on property pursuant to that same caselaw. This Court concludes that ESSB 5096 violates the uniformity and limitation requirements of article VII, sections 1 and 2 of the Washington State Constitution. It violates the uniformity requirement by imposing a 7% tax on an individual's long-term capital gains exceeding \$250,000 but imposing zero tax on capital gains below that \$250,000 threshold. It violates the limitation requirement because the 7% tax exceeds the 1% maximum annual property tax rate of 1%."

As the state Supreme Court [reminded lawmakers in 1960](#), the proper way to impose a graduated income tax is with a constitutional amendment. It is past time to stop playing tax word games in an attempt to circumvent the [voters' consistent opposition to income taxes](#).

State officials can't say feign ignorance. We repeatedly tried to warn lawmakers that the [IRS unequivocally says](#):

**"You ask whether tax on capital gains is considered an excise tax or an income tax? It is an income tax. More specifically, capital gains are treated as income under the tax code and taxed as such."**

Now that the [Inslee appointed judge in Douglas County](#) has ruled the capital gains income tax unconstitutional, I have just one question: Can state lawmakers and the governor hear us now?

Sincerely,

Jason Mercier  
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