



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 blue ink that reads "Jackson Maynard, Jr." The signature is written in a cursive style with a large, stylized initial 'J'.

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