



July 21, 2017

The Honorable Bob Ferguson
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Re: Request for the Attorney General to challenge the constitutionality of the Seattle Income Tax, Seattle City Ord. 125339, signed into law on July 14, 2017

Dear Attorney General Ferguson:

We represent a group of Washington taxpayers who are Seattle residents, including Ms. Dena Levine, Mr. Khoa Pham, Mr. Christopher Rufo, and Mr. Martin Tobias. We ask that your office investigate and challenge the legality of Seattle's recently enacted city-wide income tax, specifically Seattle City Ord. 125339 (July 14, 2017) (the "Seattle Income Tax").¹

On May 1, 2017, the Seattle City Council passed a resolution of intent "to adopt a progressive income tax targeting high-income households." Seattle City Res. 31747, at 1 (May 1, 2017). On July 10, 2017, the City Council passed an ordinance to create and direct the implementation of a city-wide income tax.

At the Seattle Income Tax's core, it taxes that portion of the "total income" of every "resident taxpayer"² in excess of \$250,000 at 2.25%. The Ordinance taxes that portion of the "total income" of every "resident taxpayer" in excess of \$500,000 at 2.25% if a resident taxpayer's federal filing status for a tax year is "married filing jointly."³ Any "total income" amount at or below the ordinance's income thresholds is taxed at 0%. Efforts to create and implement graduated personal income taxes in Washington are not new. *See, e.g.*, 1935 Wash. Laws 178; 1933 Wash. Laws 5. Those taxes are, however, illegal, including the Seattle Income Tax.

First, Washington cities – including charter cities such as Seattle – are creatures of the state, and are "subject to and controlled by general laws." *State ex rel. Bowen v. Kruegel*, 67 Wn.2d 673, 676 (1965); *see* Wash. Const. art. 11 § 10. The Supreme Court has "consistently held that municipalities must have

¹ We attach a copy of Ordinance No. 125339 for your convenience. The ordinance adds a new chapter to the Seattle Municipal Code ("SMC") – Chapter 5.65.

² SMC 5.65.020.A, .C-.E, and .G define the Seattle Income Tax's operative terms.

³ If a resident taxpayer is married to a non-resident of Seattle, "total income" can be calculated by treating both spouses as residents of Seattle

The Honorable Bob Ferguson
Attorney General of Washington
July 21, 2017
Page 2



express authority, either constitutional or legislative, to levy taxes.” *King Cty. v. City of Algona*, 101 Wn.2d 789, 791 (1984). Moreover, “municipalities must have specific legislative authority to levy a particular tax.” *Id.* at 793. The state legislature has not authorized cities generally, or Seattle specifically, to tax personal income.

Second, the state legislature has forbidden cities from taxing personal income. Over 30 years ago, the state legislature prohibited cities from levying a tax like the Seattle Income Tax: “A county, city, or city-county shall not levy a tax on net income.” RCW 36.65.030. The City attempts to evade this longstanding prohibition simply by using different terminology⁴ but that effort fails because “total income,” as it is defined by the Ordinance, is “net income.” If no deductions and exemptions are allowed, as with the Seattle Income Tax, then total income equals, and is, net income.

“Net income” is also a phrase that our state supreme court and our state legislature have used interchangeably with the concept of “personal income,” in both judicial decisions and legislative deliberations. Accordingly, the Seattle Income Tax’s incidence on “total income” is in fact a tax on “net income.” And our state Supreme Court has stated: “The character of a tax is determined by its incidents, not by its name.” *Power, Inc. v. Huntley*, 39 Wn.2d 191, 196 (1951) (collecting cases). Because the state legislature has not authorized and, indeed, prohibits cities’ taxation of “net income,” the Seattle Income Tax is an unconstitutional ordinance which also violates the controlling state statute, and we ask that your office challenge the Seattle Income Tax’s legality in court.

Third, Article VII, Section 1 of the Washington Constitution requires that “All taxes shall be uniform upon the same class of property . . .” The Seattle Income Tax violates the State Constitution because the Seattle Income Tax is a non-uniform property tax. Any question whether an income tax is a tax on property was long ago put to rest. “It has been definitely decided in this state that an income tax is a property tax. . . .” *Power, Inc.*, 39 Wn.2d at 195 (citing *Aberdeen Sav. & Loan Ass’n v. Chase*, 157 Wash. 351 (1930)). Because an income tax is a tax on property, an income tax must be “uniform upon the same class of property.” Const. Art. VII § 1. However, a 0% tax on that portion of annual income between \$0 and \$250,000 and a 2.25% tax on that portion of income above \$250,000 is obviously not uniform. Just as a property tax that applies different rates to land parcels of different acreages based on size or amount of property would be non-uniform, see *Culliton v. Chase*, 174 Wash. 363, 380-82 (1933) (Mitchell, J., concurring), so too a tax that applies different rates to different levels of personal income is non-uniform. Gross income or net income is unitary. This is amply demonstrated by the fact that it is defined in Ordinance 125339 to be a single sum. SMC 5.65.020.G. This is non-uniform.

Ordinance 125339 states that its intention is to shift a greater portion of the city tax burden to the “wealthy.” It is precisely such efforts to tax the same classification of property at different rates – by

⁴ What’s in a name? that which we call a rose
By any other name would smell as sweet.
William Shakespeare, *Romeo and Juliet*, Act II, Scene 2

The Honorable Bob Ferguson
Attorney General of Washington
July 21, 2017
Page 3



singling out certain groups of citizens for unfavorable treatment, whatever the rationale or nomenclature that the Washington Constitution prohibits. It could not be more self-evident that the Constitution's uniformity provision was intended to prohibit *precisely* what the City has set out to do in its Ordinance 125339.

The Seattle Income Tax is the latest attempt by a local government to enact an illegal, local income tax. The State has not authorized the City to tax personal income. Moreover, the Seattle Income Tax is precluded by statute. In addition to these statutory barriers, the Seattle Income Tax is also a non-uniform property tax, which violates Article VII § 1 of the state constitution. The Attorney General should act now to ensure that one city's illegal tax policy does not embolden other local governments to enact similarly illegal taxes. We ask that you pursue immediate measures to address the illegal Seattle Income Tax.

Please let us know at your earliest convenience whether your office will initiate legal proceedings against the Seattle Income Tax.

Sincerely yours,

Orrick, Herrington & Sutcliffe LLP

A handwritten signature in blue ink that reads "Robert M. McKenna". The signature is fluid and cursive, with the first letters of each word being capitalized and prominent.

Robert M. McKenna

A handwritten signature in blue ink that reads "Daniel J. Dunne". The signature is highly stylized and cursive, with a long horizontal flourish extending to the right.

Daniel J. Dunne

cc: Hon. Gerry L. Alexander