

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

**STATE OF WASHINGTON
DOUGLAS COUNTY SUPERIOR COURT**

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; NEIL MULLER, an individual; LARRY and MARGARET KING, as individuals and the marital community comprised thereof; and KERRY COX, an individual,

Plaintiffs,

v.

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

Defendants,

EDMONDS SCHOOL DISTRICT, TAMARA GRUBB, ADRIENNE STUART, MARY CURRY, and WASHINGTON EDUCATION ASSOCIATION,

Intervenors.

APRIL CLAYTON, an individual; KEVIN BOUCHEY, an individual; RENEE BOUCHEY, an individual; JOANNA CABLE, an individual; ROSELLA MOSBY, an individual; BURR MOSBY, an individual; CHRISTOPHER SENSKE, an individual; CATHERINE SENSKE,

NO. 21-2-00075-09
NO. 21-2-00087-09

NOTICE OF APPEAL TO THE
WASHINGTON SUPREME
COURT

1 an individual; MATTHEW SONDEREN, an
2 individual; JOHN MCKENNA, an individual;
3 WASHINGTON FARM BUREAU;
4 WASHINGTON STATE TREE FRUIT
5 ASSOCIATION; WASHINGTON STATE
6 DAIRY FEDERATION,

7 Plaintiffs,

8 v.

9 STATE OF WASHINGTON, DEPARTMENT OF
10 REVENUE, an agency of the State of Washington;
11 VIKKI SMITH, in her official capacity as Director
12 of the Department of Revenue,

13 Defendants.

14 EDMONDS SCHOOL DISTRICT, TAMARA
15 GRUBB, ADRIENNE STUART, MARY
16 CURRY, and WASHINGTON EDUCATION
17 ASSOCIATION,

18 Intervenors.

19 Pursuant to RAP 4.2(b), 5.1, and 5.2(a), Defendants State of Washington, State
20 Department of Revenue, and Vikki Smith as Director of the State Department of Revenue
21 (collectively State Defendants) and Intervenors Edmonds School District, Tamara Grubb,
22 Adrienne Stuart, Mary Curry, and Washington Education Association (collectively Education
23 Intervenors) seek direct review by the Washington Supreme Court of the Douglas County
24 Superior Court’s March 22, 2022 Order Granting Plaintiffs’ Motion for Summary Judgment
25 and Denying Defendants’ Motion for Summary Judgment (Order). A copy of the above-
26 referenced Order is attached hereto as Exhibit A. A copy of the Superior Court’s March 1,
2022, letter ruling—which is incorporated by reference into the Order is attached hereto as
Exhibit B.

The name and address of the attorneys of record are:

Attorneys for the Quinn et al. Plaintiffs:

Scott Edwards, WSBA No. 26455

edwardss@lanepowell.com

1 Callie Castillo, WSBA No. 38214
Lane Powell PC
2 1420 Fifth Avenue, Suite 4200
3 P.O. Box 91302
Seattle, WA 98111-9402

castilloc@lanepowell.com

4 Eric R. Stahlfeld, WSBA No. 22002
Freedom Foundation
5 P.O. Box 552
6 Olympia, WA 98507

estahlfeld@freedomfoundation.com

7 **Attorneys for the Clayton et al. Plaintiffs:**

8 Robert McKenna, WSBA No. 18327
Daniel J. Dunne, Jr., WSBA No. 16999
9 Amanda McDowell, WSBA No. 52312
Orrick Herrington & Sutcliffe LLP
10 701 Fifth Avenue, Suite 5600
Seattle, WA 98104

rmckenna@orrick.com
ddunne@orrick.com
amcdowell@orrick.com

11 Allison R. Foreman, WSBA No. 41967
12 Foreman, Hotchkiss, Bauscher &
Zimmerman, PLLC
13 124 N. Wenatchee Avenue, Suite A
14 Wenatchee, WA 98801

allison@fhbzlaw.com

15 **Attorneys for the State Defendants:**

16 Noah G. Purcell, WSBA No. 43492
Solicitor General
17 Jeffrey T. Even, WSBA No. 20367
Deputy Solicitor General
18 Peter B. Gonick, WSBA No. 25616
Deputy Solicitor General
19 Cameron G. Comfort, WSBA No. 15188
Sr. Assistant Attorney General
20 Charles Zalesky, WSBA No. 37777
Assistant Attorney General
21 Attorney General of Washington
Revenue and Finance Division
22 P.O. Box 40123
7141 Cleanwater Drive SW
23 Olympia, WA 98504-0123

noah.purcell@atg.wa.gov

jeffrey.even@atg.wa.gov

peter.gonick@atg.wa.gov

cam.comfort@atg.wa.gov

chuck.zalesky@atg.wa.gov

24 **Attorneys for the Education Intervenors:**

25 Paul J. Lawrence, WSBA No. 13557
26 Sarah S. Washburn, WSBA No. 44418

paul.lawrence@pacificallawgroup.com
sarah.washburn@pacificallawgroup.com

1 Pacifica Law Group LLP
2 1191 2nd Ave, Suite 2000
3 Seattle, WA 98101-3404

4 DATED this 25 day of March, 2022.

5 ROBERT W. FERGUSON
6 Attorney General

7 

8 NOAH G. PURCELL, WSBA No. 43492
9 Solicitor General

10 JEFFREY T. EVEN, WSBA No. 20367
11 Deputy Solicitor General

12 PETER B. GONICK, WSBA No. 25616
13 Deputy Solicitor General

14 CAMERON G. COMFORT, WSBA No. 15188
15 Sr. Assistant Attorney General

16 CHARLES ZALESKY, WSBA No. 37777
17 Assistant Attorney General

18 Attorneys for State Defendants
19 OID Nos. 91027 and 91087

20 PACIFICA LAW GROUP LLP

21 s/Charles Zalesky for Education Intervenor Attorneys

22 PAUL J. LAWRENCE, WSBA No. 13557

23 SARAH S. WASHBURN, WSBA No. 44418
24 Attorneys for Education Intervenors

1 **PROOF OF SERVICE**

2 I certify that I caused to be served a copy of this document, through my legal assistant,
3 through electronic mail, per agreement, to:

4 Scott Edwards
5 Callie Castillo
6 Lane Powell PC
7 EdwardsS@lanepowell.com
8 CastilloC@lanepowell.com
9 CraigA@lanepowell.com
10 Docketing@lanepowell.com

11 Eric Stahlfeld
12 The Freedom Foundation
13 ESTahlfeld@freedomfoundation.com
14 KElder@freedomfoundation.com

15 Attorneys for the Quinn Plaintiffs

16 Robert McKenna
17 Amanda McDowell
18 Daniel Dunne
19 Orrick Herrington & Sutcliffe
20 rmckenna@orrick.com
21 Amcdowell@orrick.com
22 ddunne@orrick.com
23 abrecher@orrick.com
24 lpeterson@orrick.com
25 PAteam7@orrick.com

26 Attorneys for the Clayton Plaintiffs

Allison R. Foreman
Foreman, Hotchkiss, Bauscher & Zimmerman, PLLC
allison@fhbzlaw.com
nancy@fhbzlaw.com

Attorney for Co-Plaintiffs Washington State Tree Fruit Association
and Washington State Dairy Federation

Joseph Henschman (Admitted *pro hac vice*)
National Taxpayers Union Foundation
jbh@ntu.org

Attorney for Amicus

1 Stephen R. Crossland
2 Crossland & Evans PLLC
3 Steve@crosslandlaw.net

4 Attorney for Amicus

5 Jackson Wilder Maynard, Jr.
6 Brooke Frickleton
7 Nikky Castillo
8 Building Industry Association of Washington
9 JacksonM@biaw.com
10 BrookeF@biaw.com
11 NikkyC@biaw.com

12 Attorney for Amicus

13 A copy of this document with proof of service has also been provided to the Supreme Court
14 via the Court's electronic filing portal.

15 I certify under penalty of perjury under the laws of the State of Washington that the
16 foregoing is true and correct.

17 DATED this 25 day of March, 2022, at Tumwater, WA.

18 s/Charles Zalesky
19 Charles Zalesky, Assistant Attorney General
20
21
22
23
24
25
26

EXHIBIT

A

9 FILED

MAR 22 2022

JENN BIGGAR
DOUGLAS COUNTY CLERK
WATERVILLE, WA
BY  DEPUTY

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

RECEIVED

ATTORNEY GENERALS OFFICE
REVENUE AND FINANCE DIVISION

3/23/2022

CHRIS QUINN, *et al.*
Plaintiffs.

v.

STATE OF WASHINGTON, DEPARTMENT OF
REVENUE, *et al.*

Defendants.

and

EDMONDS SCHOOL DISTRICT, *et al.*

Intervenors.

Case No. 21-2-00075-09

Case No. 21-2-00087-09

ORDER
GRANTING PLAINTIFFS'
MOTION FOR SUMMARY
JUDGMENT AND DENYING
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT

APRIL CLAYTON, *et al.*
Plaintiffs.

v.

STATE OF WASHINGTON, DEPARTMENT OF
REVENUE, *et al.*

Defendants.

and

EDMONDS SCHOOL DISTRICT, *et al.*

Intervenors.

1 THIS MATTER came before the Court on Defendants' Motion for Summary Judgment
2 filed December 2, 2021, and Plaintiffs' Motion for Summary Judgment filed December 6,
3 2021.

4 The Court considered the following pleadings and documents:

- 5 • Defendants' Motion for Summary Judgment, filed December 2, 2021;
- 6 • Declaration of Kathy L. Oline in Support of Defendants' Motion for Summary
7 Judgment, filed December 2, 2021;
- 8 • Intervenor Education Parties' Joinder in Defendants' Motion for Summary
9 Judgment and Supplement Brief, filed December 6, 2021;
- 10 • Plaintiffs' Motion for Summary Judgment, filed December 6, 2021;
- 11 • Declaration of Jason Mercier in Support of Plaintiffs' Motion for Summary
12 Judgment, filed December 6, 2021;
- 13 • *Amici Curiae* Brief of The Building Industry Association of Washington and
14 Washington Cattlemen's Association in Support of Plaintiffs' Motion for
15 Summary Judgment, filed December 20, 2021;
- 16 • Brief of *Amici Curiae* Mrs. Mary Ann Warren, Meliesa Tigard, Kristen
17 Cameron, and Dr. Katherine Baird, filed December 20, 2021;
- 18 • *Amici Curiae* Brief of National Taxpayers Union Foundation, Washington
19 Policy Center, Adam Hoffer, Randall G. Holcombe, Jeremy Horpedahl, Todd
20 Nesbit, Justin M. Ross, William F. Shughart II, and Jared Walezak ("Tax
21 Economists and Policy Analysts") in Support of Plaintiffs, filed December 20,
22 2021;
- 23 • Defendants' Memorandum in Opposition to Plaintiffs' Motion for Summary
24 Judgment, filed January 7, 2022;
- 25 • Intervenor Education Parties' Joinder in Defendants' Memorandum in
26 Opposition to Plaintiffs' Motion for Summary Judgment and Supplemental
27 Brief, filed January 7, 2022;
- 28

- 1 • Plaintiffs' Opposition to Defendants' Motion for Summary Judgment, filed
- 2 January 7, 2022;
- 3 • Declaration of Chris Quinn, filed January 7, 2022;
- 4 • Declaration of Christopher Senske in Support of Plaintiffs' Opposition to
- 5 Defendants' Motion for Summary Judgment, filed January 7, 2022;
- 6 • Declaration of Craig Leuthold, filed January 7, 2022;
- 7 • Declaration of Washington State Dairy Federation in Support of Plaintiffs'
- 8 Opposition to Defendants' Motion for Summary Judgment, filed January 7,
- 9 2022;
- 10 • Declaration of Joanna Cable in Support of Plaintiffs' Opposition to Defendants'
- 11 Motion for Summary Judgment, filed January 7, 2022;
- 12 • Declaration of John McKenna in Support of Plaintiffs' Opposition to
- 13 Defendants' Motion for Summary Judgment, filed January 7, 2022;
- 14 • Declaration of Kerry Cox, filed January 7, 2022;
- 15 • Declaration of Kevin Bouchey in Support of Plaintiffs' Opposition to
- 16 Defendants' Motion for Summary Judgment, filed January 7, 2022;
- 17 • Declaration of Larry King, filed January 7, 2022;
- 18 • Declaration of Lewis E. Randall, filed January 7, 2022;
- 19 • Declaration of Neil Allen Muller, filed January 7, 2022;
- 20 • Declaration of Rick Glenn, filed January 7, 2022;
- 21 • Declaration of Suzie Burke, filed January 7, 2022;
- 22 • Declaration of Matthew Sonderer in Support of Plaintiffs' Opposition to
- 23 Defendants' Motion for Summary Judgment, filed January 7, 2022;
- 24 • Declaration of Washington State Tree Fruit Association in Support of
- 25 Plaintiffs' Opposition to Defendants' Motion for Summary Judgment, filed
- 26 January 7, 2022;
- 27 • Declaration of Washington Farm Bureau in Support of Plaintiffs' Opposition to
- 28 Defendants' Motion for Summary Judgment, filed January 7, 2022;

- 1 • Amended Declaration of Joanna Cable in Support of Plaintiffs' Opposition to
- 2 Defendants' Motion for Summary Judgment, filed January 14, 2022;
- 3 • Defendants' Reply in Support of Summary Judgment, filed January 21, 2022;
- 4 • Intervenor Education Parties' Joinder in Defendants' Reply in Support of
- 5 Motion for Summary Judgment and Supplemental Brief, filed January 21,
- 6 2022; and,
- 7 • Plaintiffs' Reply in Support of Motion for Summary Judgment, filed
- 8 January 21, 2022.

9 In addition to consideration of the filed materials, on February 4, 2022, the Court heard
10 oral argument on the parties' respective motions from all parties and from interested *amici*.

11 THE COURT FINDS that there are no genuine issues of material fact in dispute and
12 that Plaintiffs are entitled to judgment as a matter of law. The Court's letter ruling dated March
13 1, 2022, is attached and incorporated into this Order by reference.

14 NOW THEREFORE, it is ORDERED that:

- 15 1. Plaintiffs' Motion for Summary Judgment is GRANTED.
- 16 2. Defendants' and Intervenors' Motion for Summary Judgment is DENIED.
- 17 3. ESSB 5096 is declared unconstitutional and invalid and, therefore, is void and
18 inoperable as a matter of law.

19
20 Dated this 22 of March, 2022.



21
22 _____
23 HONORABLE BRIAN C. HUBER
24 SUPERIOR COURT JUDGE

1 ***Presented by:***

2 ORRICK, HERRINGTON & SUTCLIFFE LLP

3
4 By */s/ Robert M. McKenna*

5 Robert McKenna, WSBA No. 18327
6 Daniel J. Dunne, Jr., WSBA No. 16999
7 Aaron P. Brecher, WSBA No. 47212
8 701 Fifth Avenue, Suite 5600
9 Seattle, WA 98104
10 Telephone (206) 839-4300
11 Fax (206) 839-4301
12 rmckenna@orrick.com
13 ddunne@orrick.com
14 abrecher@orrick.com

15 FOREMAN, HOTCHKISS, BAUSCHER &
16 ZIMMERMAN, PLLC
17 Allison R. Foreman (WSBA No. 41967)
18 124 N Wenatchee Avenue, Suite A
19 Wenatchee, WA 98801
20 Telephone (509) 662-9602
21 Fax (509) 662-9606
22 allison@lhbzlaw.com

23 *Attorneys for Clayton Plaintiffs*

24 LANE POWELL PC

25 By: */s/ Callie A. Castillo*

26 Scott M. Edwards, WSBA No. 26455
27 Callie A. Castillo, WSBA No. 38214
28 Lane Powell PC
1420 5th Avenue, Suite 4200
Seattle, WA 98101
Telephone: 206.223.7000
Facsimile: 206.223.7107
edwardss@lanepowell.com
castilloc@lanepowell.com

Eric R. Stahlfeld, WSBA No. 22002
Freedom Foundation
P.O. Box 552, Olympia, WA 98507
Telephone 360.956.3482
Facsimile 360.839.2970
estahlfeld@freedomfoundation.com

Attorneys for Quinn Plaintiffs

1 *Approved as to Form;*
2 *Notice of Presentation Waived:*

3 ROBERT W. FERGUSON
4 Attorney General

5
6 By: */s/ Cameron G. Comfort*

7 Noah G. Purcell, WSBA No. 43492
8 Jeffrey T. Even, WSBA No. 20367
9 Peter B. Gonick, WSBA No. 25616
10 Cameron G. Comfort, WSBA No. 15188
11 Charles Zalesky, WSBA No. 37777
12 Revenue and Finance Division
13 7141 Clearwater Dr. SW
14 PO Box 40123
15 Olympia, WA 98504-0123
16 (360) 753-5515
17 Noah.purcell@atg.wa.gov
18 Jeffrey.even@atg.wa.gov
19 Peter.gonick@atg.wa.gov
20 Cam.comfort@atg.wa.gov
21 Chuck.zalesky@atg.wa.gov

22 *Attorneys for Defendants*

23 PACIFICA LAW GROUP LLP

24
25 By: *s/ Paul J. Lawrence*

26 Paul J. Lawrence, WSBA No. 13557
27 Sarah Washburn, WSBA No. 44418
28 1191 Second Ave., Suite 2000
Seattle, WA 98101-3404
(206) 245-1700
Paul.Lawrence@pacificallawgroup.com
Sarah.Washburn@pacificallawgroup.com

Attorneys for Intervenor Education Parties

EXHIBIT

B

RECEIVED

ATTORNEY GENERALS OFFICE
REVENUE AND FINANCE DIVISION

3-2-22

Brian C. Huber

Douglas County Superior Court Judge



Tony DiTommaso
Court Commissioner

Phil Safar
Court Commissioner


Steve Clem
Court Commissioner

Jo L. Jackson
Court Administrator

FILED

March 1, 2022

MAR 01 2022

JENN BIGGAR
DOUGLAS COUNTY CLERK
WATERVILLE, WA
BY  DEPUTY

Noah Purcell, AAG
Chuck Zalesky, AAG
Washington Attorney General's
Office
PO Box 40100
Olympia, WA 98504-0100
noah.purcell@atg.wa.gov

Callie A. Castillo
Lane Powell, PC
1420 – 5th Avenue, Suite 4200
Seattle, WA 98101-2375
CastilloC@lanepowell.com

Eric R. Stahfield
c/o The Freedom Foundation
PO Box 552
Olympia, WA 98507
Estahlfeld@freedomfoundation.com

Joseph Henchman
National Taxpayers Union Foundation
jbh@ntu.org

Jackson Wilder Maynard, Jr.
Nikky Castillo
Brooke Frickleton
Building Industry Association of Washington
300 Deschutes Way SW, Suite 300
Tumwater, WA 98501
JacksonM@biaw.com
BrookeF@biaw.com
NikkyC@biaw.com

Robert M. McKenna
Orrick, Herrington & Sutcliffe, LLP
701 – 5th Avenue, Suite 5600
Seattle, WA 98104
rmckenna@orrick.com

Gregory J. Wong
Pacifica Law Group, LLP
1191 – 2nd Avenue, Suite 2000
Seattle, WA 98101-3404
greg.wong@pacificalawgroup.com

Steve Crossland
Crossland & Evans, PLLC
1500 Alpensee Strasse
Leavenworth, WA 98826
steve@crosslandlaw.net

Allison Foreman
Foreman Hotchkiss Bauscher &
Zimmerman, PLLC
124 North Wenatchee Avenue
Wenatchee, WA 98801
allison@fzbzlaw.com

**Re: Quinn/Clayton, et. al. v. State of Washington, et. al.
Douglas County Cons. Cause Nos. 21-2-0075-09 & 21-2-00087-09**

Noah Purcell, AAG
Charles Zalesky, AAG
Callie A. Castillo
Eric R. Stahfeld
Robert M. McKenna
Gregory J. Wong
Building Industry of WA
National Taxpayers Union
Allison Foreman
Steve Crossland
March 1, 2022
Page 2

Dear Counsel,

This letter sets forth the Court's rulings on the parties' Cross Motions for Summary Judgment which were argued at the February 4, 2022 hearing.

In this letter the Court will start by discussing its analysis and rulings on the State's Motion to Strike the Declaration of Jason Mercier. Then the Court will address the State's argument that the Plaintiffs lack standing to bring this lawsuit. Finally, the Court will outline its rulings on the parties' Cross Motions for Summary Judgment.

State's Motion to Strike Mercier Declaration

The State and the Plaintiffs have each filed a Motion for Summary Judgment under CR 56. That rule states that affidavits or declarations must set forth facts showing that the affiant is competent to testify as a witness, and must be limited to "such facts as would be admissible in evidence." Billings v. Town of Steilacoom, 2 Wash. App. 2d 1 (Div. 2 2017). Factual matters that would be inadmissible if offered at trial will be disregarded by the court in a summary judgment proceeding. See, e.g., Germain v. Pullman Baptist Church, 96 Wash. App. 826 (Div. 3 1999) (trial court properly refused to consider affidavit from unqualified expert). If a declaration or affidavit contains both admissible and inadmissible portions, only the inadmissible portions should be stricken. See, e.g., Simmons v. City of Othello, 199 Wash. App. 384 (Div. 3 2017) (irrelevant statements and legal conclusions in summary judgment affidavit properly stricken).

The State has moved to strike the Declaration of Jason Mercier from the record, arguing that it is inadmissible and cannot be considered under CR 56. The State's argument is that Mr. Mercier's statements, as well as the declaration exhibits, constitute inadmissible hearsay. State's Opp. Brief filed 1-10-22 at n. 4 on p. 18.

The Plaintiffs counter by arguing as follows:

Mr. Mercier testifies as an expert on tax policy. Mercier Decl. ¶ 2. His opinions on taxing capital gains are based on a state-by-state survey he conducted. See *id.* ¶¶ 1, 4-5. The survey results are "of a type

Noah Purcell, AAG
Charles Zalesky, AAG
Callie A. Castillo
Eric R. Stahfeld
Robert M. McKenna
Gregory J. Wong
Building Industry of WA
National Taxpayers Union
Allison Foreman
Steve Crossland
March 1, 2022
Page 3

reasonably relied upon by experts in the particular field in forming opinions or inferences on the subject.” See State v. Mohamed, 186 Wn.2d 235, 242, 375 P.3d 1068 (2016) (quoting ER 703). His general opinion is admissible even if the underlying correspondence is not. Additionally, Exhibit C to the Mercier declaration is a report on ESSB 5096 prepared by the Department of Revenue that is an admission of a party-opponent. ER 801(d)(2).

Plaintiffs’ Reply filed 1-21-22, at n. 9 on p. 11.

The Motion to Strike is granted in part and denied in part. The following portions of the Mercier declaration are hereby deemed to be inadmissible hearsay and will be stricken:

- The last two sentences of paragraph 4 (“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:”)
- The table that follows paragraph 4 at page 2 line 1 through page 4 line 22.
- Paragraph 7 and the referenced **Exhibit D** (letter from IRS to U.S. Congressman Dan Newhouse).

Paragraphs 1 and 2 contain no inadmissible hearsay. Nor does paragraph 3 which merely attaches a copy of ESSB 5096. The first two sentences of paragraph 4 contain no inadmissible hearsay, although they describe how Mr. Mercier gathered the data underlying his expert testimony under ER 702. This Court deems paragraphs 1 through 3 and the first two sentences of paragraph 4 to be admissible.

The last two sentences of paragraph 4, as well as the table that follows paragraph 4, are deemed to be inadmissible and will be stricken even though Mr. Mercier appears to have considered the various states’ survey responses as a basis for his testimony in paragraph 5. See ER 703 (providing in part that “[i]f reasonably relied upon by experts in the particular field in forming opinions or inferences on the subject, the facts or data [upon which the expert bases his/her opinion or inference] need not be admissible in evidence.”) In other words, this Court may consider any properly admitted expert

Noah Purcell, AAG
Charles Zalesky, AAG
Callie A. Castillo
Eric R. Stahfeld
Robert M. McKenna
Gregory J. Wong
Building Industry of WA
National Taxpayers Union
Allison Foreman
Steve Crossland
March 1, 2022
Page 4

testimony from Mr. Mercier, but the data underlying that testimony need not be admissible.

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 which provides as follows:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

ER 702. This Court finds that paragraph 5 sets forth "scientific, technical, or other specialized knowledge" that satisfies the requirements of ER 702. To the extent the State argues paragraph 5 should be disregarded because Washington's tax statutes may be different from the tax statutes in those other states, such objection goes to the weight of the evidence rather than to its admissibility.

Paragraph 6 and the referenced Exhibit C are both deemed to be admissible. The Washington State Department of Revenue's (DOR's) analysis of ESSB 5096 provides in pertinent part as follows:

Another issue with the charitable deduction [set forth in Section 9 of ESSB 5096] is that, because it is a common feature of income taxes, it may increase the chance that the courts will determine that the Washington capital gains tax is an income tax. At least one lawsuit has already been filed seeking to invalidate the capital gains tax on several grounds, including that the tax is an income tax and, as such, violates article VII, sections 1 and 2 of the Washington Constitution, because the tax is non-uniform and the tax rate exceeds the 1% aggregate limit.

It is impossible to quantify the extent to which the charitable deduction may strengthen the argument that the capital gains tax is an income tax.

Noah Purcell, AAG
Charles Zalesky, AAG
Callie A. Castillo
Eric R. Stahfeld
Robert M. McKenna
Gregory J. Wong
Building Industry of WA
National Taxpayers Union
Allison Foreman
Steve Crossland
March 1, 2022
Page 5

All we can say is that the charitable deduction likely incrementally strengthens the argument that the capital gains tax is an income tax. The charitable deduction is not the only provision in the bill that opponents of the capital gains tax can point to in support of their argument that the capital gains tax is an income tax.

DOR Bill Report on ESSB 5096, at pp. 5-6, attached as Exhibit C to Mercier declaration. This Court deems the DOR Bill Report to be admissible as an admission of a party-opponent under ER 801(d)(2).

As mentioned above, paragraph 7 and the referenced Exhibit D (the letter from the IRS to Rep. Newhouse stating, *inter alia*, that under federal law “capital gains are treated as income under the tax code and taxed as such”) is inadmissible hearsay and will be stricken. Mr. Mercier’s declaration merely attaches a copy of Exhibit D without providing any testimony or other information relating to it, other than a statement that it was obtained through a public records request. This Court finds no basis to deem paragraph 7 or Exhibit D to be admissible.

Cross Motions for Summary Judgment

1. The State’s Objection Re: Plaintiffs’ Standing.

This Court once again rejects the State’s argument that none of the Plaintiffs have standing to bring this facial challenge to the constitutionality of ESSB 5096. The Court previously rejected the State’s arguments on standing that were asserted as part of the State’s Rule 12 Motion to Dismiss.

It is true that the pending Cross Motions for Summary Judgment have been brought under CR 56 rather than under CR 12. However, under CR 56 the Court must still view the evidence in a light most favorable to the non-moving party for purposes of the motion. See, e.g., Afoa v. Port of Seattle, 176 Wn.2d 460 (2013).

The Court incorporates by this reference its analysis as set forth in its letter ruling dated September 10, 2021 in which it rejected the State’s prior arguments and objections

Noah Purcell, AAG
Charles Zalesky, AAG
Callie A. Castillo
Eric R. Stahfeld
Robert M. McKenna
Gregory J. Wong
Building Industry of WA
National Taxpayers Union
Allison Foreman
Steve Crossland
March 1, 2022
Page 6

regarding Plaintiffs' standing to bring this lawsuit. The Court also notes that multiple additional sworn declarations filed since this Court issued that letter ruling only further support this Court's finding that the Plaintiffs have standing.

2. The Scope of Matters Considered by this Court.

The Court has reviewed a wealth of material filed in connection with the pending motions. Much of the information and argument, particularly in some of the amicus briefs but also in the State's filings,¹ centered around discussions involving policy considerations such as whether schools are appropriately funded and whether the new tax statute makes Washington's tax structure more fair.

This Court is not permitted to consider such policy considerations when ruling on the constitutionality of ESSB 5096.

It is not the function of [the courts] . . . to consider the propriety of the tax, or to seek for the motives or to criticize the public policy which may have prompted adoption of the legislation. [Citation omitted.]

State ex rel Namer Inv. Corp. v. Williams, 73 Wn.2d 1, 7 (1968). Accordingly, this Court's sole function in these consolidated cases is to provide a ruling, at the trial court level, whether ESSB 5096 is unconstitutional pursuant to established Washington caselaw, without any regard to any motives or public policy considerations that may have led to the adoption of ESSB 5096.

3. Analysis of Cross Motions for Summary Judgment.

Under Washington law, it is up to the courts to decide whether a tax law is constitutional. Kunath v. City of Seattle, 10 Wn.App.2d 205 (2019) involved a challenge to a city ordinance that imposed a graduated income tax on high-income residents. Division I of the Washington State Court of Appeals stated in Kunath:

¹ See, e.g., State's MSJ filed 12-6-21, at 2-6.

Noah Purcell, AAG
Charles Zalesky, AAG
Callie A. Castillo
Eric R. Stahfeld
Robert M. McKenna
Gregory J. Wong
Building Industry of WA
National Taxpayers Union
Allison Foreman
Steve Crossland
March 1, 2022
Page 7

Before addressing the tax's statutory and constitutional validity, we must address [plaintiff] Shock's threshold contention that these issues are nonjusticiable political questions. Shock contends: "The City's request that this Court reverse nearly a century of case law holding that income is personal property, and therefore subject to the Constitution's uniformity requirement, is not appropriate for judicial determination." But it is well settled that Washington courts have the power to hear constitutional challenges to tax laws, which is why we are guided by "nearly a century of case law" on these issues. The issues raised in this case are justiciable. [Emphasis supplied; internal citations omitted.]

Kunath, at 216. See also Wash. Const. art. IV § 6 and RCW 2.08.010 (both of which provide that superior courts have original jurisdiction over "the legality of any tax").

This Court has reviewed the "nearly a century of case law" as referenced by the Kunath court, see list of appellate decisions recited in Kunath at p. 213-16. That caselaw makes clear that the starting point for this Court's analysis is certain language that was added to the Washington State Constitution by a constitutional amendment adopted in 1930. The Kunath court stated:

Since 1930, article VII, section 1 of our state constitution has required that "[a]ll taxes shall be uniform upon the same class of property within the territorial limits of the authority levying the tax and shall be levied and collected for public purposes only. The word 'property' as used herein shall mean and include everything, whether tangible or intangible, subject to ownership."

Kunath, at 213. See also article VII, section 2 of the Washington State Constitution (placing 1% annual limit on the aggregate of all tax levied on real and personal property).

Three years after article VII, section 1 was adopted, Washington voters passed a statewide initiative levying a graduated tax on net income. Taxpayers challenged the new graduated tax statute, arguing it was unconstitutional because it taxed property and

Noah Purcell, AAG
Charles Zalesky, AAG
Callie A. Castillo
Eric R. Stahfeld
Robert M. McKenna
Gregory J. Wong
Building Industry of WA
National Taxpayers Union
Allison Foreman
Steve Crossland
March 1, 2022
Page 8

therefore violated the uniformity requirement set forth in article VII, section 1. In Culliton v. Chase, 174 Wash. 363 (1933), the Washington Supreme Court declared the statute to be unconstitutional. In so doing, the Culliton court made clear that income taxes are different from excise taxes inasmuch as excise taxes are levied on an activity (e.g., the sale, consumption or manufacture of goods) rather than on income generated by an activity. Culliton, at 377. Next the Culliton court characterized income as within the broad definition of “property” and ruled the new statute to be unconstitutional because the graduated income tax was not uniform as required by article VII, section 1. Culliton, at 378-79.

The Washington Supreme Court’s decision in Jensen v. Henneford, 185 Wash. 209 (1936) was issued only three years after Culliton. Jensen involved a challenge to a 1935 tax statute that levied a graduated income tax on every Washington resident “for the privilege of receiving income therein while enjoying the protection of its laws.” Jensen, at 212 (quoting Laws of 1935, ch. 178, Sec. 2). As in the instant case, the State in Jensen argued that the new tax statute should be deemed an excise tax (which would be constitutional) and not an income tax (which would be unconstitutional). The Jensen court rejected the State’s argument, stating that “[t]he character of a tax is determined by its incidents, not by its name.” Jensen, at 217. Because the new statute taxed income below \$4,000 at three percent and income above \$4,000 at four percent, and because Culliton had established that income constitutes property for purposes of Article VII, Section 1, the Jensen court ruled the 1935 tax statute to be an unconstitutional non-uniform tax on property. Jensen, at 220.

These principles were revisited in 1951 when the Washington Supreme Court decided the case of Power, Inc. v. Huntley, 39 Wn.2d 191 (1951). In 2019 the Kunath court summarized Power as follows:

In 1951, Power, Inc. v. Huntley evaluated a statewide “corporation excise tax” that levied a four percent tax on a corporation’s net income “for the privilege of exercising its corporate franchise in this state or for the privilege of doing business in this state.” The tax did not apply to sole proprietorships or partnerships. The central question before the court was whether the tax fell on income rather than being a true excise. If a tax on

Noah Purcell, AAG
Charles Zalesky, AAG
Callie A. Castillo
Eric R. Stahfeld
Robert M. McKenna
Gregory J. Wong
Building Industry of WA
National Taxpayers Union
Allison Foreman
Steve Crossland
March 1, 2022
Page 9

income, then it violated the uniformity clause of article VII, section 1 by affecting only certain forms of corporations and not other companies in competition with them. The Power court set aside the language of the tax, analyzed its incidents, and concluded it was “a mere property tax masquerading as an excise.” Under the taxing scheme, a Washington corporation with zero net income would not pay any income tax, while a foreign corporation doing business in Washington would pay taxes on activities unconnected to the privilege of conducting business in Washington. Also, the scheme hewed closely to federal corporate income tax law, illustrating its true nature as an income tax. The court concluded the tax was a nonuniform property tax and therefore unconstitutional. [Citations omitted.]

Kunath, at 215. One way to summarize Power would be to say that when deciding a challenge as to the facial constitutionality of a tax statute (specifically including where the State argues it is an excise tax and not an income tax), the court must look through any labels the State has used to describe the statute, analyze the “incidents” of the statute, and determine whether it is a “property tax masquerading as an excise.” *Id.*

As Power makes clear, rather than merely relying upon whatever label or characterization the State has used to describe a tax statute, it is the State’s choices about “who is being taxed, what is being taxed, and how the tax is measured” that determine its “incidents” and whether it should be deemed a tax on income as opposed to an excise. See Kunath, at 221. In the instant case, some of the most significant “incidents” of ESSB 5096 show the hallmarks of an income tax rather than an excise tax. They include the following:

- It relies upon federal IRS income tax returns that Washington residents must file and is thus derived from a taxpayer’s annual federal income tax reporting. See Kunath, at 215 (“scheme [that] hewed closely to federal corporate income tax law” held to be an unconstitutional property tax).
- It levies a tax on the same long-term capital gains that the IRS characterizes as “income” under federal law.

Noah Purcell, AAG
Charles Zalesky, AAG
Callie A. Castillo
Eric R. Stahfeld
Robert M. McKenna
Gregory J. Wong
Building Industry of WA
National Taxpayers Union
Allison Foreman
Steve Crossland
March 1, 2022
Page 10

- It is levied annually (like an income tax), not at the time of each transaction (like an excise tax).
- It is levied not on the gross value of the property sold in a transaction (like an excise tax as demonstrated by the examples cited by the State²), but on an individual's net capital gain (like an income tax).
- Like an income tax, it is based on an *aggregate* calculation of an individual's capital gains over the course of a year from all sources, taking into consideration various deductions and exclusions, to arrive at a single annual taxable dollar figure.
- Like an income tax, it is levied on all long-term capital gains of an individual, regardless whether those gains were earned within Washington and thus without concern whether the State conferred any right or privilege to facilitate the underlying transfer that would entitle the State to charge an excise. See, e.g., Jensen, at 218 ("When a tax is, in truth, levied for the exercise of a substantive privilege granted or permitted by the state, the tax may be considered as an excise tax.")
- Like an income tax and unlike an excise tax, the new tax statute includes a deduction for certain charitable donations the taxpayer has made during the tax year.³

² See, e.g., State's MSJ filed 12-6-21, at pp. 11-16, discussing *inter alia*, Morrow v. Henneford, 182 Wash. 625, 631 (1935) (upholding business and occupation tax imposed on the privilege of engaging in business activity in the state and measured by the total gross income earned from business activity in Washington); Mahler v. Tremper, 40 Wn.2d 405 (1952) (upholding real estate excise tax measured by selling price of the property); Black v. State, 67 Wn.2d 97, 98 (1965) (upholding sales tax imposed on lease and measured by total cost of the lease); Wash. Pub. Ports Ass'n v. Dept of Revenue, 148 Wn.2d 637, 642-43 (2003) (upholding leasehold excise tax measured by total taxable rent); High Tide Seafoods v. State, 106 Wn.2d 695, 700 (1986) (measure of tax on enhanced fish food was total value of the fish at first possession); Sheehan v. Cent. Puget Sound Reg'l Transit Auth., 155 Wn.2d 790, 800 (2005) (measure of motor vehicle excise tax was value of the vehicle at registration); In re Estate of Hambleton, 181 Wn.2d 802 (2014) (upholding estate tax that was measured by the value of the property at the time of decedent's death and is apportioned to the extent any of the property was located outside Washington).

³ See Section 9 of ESSB 5096, entitled "Additional Deduction for Charitable Donations." See also, Washington State Department of Revenue (DOR) bill report on ESSB 5096, at 5-6, attached at Exhibit C to Declaration of Jason Mercier, which as explained earlier, the Court deems to be admissible as an admission of a party opponent under ER 801(d)(2). The DOR bill report states in part:

Noah Purcell, AAG
Charles Zalesky, AAG
Callie A. Castillo
Eric R. Stahfeld
Robert M. McKenna
Gregory J. Wong
Building Industry of WA
National Taxpayers Union
Allison Foreman
Steve Crossland
March 1, 2022
Page 11

- If the legal owner of the asset who transfers title or ownership is not an individual, then the legal owner is not liable for the tax generated in connection with the transaction, unlike the excise taxes identified by the State.

The State characterizes the new tax statute as a “tax that applies on the sale or transfer of property” and argues that such taxes are excise taxes. State’s MSJ filed 12-6-21, at 1. But as noted above, the new tax is not levied upon “the sale or transfer” of capital assets. Instead, the new tax statute levies a tax on receipt, and thus ownership, of capital gains. See Jensen v. Henneford, 185 Wash. 209, 219 (1936) (“The right to receive” is an incident of property ownership).

In attempting to label the new tax as an excise and not an income tax, the State also argues that the tax “applies only upon the voluntary sale of a long-term asset.” State’s MSJ filed 12-6-21 at 9-10. However, the new tax would be levied not only upon capital gains from voluntary transactions, but also in a number of scenarios where the sale or transfer of a capital asset would occur without any voluntary act by the transfer, e.g., transactions involving a minority shareholder, non-managing member of a limited liability company, or trust beneficiary. To the extent the new tax is unavoidable – at least for some taxpayers – it constitutes an “absolute and unavoidable” tax that meets the definition of a property tax, see authorities cited in Plaintiff’s MSJ filed 12-6-21 at 9-

Another issue with the charitable deduction is that, because it is a common feature of income taxes, it may increase the chance that the courts will determine that the Washington capital gains tax is an income tax. At least one lawsuit has already been filed seeking to invalidate the capital gains tax on several grounds, including that the tax is an income tax and, as such, violates articles VII, sections 1 and 2 of the Washington Constitution, because the tax is non-uniform and the tax rate exceeds the 1% aggregate rate limit.

It is impossible to quantify the extent to which the charitable deduction may strengthen the argument that the capital gains tax is an income tax. All we can say is that the charitable deduction likely incrementally strengthens the argument that the capital gains tax is an income tax. The charitable donation deduction is not the only provision in the bill that opponents of the capital gains tax can point to in support of their argument that the capital gains tax is an income tax.

Noah Purcell, AAG
Charles Zalesky, AAG
Callie A. Castillo
Eric R. Stahfeld
Robert M. McKenna
Gregory J. Wong
Building Industry of WA
National Taxpayers Union
Allison Foreman
Steve Crossland
March 1, 2022
Page 12

10, that is subject to the uniformity and limitation requirements of article VII, sections 1 and 2 of the Washington State Constitution.

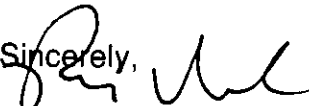
ESSB 5096 is properly characterized as an income tax pursuant to Culliton, Jensen, Power and other applicable Washington caselaw, rather than as an excise tax as argued by the State. As a tax on the receipt of income, ESSB 5096 is also properly characterized as a tax on property pursuant to that same 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%.

CONCLUSION

For the reasons set forth above, this Court grants Plaintiffs' Motion for Summary Judgment and denies the State's Motion for Summary Judgment. Having ruled that ESSB 5096 is invalid because it violates the uniformity and limitation requirements of article VII, sections 1 and 2 of the Washington State Constitution, this Court does not reach the additional arguments raised by the parties.

It is hoped that the parties will seek to agree upon the form of the written orders that will memorialize the Court's rulings set forth in this letter. If a presentment hearing is needed, it may be scheduled as a special set hearing by emailing the Court Administrator.

Sincerely,


Brian C. Huber
Judge of the Superior Court
BCH/jlj
cc: Court File