

Is the proposed tax on capital gains an excise tax or an income tax?

By Jason Mercier, Director, Center for Government Reform

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Key Findings

1. **A bill proposed by Democrats in the state House proposes to enact a capital gains tax in Washington.**
2. **If passed by the legislature and signed by the Governor, it would face an immediate court challenge.**
3. **The uniformity clause of the state constitution requires that property tax payers must be treated equally, and the courts have found that income is property.**
4. **Since a nonuniform tax on income is not allowed, supporters say a capital gains tax would be an excise tax, and thus allowed under the state constitution.**
5. **However, a survey of all 50 states conducted by Washington Policy Center finds that no state treats a capital gains tax as an excise tax.**
6. **The survey found that all states treat capital gains as income for tax purposes, and that the proposed capital gains tax is unconstitutional in Washington state.**

Introduction

A bill introduced by Democratic leaders in the state House, HB 2186, would impose a special state tax on the earnings that some people receive from capital investments. The sponsors describe the bill as an excise tax, not an income tax.

The distinction is important because the uniformity clause of the state constitution bars the imposition of a property tax that treats citizens unequally. The state supreme court has ruled repeatedly that income is property.¹ In addition, a state income tax is highly unpopular; Washington voters have rejected it nine times.

Any capital gains tax bill passed by the legislature and signed by Governor Inslee would face an immediate court challenge. Whether it would survive a constitutional challenge hinges on how judges would interpret the tax.

So the important question arises: Is the proposed capital gains tax an excise tax or an income tax?

To answer that question I contacted the departments of revenue of all fifty states. In every case, revenue officials reported that they consider a tax on the profits from capital investment to be an income tax. In a few instances, state revenue officials actually chuckled at my question, because they thought the answer was obvious.

All state revenue departments describe capital gains as income. Those that tax capital gains do so through their income tax codes. No state taxes capital gains as an excise tax. States without income taxes described their

1 “Constitutionality of Initiative 1098,” by former state supreme court justice Philip A. Talmadge, legal analysis, Washington Policy Center, August 19, 2010, at www.washingtonpolicy.org/library/docLib/talmadge-letter-initiative-1098.pdf.

treatment of capital gains income similar to the way Florida officials did:

“There is currently no Florida income tax for individuals and, therefore, no Florida capital gains tax for individuals.”

The best response describing the difference between an excise tax and an income tax was provided by Illinois:

“Capital gains are included in federal taxable income, against which Illinois income tax is determined. Illinois does not impose an excise tax on any form of income. Excise taxes are imposed on items of consumption, such as the liquor tax, cigarette tax and utilities taxes.”

Here are direct quotes from officials at each state revenue department describing how they treat capital gains income. Quotes are from a survey I recently conducted of all 50 states.²

Survey question: Does your state tax capital gains income? If yes, do you tax it as an excise tax or income tax?

Alabama Department of Revenue: “Capital gains are reported on the income tax returns.”

Alaska Department of Revenue: “No personal capital gains tax. Alaska currently does not have a personal income tax.”

Arizona Department of Revenue: “Arizona taxes capital gains as an income tax.”

Arkansas Department of Finance and Administration: “[Capital gains taxed] as income tax.”

California Franchise Tax Board: “California taxes capital gains as an income tax and they are taxed at the same rate as ordinary income.”

Colorado Department of Revenue: “Colorado treats qualified capital gains tax as an income tax deduction.” Note: This

mean qualified capital gains are not taxed in Colorado.

Connecticut Department of Revenue Services: “For Connecticut tax purposes, capital gains are part of income tax.”

Delaware Division of Revenue: “Capital gains are reported on income taxes in Delaware.”

Florida Department of Revenue: “There is currently no Florida income tax for individuals and, therefore, no Florida capital gains tax for individuals.”

Georgia Department of Revenue: “No separate tax on capital gains. Income reported for federal income taxes, however, is taxed via Georgia income tax.”

Hawaii Department of Taxation: “Capital gains are taxed as an income tax in Hawaii.”

Idaho State Tax Commission: “Idaho taxes capital gains as income tax.”

Illinois Department of Revenue: “Capital gains are included in federal taxable income, against which Illinois income tax is determined. Illinois does not impose an excise tax on any form of income. Excise taxes are imposed on items of consumption, such as the liquor tax, cigarette tax and utilities taxes.”

Indiana Department of Revenue: “[Capital gains] taxed as income at Indiana’s flat rate.”

Iowa Department of Revenue: “[Capital gains are] part of the income tax system.”

Kansas Department of Revenue: “Kansas taxes capital gains as an income tax.”

Kentucky Department of Revenue: “Capital gains are subject to Kentucky income tax. For resident individuals, Kentucky capital gains are included in income and taxed as such.”

Louisiana Department of Revenue: “Capital gains are taxed as income.”

Maine Revenue Services: “Capital gain, to the extent that it is included in the federal adjusted gross income, is taxed as part of the

² Based on interviews with state officials conducted by phone and e-mail. Responses current as of April 10, 2017.

taxable income, at the same tax rate as other income tax.”

Maryland Comptroller: “Maryland generally includes capital gain (or losses) in income to the extent such income or losses were included in federal adjusted gross income. There is no preferential treatment accorded them by Maryland by taxing them at a different rate.”

Massachusetts Department of Revenue: “Massachusetts gross income includes capital gains. Capital gains are taxed as income rather than a separate excise tax on each transaction.”

Michigan Department of Treasury: “Michigan taxes capital gains through an income tax.”

Minnesota Department of Revenue: “Minnesota taxes capital gains like income. The rate for capital gains income is the same in Minnesota as wage income.”

Mississippi Department of Revenue: “Capital gains are taxed as part of Mississippi income tax code.”

Missouri Department of Revenue: “Capital gains are taxed as normal income as part of Missouri income taxes.”

Montana Department of Revenue: “Montana taxes capital gains as an income tax, however, taxpayers receive a nonrefundable credit against their entire tax liability that is equal to 2% of the amount of capital gains reported on the taxpayer’s income tax return.”

Nebraska Department of Revenue: “Nebraska taxes capital gains as an income tax - both corporate and individual income taxes.”

Nevada Department of Taxation: “Nevada does NOT have a capital gains tax similar to federal income tax.”

New Hampshire Department of Revenue Administration: “No capital gains tax in New Hampshire.” Note: New Hampshire does not have general income taxes.

New Jersey Division of Taxation: “Capital gains are subject to income tax in New Jersey.”

New Mexico Taxation and Revenue: “New Mexico doesn’t have a capital gains tax.” Note: State income tax but no capital gains tax since they are subject to deduction.

New York Department of Taxation and Finance: “New York taxes capital gains as an income tax.”

North Carolina Department of Revenue: “In North Carolina, capital gains are a component of a taxpayer’s adjusted gross income for individual income tax purposes and federal taxable income for corporate income tax purposes.”

North Dakota State Tax Department: “North Dakota essentially levies an income tax on capital gains to the same extent the federal government does.”

Ohio Department of Taxation: “Capital gains are taxed as an income tax.”

Oklahoma Tax Commission: “Capital gains are treated as ordinary income and are taxable under our Income Tax Code.”

Oregon Department of Revenue: “If it’s a capital gain for your personal income tax then it would be taxed under your Oregon personal income tax.”

Pennsylvania Department of Revenue: “For Pennsylvania personal income tax purposes, PA taxes gains on the sale, exchange or disposition of property at the same tax rate (3.07%) as all other taxable income for personal income tax purposes.”

Rhode Island Division of Taxation: “RI does not tax capital gains as a separate tax. Taxed as income by income tax code.”

South Carolina Department of Revenue: “[Tax capital gains] as income tax.”

South Dakota Department of Revenue: “South Dakota does not have an income tax and does not tax capital gains income.”

Tennessee Department of Revenue: “Tennessee does not have a general income tax. Instead, the Hall income tax is imposed only on bond interest and dividends from

stock. Capital gains are therefore generally not subject to taxation in Tennessee.” Note: Tennessee is phasing out the Hall tax by 2022.

Texas Comptrollers Office: “No capital gains tax. Texas does not have a state income tax.”

Utah State Tax Commission: “Utah taxes capital gains as an income tax.”

Vermont Department of Taxes: “Capital gains are taxed as income. Vermont does not have an excise tax.”

Virginia Department of Taxation: “Virginia doesn’t have a special capital gains rate. Capital gains are subject to income taxation at the same rates as all other income.”

Washington Department of Revenue: “Washington does not currently tax capital gains, and it does not have an income tax.”

West Virginia Department of Revenue: “We tax it [capital gains] as income tax.”

Wisconsin Department of Revenue: “Capital gains are taxed as part of the income tax computation.”

Wyoming Department of Revenue: “No capital gains tax because Wyoming does not have an income tax.”

*Jason Mercier is
Washington Policy Center’s
Center for Government
Reform Director.*

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