

The Washington State Capital Gains Tax May Have More Than Nine Lives - The Saga Continues With the State Attorney General Appealing to the Highest State Court

04.12.22 01.07.26

As I [previously reported](#), the Washington state capital gains tax has had a turbulent ride, commencing with a rough ride through the legislative process where it almost hit disastrous terrain on at least six (6) occasions. Then, it was hit with a lawsuit to strike it down as unconstitutional before Governor Inslee could even sign the legislation into law. Days later, it was sideswiped with a second lawsuit to end its short life.

As I reported on [March 2, 2022](#), the new tax regime took a near lethal blow when Douglas County Superior Court Judge Brian C. Huber struck down the newly enacted Washington state capital gains tax as unconstitutional.

Judge Huber concluded:

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 suspected by many local commentators, the state would not let the tax regime die without a fight. It is now seeking a higher court review of Judge Huber's ruling, hoping to bring life back into the tax.

On March 25, 2022, Attorney General Robert W. Ferguson filed a notice of appeal. Instead of appealing to the Washington Court of Appeals (the normal course of review), Mr. Ferguson filed a petition requesting the Washington State Supreme Court hear the case.

If the Washington Supreme Court denies the petition for review, the case may still be heard

by the Court of Appeals and then likely meander its way back to the state's highest court.

That could take years. So, in terms of judicial efficiency, one hopes that the Supreme Court agrees to hear the case.

While the case is pending a final outcome, the Washington Department of Revenue cannot assess and collect the new capital gains tax under ESSB 5096. The law was stricken by a court of competent jurisdiction as unconstitutional. So, as the attorney general has stated, an appeal directly to the Washington Supreme Court is conducive to judicial efficiency. I assume, however, another reason for the direct appeal exists - to speed up the process so, in the event the lower court's decision is overturned, the state can start assessing and collecting the new tax earlier than later. Keep in mind, the tax is now dead - it cannot arguably be revived on a retroactive basis. So, if it is ultimately overturned, the sooner the better for the state's tax coffers.

While we await the Washington Supreme Court's decision on whether it will hear the case, local voters are taking matters into their own hands, pursuing a non-judicial remedy. Several ballot measures to repeal the tax once and for all have been created and are currently circulating among voters in the state. Throughout history, Washingtonians have enjoyed life free of income taxes. One of the attorneys for the plaintiffs in the underlying lawsuit characterized the passage of the new tax as "incredibly disrespectful" in light of the fact that voters have repeatedly said no to a state income tax. In fact, as previously reported, on November 2, 2021, as part of the statewide general elections process, Washington voters were asked for their opinion on the capital gains tax.

State Measures - Advisory Vote No. 37

The legislature imposed, without a vote of the people, a 7% tax on capital gains in excess of \$250,000, with exceptions, costing \$5,736,000,000 in its first ten years, for government spending.

This tax increase should be:

___ *Repealed*

___ *Maintained*

652,065 voters or 62.99% of the voters that answered the question responded that the tax be repealed.
383,136 voters or 37.01% of the voters that answered the question responded that the tax be maintained.

It is possible that the voters in Washington will, before any appellate court has a chance to rule on the matter, decide the ultimate fate of the tax under a ballot measure.

These are interesting times in Washington state. The capital gains tax has already survived at least nine (9) attempts to strike it down and yet it keeps attempting to resuscitate itself. Will the Washington appellate courts or the voters of Washington end the saga? Time will tell!

Posted in [Legislation](#), [State and Local Tax](#), [Tax Laws](#)

Tagged as [Attorney General Robert W. Ferguson](#), [capital gains tax](#), [Douglas County Superior Court](#), [income tax](#), [SB 5096](#), [Unconstitutional](#), [Washington constitution](#), [Washington legislature](#), [Washington state](#), [Washington state capital gains tax](#), [Washington Supreme Court](#)

Authored by

[Larry J. Brant](#)

[Principal|Portland](#)

[503.553.3114 larry.brant@foster.com](#)