

## Income/Franchise:

### Washington DOR Implements Controversial Tax on Capital Gains, Including Online Payment System

*Capital Gains Tax*, Wash. Dept. of Rev. (2/23). Despite pending litigation initiated by a group of taxpayers challenging the validity of state legislation enacted in 2021 [see E.S.S.B. 5096 and previously issued Multistate Tax Alert (May 13, 2021) for more details on this state law, as well as previously issued Multistate Tax Alert (January 26, 2023) for more details on the pending litigation] that imposes a new Washington tax on long-term capital gains earned by some individuals from the sale or exchange of certain capital assets at the rate of 7% beginning January 1, 2022, the Washington Department of Revenue (Department) posted implementation guidance on the new tax reflecting how to file and pay the tax, as well as underlying penalties for noncompliance. According to the guidance, the tax takes effect on January 1, 2022, and the first payments are due on or before April 18, 2023.

URL: <https://dor.wa.gov/taxes-rates/other-taxes/capital-gains-tax>

URL: <https://app.leg.wa.gov/billsummary?BillNumber=5096&Year=2021&Initiative=false>

URL: <https://www2.deloitte.com/content/dam/Deloitte/us/Documents/Tax/washington-law-imposes-new-excise-tax-on-capital-gains.pdf>

URL: <https://www2.deloitte.com/content/dam/Deloitte/us/Documents/Tax/us-tax-multistate-tax-alert-washington-department-of-revenue-to-administer-capital-gains-tax-while-state-court-case-is-pending.pdf>

In 2022, a state superior (trial) court held that this new tax constitutes an “income tax” under state caselaw – rather than an “excise tax” as argued by the State of Washington (State) – that does not meet state constitutional requirements and, therefore, is unconstitutional and invalid. The State has since appealed the ruling to the Washington Supreme Court (Court). The Department explains that the validity of the tax is currently under review by the Court, “which has stayed the superior court decision.” While the stay “does not resolve the issues surrounding the constitutionality of the capital gains tax,” the Department states that it does preserve its ability to effectively administer and implement the tax and meet statutory obligations, including accepting tax payments, pending a final decision from the Court. As a result, Department explains that its online system is now available to report and pay the new tax. According to the Department, “if the Court eventually finds the statute to be unconstitutional, any tax payments received will be promptly refunded with interest.” Please contact us with any questions.

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