Judge John Ruhl
November 17, 2017 10:00 a.m.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

S. MICHAEL KUNATH,

Plaintiff,

v.

CITY OF SEATTLE,

Defendant.

NO. 17-2-18848-4 SEA

KUNATH'S RESPONSE TO SEATTLE'S MOTION FOR SUMMARY JUDGMENT AND CROSS MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

The City of Seattle's motion for summary judgment is as ham-handed and ill-conceived as the income tax ordinance. RCW 36.65.030 prohibits taxes on net income, and in its own motion, the City says that the Ordinance taxes some amounts that are "calculated on a net basis, i.e., total receipts of the business less expenses and deductions attributable to the business." But the City says that is not a problem because "although netting occurs, the netting only reflects that the taxpayer pays personal income taxes solely on actual profits, dividends, or other gain received." The City has admitted that the Ordinance taxes net income, and there really isn't anything to do except to point that out.

The City says that the income tax is not a property tax because income is not property. Washington courts have held for over a century that community income is community property, and that each spouse owns an undivided half interest in it. In addition, the United States Supreme Court took a case from Washington to answer the question, "What, then, is the law of Washington as to the

DAVIS LEARY
3233 56TH PL SW
Seattle, WA 98116
206-778-6696

ownership of community property and of community income including the earnings of the husband's and wife's labor?" *Poe v. Seaborn*, 51 S.Ct. 58, 282 U.S. 101, 75 L.Ed. 239 (1930). The Supreme Court said that "Without further extending this opinion, it must suffice to say that it is clear the wife has, in Washington, a vested property right in the community property equal with that of her husband, and in the income of the community, including salaries or wages of either husband or wife, or both." *Id.* at 111. The City's arguments that people do not own their own incomes is absurd in its best moments and painful most of the time.

Then the City says that it just realized the income tax is really an excise tax. That idea failed the last time a Washington city enacted an ordinance imposing an income tax. Seattle likes to think that it is blazing a new path with the Ordinance, but it is following an old trail. In 1951, Bellingham enacted an income tax and called it an excise tax. The Supreme Court shut that door once and for all, stating, "The right to earn a living by working for wages is not a 'substantive privilege granted or permitted by the state.'" *Cary v. City of Bellingham*, 41 Wn.2d 468, 472, 250 P.2d 114 (1952).

The fact that this case has attracted the attention of the press and many residents of Seattle does not mean that the Court needs to make something of the arguments that just isn't there. Seattle has not presented a colorable argument for any of its claims, and the Court should summarily grant summary judgment for Kunath.

II. FACTS

The facts relevant to this case primarily concern the background and history of RCW 36.65.030 and Section 1 of Title VII of the Washington constitution. To avoid repetition, the relevant facts are discussed in the Argument below.

III. STANDARDS ON CHALLENGES TO VALIDITY OF STATUTES.

This action presents both constitutional and statutory challenges to the Ordinance. The legal standards for those challenges are quite different.

A. Statutory Challenge.

Whether an ordinance is barred by a statute is a routine question of statutory interpretation. When interpreting a statute, courts first look for the statute's plain meaning, which they discern from the

DAVIS LEARY
3233 56TH PL SW
Seattle, WA 98116
206-778-6696

ordinary meaning of the language at issue, the context of the statute as a whole, and related statutory provisions. *State v. Jacobs*, 154 Wash.2d 596, 600, 115 P.3d 281 (2005). Moreover, "the legislature is presumed to be aware of its past legislation and judicial interpretations thereof." *Western Plaza, LLC v. Tison*, 184 Wn.2d 702, 722, 364 P.3d 76 (2015) (citation omitted); *Knack v. State Dept. of Retirement Systems*, 50 Wn.App. 622, 630, 750 P.2d 266 (1988). When a term is not defined in a statute, the Legislature is also "presumed to know the prior judicial use of the term." *State v. Vars*, 157 Wn.App. 482, 490, 237 P.3d 378 (2010). Courts also "presume that the legislature is aware of formal opinions issued by the attorney general." *Five Corners Family Farmers v. State*, 173 Wn.2d 296, 308, 268 P.3d 892 (2011).

B. Constitutional Challenge.

A party asserting that a statute is unconstitutional, on the other hand, bears a heavy burden because courts presume that legislative enactments are constitutional. *State v. Gresham*, 173 Wn.2d 405, 428, 269 P.3d 207 (2012). The party must prove "beyond a reasonable doubt" that the statute is unconstitutional, but in this context, that term refers to legal doubt rather than the factual doubt at issue in the criminal law standard of the same name. *Island County v. State*, 135 Wn.2d 141, 147, 955 P.2d 377 (1998).

IV. THE ORDINANCE IS BARRED BY RCW 36.65.030.

RCW 36.65.030 was enacted as Section 3 of Senate Substitute Bill 4313 in 1984. The Senate Bill Report, House Bill Report and Final Bill Report all summarize Section 3 by saying "A county, city, or combined city-county is prohibited from enacting an income tax." Exhibits 1, 2, 3. The bill itself stated that "A county, city, or city-county shall not levy a tax on net income." Exhibits 4, 5 and 6. SSB 4313 passed both houses by large majorities and was signed into law by Governor Spellman. The Act was codified as RCW Chapter 36.65, and section 3 was codified as RCW 36.65.030, which states: "A county, city, or city-county shall not levy a tax on net income." RCW 36.65.030.

The Seattle ordinance codified in SMC Chapter 56.65 is entitled "AN ORDINANCE imposing an income tax on high-income residents" and imposes a tax on resident taxpayers with total income over $250,000. The entire Ordinance is attached as Exhibit 7. The Ordinance levies the tax based on

DAVIS LEARY
3233 56TH PL SW
Seattle, WA 98116
206-778-6696

a taxpayer's "total income" as reported on Line 22 of IRS Form 1040. SMC 5.65.020, 5.65.030. Exhibit 7. The City says this is not net income, and that RCW 36.65.030 therefore does not prohibit the Ordinance.

Whether the Ordinance taxes next income depends on the definition of "net income" as that term is used in RCW 36.65.030 and whether the income reported on Line 22 of IRS form 1040 comes within that definition. The two issues are addressed separately and in order.

A. Net Income Means Gross Income Less Expenses Incurred to Obtain It.

The definition of net income for purposes of RCW 36.65.030 presents a straightforward question of statutory interpretation. Because RCW 36.65.030 does not define the term, the Court may consult dictionaries, case law and other appropriate sources to determine its plain and ordinary meaning." *State v. Jones*, 172 Wn.2d 236, 242, 257 P.3d 616 (2011); *State v. Bahl*, 164 Wn.2d 739, 754, 193 P.3d 678 (2008).

The City argues that the Court should use Black's Law Dictionary, Webster's Third New International Dictionary, and *Audit & Adjustment Co. v. Earl*, 165 Wn.App. 497, 503, 267 P.3d 441 (2011) as sources for a definition. Motion at 6. Kunath agrees. With the parties in agreement, the Court should focus its consideration on those sources.

In considering dictionary definitions, the Court should bear in mind that RCW 36.65.030 is over thirty years old. When using a dictionary for statutory interpretation, courts should "look to a dictionary in use at the time the statute was adopted to give them their plain and ordinary meanings." *American Continental Ins. Co. v. Steen*, 151 Wn.2d 512, 519-20, 91 P.3d 864 (2004).

> At the time these provisions were adopted, "credit" was understood to be " (t)he correlative of a debt; ... that which is incoming or due to one." Black's Law Dictionary 299 (1st ed. 1891); see Burrell's Law Dictionary 399 (1871).

Johnson v. Johnson, 96 Wn.2d 255, 267, 634 P.2d 877 (1981).

> We therefore do not consider the modern view of trespass, but the historical view. See *Bloomer v. Todd*, 3 Wash. Terr. 599, 615, 19 P. 135 (1888) (" The ordinary use of words at the time when used, and the meaning adopted at that time, is usually the best guide for ascertaining legislative intent.").

DAVIS LEARY
3233 56TH PL SW
Seattle, WA 98116
206-778-6696

Jongeward v. BNSF R. Co., 174 Wn.2d 586, 596, 278 P.3d 157 (2012); *see also State v. Houck*, 32 Wn.2d 681, 690, 203 P.2d 693 (1949); *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 259-60, 11 P.3d 762 (2000). The Court therefore should use the versions or editions of dictionaries that were current in 1984.

The definitions of net income in the three agreed sources are all functionally identical. They all define "net income" as gross income less expenses incurred to obtain it. That definition is also consistent with the plain meaning of "net income," and the Court should adopt it for this case.

1. Black's Law Dictionary.

The City says that Black's Law Dictionary defines "net income" as "[t]otal income from all sources minus deductions, exemptions, and other tax reductions." Motion at 6. However, the City obtained that definition from the 10th Edition of Black's law Dictionary, which was first published in 2014, thirty years after RCW 36.65.030 was enacted. Black's law Dictionary, 10th Edition at income (2014).

Black's Law Dictionary is updated regularly, and in 1984, the current version was the Fifth Edition, which was first published in 1979. The Fifth Edition of Black's law Dictionary has a more substantial and detailed definition of "net income."

> **Net income.** Income subject to taxation after allowable deductions and exemptions have been subtracted from gross or total income. The excess of all revenues and gains for a period over all expenses and losses of the period.
>
> Net income for income tax purposes is what remains out of gross income after subtracting ordinary and necessary expenses incurred in efforts to obtain or to keep it. *Walling's Estate v. C. I. R.*, C.A.Pa., 373 F.2d 190, 193

Black's Law Dictionary, Special Deluxe Fifth Edition (1979) at "Net Income" (attached as Exhibit 8). In addition to being from the relevant time, the Fifth Edition also had a specific definition "for income tax purposes." Given those two big advantages, the Court should use the Fifth Edition, and it specifically should use the version for income tax purposes.

Accordingly, the Court should adopt "what remains out of gross income after subtracting ordinary and necessary expenses incurred in efforts to obtain or to keep it" as the Black's Law Dictionary definition of net income.

DAVIS LEARY
3233 56TH PL SW
Seattle, WA 98116
206-778-6696

2. Webster's Third New International Dictionary.

The City provided the definition of "the balance of gross income remaining after deducting related costs and expenses [usually] for a given period and losses allocable to the period" for Webster's Third New International Dictionary. Motion at 6 (citing Webster's Third New Int'l Dict. (1993)). The City used a version of the dictionary that was published in 1993, and the exactly the same definition is also contained in the 1981 version. Webster's Third New International Dictionary at "net income" (1981). Accordingly, since the parties are in complete agreement, the Court should adopt this definition as well.

***3. Audit & Adjustment Co. v. Earl,* 165 Wn.App. 497, 503, 267 P.3d 441 (2011).**

Lastly, the City cites *Audit & Adjustment Co. v. Earl*, 165 Wn.App. 497, 503, 267 P.3d 441 (2011), but it does not clearly explain why. However, the *Audit & Adjustment* court did define the term "net income."

> "Net earnings" is equivalent to "net income" and means "the balance of gross income remaining after deducting related costs and expenses [usually] for a given period and losses allocable to the period." WEBSTER'S, *supra,* at 1520; *see also* BLACK'S LAW DICTIONARY, at 832, 1139 (9th ed. 2009).

Audit & Adjustment Co., 165 Wn.App. at 503. Since both parties have agreed to use *Audit & Adjustment* as a source, the Court should its definition.

Audit & Adjustment was decided long after RCW 36.65.030 was enacted, but at least one earlier Supreme Court decision reached the same definition. In *Pessemier v. Pessemier*, 66 Wn.2d 117, 401 P.2d 351 (1965), the court ruled that "'net income' ordinarily consists of total income received from all sources, less the legitimate expenses in realizing it." *Id.* at 119. Because *Pessemier* was decided before 1984, this definition was current when RCW 36.65.030 was enacted. The Court should adopt the definition in *Audit & Adjustment* or *Pessemier* as the judicial definition when RCW 36.65.030 was enacted.

All of these sources say the same thing; "net income" means gross income less expenses incurred. The City, however, has other ideas. It argues that "net income" means total income less statutory

DAVIS LEARY
3233 56TH PL SW
Seattle, WA 98116
206-778-6696

income tax exemptions and deductions. Motion at 7. The City never identifies a single authority of any kind agreeing with its theory.

Immediately after accepting Webster's definition "the balance of gross income remaining after deducting related costs and expenses [usually] for a given period and losses allocable to the period," the City says the definition is really "the balance of income remaining after deductions, exemptions, and other reductions." Motion at 6. It becomes clear where the City is headed on the next page, where it says

> Line 22 total income reported to the IRS does not subtract personal deductions, exemptions, and other reductions allowable under the Internal Revenue Code to determine net taxable income. The taxpayer reports certain personal deductions further down the form, on lines 23 to 36, and then subtracts these deductions from total income to calculate the taxpayer's "adjusted gross income" (line 37). *See id.*, Exs. D, ln. 23-37, H at 31-38. Then, in the "Tax and Credit" section, the taxpayer reports and subtracts standard or itemized deductions and exemptions (lines 40 and 42) from` adjusted gross income to calculate the taxpayer's "taxable income" (line 43), which is used to calculate the amount of federal tax (line 44). *See id.*, Exs. D, ln. 38-44, H at 38-44. Thus, line 43 is the taxpayer's net income subject to federal tax, *i.e.*, the balance remaining after all deductions and exemptions are taken.

Motion at 7.

The City is arguing that "net income" means what is left after "personal deductions, exemptions, and other reductions allowable under the Internal Revenue Code" are deducted. Motion at 7. The income tax definition in Black's Law Dictionary, Webster's Third New International Dictionary, and the *Audit & Adjustment* case all say that net income means what is left after deducting expenses, not statutory tax deductions. The City's definition is very different from those of its own sources, and it should have a cogent argument and compelling authorities before proposing such a radical change, but it has nothing. The City does not have a single source that says net income means gross income less income tax exemptions and deductions. If any existed, the City surely would have it.

Kunath and the City have agreed to the dictionaries and case authority that will define "net income." Those sources all agree: Net income is total or gross income less expenses incurred to obtain it. Deductions and exemptions under federal income tax law are utterly irrelevant to the determination

DAVIS LEARY
3233 56TH PL SW
Seattle, WA 98116
206-778-6696

of net income. The Court should adopt the definition in Black's Law Dictionary Webster's, and *Audit & Adjustment* for purposes of this case.

B. <u>The Ordinance Taxes Net Income</u>.

The Ordinance imposes an income tax based on the taxpayer's reported "total income" in line 22 of Form 1040. SMC 5.65.020, 5.65.030. The dispositive question therefore is whether "total income" reported on line 22 of Form 1040 is or includes "net income." The answer is plainly yes.

Before diving into IRS tax forms, it makes sense to point out that the City has already admitted that its Ordinance taxes net income. The City admits that taxable business income is "calculated on a net basis, i.e., total receipts of the business less expenses and deductions attributable to the business." Motion at 8. It admits that other items taxed by the Ordinance are "calculated on a net basis [and] are likewise the profits/loss from various types of business and non-wage activities." *Id.* The City tries to explain these admissions away by saying that "although netting occurs, the netting only reflects that the taxpayer pays personal income taxes solely on actual profits, dividends, or other gain received." *Id.* If netting occurs, the result is net income by definition.

The IRS forms that generate the amounts reported in lines 7-21 and then line 22 of Form 1040 also prove that the amounts reported are net income. Lines 7-22 of form 1040 report income of different types. Exhibit 9. Lines 7-21 set forth specific income items, and Line 22 reports the total of them. *Id.* Most of the items in Lines 7-21 require one or more additional forms if the taxpayer has income to report. *Id.* For purposes of this motion, only a select few line items are discussed.

Line 12: Business Income or Loss.

The City misunderstands or misrepresents the business income that is reported on line 12 of Form 1040. According to the City,

> The City's tax is imposed on the individual resident taxpayer. It is not a tax on businesses. The City's tax captures the total income received by the individual resident taxpayer regardless of whether that income is received as wages by an employee or distributions of profits of a business by an owner. The profits or (loss) from a business distributed to a business owner are appropriately calculated on a net basis, *i.e.*, total receipts of the business less expenses and deductions attributable to the business.

DAVIS LEARY
3233 56TH PL SW
Seattle, WA 98116
206-778-6696

Motion at 7-8. The City is talking about corporations, but Line 12 applies only to sole proprietors. Line 12 requires a Schedule C, and the instructions for Schedule C state: "Use Schedule C (Form 1040) to report income or (loss) from a business you operated or a profession you practiced as a sole proprietor." Exhibits 9, 10. The Ordinance may not be a tax on businesses, but it is a tax on people who have their own business.

On Schedule C, the taxpayer lists the income and expenses of the business to calculate the "Net profit or (loss)" on line 31. That amount is then entered on Line 12 of Form 1040 as directed by Line 31. Exhibit 10. Form 1040 states the net income of the taxpayer in the operation of his or her business. The amount is net income because the expenses of the business are deducted in Schedule C.

Line 13: Capital Gain or Loss. Taxpayers with capital gains or losses must file a Schedule D, a copy of which is attached as Exhibit 11. Line 7 of Schedule D is entitled "Net short-term capital gain or (loss)," and Line 15 is entitled "Net long-term capital gain or (loss)." *Id.* The sum of those two numbers is reported on line 13 of Form 1040 pursuant to Line 16 of Schedule D. *Id.*

Line 14: Other Gains or Losses. Line 14 of Form 1040 reports other income from sales of business property and requires Form 4797. Exhibit 12. Part I of Form 4797 has columns to report the gross sales price, depreciation, cost or other basis, and expense of sale to arrive at "Gain or (loss)." *Id.* Part II lists Ordinary Gains or Losses to arrive at the total gain or loss. *Id.* The "gain or (loss)" is then entered on line 14 of Form 1040 pursuant to Line 18 (b) of Form 4797. *Id.*

Line 17: Rental Real Estate, S-Corps and Trusts. Line 17 includes a number of categories of income and requires a Schedule E. Exhibit 13. Schedule E lists rents and royalties received in lines 3-4, and then itemizes expenses in lines 5-20. *Id.* The expenses are deducted from the income to reach "Total rental real estate and royalty income or (loss)," which is reported on line 17 of Form 1040 pursuant to line 26 of Schedule E. *Id.*

Line 18: Farm Income. Line 18 requires Schedule F. Exhibit 14. Schedule F is entitled "Profit or Loss from Farming" and lists income and expenses, which calculate "Net farm profit or (loss)" at Line 34. *Id.* This amount is reported on line 18 of Form 1040. *Id.*

DAVIS LEARY
3233 56TH PL SW
Seattle, WA 98116
206-778-6696

The City erroneously treats "net income" as having only one definition. As the IRS forms discussed above and the City's reference to "netting" indicates, a net amount can be "net of" or "net after" a wide variety of variables. Washington cases bear this out. *Kim v. Lee*, 145 Wn.2d 79, 31 P.3d 665 (2001) ("equity in real estate, net of the homestead amount."); *Senate Republican Campaign Committee v. Public Disclosure Com'n of State of Wash.*, 133 Wn.2d 229, 235, 943 P.2d 1358 (1997) ("funds raised as a result of that letter, net of expenses"); *Cogan v. Kidder, Mathews & Segner, Inc.*, 97 Wn.2d 658, 648 P.2d 875 (1982), ("$20,000 profit, net of commissions"); *Dep't of Revenue v. Federal Deposit Insurance Corp*, 190 Wn.App. 150, 156, 359 P.3d 913 (Div. 1 2015) ("the proceeds of the sale, net of reasonable expenses"). Net income can have many meanings depending on the specifics of the situation.

The City seems to think that it can prevail if it can show that total income less statutory exemptions is net income, but that is not the question at all. The task at hand is not so much to arrive at an all-inclusive definition of "net income," but instead to determine whether Total Income as reported on Line 22 of Form 1040 is within the many variations that come within the meaning of the term. It is clear from the definitions, from the cases, and from the City's admissions about amounts calculated on a net basis that Line 22 is well within the scope of net income. Net income is squarely within the definitions that both parties have provided. Line 22 is a form of net income, and that is all that the court needs to determine.

V. THE ORDINANCE VIOLATES THE PROPERTY TAX UNIFORMITY CLAUSE.

The Court should only reach the constitutional issues if it determines that the Ordinance is not prohibited by RCW 36.65.030. If the Court does reach the constitutional issues, it should rule that income is property as defined by Article VII, Section 1 of the Constitution, the Ordinance imposes a property tax, not an excise tax, and that the tax imposed by the Ordinance violates the uniformity clause of Sections 1 and 9 of Article VII of the Constitution.

DAVIS LEARY
3233 56TH PL SW
Seattle, WA 98116
206-778-6696

A. <u>The Constitution Defines the Word "Property" Expansively</u>.

As originally enacted, the Washington Constitution treated all property the same for taxation purposes. Under the uniformity clause in Article II, that meant that all property had to be taxed at the same rate, whether it was real or personal. This led to widespread tax evasion for personal property and legitimate questions about taxes on intangible property. *State v. Wooster*, 163 Wash. 659, 663, 2 P.2d 653 (1931).

In 1930, the people adopted an amendment to Article VII that allowed different classes of property to be taxed at different rates as long as the rate was uniform within each class. Exhibit 15. The amendment also included an expansive definition of the word "property" to ensure that all property of any kind could be taxed. It states: "The word 'property' as used herein shall mean and include everything, whether tangible or intangible, subject to ownership." *Id.*

Many Supreme Court justices have since commented on the sweeping breadth of that definition.

> The word 'everything,' of course, comprehends and includes the word 'something.' It is even broader than the word 'anything.' When we say everything, it is impossible to conceive of something or anything else beyond that. Had the Constitution said that 'property' shall include something or anything subject to ownership, those terms would certainly have included income. Did the Constitution say less when it used the word 'everything'? The question answers itself.

Culliton v. Chase, 174 Wash. 363, 383, 25 P.2d 81 (1933) (Steinert, J., Concurring). In *American Smelting & Refining Co. v. Whatcom County*, 13 Wn.2d 295, 302, 124 P.2d 963 (1942), the court commented that "The definition of the word 'property,' as used in the Fourteenth Amendment, supra, is as broad and comprehensive as may well be imagined." The Supreme Court has twice concurred with that statement in later decisions. *City of Kennewick v. Benton County*, 131 Wn.2d 768, 771, 935 P.2d 606 (1997); *Dean v. Lehman*, 143 Wn.2d 12, 25, 18 P.3d 523 (2001).

Any definition that starts with the word "everything" and ends with "subject to" is going to cover a lot of territory. The term "subject to" is itself nebulous and hard to pin down. The Fifth Edition of Black's Law Dictionary defines "subject to" as

> Liable, subordinate, subservient, inferior, obedient to; governed or affected by; provided that; provided; answerable for.

DAVIS LEARY
3233 56TH PL SW
Seattle, WA 98116
206-778-6696

Black's Law Dictionary, Special Deluxe Fifth Edition at "Subject to" (1979).

B. <u>The Constitutional Definition of Property Includes Income</u>.

In 1930, the Supreme Court held that income is property, and that an income tax is a property tax, in *Aberdeen Sav. & Loan Ass'n v. Chase*, 157 Wash. 351, 289 P. 536 (1930). *Aberdeen* concerned an income tax on banks and financial corporations, and the court based its decision on the equal protection clause of the Fourteenth Amendment to the United States Constitution. *Id.*

Two months after *Aberdeen* was decided, the people approved Amendment 14 to the Washington Constitution, which included a definition of property in Section 1 of Article VII. Exhibit 15. The definition states that "The word 'property' as used herein shall mean and include everything, whether tangible or intangible, subject to ownership." Wa. Const. Art. VII, § 1.

In 1932, the people approved an initiative to enact a "tax on all net income." *Culliton*, 174 Wash. at 372. In 1933, the constitutionality of the income tax came before the Supreme Court in *Culliton v. Chase*, 174 Wash. 363, 377, 25 P.2d 81 (1933). The City asserts that the *Culliton* court

> did not undertake an in-depth analysis of why income is a form of property. Instead, the Culliton court simply stated: "It has been definitely decided in this state that an income tax is a property tax, which should set the question at rest here." 174 Wash. at 376. The sole authority the court cited in support of this statement was *Aberdeen Savings & Loan Assoc. v. Chase ("Aberdeen*"), 157 Wash. 351, 289 P. 536, 290 P. 697 (1930).

Motion at 11. In truth, the City just ignores the court's thorough analysis of the question and does not accurately describe the decision.

The City claims that *Culliton* relied exclusively on *Aberdeen*. Aberdeen was decided under the United States Constitution, and the issues in *Culliton* concerned only the definition of the word property in the Washington Constitution, which had not even been adopted when *Aberdeen* was decided.

> Respondents insist that, under the constitutional definition. 'The word 'property' as used herein shall mean and include everything, whether tangible or intangible, subject to ownership,' a tax on income derived from property is a tax on the property from which the income is derived; therefore the method of classification adopted by the income tax law is violative of the requirements of the State Constitution that 'all taxes shall be uniform upon the same class of property.'

Id. at 373.

DAVIS LEARY
3233 56TH PL SW
Seattle, WA 98116
206-778-6696

The *Culliton* court found that the definition of property in the constitution was clear and unambiguous. *Id.* at 374 ("No more positive, precise, and compelling language could have been used than was used in those words of our Fourteenth Amendment."). The Court actually said that it would be impossible to craft a broader definition of property than the one in the constitution. *Id.* ("It would certainly defy the ingenuity of the most profound lexicographer to formulate a more comprehensive definition of 'property.' It is 'everything, whether tangible or intangible, subject to ownership.'"). The decision in *Culliton* was the result of the court's determination that "It needs no technical construction to tell what those words mean." *Id.*

Calling the definition comprehensive is something of an understatement. The term "property" itself is already so broad that the court called it "*nomen generalissimum*" in *Labberton v. General Cas. Co. of America*, 53 Wn.2d 180, 332 P.2d 250, (1958). In a cade decided a few years before Amendment 14 was adopted, the New York Supreme Court said, "'Property' is *nomen generalissimum,* and extends to every species of valuable right and interest, including real and personal property, easements, franchises, and other corporeal hereditaments.'" *Brooklyn City Railroad Co. v. Kings County Trust Co*., 212 N.Y.S. 343, 214 A.D. 506, 510 (1925). Similarly, in *604, Jones v. Union Pacific Railroad Company*, 84 Neb. 121, 125, 120 N.W. 946, (1909), the Supreme Court of Nebraska stated that

> In Lining v. City Council, 1 McCord (S.C.) 345, it was said: "Incomes and profits, labor, wages or hire, are included under the *nomen generalissimum* of personal property; for the right being attached to a man, and for which, if withheld from him, he has no other remedy but by a personal action, may very properly and emphatically be denominated personal property." The salary of an officer of a bank was personal property, under a city ordinance laying a tax on all profit or income arising from the pursuit of any faculty, profession, or occupation, trade or employment. The words "personal property" "embrace not only goods, chattels, coin, bills and evidences of debt, but in their strict and more appropriate legal definition signify the right and interest of the owner or owners in these articles." Stief v. Hart, 1 N.Y. 20. There can be little doubt that wages due are embraced in and covered by the words "personal property" found in section 521 of our code, and that money due either for wages or on any other account may be claimed as exempt under the provisions of that statute, which is to be liberally construed.

604, Jones v. Union Pacific Railroad Company, 84 Neb. 121, 120 N.W. 946, (1909).

DAVIS LEARY
3233 56TH PL SW
Seattle, WA 98116
206-778-6696

Amendment 14 went far beyond the typical broad definition of property. It said everything can be property and that is only has to be subject to ownership. A thing does not even have to ne owned to be property under the definition; it just has to be capable of being owned. The City is trying to put that definition in a box. It is offering an absurdly narrow definition of property and then claims that anything that fails to meet that particular definition is not property. There are countless different kinds of property and countless different reasons why something can be property. The City needs to explain why income can't be property, but it never even tries.

The court also considered the consequences if income were not property. "Income is either property under our Fourteenth Amendment, or no one owns it. *Id.* at 374. ("If that is true, any one can use our incomes who has the power to seize or obtain them by foul means."). The definition of larceny in effect at the time was to "obtain from the owner or another the possession of or title to any property" "with intent to deprive or defraud the owner thereof."
State v. Post, 152 Wash. 393,402, 278 P. 164 (1929). As *Culliton* pointed out, if income is not property, then stealing it would not be larceny.

The consequences of ruling that income is not property would actually be far more extensive than the *Culliton* court recognized. If income is not property for tax purposes, then it logically could not be property for any purpose. In that case, the government could seize a person's income without due process because due process applies only to "life, liberty or property." Wa. Const. Article I, § 3. If income were not property, then it could not be community property because community property is defined by RCW 26.16.030 as "Property . . . acquired after marriage or after registration of a state registered domestic partnership by either domestic partner or either husband or wife or both." Nothing can be community property unless it is property to begin with.

Culliton also pointed out that the income already had been held to be property in *Aberdeen*. *Id.* at 376 ("It has been definitely decided in this state that an income tax is a property tax, which should set the question at rest here."). *Id.* at 376.

DAVIS LEARY
3233 56TH PL SW
Seattle, WA 98116
206-778-6696

The City argues that the *Aberdeen* decision "includes no such holding." Motion at 11. Once again, the City does not have the full story. Before the decision in *Aberdeen* was released, the court realized that its decision was not entirely clear. As a result, the court issued a unanimous *per curiam* opinion the same day as the decision to clarify its holding in *Aberdeen* and another case decided at the same time.

> In order to clarify the situation, the court now states that the opinions above cited were rendered with a view to determining the questions presented by the cases at bar, and those questions only; that the majority of the court was of the opinion that the legislation therein attacked must be held, under the decisions of the Supreme Court of the United States, to attempt to establish a property and not an excise or corporation franchise tax; that being a property tax, the same could not be levied upon a certain class of corporations only and not upon copartnerships or individuals engaged in the same business.

Washington Mutual Savings Bank v. Chase, 157 Wash. 351, 392, 290 P. 697 (1930). *Aberdeen's* ruling that income is property has been acknowledged by many Supreme Court decisions. *E.g.*, *Power, Inc. v. Huntley*, 39 Wn.2d 191, 195, 235 P.2d 173 (1951); *Petroleum Nav. Co. v. Henneford*, 185 Wash. 495, 496, 55 P.2d 1056 (1936); *Culliton v. Chase*, 174 Wash. 363, 377, 25 P.2d 81 (1933).

The City also misinterprets the *Culliton* court's statement that The "overwhelming weight of judicial authority is that 'income' is property and a tax upon income is a tax upon property." *Culliton*, 174 Wash. at 374. The City says that this statement was erroneous because most states held that an income tax was not a property tax at the time. Motion at 14. However, the *Culliton* court said that "None of the decisions from other states have any bearing upon the law before us, because of our peculiarly forceful constitutional definition and the difference in their constitutional authorization or restriction." *Id.*

Ultimately, the *Culliton* could treated *Aberdeen* as the background for its decision but relied on the constitutional amendment adopting the definition.

> After the decision by this court in the *Aberdeen, Savings & Loan Association* case, *supra*, deciding that income was property for the purposes of taxation, the people adopted the Fourteenth Amendment, supra, which made it a part of the fundamental law of the state.

Id. at 377. The court also expressed some regret about the decision, but had no alternative in light of the wording of the definition.

DAVIS LEARY
3233 56TH PL SW
Seattle, WA 98116
206-778-6696

> We have no constitutional provision authorizing taxation of income as one thing and property as another. We have only the constitutional provision that property 'shall mean and include everything, whether tangible or intangible, subject to ownership.' Until we have such a constitutional amendment, the hands of the people, as well as the Legislature, in enacting laws, are tied.

Id. at 376.

Proponents of a state income tax roundly criticize *Culliton* for its aberrant holding that income is property and often claim that it is a deviation from established law. However, the truth is very different. Washington courts and even the United States Supreme Court have held that income is property and routinely reaffirm those rulings.

For example, Washington courts have consistently stated that the income of a married couple is community property, and that each spouse owns an undivided one-half interest in that income.

> In the absence of federal preemption, the **ownership of income** received by spouses in Washington would be determined by Washington community property law. Each spouse would **own an undivided one-half interest** in the community income received by either spouse.

Purser v. Rahm, 104 Wn.2d 159, 702 P.2d 1196 (1985) (emphasis added).

In fact, this specific issue was decided by the United States Supreme Court in a case out of Washington. The Supreme Court emphatically held that each spouse owns half of any income.

> Without further extending this opinion, it must suffice to say that it is clear the wife has, in Washington, **a vested property right** in the community property equal with that of her husband, and **in the income of the community**, including salaries or wages of either husband or wife, or both.

Poe v. Seaborn, 51 S.Ct. 58, 282 U.S. 101, 111, 75 L.Ed. 239 (1930) (emphasis added). A "vested property right" is a property interest in future income.

Income has also been held to be property in the context of executions on judgments. In a wage garnishment case, the United States Supreme Court called wages a "specialized type of property." *Sniadach v. Family Finance Corp.*, 89 S.Ct. 1820, 395 U.S. 337, 23 L.Ed.2d 349 (1969). Wages are income. The Washington Supreme Court adopted the term "specialized type pf property" for wages in *State v. Adams*, 107 Wn.2d 611, 616, 732 P.2d 149 (1987), and *Thompson v. DeHart*, 84 Wn.2d 931, 939, 530 P.2d 272 (1975).

DAVIS LEARY
3233 56TH PL SW
Seattle, WA 98116
206-778-6696

If income ceases to be property in Washington, then wage garnishments will become a thing of the past. RCW 6.17.090 sets forth the property liable to execution: "All property, real and personal, of the judgment debtor that is not exempted by law is liable to execution." If income is not property, then wages cannot be either.

The Court may also find helpful a 2002 Minnesota Court of Appeals decision that used Black's Law Dictionary in a somewhat analogous situation. The question was whether a farm worker's wages were property and therefore entitled to special farm provisions of Minnesota law.

> Glacial Plains also argues that "it would be inconsistent with the manifest intent of the legislature to include wages from non-agricultural employment within the definition of 'personal property' within [Minn.Stat. § 550.366]." But when interpreting a statute, words and phrases should be construed according to their common and approved usage. Minn.Stat. § 645.08(1) (2004). "Personal property" is commonly defined as "[a]ny movable or intangible thing that is subject to ownership and not classified as real property." Black's Law Dictionary 1233 (7th ed. 1999). Respondent's wages are clearly personal property.

Glacial Plains Co-op. v. Hughes, 705 N.W.2d 195, 197 (Minn. App. 2005). The Fifth Edition of Black's Law Dictionary defines personal property as "everything that is the subject of ownership, not coming under the domination of real estate."

Income also has what the City calls a defining attribute of property. The City says that property can be transferred, but income cannot be. Motion at 16. In truth, income in the form of wages can be transferred with a simple assignment of wages. Washington even has a specific statute dealing with that subject. RCW 49.48.090 is entitled "Assignment of wages-Requisites to validity." Wages can be assigned because they are property.

The court in *Culliton* correctly held that the constitutional definition of property includes wages and income. Any other decision would have caused chaos in the legal and the real world. Courts would be faced with an onslaught of claims asserting that wages or income had wrongfully been treated as property, and working people would awaken one day to discover that they did not own their own income until they received it and it became an asset. One can certainly question the wisdom of the drafters of Amendment 14, and one can question with wisdom of voters who have consistently rejected income taxes for seventy years. However, no principled person who believes in democracy

DAVIS LEARY
3233 56TH PL SW
Seattle, WA 98116
206-778-6696

would rewrite the law against the will of the people for their own good. In the end, that is precisely the question here.

This case brings to mind another financial crisis that engulfed Washington state in 1959. Desperate to raise funds, the Legislature enacted a statute that imposed a tax of one quarter of one percent on rents in excess of $300 per month. A landlord association challenged the statute, and the Supreme Court held that the tax was a property tax that violated the uniformity requirement. The attorney general pleaded with the court to consider the state's financial needs, and the court's response would be just as apt here.

> Among other things, the attorney general urges that the result should now be different because the state is confronted with a financial crisis. If so, the constitution may be amended by vote of the people.

Apartment Operators Ass'n of Seattle, Inc. v. Schumacher, 56 Wn.2d 46, 47-48, 351 P.2d 124 (1960). This Court likewise should grant summary judgment so that the proponents of an income tax can propose a constitutional amendment.

VI. THE ORDINANCE IS NOT AN EXCISE TAX

Lastly, the City says that its income tax is really an excise tax. That argument only matters if the Court rules that the Ordinance does not violate RCW 36.65.030 because the legislature can restrict or prohibit the right of cities to enact an excise tax. The City's claim that the ordinance is an excise tax is an argument made up long after the tax was enacted, not an honest argument.

Every tax statute must have three essential elements: "First, there must be an incident that triggers the tax." *Ford Motor Co. v. City of Seattle, Executive Services Department*, 160 Wn.2d 32, 156 P.3d 185 (2007). The "taxable *incident*" is the "activity that the legislature has designated as taxable." Id. Second, there must be a base that represents the value of the taxable incident. This is known as the "tax measure." Id. Third, there must be a "tax rate," which, when multiplied by the tax measure, determines "the amount of tax due."

The City never even acknowledges that these requirements exist. Whether the Ordinance is a valid excise tax presents a question of Washington law. The City, however, relies almost entirely on federal and out of state cases. In its entire discussion of excise taxes, the City cites a total of 18 cases.

DAVIS LEARY
3233 56TH PL SW
Seattle, WA 98116
206-778-6696

4 of those 18 cases are from Washington. The remaining cases include 5 U.S, Supreme Court cases, 1 Illinois case, 1 Kentucky case, 2 Mississippi cases, 1 Idaho case, 1 Iowa case, 1 Virginia case, 1 Michigan case, and 1 Massachusetts case. This is purely a question of law, and those cases are utterly irrelevant. Because the City spends all of its time citing foreign cases, it never gets around to Washington law.

The City never talks about its taxable incident or identifies what it would be. If the Ordinance is an excise tax, then it must be a tax on some privilege. *Tesoro Refining and Marketing Co. v. State, Dept. of Revenue*, 135 Wn.App. 411, 144 P.3d 368 (Div. 2 2006) ("An excise tax is a tax that the State of Washington imposes on a taxpayer for exercising a certain right or privilege."). To be a valid excise tax, the privilege must be "the voluntary action of the person taxed in performing the act, enjoying the privilege or engaging in the occupation which is the subject of the excise." *Covell*, 127 Wn.2d at 889, 890. If the privilege is the receipt of income, then the privilege being taxed is the receipt of more than $250,000 of income per year. The City never explains how the privilege is any different over $250,000.

The City also never addresses why the receipt of income is voluntary. If the tax is an excise tax, then the taxable incident must be "the voluntary action of the person taxed in performing the act, enjoying the privilege, or engaging in the occupation which is the subject of the excise tax." *The City of Snoqualmie v. King County Executive Dow Constantine*, 187 Wn.2d 289, 386 P.3d 279 (2016). Otherwise stated, "excise taxes are imposed upon a voluntary act of the taxpayer, which affords the taxpayer the benefits of the occupation, business, or activity that triggers the taxable event." *Sheehan v. Central Puget Sound Regional Transit Authority*, 155 Wn.2d 790, 123 P.3d 88 (2005). Earning a living is not voluntary.

The second requirement for taxes is that the tax must identify "a base that represents the value of the taxable incident." *Id.* at 39. For example, a B&O tax can use gross receipts of businesses as its base because they reflect "the extent to which the taxpayer enjoys the taxable privilege" of doing business. *Sheehan v. Central Puget Sound Regional Transit Authority*, 155 Wn.2d 790, 123 P.3d 88

DAVIS LEARY
3233 56TH PL SW
Seattle, WA 98116
206-778-6696

(2005). Because doing business is the taxable event, the gross receipts indicate how much business was done, not whether any profit or net income was earned. A valid excise tax must identify the privilege that is its taxable incident and then justify how the item taxed measures the extent to which the privilege is enjoyed. The City has done none of the work necessary to try to justify the Ordinance as an excise tax.

Perhaps the simplest way to respond to Seattle's excise tax argument is to consider what happened the last time a Washington city enacted an income tax. Seattle claims that it is the first Washington city to enact an income tax, but Bellingham was first by 65 years. In 1951, the City of Bellingham enacted an income tax that was designated as an excise tax. The ordinance provided in relevant part:

> On and after the effective date of this ordinance, there is hereby levied * * * [a tax] * * * (f) Upon every person engaging within the City in any activity, receiving compensation in salary, wages, commissions, bonuses, incentive payments and/or other forms of compensation * * * the amount of the tax on account of such activities shall be equal to the gross income of such person so received, multiplied by the rate of one-tenth of one per cent; * * *.'

Cary v. City of Bellingham, 41 Wn.2d 468, 471, 250 P.2d 114 (1952). A city resident filed an action to declare the ordinance unconstitutional just as Mr. Kunath has filed this action. The trial court entered judgment permanently enjoining the city from enforcing the tax, and the city appealed. *Id*. at 470.

The court said that the Supreme Court has "recognized an inherent, fundamental difference between one engaged in business for himself and one who is simply employed by others." *Id.* at 471. The court went on to say that

> The right to earn a living by working for wages is not a 'substantive privilege granted or permitted by the state.' It is, as described by the supreme court of the state of Wyoming: '* * * one of those inalienable rights covered by the statements in the Declaration of Independence and secured to all those living under our form of government by the liberty, property, and happiness clauses of the national and state *Constitutions.'*

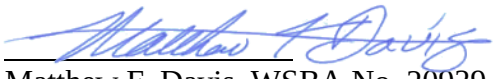
Id. at 472. Whatever the other states or the federal constitution may say, Washington's constitution does not permit excise taxes on the right to earn a living.

DAVIS LEARY
3233 56TH PL SW
Seattle, WA 98116
206-778-6696

It is inexcusable for the City to claim that it is imposing the same excise tax that was held invalid in *Cary*. Seattle is flouting the law in a way that brings disgrace to the whole city. The Court should reject the City's arguments, grant summary judgment, and send a clear signal to the people of Seattle that this whole exercise was a pointless waste of time and resources.

Dated this 23rd day of October, 2017.

MATTHEW F. DAVIS



Matthew F. Davis, WSBA No. 20939
Attorney for plaintiff S. Michael Kunath

DAVIS LEARY
3233 56TH PL SW
Seattle, WA 98116
206-778-6696