



Nearly two years after being enacted by the state legislature, and one year after being struck down by a lower court, the Washington state capital gains tax has been reinstated as constitutional, and the first returns and payments are due April 18, 2023. The tax applies on Washington capital gains in excess of \$250,000 at a flat rate of 7%, but the rules for determining Washington capital gains are relatively complex and, in some respects, unclear. Below are several questions about the tax and responses to those questions, several of which highlight ambiguities in the tax.

### **Determining Taxable Washington Capital Gains**

## **1. How are Washington capital gains determined?**

Determining Washington capital gains subject to the long-term capital gains tax is complicated. The starting point is the federal net long-term capital gains.[\[1\]](#)

If the taxpayer has any qualified opportunity zone investments or alternative minimum tax adjustments, the federal net long-term capital gain must be recalculated without regard to the alternative minimum tax or to any deferral or exemption from gains on account of the qualified opportunity zone investments. If, for example, the taxpayer deferred taxable gains by investing in a qualified opportunity zone investment, the deferred gains must be added to Line 15.[\[2\]](#)

Any losses from sales or exchange that are exempt from the Washington capital gains tax, such as losses on the sale of real estate, must be added.[\[3\]](#)

Any losses from sales or exchanges that are not allocated to Washington, such as a sale of tangible personal property in another state for a loss that would be taxable in that state, must be added.[\[4\]](#)

Any loss carryforward from sales or exchanges that are not allocated to Washington, such as loss carryforward from sales that occurred when the taxpayer was not a Washington resident, must be added.[\[5\]](#)

Any long-term capital gain not allocated to Washington, such as a sale of tangible personal property in another state for a loss that would be taxable in that state must be subtracted.[\[6\]](#)

Any long-term capital gain from sales or exchanges that are exempt from the Washington capital gains tax, such as sales of real estate, timber, or goodwill of auto dealerships, must be subtracted.[\[7\]](#)

If an incomplete gift nongrantor trust of which the taxpayer is the grantor recognized long-term capital gains or losses on the sale of assets, and the gain or loss is allocated to Washington, the gains must be added, and the losses must be subtracted.[\[8\]](#)

The standard deduction of \$250,000 per individual or married couple (whether filing jointly or separately, a married couple has a combined \$250,000 standard deduction) must be subtracted.[\[9\]](#)

Any gain that the state is prohibited from taxing under the Washington Constitution or federal law must be subtracted.[\[10\]](#)

Any gain from the sale of a qualified family-owned business interest must be subtracted.[\[11\]](#)

Any qualified charitable deduction (up to \$100,000) must be subtracted.[\[12\]](#)

A return must be filed if there is a resulting balance, and Washington capital gains tax is due at 7% of the balance.[\[13\]](#)

## **2. What is federal net long-term capital gain?**

In the federal Internal Revenue Code, the term "net long-term capital gain" is defined in Section 1222 as the excess, for the taxable year, of gains from the sale or exchange of capital assets held for more than one year over the losses from the sale or exchange of capital assets held for more than one year.[\[14\]](#)

The Department of Revenue (the Department) advises, however, that the "federal net long-term capital gain" should match what is found on Schedule D of the taxpayer's IRS Form 1040. Line 15 of Schedule D is titled "Net long-term capital gain or (loss)" and would seem to be the figure that the Department intends to be the starting point.<sup>[15]</sup> Line 15 of Schedule D can include long-term loss carryforward from previous taxable years, and it can include income not derived from the sale of a capital asset held for more than one year. Neither of those items would seem to fall within the definition of net long-term capital gain under Section 1222.<sup>[16]</sup>

The Washington capital gains tax statute also provides for the removal of loss carryforward that might be included in federal net long-term capital gain when that loss was from a sale that is not allocated to Washington (such as a sale that occurred before the taxpayer became domiciled in Washington).<sup>[17]</sup>

One open question is whether loss carryforward from sales or exchanges prior to the effective date of the capital gains tax must also be added back to Washington capital gains. The statute does not expressly provide for including pre-effective date long-term capital loss carryforward, but the regulation states that the tax "is not imposed on any sale or exchange occurring prior to January 1, 2022."<sup>[18]</sup> This is presumably the authority under which the Department has conveyed that the tax does not apply to any deferred gain on pre-effective date installment sales, and consistency may require adding back long-term capital loss carryforward from pre-effective date sales to the extent included in federal net long-term capital gain.<sup>[19]</sup> Further, the Department's guidance on its website, while not binding, advises that long-term capital loss carryforward that precedes the effective date must be added back to Washington capital gains.<sup>[19.1]</sup>

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### **3. I sold qualified small business stock (QSBS) that would have generated long-term capital gain but for the exemption under Section 1202 of the Internal Revenue Code. Is the exempt gain subject to the Washington capital gains tax?**

While the statute expressly requires determining federal net long-term capital gain without regard to deferral or exemption of gains under qualified opportunity zone investment rules for federal income tax purposes, the statute does not provide for an adjustment for exempt gains attributable to QSBS sales.<sup>[20]</sup>

### **Gain Distributions, Pass-Throughs, and Trusts**

#### **4. Are long-term capital gain distributions from my mutual fund subject to the tax?**

Apparently so. Long-term capital gain distributions from a mutual fund that are included in federal long-term capital gain appear to be subject to the Washington capital gains tax, as indicated by the Department in guidance on its website. <sup>[21]</sup> A taxpayer might assert, however, that the tax should not apply if the taxpayer has not sold the mutual fund interest or otherwise undertaken any action that could constitute a sale or exchange of a capital asset, especially if the sale or exchange occurred outside the state of Washington and had no significant connection to the state of Washington other than the taxpayer's domicile.<sup>[22]</sup>

#### **5. I am a minority owner of an S corporation, partnership, or LLC taxed as a partnership (pass-through entity), and I received a K-1 reporting long-term capital gains incurred by**

**the pass-through entity. Are those gains subject to the tax?**

Yes, those gains are included in federal net long-term capital gains on Line 15 of Schedule D, and unless those gains are from a transaction exempt from the tax (such as for a sale of real estate or timber) or from transactions not allocated to Washington (such as the sale of artwork in another state that subjects the sale to tax), they are subject to the tax.[\[23\]](#)

**6. I am the grantor of a trust taxable as a grantor trust for federal income tax purposes, which means that long-term capital gains on sales or exchanges of trust assets are taxable to me for federal income tax purposes. Are those gains subject to the Washington capital gains tax?**

Yes, the grantor of a grantor trust is considered to be a beneficial owner of long-term capital assets held by a grantor trust, and the sale or exchange of such assets is taxable to the grantor for Washington capital gains tax purposes.[\[24\]](#)

**7. I am a beneficiary of a nongrantor trust and received a K-1 reporting that a portion of my distributions are taxable as long-term capital gains. Are those gains subject to the tax?**

Yes, as with distributions from a pass-through entity, long-term capital gains distributions from nongrantor trusts are subject to the tax unless an exemption applies.

**8. Are nongrantor trusts subject to the Washington capital gains tax?**

No, nongrantor trusts themselves are not subject to the Washington capital gains tax, and gains recognized by a nongrantor trust that are not distributed to beneficiaries as distributable net income are not taxable as Washington capital gains tax.[\[25\]](#)

**9. Are nongrantor grantor trusts treated differently if the grantor's contributions to the trusts are treated as incomplete gifts (so-called Incomplete Gift Nongrantor Trusts, or ING's)?**

Yes, ING's are treated as grantor trusts for purposes of the Washington capital gains tax. This presumably means that any gains or losses recognized by the trust are taxable to the grantor as if the grantor directly owned the assets triggering the gains or losses, and beneficiaries receiving long-term capital gains as distributable net income may remove those gains from the beneficiary's Washington capital gains calculation.[\[26\]](#)

**10. I sold my business before 2022 in installments and elected installment sale treatment for federal income tax purposes to defer the gain; is the deferred gain on that sale, reported in 2022 and beyond, subject to Washington capital gains tax?**

The statute itself is not entirely clear, but the regulation from the Department indicates that the capital gains tax is not imposed on a sale or exchange occurring before 2022, and the Department's website indicates that no Washington capital gains tax is due on any of the payments received for the pre-2022 sale.[\[27\]](#)

**11. I am a beneficiary of a charitable remainder trust that makes distributions to me each year, and a portion of those distributions are characterized as long-term capital gain; are**

## **those gains subject to the Washington capital gains tax?**

Generally, those gains are subject to the Washington capital gains tax, but the federal gift tax treatment of the grantor's gifts to the trust may determine how such gains are taxable. If the trust is not an ING, and the grantor's transfer of assets to the trust is treated as a completed gift under federal law, then the Washington capital gains tax on the long-term capital gain portion of the beneficiary's distribution would be subject to at least two exceptions. First, to the extent the gains are attributable to sales within the trust that occurred prior to 2022, the regulations appear to exempt those gains as realized prior to the effective date of the tax, but the law is not entirely clear.<sup>[28]</sup> In addition, if the capital gains are attributable to sales of assets that are exempt from the Washington capital gains tax, such as the sales of real estate, timber, or auto dealership goodwill, those gains are also exempt.<sup>[29]</sup>

Many charitable remainder trusts, however, reserve for the grantor the power to change the charitable beneficiaries up until the grantor's death. Under federal gift tax law, this reserved power appears to cause the trust to be treated as an ING.<sup>[30]</sup> If such a charitable remainder trust is treated as an ING, the grantor "must include any long-term capital gain or loss from the sale or exchange of a capital asset by the trust" for Washington capital gains tax purposes, even if the capital gains of the trust significantly exceed the grantor's distribution from the trust.<sup>[31]</sup> This could be onerous to the grantor and may be an unintended application of this provision.

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## **12. Under Section 1256 of the Internal Revenue Code, 60% of the income or loss derived from trading certain options and futures contracts is taxable as long-term capital gain or loss for federal income tax purposes, even if the contracts are not held for more than one year. Is the long-term capital gain portion of Section 1256 income subject to the Washington capital gains tax?**

This is another instance in which the law is not clear. The Washington statute states that the capital gains tax is imposed on the sale of "long-term capital assets," defined as assets held for more than one year.<sup>[32]</sup> This would seem to exclude income attributable to futures and options trading if the contracts are not held for more than one year before being traded.

On the other hand, the statute treats "Washington capital gains" as the tax base subject to tax, and that base begins with federal net long-term capital gain (which includes Section 1256 long-term capital gain) and then provides for several adjustments, deductions, and exemptions, none of which expressly provides for removing Section 1256 long-term capital gain from the tax base.

One adjustment excludes "long-term capital gain from a sale or exchange that is exempt from the tax."<sup>[33]</sup> Section 1256 long-term capital gain may be excludable from Washington capital gains under that provision, but that provision could also be interpreted more narrowly to allow for excluding only those categories of income enumerated as "Exemptions," and Section 1256 long-term capital gain is not described among those categories.<sup>[34]</sup>

## **13. I recognized significant short-term capital losses in 2022 due to the stock market dip; can those losses offset my federal long-term capital gains in determining my Washington capital gains tax liability? If I have short-term loss carryforwards, can those carryforwards offset my federal long-term capital gains in determining my Washington**

## **capital gains tax liability for the current year?**

No, the Washington capital gains tax does not allow short-term capital losses and loss carryforwards attributable to short-term capital losses to offset long-term capital gains. This is different than the treatment for federal income tax purposes, which allows short-term capital losses and short-term loss carryforwards to offset long-term capital gains.[\[35\]](#)

## **14. If I have a loss carryforward attributable to a sale after 2021 that is allocated to Washington, does that loss carryforward reduce my long-term capital gains for Washington capital gains tax purposes?**

Yes, if the loss carryforward is included in the determination of the federal net long-term capital gain, and the loss is attributable to a sale or exchange allocated to Washington, such as a sale of intangible property by a taxpayer who was a Washington resident at the time of the sale, then the loss is included in the Washington capital gains calculation.[\[36\]](#)

If, however, the loss is attributable to a sale that occurred while the seller was not a Washington resident and the seller has since become a Washington resident, then the loss carryforward must be added back to the taxpayer's Washington capital gains.[\[37\]](#)

If the loss is attributable to a sale that was allocated to Washington but occurred prior to 2022, or if the loss is attributable to a sale occurring after 2021 but of an asset the sale of which is exempt from the Washington capital gains tax (such as a sale of real property for a loss), the law is not clear as to whether such loss must be added back to the taxpayer's Washington capital gains.[\[38\]](#)

## **15. Is there a separate Washington capital loss carryforward?**

No, only the federal capital loss carryforward, subject to the adjustments described above, is included in the Washington capital gains tax calculation.[\[39\]](#)

## **Deductions**

## **16. Do both spouses receive \$250,000 deductions if they file their income tax returns separately?**

No, the standard deduction of \$250,000 available to an individual must be divided between spouses or domestic partners, whether they file joint or separate returns.[\[40\]](#) If spouses file jointly for federal income tax purposes, they must file a joint Washington capital gains tax return, for which a single \$250,000 deduction is applied. If spouses file separately for federal income tax purposes, they must file separately for Washington capital gains tax purposes, and the law does not specify that the \$250,000 deduction must be divided evenly, only that the combined deduction between spouses is limited to \$250,000.[\[41\]](#) This suggests spouses may allocate their deduction in proportion to their gain or by agreement.

## **17. If my minor child recognizes long-term capital gains and reports those gains on their own federal income tax returns, does my child receive a separate standard deduction of**

## **\$250,000?**

Yes. Even if the child is subject to the "kiddie tax" and must pay tax on capital gains at the parents' tax rate, the child's Washington capital gains tax liability is determined separately from the parents' liability.[\[42\]](#)

## **18. When is the qualified family-owned small business deduction available?**

This deduction is available on the entire amount of the gains on the sale of a business if:

- The worldwide gross revenue of the business was \$10 million or less in the 12-month period immediately preceding the sale.
- The sale was of at least 90% of the fair market value of the business assets or 90% of the taxpayer's interest in the business.
- The taxpayer held a qualifying interest (defined below) in the business for at least five years prior to the sale.
- And either:
  - The taxpayer or a member of the taxpayer's family (defined by statute) materially participated in operating the business for at least five of the ten years immediately prior to the sale, or
  - the sale was to a member of the taxpayer's family.

To constitute a qualifying interest, the taxpayer's interest must have been a sole proprietorship or an interest in a business if:

- At least 50% of the business is owned at the time of sale by a combination of the taxpayer and the taxpayer's family.
- At least 30% of the business is owned at the time of sale by the taxpayer and the taxpayer's family, and either of the following applies:
  - At least 70% is owned by two families.
  - At least 90% is owned by three families.[\[43\]](#)

The requirements for this deduction are significantly different than the requirements for the Washington estate tax deduction for qualified family-owned business interests.[\[44\]](#)

## **19. I own multiple businesses. If I sell all of them in the same year, how does the deduction apply?**

The deduction for sales of qualified family-owned business interests applies on a per-business basis; all the gain on the sale of the assets or of the taxpayer's interest in each business is deductible if each business satisfies the above requirements. There is no aggregate limit on the value of the deduction or on the number of businesses for which the deduction may be allowed.[\[45\]](#)

A taxpayer's "qualifying interest" is defined to mean a taxpayer's sole proprietorship or an interest in a business that satisfies the closely held ownership percentage limitations. The statute does not define the term "business." The Department may interpret the term "business" to include related entities engaged in a common enterprise, but the language of the statute appears more likely to refer to each separate entity (corporation, partnership, limited liability company, or other entity) as a "business."[\[46\]](#)

## **20. How do I qualify for the special charitable deduction?**

The Washington capital gains tax provides a modest charitable deduction, but only:

- On charitable gifts exceeding \$250,000.
- In an amount totaling no more than \$100,000.
- For gifts to charities that are principally directed or managed in the state of Washington.[\[47\]](#)

The maximum deduction is \$100,000, generating a maximum tax savings of \$7,000.

**21. I make most of my charitable contributions through a donor-advised fund administered by a national financial institution operated outside the state of Washington. If my donor-advised fund supports charities directed or managed in Washington, will my contributions qualify for the Washington charitable deduction?**

Probably not. Grants from a donor-advised fund are not treated as donations from the taxpayer. Instead, the taxpayer's donations are the contributions to the charitable donor-advised fund, and if the donor-advised fund is not principally directed or managed in Washington, those donations would likely not qualify for the deduction.

On the other hand, a Washington taxpayer subject to the capital gains tax who contributes to a donor-advised fund directed or managed in Washington may qualify for the charitable deduction even if the donor-advised fund distributes grants to organizations directed or managed outside the state of Washington.[\[48\]](#)

## **Residency and Domicile**

**22. Is there a difference between being a Washington resident and being domiciled in Washington for purposes of the capital gains tax?**

Yes. Domicile, which is solely relevant for taxing sales of intangible property (generally financial assets and intellectual property), is the legal concept of the place in which an individual last resided with the intent to remain indefinitely.

Residency, which is relevant only for determining whether sales of tangible personal property that occur outside the state of Washington are nevertheless taxable in Washington, is defined in the Washington capital gains tax statute as:

- An individual who is domiciled in the Washington unless:
  1. The individual maintained no permanent place of abode (or residence) during the entire taxable year.[\[49\]](#)
  2. Maintained a permanent place of abode outside of Washington during the entire year.
  3. And spent no more than 30 days in the aggregate (counting each portion of a day as a whole day) in Washington during the tax year.
- Or an individual who is not domiciled in Washington but maintains a place of abode in Washington and was physically present in Washington for more than 183 days during the taxable year.[\[50\]](#)



## **23. How does my domicile or residency factor into determining my Washington capital gains tax liability?**

For intangible personal property, gains or losses on sales or exchanges are allocated to Washington under the capital gains tax if the taxpayer was domiciled in Washington at the time the sale or exchange occurred; residency is not relevant to the sales of intangible personal property.

If a taxpayer changes domicile in the middle of a tax year, the gains and losses recognized from sales or exchanges during the portion of the year that the taxpayer was domiciled in Washington are allocated to Washington, and gains or losses on sales or exchanges during the portion of the year the taxpayer was not domiciled in Washington are not allocated to Washington.[\[51\]](#)

For tangible personal property located outside the state of Washington at the time of a sale or exchange, gains or losses on sales or exchanges are allocated to Washington if the taxpayer was a Washington resident at the time of the sale, the property was located in Washington at some time during the year of or the year prior to the sale, and the taxpayer is not subject to income or excise taxes on long-term capital gains or losses in another state.[\[52\]](#)

For tangible personal property located in Washington at the time of a sale or exchange, gains or losses are allocated to Washington without regard to the residency or domicile of the taxpayer.[\[53\]](#)

## **24. If I am a Washington resident and recognize long-term capital gains on the sale of tangible property in another state that subjects the sale to capital gains tax in that state, am I taxed on the same sale in both states?**

Generally, no. Since the sale is subject to tax in another state, the gains are exempt from Washington capital gains tax. Moreover, if any gains derived from assets in another state are included in the taxpayer's Washington capital gains and are subject to tax in the other state, Washington allows a credit for the amount of tax paid to the other state on the sale.[\[54\]](#)

## **25. How do I change my domicile outside of Washington for purposes of the Washington capital gains tax?**

Domicile is a legal concept that refers to the last location in which an individual resided with the intent to remain in that location indefinitely. An individual is presumed to maintain a domicile until the facts and circumstances show that the individual has relocated to a new residence with the intent to remain there indefinitely. Courts will review the facts and circumstances to determine whether the individual has effectively changed domicile.[\[55\]](#)

To change domicile, an individual must demonstrate the intention to remain in the new residence indefinitely in light of all relevant facts and circumstances. In other legal contexts, various courts have considered the following factors (among other factors, and with no single factor controlling) to be relevant in indicating an individual's intentions with respect to changing domicile:

- Number of days spent in the previous domicile and in the new residence.
- Location of personal and real property.
- Voting registration and voting practices.
- Location of spouse and family.
- Location of brokerage and bank accounts and financial advisory relationships.
- Place of employment or business interests.

- Driver's license and automobile registration.
- Membership in civic, social, religious, and cultural organizations.
- Payment of state and local taxes.

## **Return Filing Procedure**

### **26. When is the tax return and payment due?**

The Washington capital gains tax, and the return reporting the tax, are due on the date the federal income tax return is due, which is generally the first business day on or after April 15 of the year following the year for which a return is required.[\[56\]](#)

### **27. May the return filing deadline be extended?**

Yes, a taxpayer who has obtained an extension for filing the federal income tax return may obtain the same extension for filing the Washington capital gains tax return by providing proof of the federal extension.

The deadline for payment of the tax may not be extended; to avoid interest and penalties, an estimate of the tax must be paid with the extension prior to the deadline.[\[57\]](#)

### **28. Is my Washington capital gains tax return automatically extended if I have filed an extension for my federal income tax return?**

No. In addition to filing the federal income tax return extension before the due date, the taxpayer must also confirm to the Department, before the due date, that the federal income tax return extension has been filed. This may be done only through the Department's Secure Access Washington (SAW) electronic filing system.[\[58\]](#)

### **29. How is the Washington capital gains tax return filed?**

The Washington capital gains tax return must be filed electronically using the online portal operated by the Department. The federal income tax return must be uploaded along with the Washington return, which accounts for adjustments to the federal return necessary for determining taxable Washington capital gains.[\[59\]](#)

### **30. May a Washington capital gains tax return be amended?**

Yes, amended Washington capital gains tax returns are required to be filed (1) if the federal income tax return is amended in a manner that affects the reported capital gains or tax liability from capital gains or (2) if necessary to correct errors on the original filed return.[\[60\]](#)

### **31. What should I do if the law is not clear as to how it applies to my circumstances? Can I ask the Department of Revenue about my circumstances before I file a return?**

Yes, the Department will issue binding rulings regarding a taxpayer's particular circumstances upon request, or the Department will provide nonbinding answers to general questions. The website for more information on the ruling process and requesting a ruling is available at <https://dor.wa.gov/contact/request-tax-ruling>. The website

advises that responses to questions about the capital gains tax should be expected within 30 days.

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## **Penalties and Interest for Late Filing/Payment**

### **32. Does a penalty apply if I do not file the return timely?**

Yes, a late filing penalty applies amounting to 5% of the tax due per month or part of a month that the return is late, up to a maximum of 25%.[\[61\]](#) The late filing penalty will be waived if (1) the Department determines that the failure to file was due to circumstances beyond the taxpayer's control, or (2) the taxpayer has not been delinquent in filing a Washington capital gains tax return during the preceding five calendar years. Since the 2022 return, due on April 18, 2023, is the first year in which returns are due, the law suggests that no late filing penalty will apply in the first year.[\[62\]](#)

### **33. Does interest apply if the tax is not paid timely?**

Yes. Interest accrues on the amount of unpaid tax due. The interest rate is 3% for 2023.[\[63\]](#)

### **34. Does a penalty apply if I do not pay the tax timely?**

Yes, if the tax is paid after the due date (April 18, 2023) but before May 1, the late payment penalty is 9% of the amount of the tax due. If the tax is paid between May 1 and May 31, the late payment penalty is 19% of the tax due. If the tax is paid after May 31, the penalty is 29% of the tax due.[\[64\]](#)

If the Department issues a notice to a taxpayer determining that the taxpayer has paid less than 80% of the amount of tax due, and if the amount of the underpayment is more than \$1,000, then a substantial underpayment penalty of 5% of the amount of tax due is due in addition to the underpayment. The penalty increases to 15% if the taxpayer pays the underpayment less than 30 days after the due date in the notice and to 25% if the taxpayer pays the underpayment more than 30 days after the notice due date.[\[65\]](#)

Additional penalties may apply if the taxpayer disregarded specific written instructions, willfully disregarded the requirement to file the return or pay the tax, or intentionally evaded the tax.[\[66\]](#)

The late payment penalties may be waived only if the Department determines that the failure to timely pay was due to circumstances beyond the taxpayer's control. Penalties for failure to pay the tax timely are in addition to penalties for failure to file the return timely, if applicable.[\[67\]](#)

### **35. Is it a crime to fail to file the return or pay the tax?**

It may be, depending on the taxpayer's intent. Knowingly attempting to evade the tax is a Class C felony. Knowing failure to pay the tax, file the return, maintain records, or supply required information is a gross misdemeanor.[\[68\]](#)

## **Endnotes**

[1] RCW 82.87.020(13) (defining "Washington capital gains" to mean "adjusted taxable gain," as modified in RCW 82.87.060); (1) (defining "adjusted taxable gain" to mean federal net long-term capital gain," subject to several additions and subtractions).

[2] RCW 82.87.020(3).

[3] RCW 82.87.020(1)(a); RCW 82.87.050. The reference to "sales or exchanges that are exempt from the tax" may also refer to pre-effective date sales and may require adding any long-term capital loss carryforward from sales prior to January 1, 2022.

[4] RCW 82.87.020(1)(b); RCW 82.87.100.

[5] RCW 82.87.020(1)(c).

[6] RCW 82.87.020(1)(d).

[7] RCW 82.87.020(1)(e). Again, the reference to "sales or exchanges that are exempt from the tax" may also refer to pre-effective date sales and may be the legal basis for subtracting any long-term capital gain from transactions prior to January 1, 2022.

[8] RCW 82.87.040(4)(b)(ii).

[9] RCW 82.87.060(1).

[10] RCW 82.87.060(3); RCW 82.87.070.

[11] RCW 82.87.060(3); RCW 82.87.070.

[12] RCW 82.87.060(4); RCW 82.87.080.

[13] RCW 82.87.040(1).

[14] IRC §1222(7).

[15] RCW 82.87.020(3); IRS Schedule D, "Capital Gains and Losses," 2022.

[16] For example, Line 15 includes the deemed long-term capital gain portion of options and futures trading income under IRC §1256 added to Line 11 of Schedule D, even if the options and futures contracts are held for less than one year.

[17] RCW 82.87.020(1)(c) ("Less any amount of long-term capital gain from a sale or exchange that is not allocated to Washington under RCW 82.87.100, to the extent such gain was included in calculating federal net long-term capital gain").

[18] WAC 458-20-300(1)(a).

[19] RCW 82.87.020(1)(c) refers to adding loss carryforward from sales not allocated to Washington under RCW 82.87.100, which relates only to the geographic allocation of gains and losses. No other provision in the statute provides for adding back pre-effective date loss carryforward. The regulation also does not specify that pre-effective date loss carryforward must be added back, but the statement in WAC 458-20-300(1)(a) that the tax "is not imposed on any sale or exchange occurring prior to January 1, 2022" may, by implication, require adding

back such pre-effective date loss carryforward.

[\[19.1\] Frequently Asked Questions About Washington Capital Gains Tax.](#)

[\[20\]](#) RCW 82.87.020(3). A spokesperson for the Department of Revenue has reportedly suggested that exempt gain from QSBS is subject to the Washington capital gains tax, but there appears to be no statutory basis for that position.

[\[21\] Frequently Asked Questions About Washington Capital Gains Tax.](#)

[\[22\]](#) RCW 82.87.040(1) indicates that the tax is imposed "on the sale or exchange of long-term capital assets." *Compare Quinn v. State*, slip opinion 100769-8 (2023), at 45 ("the capital gains tax is levied on capital transactions...and the taxable incident is the taxpayer's exercise of their power to dispose of capital assets") *with Quinn*, at 31 ("That there may not be a personal, deliberate decision to engage in a transaction by the taxpayer in some situations does not transform this tax from an excise tax into a property tax").

[\[23\]](#) RCW 82.87.040(4)(b)(i).

[\[24\]](#) RCW 82.87.040(4)(b)(i).

[\[25\]](#) *See* RCW 82.87.040(4)(b)(i).

[\[26\]](#) RCW 82.87.040(b)(ii); the income and losses of a grantor trust are treated as owned by the grantor and not allocable to the trust beneficiaries.

[\[27\]](#) WAC 458-20-300(1)(a); [Frequently Asked Questions About Washington Capital Gains Tax](#); RCW 82.87.020(1)(e) may be read to treat such sales as "exempt."

[\[28\]](#) WAC 458-20-300(1)(a).

[\[29\]](#) RCW 82.87.020(1)(e).

[\[30\]](#) Treas. Reg. §25.2511-2(c) (providing that a gift is incomplete "if and to the extent that a reserved power gives the donor the power to name new beneficiaries...").

[\[31\]](#) RCW 82.87.040(4)(b)(ii). The grantor's relinquishment of the power to change beneficiaries would cause the gift to be incomplete under Treas. Reg. §25.2511-2(f); doing so may end the treatment of the trust as a deemed grantor trust for Washington capital gains tax purposes, in which case the grantor would be subject to tax only on the portion of distributions characterized as long-term capital gain allocated to Washington. This assumes that the statutory phrase "the grantor's transfer of assets to the trust is treated as an incomplete gift" refers not to the grantor's initial, actual transfer of assets to the trust but to a hypothetical transfer of assets to the trust as of the date that the trust recognizes long-term capital gain.

[\[32\]](#) RCW 82.87.040(1); RCW 82.87.020(6).

[\[33\]](#) RCW 82.87.020(1)(e).

[\[34\]](#) RCW 82.87.050.

[\[35\]](#) RCW 82.87.020 (determining Washington capital gains based on net long-term capital gain for federal income tax purposes); [Frequently Asked Questions About Washington Capital Gains Tax](#).

[36] RCW 82.87.040(3).

[37] RCW 82.87.020(1)(c).

[38] If RCW 82.87.020(1)(e) exempts gain from transactions that occurred prior to the effective date of the tax, including deferred gains from pre-effective date installment sales, but there is no corresponding provision in the statute that requires adding back any loss carryforwards that are "exempt" from the tax, which could include both pre-effective date sales and post-effective date sales subject to an exemption. Reading RCW 82.87.020(1) strictly, such losses would be available to offset gains. But the statement in WAC 458-20-300(1)(a) that the tax is imposed only on post-effective date sales or exchanges may be interpreted to require adding back long-term capital loss carryforward from pre-effective date sales.

[39] RCW 82.87.040(3).

[40] RCW 82.87.060(1).

[41] RCW 82.87.060(1).

[42] RCW 82.87.060(1).

[43] RCW 82.87.070.

[44] See RCW 83.100.048.

[45] RCW 82.87.070.

[46] RCW 82.87.070(2)(f).

[47] RCW 82.87.080.

[48] RCW 82.87.080(4)(b)(ii).

[49] RCW 82.87.100(1)(a)(ii).

[50] RCW 82.87.020(10).

[51] RCW 82.87.020(1)(c).

[52] RCW 82.87.100(1)(a).

[53] RCW 82.87.100(1)(a).

[54] RCW 82.87.100.

[55] See *In re Lassin's Estate*, 33 Wn.2d 163, 165–166 (1949); *Ex parte Mullins*, 26 Wn.2d 419, 445 (1946).

[56] RCW 82.87.110(1)(a); WAC 458-20-300(2).

[57] RCW 82.87.110(5); WAC 458-20-300(3).

[58] RCW 82.87.110(5); WAC 458-20-300(3); see <https://dor.wa.gov/manage-business/my-dor-help/capital-gains-my-dor-help#fileextension> ("To request a filing extension, you must first register for a Capital Gains tax

account.").

[59] RCW 82.87.110(1)(b); WAC 458-20-300(2)(e); the return portal is available at <https://dor.wa.gov/manage-business/my-dor-help/capital-gains-my-dor-help>.

[60] WAC 458-20-300(f).

[61] RCW 82.87.110(6)(a); WAC 458-20-300(5)(a).

[62] RCW82.87.110(6)(b).

[63] RCW 82.87.110(3); RCW 82.32.050; WAC 458-20-300(5)(f); <https://dor.wa.gov/file-pay-taxes/late-filing> (for interest rates).

[64] WAC 458-20-300(5)(b) (applying a 9% penalty if tax is late, a 19% penalty if tax is not paid "on or before the last day of the month following the due date," and a 29% penalty if tax is not paid "on or before the last day of the second month following the due date.")

[65] WAC 458-20-300(5)(c); RCW 82.32.090(2).

[66] WAC 458-20-300(5)(c); RCW 82.32.090(5), (7).

[67] RCW 82.32.105(1). The Department has issued an "Interim Statement" that it will not assess the late payment penalty for 2022 if the taxpayer submits a request for extension, payment information, and payment before April 18, 2023, even if it is later determined that the taxpayer paid less than was properly due, but the Department will continue to assess substantial underpayment penalties. See <https://dor.wa.gov/laws-rules/interim-statement-regarding-late-payment-penalties-and-washingtons-capital-gains-tax>.

[68] RCW 82.87.140.

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