



# This Week in State Tax (TWIST)

October 28, 2024



## Washington: State Supreme Court Rejects Broader Reading of “Investments” for B&O Tax

The Washington State Supreme Court recently upheld an [appellate court ruling](#) that several investment fund LLCs did not qualify for a Business & Occupation (B&O) tax deduction for investment income. Under Washington law, a deduction is allowed in computing B&O liability for “amounts derived from investments,” other than investment income of certain types of businesses (not at issue here). The LLCs received all their income from owning and trading distressed debt. They included the income on their original B&O returns and filed refund claims on the basis that their income (which was agreed to be income from investments) qualified for the investment income deduction. The refunds were subsequently denied by the Department of Revenue (Department), and the LLCs filed suit.

The Department’s position was that the deduction did not apply when the investment was not incidental to the main purpose of the taxpayer’s business or when the investment income was more than five percent of the taxpayer’s gross income. This position was based on the holding of the state supreme court in *O’Leary* (1986) that income from investments as used in the deduction meant “incidental investments of surplus funds,” or an “investment that is incidental to the main purpose of the business.” After a trial court granted summary judgment in favor of the Department, the LLCs appealed, arguing that under the plain language of the law they were entitled to the investment income deduction. The appeals court ruled for the Department, and the matter was elevated to the Washington Supreme Court.

The Washington Supreme Court decision focuses entirely on a 2002 statutory amendment adopted in response to the *Simpson* decision (2000) on this subject. Prior to the amendment, the court had narrowly defined both what types of taxpayers qualified for the deduction and what streams of income were eligible for it. The 2002 amendment overrode the narrow interpretation of who qualifies for the deduction but did not address the limitation on what income is eligible. The legislature’s stated intent in making the amendment was to reduce “uncertainty” and “provide a positive environment for capital investment in this state, while continuing to treat similarly situated taxpayers fairly.” In its decision, the court determined the legislature clearly stated its intent to address the *Simpson* case which dealt with the types of business precluded from availing themselves of the investment income deduction, but it had not expressed a “clear legislative intent” to abrogate the court’s *O’Leary* decision on what income is eligible for the deduction. Therefore, the court’s prior interpretation remained in force, and the LLCs may not deduct income earned from their main business activities under the investment income deduction. A dissent argued that the amendment rendered the previous line of cases inoperable, and that the plain language of the statute should control under a *de novo* review. Please contact [Michele Baisler](#) with questions on in [Antio, LLC v. Washington State Dep’t of Revenue](#).

Learn about us:



[kpmg.com](https://www.kpmg.com)

The following information is not intended to be “written advice concerning one or more federal tax matters” subject to the requirements of section 10.37(a)(2) of Treasury Department Circular 230.

The information contained herein is of a general nature and based on authorities that are subject to change. Applicability of the information to specific situations should be determined through consultation with your tax adviser.

© 2024 KPMG LLP, a Delaware limited liability partnership and a member firm of the KPMG global organization of independent member firms affiliated with KPMG International Limited, a private English company limited by guarantee. All rights reserved. USCS011027-1AG