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Multnomah County Personal Income Tax
ITAX Administrator
P. O. Box 279
Portland Or. 97207-0279

ph: (503) 988-4829

July 16, 2005

re: Appeal of Final Letter of Determination June 28, 2005,

26481031546
ITAX Acct: 26481031555

Dear Administrator:

This letter is intended to initiate our written notice to appeal your "Final letter of Determination" prior to the 30 day deadline of your referenced letter.

History: Our previous letter seeking relief of June 27, 2005 was based on the Q & A page from Multnomah County ITAX website that states:

"What if I only lived in Multnomah County for part of the year?

Part-year residents will only be taxed based on the portion of the year they lived in Multnomah County. Part-year residents will only be taxed on the income they earned during the time they lived in Multnomah County. For example, a taxpayer who moved out of Multnomah County on Feb. 1 will owe the tax on roughly one-twelfth of their income."

You can see from that Q&A answer that it would be reasonable to conclude that we are entitled to the residency fraction provisions of the ITAX ordinance as we are "part year residents" given the limit of information in that website answer. We "move out", as stated in our prior letter, for six months annually. While ORS 316.027 and associated OAR 150-319-6.027 would appear to support your interpretation of "residency" in Oregon your administration of the ITAX does not address some Constitutional issues associated with real estate lease income earned outside of Multnomah County by residents of Multnomah County. Nor does it address real estate lease income earned inside Multnomah County by residents of Multnomah County and residents of other counties.

While outside the intent and focus of this appeal the Appellant strongly recommends that this website "Q&A" question be rewritten so that additional people are not misled by what it actually attempts to describe. As written the appellant fits the description of "*Part year residents*" which only refers to "*during the time they lived in Multnomah County*" without reference to voter registration and DMV demographics. Only additional research of ORS 316.027 and associated OAR 150-319-6.027 reveals that this website description is incomplete and misleading. Our initial appeal was based on that misleading and incomplete information.

The core of this appeal revolves around several Constitutional issues on leased income producing real estate as an associated class of citizens. It also addresses the specific economic loss to the Appellant due to the devaluation of his primary asset. All owners of income real estate in Multnomah County pay Multnomah County property tax but some of these owners avoid the County income tax on their income property. The County, through its administration and construction of the ITAX ordinance, has violated certain Constitutional rights and safeguards of income real estate owners as enumerated herein.

This non-uniform taxation gives an undue economic advantage to owners residing in other counties over Multnomah County resident income property owners which becomes punitive to those Multnomah County resident Owners of Multnomah County Income Real Estate (OMCIRE). This "comparative advantage" becomes particularly onerous for Multnomah County resident OMCIRE who derive the bulk of their retirement income from income real estate within Multnomah County. Appellant is in this class of "OMCIRE" citizens.

Introduction and Claims of this appeal:

1. Denial of Due Process: The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution prohibits laws that are arbitrary, or which deprive any person of a property interest without sufficient procedural safeguards. More specifically the ITAX ordinance, by reference to ORS residency, has ignored the arbitrary nature of not taxing people who may live in Clackamas County but own income real estate in Multnomah County. It also takes leased income real estate in other counties from owners Multnomah County resident owners. Clackamas County residents of OMCIRE enjoy an immunity to the tax whereas Multnomah County OMCIRE are penalized by the ITAX for their owning income real estate for retirement income in Multnomah County. Income producing real estate is the only instance where this disparity exists due to the ITAX.

The ITAX also arbitrarily penalizes triple net lease holders of OMCIRE within Multnomah County. This arbitrary penalty manifests itself in the form of reduced income by impairing previously established contracts and obligations which are discussed in more detail later in this appeal.

2. Equal protection: Appellant is entitled to equal protection under the 14th Amendment. The Appellant is not receiving equal treatment with other owners of income real estate in Multnomah County as discussed below. Emphasis here is drawn to a US Supreme Court ruling that the Justices ruled: "this Court may invoke to invalidate ordinances by which municipal governments seek to solve their local problems."

RAILWAY EXPRESS AGENCY, INC. ET AL. v. NEW YORK,
SUPREME COURT OF THE UNITED STATES 336 U.S. 106, January
31, 1949, Decided.

(MR. JUSTICE JACKSON, concurring.)

There are two clauses of the Fourteenth Amendment which

this Court may invoke to invalidate ordinances by which municipal governments seek to solve their local problems. One says that no state shall "deprive any person of life, liberty, or property, without due process of law." The other declares that no state shall "deny to any person within its jurisdiction the equal protection of the laws."

(MR. JUSTICE JACKSON continues:)

"The equal protection clause ceases to assure either equality or protection if it is avoided by any conceivable difference that can be pointed out between those bound and those left free. This Court has often announced the principle that the differentiation must have an appropriate relation to the object of the legislation or ordinance."

Multnomah County enacted the County Income Tax to "solve their local problem" with school funding. As demonstrated in the balance of this appeal the Appellant has been given unequal protection under the laws of Oregon by "impairing the obligation of a contract" under Oregon real estate law and pursuant to Article I Section 21 of the Oregon Constitution. (See below)

This appeal document will also show that the ITAX fails to make "the differentiation must have an appropriate relation to the object of the legislation or ordinance".

The differences cited in Jackson's opinion between those "bound and left free" are addressed in the balance of this appeal. It will be shown in this appeal that out-of-county resident OMCIRE are "those left free" in regard to the Multnomah County resident owners of OMCIRE "who are bound". Also *Fiehe v. R.E. Householder Co.*, 125 So. 2, 7 (Fla. 1929).

Oregon Constitutional arguments:

3. Article I Section 32. Taxes and duties; uniformity of taxation. "No tax or duty shall be imposed without the consent of the people or their representatives in the Legislative Assembly; and all taxation shall be uniform on the same class of subjects within the territorial limits of the authority levying the tax." [Constitution of 1859; Amendment proposed by H.J.R. 16, 1917, and adopted by the people June 4, 1917]

a. The class of OMCIRE are entitled to "all taxation shall be uniform on the same class of subjects within the territorial limits" under Article I Section 32 of the Oregon Constitution. Clackamas County residents with OMCIRE do not pay the ITAX even though they are "subjects within the territorial limits" of Multnomah county regarding their commercial real estate interest being subject to Multnomah County property tax, COP Business License Tax, and all the various laws of Multnomah County excepting the ITAX. This constitutes taxation that is non-uniform and therefore violates Art I Sec 32. Also see *Mayor of Baltimore vs. Scharf*, 54 Md. 499, 519 (1880).

b. The ITAX grants unequal non-uniform taxation by allowing some, but not all, OMCIRE a reduction in the fair market value of their real estate by enactment and enforcement of the ITAX ordinance. This non-uniform taxation stems from the increased costs inherent in the ITAX as OMCIRE owned by Multnomah County residents where no such ITAX cost exists for similar for OMCIRE owned by Clackamas County residents. Also *Kazubowski v. Kazubowski*, 45 405, 259.

c. Appellant also owns retirement income real estate in Clackamas County which is also taxed under the arbitrary terms of the ITAX of Multnomah County. Again the arguments leveled at the competitive disadvantage and devaluation of Appellant's property relative to like properties in Clackamas County apply. [State v. Green, 232 S.W.2d 897, 903 (Mo. 1950)] I.e. Clackamas County residents do not pay the ITAX on their income real estate in Clackamas County. This places the Appellant's property at a competitive disadvantage in Clackamas County not just Multnomah County. This devaluation of Appellant's property(s) occurs both within and without the "the territorial limits of the authority (Multnomah County) levying the tax".

4. Article III, Section 11 of the Oregon Constitution prohibits the Legislative branch from delegating authority to determine whether a law applies without "providing a standard to constrain discretion". In this case Multnomah County has constrained discretion arbitrarily without regard to the common class of owners of income real estate within and without the County regardless of county of residence.

a. The essential intent behind ITAX was to tax the personal incomes of broad economic activity within the County including wages, investments, and all personal income. A *privilege* and *immunity* was created by not adopting a standard to "constrain discretion" between non-Multnomah County resident owners of OMCIRE. Pettit v. Penn., La.App., 180 So.2d 66, 69.

b. Out of state owners of OMCIRE are exempt from the ITAX since they are not residents of Multnomah County. Again, the ITAX grants unequal and non-uniform taxation by not adopting a standard to "constrain discretion" between non-Multnomah County resident OMCIRE and residents of Multnomah County. Vaughn v. State, 3 Tenn. Crim. App. 54, 456 - 879, 883.

5. Article I, Section 20 of the Oregon Constitution prohibits any law that grants "to any citizen or class of citizens privileges, or immunities, which upon the same terms shall not equally belong to all citizens." The ITAX as constructed and administered violates Article I and Section 20 in the following ways:

a. The class of OMCIRE are penalized for owning income real estate if they are residents of Multnomah County, while Clackamas County residents with income real estate in Multnomah County are not taxed. This creates "*privileges*" and "*immunities*" within this class of citizens. Clackamas residents owning income real estate in Multnomah County are *immune* and *privileged* while that same class of income real estate owners are penalized by the ITAX if they are Multnomah County residents.

b. The ITAX ordinance, as constructed and administered, is arbitrary and fails to recognize the *privileges* and *immunities* created under this tax. It is arbitrary, under Article I, Section 20, in that it arbitrarily treats owners of income real estate in Multnomah County preferentially depending on the owner's county of residence without regard to sources of income and contractual obligations inherent in income producing real estate both within and without Multnomah County. (See Section 6. Economic Consequences)

c. The ITAX grants unequal *privileges* and *immunities* by creating some, but not all, owners of OMCIRE a reduction in the fair market value of their real estate by enactment and enforcement of the ITAX ordinance. These unequal privileges stem from the increased costs inherent in the ITAX from the income real estate in Multnomah owned by Multnomah County residents where no such ITAX cost exists for similar OMCIRE for Clackamas County residents. Kulko v. Superior Court, 436 U.S. 84 (1978). (See item 6.)

d. Argument "c." applies in reverse as well. I.e. Multnomah residents owning Clackamas County income producing real estate are taxed on their income from that Clackamas County real estate whereas Clackamas county residents are not so taxed. The result is the creation of a 'privilege' and 'immunity' for Clackamas County residents owning income real estate in either or both counties. Argument "c." above applies again and creates an additional *immunity* that "shall not equally belong to all citizens." as provided in Article I Section 20. This class of Clackamas County and Multnomah County OMCIRE are the same regardless of county of residence.

e. Non-Multnomah County residents gain a *privileged* position by being afforded all the benefits of public services for the Multnomah County income real estate that Multnomah county residents receive but without paying the proportionate ITAX. While this tax is presumably restricted to school funding it can still be seen that a commercial income property, such as a convenience store, will benefit from the ITAX funding which could conceivably be pivotal in keeping the neighborhood school and resultant customer base intact. This reinforces the granting of prohibited acts "to any citizen or class of citizens privileges, or *immunities*, which upon the same terms shall not equally belong to all citizens." under Article I Section 20.

f. This common class of citizens owning commercial/income producing real estate in Multnomah County, regardless of county of Residence, share at least 13 common citizen obligations and benefits. That is, their real property derives the same benefit of public services, (fire protection, police, parks, street lighting, school, etc), as 'entitlements' from the obligation of real estate taxes. These obligations include, but are not limited to, paying the following property taxes regardless of county of residence:

- 1.) Multnomah County ESD
- 2.) Portland Community College
- 3.) Portland School District #1
- 4.) Port of Portland
- 5.) City of Portland
- 6.) Metro
- 7.) City of Portland Child Loc Op
- 8.) City of Portland Parks Loc Op
- 9.) Mult Co. Library Local Opt Tax
- 10.) Portland Fire/Police Pension
- 11.) Urban Renewal - Portland
- 12.) Metro and Multnomah County Bonds
- 13.) Tri-Met, Portland Community College and PSD #1 Bonds

In addition these OMCIRE, regardless of county of residence, also pay the City of Portland Business License Tax on their commercial real estate income. Multnomah County, in linking OMCIRE to the financing of school funding, violated Article I Section 21. concerning ex-post facto laws; "*laws impairing contracts*" by exempting out-of-county OMCIRE from the ITAX. This created an unequal protection under the law as cited above by impairing the contract between the Appellant and out-of-County OMCIRE. The only way the class of OMCIRE can be distinguished is now by those OMCIRE that live outside Multnomah County and are not subject to the ITAX. I.e. The ITAX fractured the longstanding class of OMCIRE. Prior to this exemption created by ITAX all other tax on income producing real estate was uniform including the City of Portland Business Tax levied on out of county residents. Article I Section 21 is quoted below:

Article I Section 21. "Ex-post facto laws; laws impairing contracts; laws depending on authorization in order to take effect; laws submitted to electors. No ex-post facto law, or law impairing the obligation of contracts shall ever be passed, nor

shall any law be passed, the taking effect of which shall be made to depend upon any authority, except as provided in this Constitution; provided, that laws locating the Capitol of the State, locating County Seats,.....”

g. The ITAX as administered, violates Appellant's rights under Article I Section 21. of the Oregon Constitution: "*impairing the obligation of contracts*" in the following ways:

h. Appellant's long standing triple net lease on his OMCIRE was signed prior to the adoption of the ITAX and Lessee agreed to pay property tax, insurance, and maintenance as a "NNN" (triple net) lease. This ITAX is an ex-post facto law that impairs Appellant's/Lessor's ability to recover the cost of the ITAX from the Lessee. This ITAX has been inserted mid-term in the Appellant's lease with no recourse to recover said ITAX costs from Lessee.

i. Said ITAX cost puts Appellant's property at a competitive disadvantage with similar OMCIRE (triple net leased commercial property). This disadvantage is created as a result of the inconsistent County tax policy in regard to the prior COP Business License Tax which does not create favor with out-of-Multnomah County residents. The ITAX is the first tax in Multnomah County on income producing real estate to "impair the obligation of contracts" as prohibited under Article I Section 21.

j. Said competitive disadvantage devalues Appellant's OMCIRE asset through the conventional "return on investment" analysis due to the higher cost inherent in the ex-post facto ITAX relative to non-resident OMCIRE. (see economic analysis below in item 6.) There is no comparable devaluation of assets for wage earners, interest earners or dividend recipients subject to the ITAX.

6. Economic Consequences of ITAX: The essential intent behind ITAX was to tax the personal incomes of broad economic activity within the County including wages, investments, and all personal income. It un-intentionally created a *privilege* and *immunity* by not creating a standard to "*constrain discretion*" between non-Multnomah County resident owners of income real estate. The bulk of County revenue derived from income taxed under ITAX is wages and actual earned income as opposed to interest, dividends, or lease income. Appellant's income is derived 90% from lease income from income producing real estate both within and without Multnomah County. Appellant has suffered a loss in his primary assets as a result of the arbitrary nature of the ITAX. The specific way and amount of this loss is calculated as follows:

Income producing real estate's value is determined by capitalizing, or "capping", the current "cap" rate of that income to determine a market value. This has been for scores of years and continues to be expressed as "dividing the net income by the cap rate to determine the market value of the real estate. Purchasers and sellers use this "cap" rate as a method of determining purchase or selling price. The current "cap" rate for like property's to Appellant's office building is 7%. Given these factual real estate principles and practices the current ITAX extracted from the Appellant yields the following calculation.....

\$455.00 ITAX divided by .07 = \$6,500.00

This \$6,500.00 is \$6,500 less value in the commercial property because it reduces the net income to the owner by \$455. Therefore a triple net leased property that produces \$30,000 per year in net income now only produces $\$30,000 - \$455.00 = \$29,545$ in net income. Verifying the above calculation of market value based on capping the income at the current 7% yields:

Before ITAX net income = \$30,000
Capping this \$30,000 @ 7% = \$428,571.41 Market Value

After ITAX net income = $\$30,000 - \$455 = \$29,545$
Capping this \$29,545 @ 7% = \$422,071.42 Market Value

\$428,571.41 Market Value (before ITAX)
\$422,071.42 Market Value (after ITAX)
\$ 6,500.00 difference in Market Value

As can be seen from this analysis the Appellant has suffered a \$6,500 decrease in his primary asset as the direct result of the County reducing the net income from his triple net lease through the imposition of the ITAX. These numbers are factual and apply to the Appellant's specific triple net leased property in the City of Portland. No such loss of asset is accrued to wage earners or other earned income earners. This same reduction in asset value occurs on income real estate owned in other counties as a result of the ITAX for those owners who reside in Multnomah County. It was not the spirit nor the intent of the ITAX to devalue Multnomah County residents' real estate values both within and without Multnomah County.

For the County to continue to consciously administer the ITAX against a select class of citizens within its territorial limits when it has been shown to lower their primary assets is not in the public interest.

7. Entitlement to Representation: The Appellant has, over the last two years, attempted to negotiate a sale of his OMCIRE only to discover that while interest rates are favorable the County ITAX has reduced his market value by \$6,500 through administering the ITAX. Rather than attempt to recover this \$6,500 from the County the Appellant has elected to seek relief from and a refund of the \$455.00 ITAX paid each year. (less the out-of-school-district refund.) The County could make this refund by acknowledging that the Appellant had the 'entitlement to representation' given by the County in its website Q&A regarding "*part year residents*" referenced previously in this appeal. I.e. Appellant was entitled to believe that representation regarding '*part year residency*' and is not obligated to research State law to verify its accuracy.

All OMCIRE pay the City of Portland Business License Tax regardless of their county of residence. I.e. Residents of Clackamas County who are OMCIRE pay the City of Portland Business License Tax on the income from their OMCIRE which is essentially another real estate tax. Appellant pays the City of Portland Business License Tax on his OMCIRE lease income. Since all like leased commercial properties in the City of Portland are in the same competitive market all owners in that market pay the same taxes except now the ITAX has impaired Appellant's lease agreement by increasing Appellant's tax obligations and associated leasing costs which reduces Appellant's asset value. (See item 6. above.)

For the reasons stated above Appellant requests the appeal be granted and that Appellant be relieved of paying the ITAX on Appellant's income derived from real estate in both Multnomah County and Clackamas County and that all said taxes paid to date be refunded to Appellant. In

the alternative Appellant requests the County, if it elects to retain the Appellant's ITAX, reimburse Appellant \$6,500 for loss in value during the two year period that Appellant attempted to sell his OMCIRE.

Appellant has previously included payment of the alleged balance of \$290.00 under separate cover as requested on the payment form attached to your referenced "Letter of Final Determination" and subsequent billing of July 1, 2005. Appellant forwarded that payment to Multnomah County in good faith and without prejudice so that in the event Appellant's appeal is not granted there will be no penalties or interest incurred. That payment was not made with any consent that the tax is due.

Sincerely,

A handwritten signature in black ink, appearing to read "Nick Steffanoff", written over the word "Sincerely,".

Nick Steffanoff - Appellant
2 Preakness Court
Lake Oswego Or. 97035-1405